2019 Annual Conference
City Attorneys' Track

City Attorneys' Department

Long Beach Convention Center
October 16 – 18, 2019

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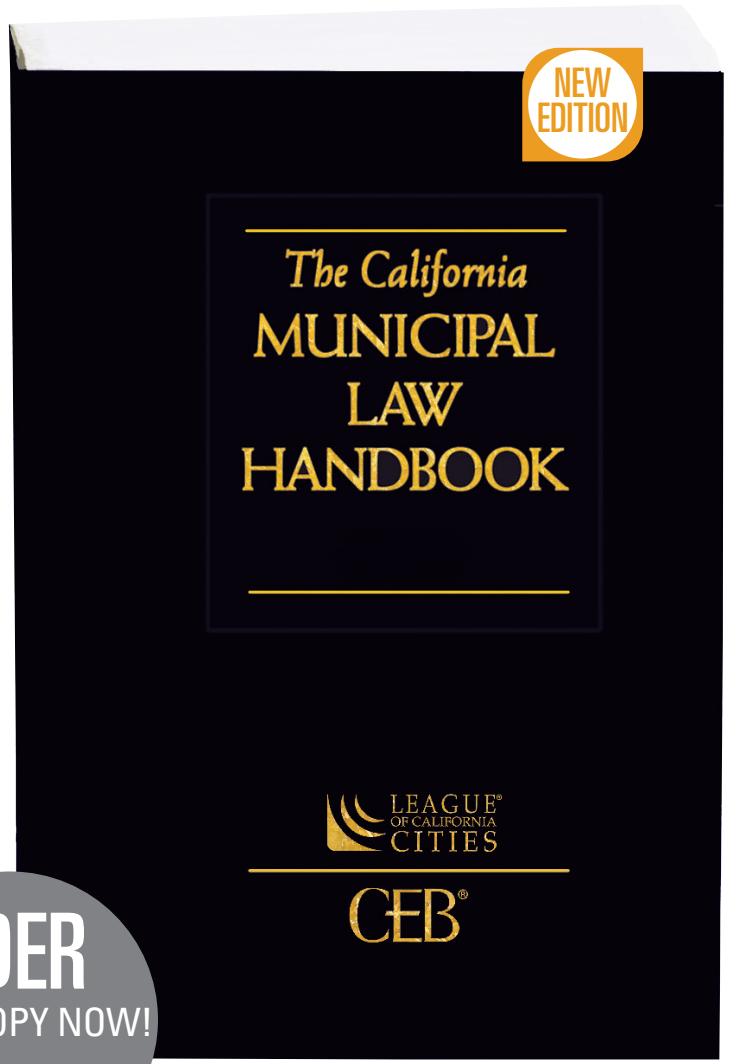

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2019 Annual Conference, City Attorneys' Track

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III. Program Materials *(continued)*

MCLE Information

The League of California Cities® is a State Bar-certified minimum continuing legal education (MCLE) provider. This activity is approved for 10.5 hours of MCLE credit, including 1 hour of Competence Issues sub-field credit.

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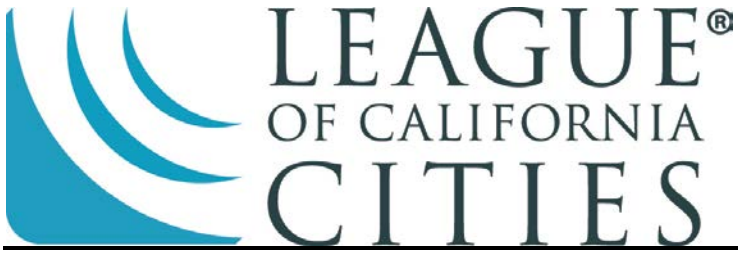

Program

2019 ANNUAL CONFERENCE

Wednesday, October 16 - Friday, October 18
Long Beach Convention Center

CITY ATTORNEYS' DEPARTMENT TRACK

2018-2019 City Attorneys' Department Officers

President: Damien Brower, City Attorney, Brentwood
1st Vice President: Celia Brewer, City Attorney, Carlsbad
2nd Vice President: Lynn Tracy Nerland, City Attorney, San Pablo
Director: Michelle Marchetta Kenyon, City Attorney, Rohnert Park, Pacifica, Piedmont, Moraga and Calistoga

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Wednesday—October 16

8:00 a.m. – 6:00 p.m. **Registration Open**
Long Beach Convention Center - Promenade Lobby (1st Floor)

1:30 – 3:30 p.m. **Opening General Session (Whole Conference; No City Attorneys' Programming)**
Long Beach Convention Center - Exhibit Hall C

3:30 – 5:00 p.m. **General Session**
Long Beach Convention Center - Room 104 BC
Moderator: Damien Brower, City Attorney, Brentwood

Cities on the Ballot: What, When & How of Speech?
Speakers: Christina Cameron, Partner, Devaney Pate Morris & Cameron, LLP
Robert "Perl" Perlmutter, Partner, Shute Mihaly & Weinberger, LLP
Richard Romero, Partner, Devaney Pate Morris & Cameron, LLP

The New Food Economy: Sidewalk Vending & Microenterprise Home Kitchens
Speakers: Kathy Shin, Associate, Best Best & Krieger
Matthew Summers, City Attorney, Ojai, Colantuono, Highsmith & Whatley, PC

5:00 – 7:00 p.m. **Grand Opening Expo Hall & Host City Reception**
Long Beach Convention Center - Exhibit Hall A & B

*****Sessions, speakers and MCLE hours are subject to change*****

Thursday—October 17

7:00 a.m. – 4:00 p.m.

Registration Open
Long Beach Convention Center - Promenade Lobby (1st Floor)

7:15 – 8:00 a.m.

Grab & Go Breakfast
Long Beach Convention Center - Promenade Lobby (1st Floor) and Grand Ballroom (2nd Floor)

8:00 – 9:30 a.m.

General Session
Long Beach Convention Center - Room 104 BC
Moderator: Damien Brower, City Attorney, Brentwood

Department Business Meeting
– President's Report (Damien Brower)
– Director's Report (Michelle Marchetta Kenyon)
– Nominating Committee Report (2nd VP & Director Nominees) (Christine Dietrick)
– Election of Department Officers (President, 1st VP, 2nd VP, Director) (Damien Brower)

Welcoming Remarks
Speaker: Charles Parkin, City Attorney, Long Beach

California Public Records Act Update
Speaker: Jolie Houston, Assistant City Attorney, Gilroy, Partner, Berliner Cohen

Mind Your [RF] Ps & Qs
Speakers: Christine Crowl, Partner, Jarvis, Fay & Gibson, LLP
Clare Gibson, Senior Partner, Jarvis, Fay & Gibson, LLP

9:45 – 11:45 a.m.

General Session (Whole Conference; No City Attorneys' Programming)
Long Beach Convention Center - Exhibit Hall C

11:30 a.m. – 1:00 p.m.

Attendee Lunch in Expo Hall (Whole Conference; No City Attorneys' Programming)
Long Beach Convention Center - Exhibit Hall A & B

1:00 – 2:30 p.m.

General Session
Long Beach Convention Center - Room 104 BC
Moderator: Michelle Marchetta Kenyon, City Attorney, Rohnert Park, Pacifica, Piedmont, Moraga and Calistoga

General Municipal Litigation Update
Speaker: Javan N. Rad, Chief Assistant City Attorney, Pasadena

Everything You Need to Know about SB 1421 and AB 748
Speakers: Howard Jordan, Consultant, Management Strategies Group
Steven Shaw, Partner, Sloan Sakai Yeung & Wong LLP
Walter Tibbet, Consultant, Management Strategies Group

*****Sessions, speakers and MCLE hours are subject to change*****

Thursday—October 17

(Continued)

2:45 – 4:00 p.m.

General Session

Long Beach Convention Center - Room 104 BC

Moderator: Celia Brewer, City Attorney, Carlsbad

Municipal Tort and Civil Rights Litigation Update

Speaker: Timothy T. Coates, Managing Partner, Greines, Martin, Stein & Richland

Is Your City's Website ADA Compliant? What You Should Know!

Speakers: Stephanie Gutierrez, Associate Attorney, Burke, Williams & Sorensen, LLP
Traci Park, Partner, Burke, Williams & Sorensen, LLP

4:00 - 4:10 p.m. **BREAK**

4:15 – 5:30 p.m.

General Session

Long Beach Convention Center - Room 104 BC

Moderator: Lynn Tracy Nerland, City Attorney, San Pablo

Land Use and CEQA Litigation Update

Speaker: Bill Ihrke, City Attorney, La Quinta, Partner, Rutan & Tucker LLP

Discretion - The Gateway To And Limitation On CEQA

Speaker: Stephen Velyvis, Partner, Burke Williams & Sorensen, LLP

5:30 p.m. **Evening On Your Own**

Friday—October 18

7:30 a.m. – 12:00 p.m. **Registration Open**
Long Beach Convention Center - Promenade Lobby (1st Floor)

8:00 – 10:00 a.m. **General Session**
Long Beach Convention Center - Room 104 BC
Moderator: Lynn Tracy Nerland, City Attorney, San Pablo

Labor and Employment Litigation Update
Speaker: Suzanne Solomon, Partner, Liebert Cassidy Whitmore

Newest Developments in Workplace Drug and Alcohol Laws
Speakers: Burke Dunphy, Partner, Sloan Sakai Yeung & Wong LLP
Madeline Miller, Senior Counsel, Sloan Sakai Yeung & Wong LLP

CalPERS' Employee Grab: The View From the Trenches
Speaker: Arthur Hartinger, Partner, Renne Public Law Group

10:00 - 10:10 a.m. **BREAK**

10:15 a.m. – 12:15 p.m. **General Session**
Long Beach Convention Center - Room 104 BC
Moderator: Celia Brewer, City Attorney, Carlsbad

Rent Control: Tenant Protection and Anti-Displacement Policies, Technically Speaking
Speakers: Karen Tiedemann, Partner, Goldfarb & Lipman LLP
Thomas Webber, Partner, Goldfarb & Lipman LLP

Implementing Redevelopment 2.0
Speakers: Christopher Lynch, Attorney, Jones Hall, A Professional Law Corporation
Jim Morales, Deputy Director/General Counsel, Office of Community Investment and Infrastructure, acting as the Successor Agency to the San Francisco Redevelopment Agency

(MCLE Specialty Credit – Competence Issues)
Walking the Tightrope: Addressing Mental Illnesses & Disabilities
Speaker: Jennifer Rosner, Partner, Liebert Cassidy Whitmore

12:30 – 2:30 p.m. **Closing Luncheon with Voting Delegates & General Assembly**
Long Beach Convention Center - Exhibit Hall C

MCLE Credit – 10.5 Hours
The League of California Cities[1] is a Multiple Activity Provider for California State Bar approved minimum continuing legal education (MCLE) and certifies this activity meets the standards for MCLE credit by the State Bar of California in the total amount of **10.5** hours, including **1 hour of Competence Issues sub-field credit.**
[1] *Provider No. 1985*

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Cities on the Ballot: What, When & How of Speech

Wednesday, October 16, 2019 General Session; 3:30 – 5:00 p.m.

Christina Cameron, Partner, Devaney Pate Morris & Cameron, LLP
Robert "Perl" Perlmutter, Partner, Shute Mihaly & Weinberger, LLP
Richard Romero, Partner, Devaney Pate Morris & Cameron, LLP

Cities on the Ballot: What, When & How of Speech?

Speakers:

Christina Cameron, Partner, Devaney Pate Morris & Cameron, LLP

Robert “Perl” Perlmutter, Partner, Shute Mihaly & Weinberger, LLP

Richard Romero, Partner, Devaney Pate Morris & Cameron, LLP

Cities on the Ballot: What, When & How of Speech?

I. Introduction

Use of public resources to support or oppose local ballot measures negates the spirit of one of this country's most fundamental principles – that electoral decisions are reserved to the people. "One of the principal dangers identified by our nation's founders was that 'the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office."[1] Accordingly, the ability of government to engage in political spending is severely limited at both the state and federal levels.

At the same time, the government possesses a wealth of non-political information that is relevant to matters placed before the voters. To deprive voters of this important information is also a disservice. Court holdings, statutes and regulations, therefore, attempt to strike a balance keeping government from explicitly or implicitly advocating for any particular electoral result but permitting and providing appropriate avenues for government to provide information that is relevant to decisions placed before the voters.

The United States Supreme Court has held that when a government entity uses compelled monetary contributions, such as taxes, to fund support or opposition for a political issue, it violates the First Amendment, as political spending is ultimately an expression of protected speech.[2] The California Supreme Court similarly has stated that the "use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leaves to the 'free election' of the people [presents] a serious threat to the integrity of the electoral process."[3] For these reasons, purely political speech by public entities is proscribed. Within this framework, it is never appropriate for cities to expend moneys or use public resources to express an official endorsement of or opposition to a particular candidate for elective office.

The result is more nuanced, however, when it comes to ballot measures and initiatives, the outcome of which can have powerful impacts on the public agencies which exist to serve the electorate. These agencies possess a wealth of information regarding the impact of legislative changes placed before the voters. To entirely muzzle public agencies from providing even non-political information could deprive the voting public of important information that is relevant to the questions they are asked to vote upon. Moreover, while public agencies cannot spend or use public resources to expressly advocate support or opposition to a particular measure, city councils can take an official position on and submit official ballot arguments for or against a particular measure.

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[1] *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 31 (quoting *Stanson v. Mott* (1976) 17 Cal.3d 206.
[2] *Janus v. American Federation of State, County, and Mun. Employees, Council 31* (2018) 138 S.Ct. 2448.
[3] *Stanson v. Mott* (1976) 17 Cal.3d 206, 218; *citing* Cal. Const., art. II, §2.

In addition to statutes codified by the legislature, the Fair Political Practices Commission ("FPPC") acts as a watch dog to ensure fair political practices are upheld by both private and public actors in the state. In recent elections, the FPPC has begun to take a closer look at how local public agencies are using public funds in relation to ballot measures – particularly bond measures – resulting in investigations, fines and stipulations against public agencies, and at least one legal challenge arguing that the Commission has overstepped its authority.

With the 2020 election right around the corner and legal challenges unlikely to resolve before the election season gets underway in earnest, cities need to know the rules of the road and best practices to make it safely through the election-season minefield.

II. Limitations on Public Agency Political Spending

A. Government and Elections Codes[4]

The Government Code, at section 54964, expressly prohibits local agency officers, employees and consultants from expending or authorizing expenditure of agency funds "to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate"[5] Ballot measures include initiatives, referendums, and recalls.[6] Public agencies, however, may use public funds to educate the public about effects a ballot measure will have on the local agency's activities if both of the following conditions are met: (1) the informational activities are not prohibited by the Constitution or state law; and (2) the information provided constitutes accurate, fair, and impartial relevant facts to aid the voters.[7] Importantly however, "section 54964 does not prohibit expenditure of local agency funds to propose, draft or sponsor a ballot measure, including expenditures to marshal support for placing the measure on the ballot, or to inform the public of need [for the measure]."[8]

The Elections Code makes several express provisions related to a city's expressive activity and spending related to the electoral process.[9]

First, legislative bodies may spend public funds to create a report on a proposed ballot measure that is being submitted for a public vote.[10] The city's report can include any or all of the following: (1) fiscal impact; (2) effect on internal consistency of the county's general or specific plans; (3) effect on use of lands (i.e. available housing); (4) impact on infrastructure funding; (5) impact on community's attraction and retention of business and employment; (6) impact on uses

[4] All statutory references are to California law unless otherwise stated.
[5] Gov. Code, §54964(a).
[6] Gov. Code, §54964(b)(1).
[7] Gov. Code, §54964(c).
[8] *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Assoc. of Governments* (2008) 167 Cal. App. 4th 1229, 1242.
[9] Elec. Code, §9200 *et. seq*.
[10] Elec. Code, §9212.

of vacant lands; (7) impact on traffic, agricultural lands and developed areas; and (8) other matters the legislative body requests.[11]

The Elections Code also provides for the submission and publication of a local legislative body's (i.e., city council's) written ballot arguments for or against a measure, as follows:

> (a) For measures placed on the ballot by petition, the persons filing an initiative petition pursuant to this article may file a written argument in favor of the ordinance, and the legislative body may submit an argument against the ordinance.
>
> (b) For measures placed on the ballot by the legislative body, the legislative body, or a member or members of the legislative body authorized by that body, or an individual voter who is eligible to vote on the measure, or bona fide association of citizens, or a combination of voters and associations, may file a written argument for or against any city measure.
>
> …
>
> (d) The city elections official shall include the following statement on the front cover, or if none, on the heading of the first page, of the printed arguments:
>
> "Arguments in support or opposition of the proposed laws are the opinions of the authors."
>
> …[12]

Given the prohibition on spending public resources to support or oppose a ballot measure, many municipal attorneys advise that city council members should draft any such ballot arguments themselves and not ask or direct city employees to assist them in that drafting.

B. Political Reform Act & FPPC Regulations[13]

Among other purposes, the Political Reform Act of 1974[14] (the "Act") declared that, in light of increasingly large campaign contributions, existing "laws [governing] disclosure of campaign receipts and expenditures have proved to be inadequate."[15] Among other things, the Act regulates the activities of political *committees*,[16] requiring disclosure of *contributions* to and *expenditures* by committees and regulating the activities of committees.

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[11] *Id.*

[12] Elec. Code, §9282.

[13] The regulations of the Fair Political Practices Commission are contained in Title 2 of the California Code of Regulations, §§18110 through 18977. All regulatory references are to the FPPC Regulations unless otherwise stated.

[14] Gov. Code, §81000 et seq.

[15] Gov. Code, §81001(d).

[16] A committee may be a candidate committee or ballot measure committee, an independent expenditure committee in support of a particular candidate or ballot measure, or may be a general purpose committee. (See generally, Gov. Code, §§ 82013, 82016, 82027.5, 82047.5 82048.7, 84101(c).)

Under the Act, a *committee* is defined to be an individual or collection of individuals that raises or spends funds for political purposes above established thresholds. Committees are required to register and thereafter publicly disclose contributions to the committee and expenditures by the committee, among other duties and obligations imposed on committees under the Act. [17] A public entity is not excluded from the definition of a committee.

The Act authorizes the FPPC to implement regulations consistent with the Act and to interpret and enforce Act violations in order to effectuate the Act's purposes and provisions.[18] FPPC interpretations are entitled to great deference if challenged in court, unless the interpretation was clearly erroneous.[19] However, courts do not defer to the FPPC's decision when deciding whether the regulation the FPPC interpreted lies within the scope of its authority under the Act.[20]

(1) Payments by Public Agencies for Campaign Related Communications

An expenditure of public money for communication that expressly advocates election or defeat of a candidate or the qualification, passage or defeat of a measure, or that "taken as a whole and in context, unambiguously urges a particular result in an election" is either a contribution or an independent expenditure triggering registration and disclosure under the Act.[21] An expenditure "include(s) payments for both the direct and indirect costs of the communication. Indirect costs of a communication are costs reasonably related to designing, producing, printing, or formulating the content of the communication including, but not limited to, payments for polling or research; payments for computer usage, software, or programming; and payments for the salary, expenses, or fees of the agency's employees, agents, vendors, and consultants."[22]

A communication unambiguously urges a particular result in an election when it meets either of the following criteria:

- It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots.
- When, considering the *style, tenor, and timing* of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.[23]

Factors used by the FPPC to determine the *style, tenor, and timing* of a communication include, but are not limited to:

[17] Gov. Code, §§82013(b), 84100 – 84225
[18] Gov. Code, §83100 - 83124
[19] *Citizens to Save California v. California Fair Political Practices Com.* (2006) 145 Cal.App.4th 736, 747
[20] *Id.*
[21] Gov. Code, §82013, 82015, 82031; FPPC Regs., §18420.1(a)
[22] FPPC Regs., §18420.1(c)
[23] FPPC Regs., §18420.1(b), emphasis added

- Whether the communication is funded from a special appropriation related to the measure as opposed to a general appropriation.
- Whether the communication is consistent with the normal communication pattern for the agency.
- Whether the communication is consistent with the style of other communications issued by the agency.
- Whether the communication uses inflammatory or argumentative language.[24]

The following activities do not to qualify as a contribution or independent expenditure:

- An agency report providing the agency's internal evaluation of a measure made available to a member of the public upon the individual's request.
- The announcement of an agency's position at a public meeting or within the agenda or hearing minutes prepared for the meeting.
- A written argument filed by the agency for publishing in the voter information pamphlet.
- A departmental view presented by an agency employee upon request by a public or private organization, at a meeting of the organization.
- A communication clearly and unambiguously authorized by law.[25]

(2) Mass Mailings

Public agencies may not send more than 200 substantially similar unsolicited tangible communications that feature an elected officer affiliated with the agency (by including the officer's photo or signature, or singling out the officer by the manner his or her name or office is displayed), or that includes a reference to an elected officer affiliated with the agency and is prepared or sent in cooperation with the elected officer in a calendar month at public expense.[26] During the 60 days preceding an election, this prohibition extends to mass mailings sent by or on behalf of a candidate whose name will appear on the ballot at that election ("mass mailings").[27] Because mass mailings are defined to be "tangible items," the restriction does not apply to emails.

Some have argued that, in this regard, the law has not kept up with the increasing use of technology, including email and social media. As previously mentioned, California law is primarily concerned with expenditures, whether monetary or in-kind, and the improper use of government resources for political purposes. Tangible, mailed items have per-item costs to design, print, and send. For an email or social media post, in contrast, there is no per-item "printing" cost or cost to mail, and value of "in-kind" use of a government computer to send or post the message is likely quite low. As with mailings, however, there is a cost to formulate a message, the design, the graphics, etc. – all of which, as previously mentioned, already come

[24] FPPC Regs., §18420.1(d)
[25] FPPC Regs., §18420.1(e)
[26] Gov. Code, §§82041.5, 89002
[27] Gov. Code, §89003

within the scope of laws prohibiting government expenditures for political purposes and the Act's regulation of political committees.

Mass mailings that either: (1) expressly advocate the election or defeat of a clearly identified candidate or measure; or (2) "unambiguously urge a particular result in an election" (as defined in the preceding section) are prohibited.[28]

Under FPPC Regulations, the following items are not considered to be prohibited mass mailings:

- An agency report providing the agency's internal evaluation of a measure sent to a member of the public upon the individual's request.
- A written argument sent to a voter in the voter information pamphlet.
- A communication clearly and unambiguously authorized by law.[29]

FPPC Regulations also provide - without establishing an express standard of review - that "a mailing sent at public expense that features, or includes the name, office, photograph, or other reference to, an elected officer affiliated with the agency which produces or sends the mailing may also be prohibited."[30]

C. Judicial Holdings

An examination of judicial activity in this arena logically starts with *Stanson v. Mott*, a 1976 case in which the California Supreme Court held that public entities may validly expend public funds in connection with ballot measures to create "informational materials," but not "campaign materials."[31] The Court recognized that not all communication can be clearly categorized and ruled that, in ambiguous circumstances, the analysis should focus on the "*style, tenor, and timing*" of the communication to determine whether it is informational or campaign material.[32] FPPC Regulation 18421.1 replicates the Court's "*style, tenor, and timing*" mandate. The pronouncement in *Stanson* that "use of public funds to purchase such items as bumper stickers, posters, advertising 'floats,' or television and radio 'spots' unquestionably constitutes improper campaign activity" remains an issue of contention, and thus the means of communication available to public entities continues to be the subject of litigation to this day.[33]

In 1993, California's Second Appellate District concluded in *Choice-in-Education League v. Los Angeles Unified School Dist.*, that television ***can*** be a permissible way for public agencies to communicate information as long as the intention was to inform and educate viewers.[34] This

[28] FPPC Regs. §18901.1(a)(2)
[29] Gov. Code, §89002(b)
[30] FPPC Regs. §18901.1(f).
[31] *Stanson v. Mott* (1976) 17 Cal.3d 206, 218.
[32] *Id.* at p. 233.
[33] *Id.* at p. 221; see generally *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415; *California State Association of Counties et al v. Fair Political Practices Commission*, Los Angeles Superior Court Case No. BS174653 (filed August 3, 2018).
[34] *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 430

suggests that *Stanson* should not be read to mean that television or radio are categorically impermissible means of communication and may be used so long as the other factors are met.

A 2008 decision, *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments,* addresses the timing of communications as a factor in determining whether it constitute campaign activity. In *Santa Barbara*, the Second District Court of Appeal held that a local transportation authority did not violate Government Code Section 54964 when, prior to placing a tax measure on the ballot, the agency retained a private consultant to help survey voter support for an extension of a sales tax, craft favorable ballot measure language, and determine the best strategy to maximize voter support.[35] The transportation authority's actions did not violate the prohibition against public spending to support or reject a ballot measure because the action did not constitute communications about a "'clearly identified ballot measure' that [had] been 'certified' to appear on an election ballot" and because measure drafting and sponsorship was not "partisan campaigning."[36]

In 2009 the California Supreme Court again addressed public agency communication in relation to the electoral process in *Vargas v. City of Salinas.*[37] *Vargas* involved a voter-sponsored initiative to repeal a utility user tax. As permitted under Elections Code section 9212 for voter-sponsored measures, the City prepared a report that informed its decision not to adopt the initiative ordinance but instead to place it before the voters. Thereafter, the City continued to study the effects of the proposed initiative and city departments prepared analyses discussing the reduction or elimination of specific services or programs in the event of the measure's passage. In the course of its normal budgeting process, the City Manager made specific budget cut recommendations to the City Council. Upon adoption of target cuts by the City Council, documents were prepared in English and Spanish and made available to the public at City locations and disseminated via a regularly published city newsletter in advance of the election. Petitioners argued that the City's speech beyond that described in section 9212 constituted an improper use of City resources for a political purpose. The Court disagreed and upheld the City's activities.

In upholding the City's activities, the *Vargas* Court reaffirmed that "the campaign activity/informational material dichotomy set forth in *Stanson*… remains the appropriate standard for distinguishing the type of activities that presumptively may not be paid for by public funds, from those activities that presumptively may be financed from public funds.[38]

Vargas held that a public agency may:

- Communicate its viewpoint on a ballot measure within the educational/informational materials without providing information about opposing views.

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[35] *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments* (2008) 167 Cal. App.4th 1229, 1242; see also Op.Atty.Gen. 04-211 (April 7, 2005).
[36] *Id.*, at p. 1242
[37] *Vargas v. City of Salinas* (2009) 46 Cal.4th 1
[38] *Id.* at p. 34.

- Analytically evaluate and express its opinion regarding the ballot measure's merits.
- Form an opinion and express that opinion in a balanced, non-inflammatory way to citizens who inquire.
- Create documents reflecting its opinion available to those who seek out the documents.

Under *Vargas*, whether a public agency's communication on matters presented to the electorate are informational are to be analyzed under the following factors:

- Whether the communication conveys past and present facts.
- Whether the communication is argumentative, includes "inflammatory rhetoric," or urges voters to take particular actions.
- Whether the communication is consistent with the agency's normal communicative practices.[39]

III. Enforcement and Recent Litigation

Since approximately 2016, the FPPC's interest in public agency spending related to campaigns appears to be on the increase. This increased scrutiny has drawn at least one legal challenge[40] and resulted in a failed attempt to expand the FPPC's jurisdiction[41] to include enforcement authority over the improper use of public funds for campaign purposes. Even without this expansion, the FPPC retains enforcement authority over the failure of a public entity to register and file disclosures if its activities qualify it as a committee under the Act.

A. *In the Matter of San Francisco Bay Area Rapid Transit District ("BART")*; FPPC Case No. 16/19959

In June 2016, the Bay Area Rapid Transit District ("BART") Board of Directors placed Measure RR, authorizing issuance of $3.6 billion in general obligation bonds, on the November 2016 ballot. The measure emanated from the "Better BART Initiative" ("Initiative") supported by the agency since at least 2014. During the time between placement on the ballot and the election, BART funded creation and distribution of campaign related communications including YouTube Videos and text messages, that:

- used the Initiative's longstanding tagline, "it's time to rebuild".
- featured riders complaining that BART had "gotten worse," that "safety has diminished," and was "obviously showing its age;" describing their need for and reliance on BART; and calling on the agency to "spend more dollars to get [BART] into a more modern condition" among other comments.

[39] *Id.* at p. 40.

[40] *California State Association of Counties ("CSAC") et al v. Fair Political Practices Commission*, Los Angeles Superior Court, Case No. BS174653.

[41] Assembly Bill 1306, introduced during the 2019/20 legislative session but suspended in April 2019, would have amended the Political Reform Act to authorize the Commission to bring administrative and civil actions against public agencies and public officials for spending public resources on campaigns.

The FPPC concluded that the communications were *inflammatory and argumentative* and that by borrowing the voices and the sympathy of its customers, BART *campaigned* for Measure RR."

Although BART had a social media presence prior to placement of Measure RR on the ballot, the FPPC concluded that it ramped up that presence with new features and programs including uploading the videos it paid to produce. In so doing, the FPPC concluded that BART's social media activities in this regard were in *furtherance of its campaign to support* Measure RR.

Relying on FPPC Regulations and the holding in *Stanson* and *Vargas*, the FPPC concluded that BART had not file required expenditure disclosures and failed to include paid-for-by statements on its electronic media advertisements. Potentially subject to a fine of $33,374.98, BART paid a fine of $7,500 pursuant to a stipulation.

It appears that this is the only matter to come to a decision to date under these FPPC Regulations.

B. *California State Association of Counties ("CSAC") and California School Boards Association ("CSBA") v. Fair Political Practices Commission*, Los Angeles Superior Court, Case No. BS174653.

On August 3, 2018, CSAC and the CSBA ("Plaintiffs") filed a writ alleging that Regulations 18420.1 and 18901.1 are invalid as a matter of law, that the Commission has exceeded its jurisdiction in adopting these regulations, and that the regulations are unenforceable. In particular, Plaintiffs assert that:

- Regulation 18901.1 broadly prohibits local government's use of electronic media (television and radio) and is therefore an invalid expansion of the holdings in *Stanson* and *Vargas*;
- The FPPC exceeded its authority in enacting Regulations 18420.1 and 18901.1 because they are drawn not from the Act but from the California Supreme Court's decision in *Vargas*;
- Any per se prohibition of televisions, radio and electronic advertising is invalid and unconstitutional because it creates a vague standard regarding the content of government speech and infringes on public entities' protected speech rights;
- FPPC Officers and employees who enforce these Regulations are acting contrary to the authority provided by the Act.

Plaintiffs seek: invalidation of Regulations 18420.1 and 18901.1; a declaration that any blanket prohibition on public agencies' use of televisions, radio and electronic media is invalid and unconstitutional; and that FPPC Regulations may not be implemented to impose such a blanket prohibition.

In March 2019, the trial court granted, with leave to amend, FPPC's motion for judgment on the pleadings as to Regulation 18901.1 on standing and ripeness grounds. In late June, 2019, petitioners filed their second amended complaint. At present no hearing date is scheduled. This

case is unlikely to be resolved on the merits before the October 2019 League of California Cities Annual Conference when this paper is to be presented.

IV. Best Practices

Although the FPPC's specific enforcement authority under Regulations 18901.1 and 18420.1 has been challenged, the underlying judicial holdings remain valid. It is well settled that public agencies are limited in the tone, tenor, and timing of communications supported by public funding as it related to campaign matters. The only question as a result of litigation against the FPPC is which state level public agency will come after a city when it crosses the line.

The following best practices are designed to assist cities in avoiding scrutiny by the FPPC and to first avoid and then withstand legal action by opponents of the city's perceived position alleging the city acted improperly in making expenditures and communicating regarding campaign matters.

A. Acceptable City Actions

- Establish robust communication methods in non-election years. Public agencies should only disseminate information to constituents during elections through already established means of communication. Establishing wider communication methods in anticipation of use for election communications will help the agencies be proactive and reach a broader audience.

- Use public resources to evaluate and provide *informational materials* regarding a ballot measure, but do not engage in *advocacy*. Purely informational materials present a fair and balanced presentation of relevant facts.

- Evaluate and publicly express the City's position as to the merits of a proposed ballot measure, including providing information at the meetings of public or private organizations inquiring about a measure, provided they are not *mounting a campaign* for or against the measure.

- Take formal action to authorize some or all of the city council to prepare and submit official ballot arguments for or against a ballot measure, such as an initiative, pursuant to the procedures established by the Elections Code.[42]

- Prepare *objective, fact-based reports* on the effects of a ballot measure.

- Distribute informational materials through communication channels *regularly used for city communications*, such as the City's website, regularly scheduled newsletters, etc., including such processes as: a City's regular budget or planning process.

[42] Election Code, §9282. As noted above, the cautious approach is to advise that city council members should draft any such ballot arguments themselves and not ask or direct city employees to assist them in that drafting.

- Respond to inquiries, provided the response is limited to (1) indicating that the City has either endorsed or opposed the measure; and (2) providing fair and impartial information regarding the measure.

B. Acceptable Activities by Officials

- On their own personal time and using their own personal resources, advocate in favor of or in opposition to a particular ballot measure.

C. Prohibited City Activities

- Use public funds or resources to campaign for or against a measure.[43]

- Expressly advocate for or against a ballot measure, i.e., urging voters to "vote against" or "defeat" or "reject" a measure.

- Use inflammatory or argumentative language or rhetoric in city communications, including language that unambiguously conveys support (or opposition), for example: testimonials and tag lines that extoll the benefits and virtues that will occur if a measure is passed/tragedies that will befall a community if a measure fails[44].

- Use mediums of communication they do not use for regular agency communications, i.e., bumper stickers, posters, advertising, floats, billboards and television or radio ads.

- Other than at a duly noticed public meeting, a quorum or more of members of the City Council may not meet to discuss or otherwise congregate to discuss ballot measures that are within the subject matter jurisdiction of the City Council.[45]

- Hire consultants to develop a strategy for building support for a measure or engage in activities that form the basis for a campaign to obtain approval of a measure before anything is placed on the ballot.[46]

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[43] Public resources are property owned by the public agency including buildings, facilities, funds, telephone, supplies, computers, vehicles, email and social media accounts, etc. For example, a public agency with a social media presence may have garnered a large number of "followers" or may have developed email distribution lists comprised of people who signed up in order to receive official public information. These types of resources should not be shared by the public agency with a committee that is advocating the favored position of the agency. Whether these lists are public records and thus open to anyone on the basis of a Public Records Act request, is beyond the scope of this paper.

[44] See FPPC Stipulation in Case No.: 16/19959 (examples include: "Rebuild BART," "parts of BART continue to deteriorate," "we need to spend more dollars to get [BART] into a more modern condition," and "if there is no BART, can you imagine how many people aren't going to get to work?"

[45] See generally the Ralph M. Brown Act (Gov. Code §54950 et. seq.).

[46] *See, e.g.*, Opinion No. 13-304, 99 Ops.Cal.Atty.Gen. 18, (2016) (citing Opinion No. 04-11, 88 Ops.Cal.Atty.Gen. 46, (2005)): "However, we also concluded that a district may not use public funds to hire a consultant to develop a strategy for building support for the measure. Impermissible activities could include, for example, assisting…in scheduling meetings with civic leaders and potential campaign contributors in order to gauge their support for the bond measure, if the purpose or effect of such actions were to develop a campaign to promote the bond measure.

- Use of public resources for advocacy can be subject to criminal and/or civil penalties for individuals involved. Incidental and minimal use of public resources may not be subject to penalties.[47]

D. Gray Areas

Though the above permissible and impermissible actions are fairly clear based on relevant case law and statutory authority, other communications by cities or city officials may or may not be appropriate depending on the *style, tenor and timing* of the publication or communication.

For example, if a city council member on his or her own (not in response to a question or comment by the public or to a presentation or report on the merits of the ballot measure) makes a comment from the dais regarding the merits of a ballot measure, the style, tenor and timing of that comment would need to be evaluated to determine if the communication was a proper informational activity or a prohibited campaign activity. *If, for example, the style, tenor, and timing of a communication demonstrates that the primary purpose of the communication is to assist in the campaign for or against an issue, it could be considered a form of prohibited campaigning.*[48] To avoid such a result, it is advisable to limit communications, such as statements by council members, to responses to comments or questions by the public and to discussions relating to reports or evaluations regarding the merits of ballot measures.

Another possible gray area is the *de minimis* use of public resources like computers, phones, time, and social media presence. As described above, the analysis is very fact specific. It potentially involves the user of public resources' intent, the instigator of the communication, and the ability to put a value on the incidental use of the agency's resources among other considerations. It is, for example, commonplace for public employees to direct inquiring members of the public to the proponents and opponents of measures. The rationale here is usually to enable members of the public to do their own research and it is generally accepted that any incidental use of public equipment is *de minimis*. Consider instead a public agency that only directs callers to the campaign in favor of a measure it likes or to the campaign opposed to a measure it does not like. In that case, it is easy to see that the analysis might not be the same.

Surveying the relevant judicial decisions, we reasoned that 'a community college district board may not spend district funds on activities that form the basis for an eventual campaign to obtain approval of a bond measure.'"

[47] Under Gov. Code, §8314 (b)(2) "Campaign activity does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities." This determination is highly fact specific. For example, in *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, a county supervisor's act of directing her chief of staff to e-mail a newspaper editorial advocating defeat of an initiative measure to a list of 1,500 people was an "incidental and minimal" use of public resources, where chief of staff created the text of the e-mail in about 10 minutes during her lunch period and distributed the e-mail once, with the push of a button and because there was neither a gain to supervisor nor a loss to the county for which a monetary value may be estimated, where the expenditure was minimal..

[48] See *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 26-27 (discussing *Keller v. State Bar* (1989) 47 Cal.3d 1152).

V. Conclusion

Cities have an important and proper role in the electoral process. They are the conduit by which measures and initiatives are places on the ballot. Cities are also repositories of important information that is relevant to a great many matters that the public will vote on. To deprive the public of that information would be a disservice. At the same time, as far back as the founding fathers, it was recognized that government should not use public funds to support or oppose measures or candidates. That conversation is reserved to the voters. Accordingly, cities must use great care to ensure that election-related expenditures and communications impartial information that, when taken as a whole, neither explicitly nor impliedly suggests a particular result. Cities should also use the same communication vehicles for election-related communications that it ordinarily uses to communicate civic information to the public.

Notes:_____

The New Food Economy: Sidewalk Vending & Microenterprise Home Kitchens

Wednesday, October 16, 2019 General Session; 3:30 – 5:00 p.m.

Kathy Shin, Associate, Best Best & Krieger
Matthew Summers, City Attorney, Ojai, Colantuono, Highsmith & Whatley, PC

State Preemption in the New Economy for Food: Sidewalk Vending (Senate Bill 946) and Microenterprise Home Kitchen Operations (Assembly Bill 626)

League of California Cities
Annual Conference
October 16, 2019

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INTRODUCTION

In 2018, the Legislature adopted two bills that legalized traditional sectors of the informal food economy in California. Senate Bill 946 (SB 946) decriminalized and limited local regulation of sidewalk vending. Assembly Bill 626 (AB 626) decriminalized and limited local regulation of home kitchen operations. Both bills were intended to promote existing small-scale businesses ("microenterprises") and to promote entrepreneurship and economic empowerment among low income and marginalized communities. The bills also reflect a legislative reaction to widely reported code enforcement cases against vendors and home cooks that were viewed as draconian.

In the process of defining the parameters and priorities of the microenterprise economy, the State preempted cities' traditional regulatory authority over sidewalk vendors and home occupations. Yet the Legislature recognized that maintaining some regulations in the public interest was critical to the new economy's legitimacy. It focused those regulations, however, on public health as manifested in food safety. (While sidewalk vending encompasses more than the sale of food, the state's regulatory role under SB 946 is limited to requiring health permits of food vendors under the California Retail Food Code. Likewise, the primary purpose of AB 626 was to develop a new health permit for the sale of homemade foods.) And yet, cities were not left without a regulatory role.

This paper examines cities' redefined authority over microenterprises and the new laws governing sidewalk vending and home kitchen operations in California's communities. In addition to reviewing state constraints on the local police power, the discussion explores the remaining regulatory options for local governments (more for sidewalk vending), and the potential transformation of a cottage industry (from home restaurants to home food demonstrations) as the law governing home kitchens takes hold in the sharing economy.

SIDEWALK VENDING

Sidewalk vending is a quintessential microenterprise in many regions of California. Beginning January 1, 2019, Senate Bill 946 ("SB 946") decriminalized and limited local regulation of sidewalk vending, with twin goals of promoting entrepreneurship and regularizing the informal economy and protecting undocumented persons from criminal prosecutions and subsequent deportations as a consequence for municipal code violations.[1] Introduced by then-Senator Ricardo Lara, the legislation expressly preempts any city regulations other than time, place, and manner regulations most of which must be "directly related to objective health, safety, or welfare concerns." The legislation also prohibits any enforcement other than administrative fines, imposes strict caps on those fines, and requires cities to develop an administrative process for vendors in violation to have their fines reduced to reflect their ability to pay.

The first part of this paper provides an overview of the legislation, its genesis, and the available regulatory options for cities, citing to Calabasas, West Hollywood, and Los Angeles as case studies.

BACKGROUND ON SIDEWALK VENDING AND THE IMPETUS BEHIND SB 946

Under state law, a sidewalk vendor is a person who sells "food or merchandise" from any "non-motorized conveyance" upon "a public sidewalk or other pedestrian path."[2] Sidewalk vendors can be stationary or mobile. Sidewalk vending does not, however, include food trucks or other persons selling their wares from motor vehicles or on private property.

Sidewalk vending is common throughout the more urban and suburban areas in California, particularly in suburban Southern California. A 2018 legislative report estimated 50,000 sidewalk vendors just in the City of Los Angeles.[3] Sidewalk vending allows small-scale microentrepreneurs to sell food and other merchandise with a lower cost of entry and with a significantly lower overall cost burden then operating a traditional brick and mortar retail store. However, sidewalk vending has also created challenges for cities, as it can interfere with open, easy sidewalk access for pedestrians and disabled persons, create trash and rodent problems, and has created economic competition concerns for traditional restaurants and food stores.

Senator Lara authored SB 946 as a solution to two interrelated problems concerning immigration and the informal economy. First, the criminalization of sidewalk vending made many undocumented immigrants more vulnerable to deportation as an effective consequence for municipal code violations. Sen. Lara and other proponents cited, as an example, the widely reported case of an undocumented immigrant and mother of four who was detained by Immigration and Customs Enforcement officials after she was cited for multiple violations of an eastern Los Angeles County city's ordinance prohibiting sidewalk vending.[4] This case and several other similar high-profile cases demonstrated that a traditional code enforcement case,

[1] Sen. Bill No. 946 (2017-2018 Reg. Sess.)
[2] Gov. Code, § 51036, subd. (a).
[3] Assembly Local Gov. Com., 3d reading analysis of Sen. Bill No. 946 (2017-2018 Reg. Sess.) as amended Aug. 16, 2018.
[4] Assem. Local Gov. Com., 3d reading analysis of Sen. Bill No. 946 (2017-2018 Reg. Sess.) as amended Aug. 16, 2018.

usually resolved administratively with a fine, can be significantly elevated into a deportation matter if the person who has violated a municipal code lacks authorization to be in the United States. Second, the author stated cities that criminalized sidewalk vending drove the activity underground and into the informal economy, leaving the vendors vulnerable to exploitation and depriving them of the benefits of regularizing and expanding their entrepreneurial small businesses.

The Legislature concurred with both primary concerns in adopting the bill, which begins by stating sidewalk vendors provide "important entrepreneurship and economic development opportunities to low-income and immigrant communities," increased access to "culturally significant foods and merchandise," and contribute "to a safe and dynamic public space."[5]

SIDEWALK VENDING REGULATIONS AFTER SB 946

Under Senate Bill 946, after January 1, 2019, a city cannot entirely prohibit or criminalize sidewalk vending. The legislation expressly declares that all sidewalk vending regulation shall be a purely civil matter, with fines set at specified maximum amounts, and with a requirement that violators be able to pay a lower fine if they can demonstrate a lack of ability to pay the maximum fines.[6] The legislation further required dismissal of all pending sidewalk vending criminal prosecutions and created a process for past convictions to be expunged.[7] Senate Bill 946 expressly preempts any contrary local ordinance, instead requiring any city regulation of sidewalk vendors be consistent with Government Code sections 51036–51039.[8]

Cities have a range of defensible regulations that can be adopted within the legislation's limits. They can require a sidewalk vending permit or fold sidewalk vending into an existing business license or encroachment permit. The legislation permits a range of reasonable regulations, including restrictions on hours of operations, certain location and zone restrictions, tax registration, and compliance with disability access standards. Cities can also require county health permits for food vendors.[9] What they cannot do is regulate on the grounds of public animus or concerns for economic competition. The legislation is intended to promote sidewalk vending as a legitimate economic activity and ensure that cities only adopt reasonable time, place, and manner regulations related to objective health, safety, and welfare concerns.

Expressly Permitted Regulations. In general, a city may not restrict sidewalk vending in the public right-of-way or restrict the overall number of vendors permitted to operate within the city unless the restriction is "directly related to objective health, safety, or welfare concerns."[10] However, the law expressly allows for the following regulations:

- **Residential Zones.** Cities may prohibit stationary sidewalk vendors in residential zones outright, but not mobile sidewalk vendors. Mobile vendors may be subject

[5] SB 946, Section 1.
[6] Gov. Code, § 51039.
[7] Gov. Code, § 51039, subd. (g).
[8] Gov. Code, § 51037, subd. (a).
[9] Gov. Code, § 51037, subd. (b).
[10] Gov. Code, § 51038, subd. (b)(1).

to reasonable regulations for reasons directly related to objective health, safety, or welfare concerns, e.g. reasonable hours restrictions.[11]

- **Permitted Temporary Events and Farmers Markets.** Cities may prohibit sidewalk vendors located near certified farmers' markets, swap meets, or other specially permitted temporary events, but only for the duration of the event.[12]

- **Public Parks.** A city may prohibit all sidewalk vending in a park (including beaches or open space areas) if the city has an exclusive concessionaire agreement for that site.[13] Otherwise, cities may adopt reasonable regulations specific to parks and natural areas if the regulations are:

    - Directly related to objective health, safety, or welfare concerns,

    - Intended to protect the public's use and enjoyment of the park or natural area and its scenic, natural, and recreational resources, or

    - Necessary to prevent overconcentration of commercial activity within a park that would unreasonably interfere with its character.[14]

  Examples of permitted park regulations include requirements that vendors stay on paved pathways and out of natural dirt, sand, or grass areas; limits on the number of vendors permitted within a park; and restrictions on hours of operation.

Prohibited Regulations. Under Senate Bill 946, a city is prohibited from adopting any of the following regulations:

- Prohibiting all sidewalk vending;[15]

- Requiring a sidewalk vendor to operate only within specific parts of the public right-of-way or only within specific neighborhoods or areas – except for a restriction directly related to objective health, safety, or welfare concerns;[16]

- Restricting the overall number of sidewalk vendors permitted to operate within the City– except for a restriction directly related to objective health, safety, or welfare concerns;[17]

- Requiring a sidewalk vendor to first obtain the consent or approval of any nongovernmental entity or individual before he or she can sell food or merchandise;[18] and

[11] Gov. Code, § 51038, subd. (b)(4)(B).
[12] Gov. Code, § 51038, subd. (d)(1).
[13] Gov. Code, § 51038, subd. (b)(2)(A).
[14] Gov. Code, § 51038, subd. (b)(2)(B).
[15] Gov. Code, § 51038.
[16] Gov. Code, § 51038, subd. (b)(1).
[17] Gov. Code, § 51038, subd. (b)(5).

- Imposing any requirement rooted in animus or economic competition concerns.[19]

Optional Regulations, if Related to Objective Health, Safety, and Welfare Concerns. A city may further restrict the time, place, and manner of sidewalk vending by ordinance or resolution, if the regulations are directly related to objective health, safety, and welfare concerns. The statute provides a non-exhaustive list of permitted regulations, which includes any of the following:[20]

- Restricting the hours of operation, if not unduly restrictive. (In nonresidential areas, hours limitations may not be more restrictive than any limitations on hours of operation imposed on other businesses or uses on the same street.).

- Reasonable sanitation requirements, e.g. that trash receptacles be available.

- Requiring compliance with the Americans with Disabilities Act of 1990 ("ADA") and other disability access standards including not blocking required ADA access paths, e.g. requiring a minimum 48" passable pedestrian path at all times.

- Requiring a city-issued permit for sidewalk vending, together with a valid business license.

- Requiring a valid California Department of Tax and Fee Administration's seller's permit, ensuring sales tax law compliance.

- Requiring additional licenses from other state or local agencies to the extent required by law, e.g. county health permits.

- Requiring compliance with other generally applicable laws, e.g. a city's fire safety requirements.

- Requiring the submission of information on the vendors' proposed operations.

For this third category of regulations, cities should consider adopting legislative findings justifying the regulations as within the confines of SB 946, meaning rooted in objective health, safety, and welfare concerns (as opposed to community animus or concerns for economic competition).[21]

SENATE BILL 946 LIMITS ON ENFORCEMENT TOOLS

After January 1, 2019, sidewalk vending can no longer be punished as a criminal infraction or misdemeanor. Instead, any violation of a city's sidewalk vending ordinance or

[18] Gov. Code, § 51038, subd. (b)(3).
[19] Gov. Code, § 51038, subd. (e).
[20] Gov. Code, § 51038, subd. (c).
[21] Gov. Code, § 51038, subd. (e).

regulations, other than vending without a permit if required, is punishable only by the following maximum administrative fine amounts:[22]

First Violation	Administrative Fine of $100
Second Violation Within One Year of First	Administrative Fine of $200
Each Additional Violation Within One Year of First	Administrative Fine of $500
Fourth and Subsequent Violations	Revocation of Permit

If a city requires a sidewalk vendor to obtain a permit, vending without a permit is punishable by the following higher administrative fines:[23]

First Violation	Administrative Fine of $250
Second Violation Within One Year of First	Administrative Fine of $500
Each Additional Violation Within One Year of First	Administrative Fine of $1,000

Enforcement of these ordinances can be challenging, particularly given the low deterrent effect inherent in the above state-mandated maximum fine amounts. Each city's regulatory program must also include a process by which a violator may seek a reduction in the above fine amounts due to a demonstrated inability to pay. If the person meets the statutory criteria for a waiver of court fees, fines amounts may be reduced by up to 20 percent.[24] A tool to help enforcement is to require each permitted vendor to display the issued permit on the street-side of each cart or other vending device, thereby allowing code enforcement officers to quickly visually confirm the presence or absence of a sidewalk vending permit.

CALABASAS CASE STUDY

Calabasas is a hilly city in north-western Los Angeles County with a mix of rural and suburban residential areas and low-rise commercial developments along the 101 Freeway corridor. Calabasas adopted its sidewalk vending ordinance early in 2019 and serves as a model for similarly situated cities. The Calabasas ordinance, Chapter 9.07 of the Calabasas Municipal Code, requires sidewalk vendors to secure an annual sidewalk vending permit from the Public Works Department, together with a state seller's permit and a county health permit, as required. Calabasas does not require business licenses. Applicants must also declare whether they intend to operate as a stationary or mobile vendor, and if mobile, the proposed route. All applicants must undergo a criminal background check as well.

[22] Gov. Code, § 51039, subd. (a)(1)(2).
[23] Gov. Code, § 51039, subd. (a)(3).
[24] Gov. Code, § 51039, subd. (f); 68632 [fee waiver standards].

The Calabasas ordinance adopted regulations under SB 946 as follows:

(1) Limiting sidewalk vending in non-residential areas to the allowable operating hours of other uses on the same street, and further requiring all vending-related equipment be removed from the public right of way between 10:00 p.m. and 8:00 a.m. in all cases;

(2) prohibiting stationary sidewalk vending in residential areas;

(3) limiting mobile sidewalk vendors within residential areas to the hours of 9:00 a.m. through 5:00 pm.;

(4) prohibiting sidewalk vending within 500 feet of a permitted certified farmers' market, permitted swap meet, and any area subject to a temporary use permit for the duration of the permit;

(5) prohibiting sidewalk vending within any park for which the City has entered into exclusive concessionaire agreements;

(6) prohibiting sidewalk vending by any state-registered sex offender;

(7) requiring display of the sidewalk vending permit on the street-side of the cart or conveyance;

(8) requiring a trash receptacle and that vendors selling food or beverages wear hairnets and gloves;

(9) requiring compliance with the City's noise ordinance;

(10) prohibiting sidewalk vending of any adult-oriented material depicting, describing or relating to sexual activities or any alcohol, marijuana, tobacco, or nicotine products; and

(11) prohibiting vending within 500' of any public or private school during school hours and one hour before and after the beginning of classes.

To prevent unintended rolling or slipping of carts into pedestrians or the roadway, sidewalk vendors are also prohibited from operating a pushcart, pedal-driven cart, wagon, or other non-motorized conveyance on any public-right-of-way with a slope greater than five percent. The City adopted these specific, additional regulations to protect the community from adverse fire and traffic safety impacts, given its local characteristics as a heavily hilled city entirely within a very high fire hazard severity zone. The City also intended these regulations to ensure that vending would be allowed in the appropriate parts of its core commercial district.

WEST HOLLYWOOD CASE STUDY

West Hollywood is a major tourist destination and urban city located between Beverly Hills and Hollywood, with several large pedestrian-oriented commercial centers. In June 2019, the City adopted an ordinance to regulate sidewalk vending by means of a specially designated business license. Chapter 5.122 of the West Hollywood Municipal Code requires sidewalk

vendors to secure an annual sidewalk vending business license, together with a state seller's permit and a county health permit, as required. To further secure the safety of pedestrians and vendors on its densely populated urban streets, the City has also adopted the following location requirements pursuant to SB 946:

(1) Sidewalk vending is prohibited within a block of certified farmers' markets and specially permitted events.

(2) Only mobile vendors are allowed in residential zones, and then only within the hours of 9:00 a.m. to 8:00 p.m.

(3) Sidewalk vending is prohibited within a block of any public or private school between the hours of 8:00 a.m. to 5:00 p.m. on school days, to minimize adverse impacts from congestion and to maintain open pedestrian pathways for students, teachers, and parents.

(4) Sidewalk vending is prohibited between the hours of 10 p.m. and 2:00 a.m. on a defined list of streets that are areas of the City with a high concentration of night-life venues. The restricted hours of operation reflect the times when the listed streets are regularly crowded with pedestrians going to and from the night-life venues and are intended to minimize the risks to public safety from overcrowding.

(5) Sidewalk vending is prohibited within 25' of any valet loading zone, taxicab stand, or other designated loading zone, to also ensure open pedestrian pathways and adequate room for persons to enter and exit loading vehicles.

(6) The ordinance imposes a graduated minimum sidewalk clearance requirement, requiring all vendors to maintain the following minimum unobstructed pedestrian access clearances:

    a. Minimum four feet clear for sidewalks up to thirteen feet wide;

    b. Minimum six feet clear for sidewalks greater than thirteen feet but less than or equal to seventeen feet wide; and

    c. Minimum eight feet clear for sidewalks greater than seventeen feet wide.

The ordinance further requires all roaming vendors to operate for no more than one hour per four-hour period on any single block in the City, thereby creating a metric for "roaming."

LOS ANGELES CASE STUDY

Unlike the previous case studies, Los Angeles represents a large, urban city with a myriad of environments – from the heart of downtown Los Angeles south to the Port and San Pedro and west to Venice and the beach. In 2018, Los Angeles had an estimated 50,000 sidewalk vendors operating in the City. It was also the center of much of the political and community activism that resulted in SB 946's passage. The Los Angeles regulatory approach is thus geared toward accommodating its existing large vendor population.

The Los Angeles ordinance, codified in Section 42.13 of the Los Angeles Municipal Code, was adopted in 2018 as an urgency measure, ahead of the state law's effective date on January 1, 2019. The ordinance restricts vending in the City's major tourist destinations, largely for reasons of overcrowding. For example, the Los Angeles ordinance prohibits all vending, both mobile and stationary sidewalk vending, at all times within 500' of the Hollywood Walk of Fame, Universal Studios, and the El Pueblo historical monument. The ordinance also prohibits vending within 500 feet of Dodger Stadium, the Staples Center, and LA Coliseum, but only on event or game days. Vending at Venice Beach is limited to only First Amendment protected expressive activities. For the areas where vending is prohibited at all times, the City has installed signs explaining the prohibition and including a map of the prohibited areas.

The ordinance also provides for additional rules and regulations to be developed by the City's Bureau of Street Services (for vending in the public right-of-way) and by the City's Board of Recreation and Parks Commissioners (for vending in parks), which are to be adopted by resolution of the City Council. Unlike Calabasas and West Hollywood, Los Angeles is not likely to require permits of all 50,000 of the City's vendors given the prohibitive administrative costs. The details are still being discussed, but the Bureau of Street Services has been considering a hybrid regulatory scheme wherein most areas of the City would be governed by the rules and regulations. Site-specific vending permits would then only be required for areas in which vendors currently compete for spaces with the most economic potential (areas such as Downtown Los Angeles and Hollywood).

SIDEWALK VENDING OUTLOOK

Sidewalk vending is an existing microenterprise in many regions of California. SB 946 allows cities to regulate sidewalk vending, with provisions defining regulations cities can adopt outright, cannot adopt, and may adopt with appropriate findings and justification, tying the optional regulations to objective health, safety, and welfare concerns. The legislation also prohibits any enforcement other than civil fines, imposes strict caps on those fines, and requires cities to develop an administrative process for vendors in violation to have their fines reduced to reflect their ability to pay. Three case studies provide examples of available reasonable regulations for small, mid-size, and large cities. In considering a sidewalk vending ordinance, cities should consider their environment, the prevalence and type of existing sidewalk vending, and the implications of possible expansions in future vending activities.

MICROENTERPRISE HOME KITCHEN OPERATIONS ("MEHKOS")

Effective January 1, 2019, Assembly Bill 626 (AB 626) established "microenterprise home kitchen operations" ("MEHKOs") as a retail food facility under the California Retail Food Code ("CalCode").[25] Within months of enactment, a coalition of environmental health directors and the bill author, introduced urgency legislation (AB 377) to clarify the law respecting the jurisdiction of local regulatory authorities and the requirements for a health permit.[26] As AB 377 was expected to pass at the time of writing, this paper discusses the law as amended.

A MEHKO involves the use of a private residence for the preparation and sale of food for pick-up, delivery, or onsite dining—much like a restaurant—or for residential food demonstrations and food preparation events. As a retail food service, MEHKOs require a health permit issued under the CalCode. Notably, CalCode enforcement agencies (typically county health departments) have discretion to authorize the permitting of operations within their jurisdiction.[27] Of particular note for municipal law, once a county "opts in" to regulate MEHKOs, every incorporated city within the county is bound by that decision. That is, if a county permits them, a city cannot prohibit them—a permitted MEHKO is a permitted use of residential property exempt from the reach of local zoning ordinances.

STATE REGULATION OF MEHKOS

Going beyond cottage foods

Prior to 2013, the sale of homemade food was illegal. State law required all food offered for sale to the public to be prepared in a properly inspected and permitted commercial kitchen. In 2012, the California Homemade Food Act authorized the limited commercial use of private homes for the preparation of cottage foods.[28] Cottage food products are limited to "nonpotentially hazardous foods," or foods that do not require refrigeration or other critical time-temperature controls (e.g., homemade breads, candy, dried fruit).[29] Given their low risk of food-borne illness, cottage food operations ("CFOs") are carved out of the definition of "food facility" and separately authorized under CalCode.[30]

Unlike CFOs, MEHKOs are defined as a type of food facility subject to CalCode with a long list of exemptions. According to bill author Assemblymember Eduardo Garcia, the goal of AB 626 was to "promote economic development, particularly in our most vulnerable

[25] Health & Saf. Code, § 113700 et seq.
[26] Assem. Bill No. 377 (2019-2020 Reg. Sess.); When this paper was submitted for distribution, AB 377 was pending in the Assembly for concurrence in amendments to the bill made by the Senate.
[27] With the exception of four city departments (Berkeley, Long Beach, Pasadena, and Vernon), the local enforcement of CalCode is charged to county environmental health departments, and this paper will occasionally refer to the enforcement agency as the county.
[28] AB 1616 (Gatto, Chapter 415, Statutes of 2012).
[29] See Health & Saf. Code, §§ 113758, 114365.5.
[30] Health & Saf. Code, § 113789, subd. (c)(2).

communities where the sale of homemade food is already incredibly popular."[31] To that end, the law opened home kitchen operations to a wider range of "potentially hazardous food" (e.g., meats and hot plates that present an increased risk of contamination and foodborne illness).

While county health departments initially balked at securing the safe preparation of potentially hazardous foods in private homes, where people and pets reside,[32] a coalition of environmental health directors supported the law as amended (through AB 377) as an improvement over the original bill's provisions for best practices in food safety.[33] Counties also retain discretion over whether to regulate MEHKOs. While CalCode enforcement agencies typically do not have authority to determine whether or not a category of food facilities (such as restaurants) may be permitted to operate within a jurisdiction, they do retain such discretion respecting the regulation of MEHKOs. A county deciding to regulate then develops a permitting process which incorporates CalCode requirements for home operations, including facility inspections and training for food handlers in public health measures.

The law also limits the scale of MEHKO operations to ensure that the home kitchen remains a "microenterprise," or "a stepping stone toward—and not a replacement of—the use of commercial kitchen spaces when appropriate and available to cooks."[34]

A restricted, and not so restricted, food facility

1. Facility regulations and training operators

A MEHKO is generally regulated as a "restricted food service facility"—the regulatory category for a bed and breakfast—and is exempt from many of CalCode's requirements. The exemptions recognize the difference between home kitchens and full commercial operations.[35] For example, unlike commercial kitchens, MEHKOs are not required to have three-compartment sinks for washing cookware and separate facilities for handwashing, provided that the kitchen has a sink equipped with hot and cold water. MEHKOs are also exempt from CalCode's plumbing and waste requirements, and from the requirements pertaining to facility ventilation.

Respecting operations, MEHKOs are further exempt from the restrictions against "unnecessary" persons being present in food preparation areas, and from the restrictions against the presence and handling of domestic animals (provided that pets are kept outside the kitchen during food service and preparation).[36]

Apart from the facility, permitted MEHKO operators must be trained and certified in food safety. Any person involved in the preparation, storage, or service of food in a MEHKO is

[31] Senate Com. on Health, Analysis of AB 626, (2017-2018 Reg. Sess.), June 13, 2018, p.8.
[32] *Id.* at p.11.
[33] Assem. Com. on Health, Analysis of AB 377 (2019-2020 Reg. Sess.), as amended Mar. 25, 2019, p.7.
[34] Senate Com. on Health, Analysis of AB 626, (2017-2018 Reg. Sess.), June 13, 2018, p.8.
[35] See generally, Health & Saf. Code, § 114367.1.
[36] Health & Saf. Code, § 114367.1, subd. (b)(3), (21).

also required to obtain a food handler card (issued upon successful completion of a food handler training course and examination).[37]

2. Restrictions on scale and scope

While MEHKOs may serve potentially hazardous food items, their operations are subject to the following restrictions for a microenterprise:

- Food is only sold directly to consumers (i.e., no sales to wholesalers or retailers).
- Food is prepared, cooked, and served on the same day.
- Food is consumed onsite, picked up, or delivered within "a safe time period."
- Food production does not require a HACCP plan (e.g., no cured or smoked foods) and does not involve the production or sale of raw milk or raw milk products.
- Operators may not serve or sell raw oysters.
- The production, processing, freezing, or packaging of milk or milk products (including cheese, ice cream, yogurt, sour cream, and butter) is prohibited.
- No more than 30 individual meals may be prepared per day (or the equivalent of meal components when sold separately), and no more than 60 individual meals per week.
- Operations are limited to annual sales in the amount of $50,000.
- Operations are limited to one full-time equivalent food employee (excluding family members or household members).[38]

Despite the foregoing restrictions, MEHKOs are permitted to operate an open-air barbeque or an outdoor wood-burning oven.[39]

3. Permits required

All food safety requirements are implemented through a health permit, which a MEHKO must obtain prior to opening for business.[40] While local CalCode enforcement agencies have discretion as to whether MEHKOs will be permitted at all within their jurisdiction, once permitting is authorized, the process is ministerial.[41] Enforcement agencies "shall issue" a permit after an initial inspection, and agencies may not impose food safety requirements different from, or in addition to, those set forth in statute.[42]

4. Limited inspections

After the initial inspection, subsequent inspections are limited:

- No more than one "routine inspection" may be required within 12 months,

[37] Health & Saf. Code, §§ 114367.1, subd. (d), (e); 113948, subd. (b)(3).
[38] See generally, Health & Saf. Code, § 113825, subd. (a).
[39] Health & Saf. Code, § 114367.1, subd. (c).
[40] Health & Saf. Code, § 114367.2.
[41] Health & Saf. Code, §§ 114367; 114367.2, subd. (d).
[42] Health & Saf. Code, § 114367.2, subd. (d)(1), (2).

- An "investigation inspection" requires just cause that a MEHKO is serving adulterated food or otherwise violating the CalCode, and
- An "emergency inspection" requires just cause that a MEHKO poses a serious hazard or immediate threat to public health.[43]

While restaurants are typically subject to unannounced inspections during operating hours to ensure that food preparation and storage procedures may be accurately assessed, the law accommodates MEHKOs' dual function as a commercial operation and a private home.[44] Specifically, MEHKOs are exempt from unannounced visits "so as to protect their privacy."[45] Operators receive advance notice of inspections, to the extent reasonable for emergencies, and routine inspections are to be conducted "at a mutually agreeable date and time."[46] (It is worth noting that MEHKOs inspected outside of operating hours increase risks to the public health as any unsafe food handling practices would go unobserved.[47])

5. Food events

In addition to simple meal service, the MEHKO law, as amended, anticipates operators will offer food demonstrations and food preparation events.[48] While demonstrations and preparation events are not otherwise defined by statute, online platforms, including Airbnb, supported the enactment of AB 626 (Airbnb, in particular, was interested in adding California home kitchens to its array of offerings in local, bookable "experiences").[49] The culinary events listed on "Airbnb Experiences" therefore suggest the form that these demonstrations might take.

These include cooking classes on local, homemade fare with hands-on instruction in the host's kitchen (e.g., classes on making handmade pasta and Chinese dumplings) as well as classes on more refined fare led by professional chefs.[50] To inform the local impacts discussion *infra*, pictures posted on Airbnb's platform suggest that class sizes typically range from five to ten people. It is also worth noting that CalCode itself does not specify occupancy limits for MEHKOs, which are deemed a standard residential use for purposes of local building and fire codes.[51]

Internet food service intermediaries

An "internet food service intermediary" is a provider of an online platform for MEHKOs that "derives revenues" from its platform services including, but not limited to, advertising fees or fees for processing sales payments.[52] (Under this definition Facebook would not be an

[43] Health & Saf. Code, § 114367.3.
[44] Assem. Com. on Health, Analysis of AB 377 (2019-2020 Reg. Sess.) April 2, 2019 hearing, p. 6.
[45] *Id.*
[46] Health & Saf. Code, § 114367.3, subd. (a)(1), (2).
[47] Assem. Com. on Health, Analysis of AB 377 (2019-2020 Reg. Sess.) April 2, 2019 hearing, p. 6.
[48] AB 377, Sec. 4, amending Health & Saf. Code, § 114367.1 to add subivision (f) [limiting the sale of food prepared at a demonstration or event to a consumer who was present at the event].
[49] Sen. Com. on Health, Analysis of AB 626 (2017-2018 Reg. Sess.) June 20, 2018, p. 12; personal communication.
[50] See e.g., Airbnb Experiences listings https://www.airbnb.com/s/experiences [as of Sept. 8, 2019].
[51] See Health & Saf. Code, § 114367.4, subd. (b).
[52] Health & Saf. Code, § 114367.6, subd. (b).

intermediary for users posting homemade meals, whereas Airbnb, by charging fees for facilitating transactions, would be.)

In general, an intermediary is required to register with the California Department of Public Health and is subject to a number of operating requirements.[53] These include a requirement to post specified information on the company's website or mobile application, including CalCode's permitting criteria for MEHKOs, platform user fees, and whether the intermediary carries liability insurance relating to the sale or consumption of food listed on its platform.[54]

Intermediaries also facilitate the regulation of MEHKOs. First, MEHKO operators are required to post their permit numbers on platforms and the name of the issuing agency (e.g., Los Angeles County Department of Public Health). Second, platforms must enable consumers to file food safety or hygiene complaints, including ways to contact the intermediary and ways to file a complaint with local agencies. Upon receiving three or more unrelated food safety complaints (or upon receiving notice of similar complaints from a CalCode agency), intermediaries are required to submit the name and permit number of a MEHKO to local enforcement agencies.[55] Prior to publishing a MEHKO on a platform, intermediaries are required to obtain the MEHKO's consent to these disclosures.[56]

CITIES' REGULATORY ROLE

Like SB 946 (sidewalk vending), AB 626 (the original MEHKOs bill) was enacted under the banner of decriminalizing a segment of the informal food economy and establishing regulations in the public interest. Indeed, as with sidewalk vending, local stories of criminal enforcement actions against home cooks selling food without a permit preceded the legislation.[57]

Unlike the story with sidewalk vending, however, state law itself was the principal barrier to legal home kitchen operations. The retail of food generally requires a food facility permit under CalCode, and until the enactment of AB 626, the permitted sale of homemade food was limited to cottage food operations. Single mothers and retired grandmothers selling ceviche and lasagna to friends and neighbors were thus shut down by local health agencies for the illegal sale of food.[58] (CalCode violations generally constitute a misdemeanor.[59]) AB 626 was meant to support these "food microentrepreneurs" by legalizing the sale of homemade meals and regulating it.[60] Regulations "[p]roviding guidelines, training, and safety resources to home cooks" were to legitimize the enterprise as well as protect consumers and the public health.[61]

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[53] Health & Saf. Code, § 114367.6, subd. (a).
[54] Health & Saf. Code, § 114367.6, subd. (a)(1)-(4).
[55] Health & Saf. Code, § 114367.6, subd. (a)(7), (8).
[56] Health & Saf. Code, § 114367.6, subd. (a)(9).
[57] See local news item https://reason.com/2016/11/06/single-mother-facing-prison-for-selling [as of Sept. 8, 2019].
[58] See local news item https://newfoodeconomy.org/california-homemade-food-operations-act-2018/ [as of Sept. 8, 2019].
[59] AB 626, § 1, subd. (a)(12); Health & Saf. Code, § 114395.
[60] AB 626, § 1, subd. (a)(8)-(10).
[61] AB 626, § 1, subd. (a)(13).

Accordingly, to the extent the law established regulations, they pertain exclusively to food safety and environmental health. Local land use regulations, which would likely restrict, if not prohibit, restaurants in residential zones, were preempted. In brief, AB 626 designates MEHKOs as a permitted use of residential property, exempt from local zoning laws.[62] In so doing, the statute dispenses with the traditional partnership between state and local agencies in the regulation of restaurants to create a singular regulatory scheme for MEHKOs.

The usual regulatory partnership

The State occupies the field of health and sanitation standards for retail food facilities through uniform statewide standards set forth in the CalCode.[63] Yet the law expressly reserves the authority to "prohibit[] any type of food facility" to local jurisdictions, which typically determine where and when commercial operations are permitted, consistent with the local police power.[64] Restaurants have long been regulated according to this model of partnership. Local health departments inspect kitchens and issues health permits, while cities issue zoning clearances and land use permits. The State ensures food safety while cities ensure compatibility of uses in accordance with local conditions.

For example, restaurants offering outdoor dining typically obtain permits issued by local planning or public works departments. This is because the regulatory concerns posed by outdoor dining are land use concerns. Permits thus ensure that operators adhere to noise restrictions (particularly live music), hours restrictions, restrictions on alcohol consumption, and disability access and parking requirements.

Preempted zoning authority

In contrast with the prevailing model of partnership, AB 626 provides that a MEHKO "shall be a permitted use of residential property" provided that it (1) abstains from outdoor signage or advertising and (2) complies with local noise ordinances.[65] In turn, a city shall not "prohibit the operation of, require a permit to operate, require a rezone of the property for, or levy any fees on, or impose any other restriction on" a MEHKO "for zoning purposes."[66] Indeed, a city's regulatory authority over MEHKOs is limited to enforcing nuisance ordinances[67] and requiring a business license for revenue purposes[68].

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[62] Health & Saf. Code, § 114367.4.
[63] Health & Saf. Code, § 113705.
[64] Health & Saf. Code, § 113709; *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 190 [holding that CalCode does not preempt all regulation of food facilities, only health and sanitation standards].
[65] Health & Saf. Code, § 114367.4, subd. (a)(1).
[66] *Id.*
[67] Health & Saf. Code, § 114367.4, subd. (a)(2).
[68] As originally enacted, AB 626 included Health & Saf. Code, § 114367.2, subd. (j), which said that only one local agency could require any fees, permits, or licenses from MEHKOs (creating "the single permit issue"). AB 377 eliminated paragraph (j) from Section 114367.2, restoring the background rule that a food facility is subject to state and local permitting agencies (at least outside of permitting for zoning purposes).

Enforcing noise ordinances and generalized nuisance ordinances (that guard against uses "injurious to the enjoyment of property") typically require fact-intensive, laborious investigations that can exhaust a city's resources for code enforcement. Apart from noise and potential smell impacts—standard nuisances—a home kitchen operation is most likely to result in traffic impacts, particularly if patrons require on-street parking. Of course, a city may consider adopting a preferential street parking ordinance and manage parking in residential zones through permits. Checking for parking permits is easy to enforce, but unless a city has already adopted such a program, it presents a bludgeon of a policy response to managing the impacts of home occupations, including MEHKOs.

Charter City Exemption

Notwithstanding the foregoing, charter cities have a good argument for home rule exemption from the MEHKOs statute. Matters of zoning are traditionally considered "municipal affairs,"[69] and the local authority to prohibit food facilities is expressly reserved in CalCode's general provisions.[70] Absent a compelling argument that a land use triggers a matter of statewide concern, the local police power is at its height respecting the location of commercial uses in a residential zone.[71]

To be sure, AB 626 expressly precludes a city's authority to regulate MEHKOs "for zoning purposes,"[72] yet both AB 626 and AB 377 are silent as to the application of the law to charter cities—there is no indication that permitting MEHKOs as a land use is a matter of statewide concern. Again, the principal legal barrier to MEHKOs was the CalCode itself, which did not recognize the operations as a legal food facility. Yet even after authorizing the sale of potentially hazardous homemade foods, AB 626 provides that local health agencies retain discretion as to whether or not MEHKOs will be permitted in a jurisdiction.[73] State law does not grant home cooks a right to the enterprise. More to the point, the Legislature knows how to address home rule issues if that is its intent, and it did not do so here. For example, the sidewalk vending statute (SB 946) expressly provides that "This act applies to any city . . . including a charter city. The criminalization of small business entrepreneurs . . . are matters of statewide concern."[74] Neither AB 626 or AB 377 present comparable indicia of legislative intent that MEHKOs present a matter of statewide concern.

HOME OCCUPATIONS IN THE SHARING ECONOMY

Again, the Legislature's stated aim in enacting AB 626 was to "authorize the use of home kitchens for small-scale, direct food sales."[75] The law was not purporting to create an industry—this was not a job creating bill. Rather, the legislative premise was that "an informal economy of

[69] *City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526, 533.
[70] Health & Saf. Code, § 113709.
[71] *Village of Euclid, Ohio v. Ambler Realty Co.*(1926) 272 U.S. 365, 388.
[72] Health & Saf. Code, § 114367.4, subd. (a)(1).
[73] Health & Saf. Code, § 113709.
[74] SB 946, § 1, subd. (a)(6).
[75] AB 626, § 1, subd. (b).

locally produced and prepared hot foods exists,"[76] and the aim was to bring these "existing informal food economies" into the fold of legitimate, regulated food establishments.[77]

A challenge for policymakers, however, is that the form an industry has taken may not be the form it continues to take, particularly in the "sharing economy." We have a telling example in short-term vacation rentals. Short-term vacation rentals have existed for decades, but largely in resort and coastal communities and under formal property management.[78] A licensed broker facilitated transactions by placing properties in the market for lodging accommodations—the administrative costs were high. Airbnb's rental platforms, assuming the role of broker, have lowered the barriers to market entry by connecting homeowners directly with travelers. Increased market access has, in turn, transformed the industry, bringing short-term rentals to communities worldwide.[79] Whereas few cities regulated the home rental space before Airbnb, many cities are now regulating short-term rentals as well as online platforms.

In the case of home kitchen operations, the sharing economy is already rewriting the narrative of the neighborhood tamale lady.[80] Since 2016, local news outlets have reported on Mariza Reulas, a single mother from Stockton, California, caught in a sting operation and charged with misdemeanor crimes for selling homemade ceviche.[81] Reulas was selling her wares through a Facebook food group. Renée McGhee, a retired grandmother in Berkeley to whom health regulators issued a cease and desist letter for selling home-cooked meals to neighbors, was connecting with her customers through a food-sharing platform called Josephine.[82]

To challenge the narrative of platforms as mere enablers, interest groups opposed to the expanding role of tech platforms in emerging markets have already expressed concerns about the potential "uberization" of food and the exploitation of home cooks through MEHKOs.[83] While the potential labor issues are beyond the scope of this paper, the concern for municipalities, is whether online platforms will change the scale of a market and its local impacts. To be sure, the statutory limits on the scale of operations (e.g., no more than 60 meals per week) make serious competition with full-scale restaurants unlikely. (While short-term rentals have come to compete with hotels, at this time the restaurant lobby has not expressed similar concerns about being displaced by MEHKOs.) Those same limits on volume, however, may cause MEHKO operators to pursue more food preparation events, as advertised on Airbnb Experiences, to improve their margins. (Operators may be able to charge more per seat in a cooking class on homemade pasta

[76] AB 626, § 1, subd. (a)(8).
[77] AB 626, § 1, subd. (a)(8), (13).
[78] K. Heneghan, A. Visveshwara, "Emerging Issues in the Enforcement of Short-Term Rental Regulations," League of California Cities, City Attorneys' Spring Conference, May 2017, p. 1, https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2017/Spring-Conf-2017/Heneghan-ResidentialRentalRegulationIssues [as of Sept. 8, 2019].
[79] *Id.*
[80] See local news item https://medium.com/the-dish/the-2017-california-homemade-food-act-bb4655d64009 [as of Sept. 8, 2019].
[81] See local news item https://newfoodeconomy.org/california-homemade-food-operations-act-2018/ [as of Sept. 8, 2019].
[82] *Id.*
[83] Sen. Com. on Health, Analysis of AB 626 (2017-2018 Reg. Sess.) June 20, 2018 hearing, p. 10.

than they might charge per plate of pasta.) Whether this will mean more traffic on residential streets, more noise, or nothing at all will be the true test for our existing regulations.

CITIES' OPTIONS NOW

In short, while AB 626 may have been targeting an existing informal food economy, the players in the sharing economy are poised to transform the industry. Indeed, the statute itself anticipates as much as it regulates both MEHKOs and online platforms.

Whatever the potential impacts on residential neighborhoods, cities will not be able to address them through zoning, and enforcing against nuisance violations is, except in clear cases, impractical. Of course, most MEHKOs may not create a nuisance, and cities may be able to direct their resources toward enforcing against the occasional bad actor, which existing nuisances ordinances may already capture. For those cities that are especially concerned, there is also the option of lobbying the board of supervisors on the issue. Most county health departments have yet to adopt a MEHKO permitting program, and local government may be more receptive to arguments for local control than was the State. (At the time of writing, the County of Riverside alone had passed a MEHKO ordinance.)

RESOURCES

Sidewalk Vending:

- **Senate Bill 946**
  http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB946

- **Calabasas Sidewalk Vending Ordinance**
  https://library.municode.com/ca/city_of_calabasas/codes/code_of_ordinances?nodeId=TIT9PUPEWE_CH9.07SIVE

- **West Hollywood Sidewalk Vending Ordinance**
  http://qcode.us/codes/westhollywood/view.php?topic=5-2-5_122

- **Los Angeles Sidewalk Vending Ordinance**
  https://streetsla.lacity.org/sites/default/files/Vending%20Ordinance.pdf

Microenterprise Home Kitchen Operations:

- **Assembly Bill 626**
  http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB626

- **Assembly Bill 377**
  http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB377

Notes:_____

California Public Records Act Update

Thursday, October 17, 2019 General Session; 8:00 – 9:30 a.m.

Jolie Houston, Assistant City Attorney, Gilroy, Partner, Berliner Cohen

California Law Revision Commission – Tentative Recommendation – California Public Records Act Clean-up (May 2019)

League of California Cities
2019 Annual Conference

Long Beach, California
October 16-18, 2019

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Introduction

In late 2016, the Legislature directed the California Law Revision Commission ("CLRC") to conduct a "nonsubstantive" clean-up of the California Public Records Act ("CPRA") ("Clean-up Study")[1] to address the "piecemeal nature" of the many revisions to the CPRA. This paper traces the history of the Clean-up Study, provides an overview of the State's proposed revisions and discusses the work of the League of California Cities, City Attorneys' Department's California Public Records Act Committee ("CPRA Committee") related to the proposed legislation.

History of the Clean-up Study

In May 2019, the CLRC proposed its *Tentative Recommendation California Public Records Act Clean-Up* ("Tentative Recommendation") for public comment.[2]

Assembly Member Chau authored the legislative resolution and he included the following in the resolution:

> "Resolved, That the Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation as soon as possible, considering the Commission's preexisting duties and workload demands, concerning the revision of the portions of the California Public Records Act and related provisions, and that this legislation shall accomplish all of the following objectives:
>
> "(1) Reduce the length and complexity of current sections.
> (2) Avoid unnecessary cross-references.
> (3) Neither expand nor contract the scope of existing exemptions to the general rule that records are open to the public pursuant to the current provisions of the Public Records Act.
> (4) To the extent compatible with (3), use terms with common definitions.
> (5) Organize the existing provisions in such a way that similar provisions are located in close proximity to one another.
> (6) Eliminate duplicate provisions.
> (7) Clearly express legislative intent without any change in the substantive provisions; …"[3]

The Assembly Committee on Judiciary explained the need for the study:

> "The CPRA, signed into law in 1968 as a general record keeping law, allows the public to monitor government activity. Since the enactment of the CPRA, it has been amended multiple times to exempt certain records. … Due to the multiple changes in the statute, *the CPRA has become difficult for the public to understand.*"[4]

[1] 2016 Cal. Stat. res. ch. 150 (ACR 148 (Chau)); see also 2018 Cal. Stat. res. ch. 158 (SRC 91 (Roth)) (reaffirming Commission's authority to study CPRA).
[2] Comments on the Tentative Recommendation must have been received by the CLRC no later than August 26, 2019.
[3] 2016 Cal. Stat. res. ch. 150 (ACR 148 (Chau)).
[4] Assembly Committee on Judiciary Analysis of ACR 148 (April 19, 2016), p.3 (emphasis in original).

The analysis for the Senate Committee on Judiciary further explained:

> "Because of nearly 50 years of amendments to the CPRA, *the CPRA has become more difficult to understand*. Making it easier for the public to understand their rights to access government information arguably will lead to more access to public records and more government accountability."[5]

The Legislature unanimously passed the resolution near the end of the 2016 legislative session. It was at this time that the League of California Cities became aware of the Clean-up Study and directed it to the CPRA Committee for its review. *See* discussion at the end of this paper for the CPRA Committee's comments regarding the Clean-up Study.

Through the Clean-up Study, the CLRC was instructed to "study, report on and prepare recommended legislation…concerning the revision of *the portions of the government code relating to public records*. …"[6] The resolution was amended to instruct the CLRC to "study, report on, and prepare recommended legislation … concerning the revision of … the *California Public Records Act and related provisions*. …" This amendment clarified that the CLRC's authority was limited to public records inspection law and not to a review of other public records laws.[7] However, the CLRC's authority was not restricted to the Government Code. The CLRC was able to review other statutes, if they related to the CPRA. The CLRC was also authorized to prepare a recodification of the CPRA and to recommend revisions of other statutes that cross-reference to the CPRA.

The Legislature clearly intended that the Clean-up Study was to be entirely nonsubstantive in nature. The Legislature's direction to the CLRC was to "clearly express legislative intent *without any change* in the substantive provisions" and "*[n]either expand nor contract* the scope of existing exemptions to the general rule that records are open to the public pursuant to the current provisions of the Public Records Act."[8]

A very important provision of the Tentative Recommendation is that it contains an explanatory "comment" for every section that was added, amended or repealed. It should be noted that almost every comment in the Tentative Recommendation expressly states that a proposed new code section continues an existing code section "without substantive change." These comments are also intended to assist in determining legislative intent.

CPRA Recodification Act of 2020

The proposed legislation will be known as "*CPRA Recodification Act of 2020*."[9] The introduction clearly states the nonsubstantive purpose and effect of the recodification. For examples:

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[5] Senate Committee on Judiciary analysis of ACR 148 (June 14, 2016), p.4 (emphasis in original).
[6] ARC 148 (Chau), as introduced on March 3, 2016 (emphasis in original).
[7] 2016 Cal. Stat. res. ch. 150 (ACR 148 (Chau)); see also 2018 Cal. Stat. res. ch. 158 (SRC 91 (Roth)) (reaffirming Commission's authority to study CPRA).
[8] 2016 Cal. Stat. res. ch. 150 (emphasis in original).
[9] *See* Proposed Derivation of New Law, a copy of which is attached to this paper.

- Proposed Section 7920.100 is a "general" statement regarding the nonsubstantive effect of the recodification.

- Proposed Section 7920.105 states that a provision of the proposed legislation is intended as a restatement and continuation of the provision that it restates, rather than a new enactment.

- Proposed Section 7920.110 states that the restatement of an existing CPRA provision is not intended to have any effect on judicial interpretations of the restated provision.

- Proposed Section 7920.120 states that the restatement of a CPRA provision is not intended to have any effect on judicial decisions or attorney general opinions on the constitutionality of the restated provision. [10]

Structure of the Proposed Legislation

The CPRA is currently located in the Government Code as "Chapter 3.5 Inspection of Public Records" in "Division 7. Miscellaneous" in "Title 1. General." The CLRC proposes to repeal the existing CPRA and recodify it in the Government Code as a new division (Division 10) of Title 1.[11] The Tentative Recommendation states that this new division makes it possible to divide the materials into parts, chapters, and articles with enough subcategories to create a "user-friendly" organizational scheme. The CRLC proposes that Division 10 would be divided into 6 parts as follows:

Part 1 - General Provisions.

Part 2 - Disclosure and Exemptions Generally.

Part 3 - Procedures.

Part 4 - Enforcement.

Part 5 - Specific Types of Public Records.

Part 6 - Other Exemptions from Disclosures.

Numbering System

The CLRC proposes a three-digit decimal system for numbering code sections (i.e. Section 7920.000). This numbering approach is intended to prevent confusion regarding the proper sequencing of code sections, and to promote logical, "user-friendly" organization as the CPRA continues to evolve.

[10] *See* proposed Government Code sections 7920.100 -7920.120.
[11] *See* proposed Contents table, a copy of which is attached to this paper.

The CLRC also states that one of the other intended purposes of the Clean-up Study was to "reduce the length and complexity of current sections."[12] The CLRC proposes to divide lengthy sections into shorter and simpler provisions.

Comments and Cross-References

The existing CPRA contains numerous internal cross-references. In the proposed legislation, the CLRC updated each cross-reference to reflect the new numbering scheme in the recodification. The Tentative Recommendation includes two tables, located immediately after the proposed legislation. One table contains the disposition of each existing code section, the other table contains the derivation of each proposed code section.

Pending, Future Legislation and Delayed Operative Date

If there are any pending bills to revise the CPRA and those bills are enacted, then the CLRC will incorporate the substance of the enacted bill(s) into the proposed legislation without substantive change.

The CLRC recommends that the proposed legislation will be given a delayed operative date of July 1, 2021.

CPRA Committee Comments

On January 26, 2017, the CLRC Memorandum 2017-5 entitled *California Public Records Act Clean-up: Scope of Study* was made public. Over the two years of the Clean-up Study, the CPRA Committee commented on many of the CLRC's Memoranda. A few of the CPRA Committee's significant comments on the Clean-up Study are discussed below.

Memorandum 2017-5 introduced the Clean-up Study and discussed its timing, scope and methodology. The CPRA Committee quickly responded to CLRC on February 14, 2017 and noted that the Committee appreciated the opportunity to comment on the Clean-up Study and looked forward to working with the CLRC.

From the beginning of the Clean-up Study, the CPRA Committee voiced its overall concern that, through no fault of the CLRC, the revisions might not be entirely nonsubstantive in nature. The CPRA Committee was most particularly concerned with how the Clean-up Study might affect the application of existing judicial and Attorney General's opinions. With that in mind, the CPRA Committee requested that any proposed legislation should contain specific legislative intent that any changes made to the CPRA were not intended to supersede or modify existing case law or Attorney General opinions. The CPRA Committee was also concerned how the Clean-Up Study would affect and/or conflict with Proposition 59, the "Sunshine Amendment" to the Constitution of California.

[12] 2016 Cal. Stat. res. ch. 150 (ACR 148 (Chau)); see also 2018 Cal. Stat. res. ch. 158 (SRC 91 (Roth)) (reaffirming Commission's authority to study CPRA).

As mentioned above, the CLRC included several provisions in the proposed legislation that it was intended to preserve the nonsubstantive effect of the recodification and that it was not intended to effect existing judicial or Attorney General opinions.[13]

In September 2017, the CPRA Committee again voiced its concern that recodification of the CPRA may have far-reaching impacts that the CLRC may not have considered and could result in an increase in litigation for public agencies. The CPRA Committee further commented that the new reorganization of the CPRA would render local agency publications, guidebooks and reference materials obsolete.

In November 2017, the CPRA Committee strongly opposed the removal of either subsection (a) or (b) from Government Code section 6253. The CPRA Committee advised the CLRC that these two subsections express the *fundamental purpose* of the CPRA because they provide for the two ways to gain access to public records under the CPRA by inspection and/or copying, and any modifications to these subsections would constitute a substantive change of the law. The CLRC did not change this section in the proposed legislation.

In May 2018 the CPRA Committee voiced its concerns regarding CLRC's proposed approach to modifying Government Code Section 6254(f) ("6254(f)").[14] The CPRA Committee strongly advocated that if CLRC was inclined to make any changes to 6254 (f), whether substantive or nonsubstantive, that it should involve the law enforcement community, along with representatives from public agency law communities (City Attorneys, Attorney Generals, County Council, etc.) to participate in what could turn out to be a complicated and daunting project.

The Tentative Recommendation noted that the CLRC refrained from attempting to rephrase 6254(f) more clearly, but instead relocated 6245(f) into a new article.[15] The CPRA Committee intends to comment on the Tentative Recommendation regarding the reorganization of former section 6254(f). As reorganized, 6254(f) was divided into many subparts and as a result, it is confusing and could affect how it is interpreted it in future litigation.

Next Steps

On completion of a final recommendation of the Clean-up Study, the CLRC will present its recommendation, including the comments, to the Legislature and the Governor. If a bill is introduced to implement the CLRC's recommendation, it will provide the full recommendation to each member of every policy committee that reviews the bill.

[13] *See* proposed Government Code sections 7920.100 -7920.120.

[14] Government Code section 6254(f) currently governs law enforcement records, which are *generally* exempt from disclosure under the CPRA.

[15] *See* proposed Government Code sections 7923.600-7923.625.

DERIVATION OF NEW LAW

Note. This table shows the derivation of each proposed provision in this draft. Unless otherwise indicated, all statutory references are to the Government Code.

Proposed Provision(s)	Existing Provision(s)
7920.000	6251
7920.005	new
7920.100	new
7920.105	new
7920.110	new
7920.115	new
7920.120	new
7920.200	6260
7920.500	6254.21(f)
7920.505	new
7920.510	6252(a)
7920.515	6252(b)
7920.520	6252(c)
7920.525(a)	6252(d)
7920.525(b)	new
7920.530	6252(e)
7920.535	6254.24
7920.540	6252(f)
7920.545	new
7920.550	6252(g)
7921.000	6250
7921.005	6253.3
7921.010	6270
7921.300	6257.5
7921.305	6252.5
7921.310	6252.7
7921.500	6254 next-to-last ¶
7921.505	6254.5
7921.505(a)	6254.5 2d sent
7921.505(b)	6254.5 1st sent
7921.505(c)	6254.5(a)-(i)
7921.700	6263
7921.705	6264
7921.710	6265
7922.000	6255(a)
7922.200	6254.29
7922.205	6254.27
7922.210	6254.28
7922.500	6253(d) 1st sent
7922.505	6253(e)
7922.525	6253(a)
7922.525(a)	6253(a) 1st sent
7922.525(b)	6253(a) 2d sent
7922.530	6253(b)
7922.535	6253(c)
7922.535(a)	6253(c) 1st, 4th sent
7922.535(b)	6253(c) 2d, 3d sent
7922.535(c)	6253(c) 5th sent
7922.540(a)	6255(b)
7922.540(b)	6253(d) 2d sent
7922.540(c)	new
7922.545	6253(f)
7922.545(a)	6253(f) 1st sent
7922.545(b)	6253(f) 2d sent
7922.570-7922.580	6253.9
7922.570(a)	6253.9 intro cl 1st part
7922.570(b)	6253.9 intro cl 2d part, (a)(1), (a)(2) 1st sent
7922.570(c)	6253.9(d)
7922.575(a)	6253.9(a)(2) 2d sent
7922.575(b)	6253.9(b)
7922.580(a)	6253.9(c)
7922.580(b)	6253.9(e)
7922.580(c)	6253.9(f)
7922.580(d)	6253.9(g)
7922.585	6254.9
7922.600	6253.1(a)-(c)
7922.605	6253.1(d)
7922.630	6253.4(a) 1st ¶
7922.635	6253.4(a) 2d ¶
7922.640	6253.4(b)
7922.680	6253.10
7922.700-7922.725	6270.5
7922.700(a)	6270.5(c)(1)
7922.700(b)	6270.5(c)(3)
7922.705	6270.5(c)(2)
7922.710(a)	6270.5(a) 1st sent
7922.710(b)	6270.5(f)
7922.715(a)	6270.5(a) 2d sent
7922.715(b)	6270.5(a) 3d sent
7922.720(a), (b)	6270.5(a) 4th sent
7922.720(c)	6270.5(e)
7922.725(a)	6270.5(b)
7922.725(b)	6270.5(d)
7923.000	6258 1st sent
7923.005	6258 2d sent
7923.100-7923.510	6259(d) (except (c) 1st sent intro cl)
7923.100	6259(a) 1st sent
7923.105	6259(a) 2d sent
7923.110	6259(b)
7923.115(a)-(b)	6259(d)
7923.115(c)	6259(e)
7923.120	6259(c) 5th sent

Proposed Provision(s)	Existing Provision(s)
7923.500	6259(c) 1st sent
7923.505(a)	6259(c) 2d sent
7923.505(b)	6259(c) 3d sent
7923.510	6259(c) 4th sent
7923.600-7923.625	6254(f)
7923.600(a)	6254(f) 1st sent
7923.600(b)	6254(f) 2d ¶
7923.605(a)	6254(f) 2d sent
7923.605(b)	6254(f) 3d sent
7923.610	6254(f) 3d ¶ (re 6254(f)(1)), 6254(f)(1)
7923.615(a)	6254(f) 3d ¶ (re 6254(f)(2)), 6254(f)(2(A) 1st sent
7923.615(b)	6254(f)(2(A) 2d, 3d sent
7923.615(c)	6254(f)(2(B)
7923.620(a)	6254(f) 3d ¶ (re 6254(f)(3)), 6254(f)(3) 1st, 2d sent
7923.620(b)	6254(f)(3) 3d sent
7923.620(c)	6254(f)(3) 4th sent
7923.625	6254(f)(4)
7923.650	6262
7923.655	6254.30
7923.655(a)	6254.30 1st sent
7923.655(b)	6254.30 2d sent
7923.700	6254(z)
7923.750	6254.4.5
7923.755	6254.17
7923.800-7923.805	6254(u)
7923.800	6254(u)(1)
7923.805	6254(u)(2)-(3)
7924.000	6254.4
7924.005	6253.6
7924.100	6253.5(c)
7924.105	6253.5(d)
7924.110(a)-(b)	6253.5(a) 1st sent
7924.110(c)	6253.5(a) 2d sent
7924.110(d)	6253.5(b)
7924.300-7924.335	6254.2
7924.300	6254.2(a)
7924.305(a)	6254.2(b)
7924.305(b)	6254.2(c)
7924.305(c)	6254.2(d)
7924.305(d)	6254.2(e)
7924.305(e)	6254.2(m)
7924.305(f)	6254.2(f)
7924.310(a)-(b)	6254.2(h)
7924.310(c)	6254.2(k)
7924.315	6254.2(i)
7924.320	6254.2(j)
7924.325	6254.2(n)
7924.330	6254.2(*l*)
7924.335	6254.2(g)
7924.500	6254.11
7924.505	6254(*o*)

Proposed Provision(s)	Existing Provision(s)
7924.510	6254.7 (except (c))
7924.510(a)	6254.7(a)
7924.510(b)	6254.7(b)
7924.510(c)	6254.7(d) 1st sent
7924.510(d)	6254.7(e)
7924.510(e)	6254.7(f)
7924.510(f)	6254.7(d) 2d sent
7924.700	6254.7(c)
7924.900	6253.8(a)-(e)
7925.000	6254(i)
7925.005	6254(n)
7925.010	6254(x)
7926.000	6254(s)
7926.100	6254(ac)
7926.200	6254 last ¶ (unlabeled)
7926.205	6254.22
7926.205(a)	6254.22 1st sent
7926.205(b)	6254.22 2d sent
7926.205(c)	6254.22 3d & 4th sent
7926.210	6254(t)
7926.215	6254.14(a)
7926.215(a)	6254.14(a)(1)
7926.215(b)	6254.14(a)(2)
7926.215(c)	6254.14(a)(3)
7926.215(d)	6254.14(a)(4)
7926.215(e)	6254.14(a)(5)
7926.220(a)	6254(q)(1)
7926.220(b)	6254(q)(2)
7926.220(c)	6254(q)(3)
7926.220(d)	6254(q)(4), 6254.14(b) (re 6254(q))
7926.225(a)	6254(v)(1)
7926.225(b)	6254(v)(2)
7926.225(c)	6254(v)(3)
7926.225(d)	6254(v)(4), 6254.14(b) (re 6254(v))
7926.230(a)	6254(y)(1)
7926.230(b)	6254(y)(2)
7926.230(c)	6254(y)(3)
7926.230(d)	6254(y)(4), 6254.14(b)(re 6254(y))
7926.230(e)	6254(y)(5)
7926.235	6254(w)
7926.235(a)	6254(w)(1)
7926.235(b)	6254(w)(2)
7926.235(c)	6254(w)(3)
7926.300	6253.2
7926.400-7926.430	6254.18
7926.400	6254.18(b)
7926.400(a)	6254.18(b)(1)
7926.400(b)	6254.18(b)(2)
7926.400(c)	6254.18(b)(3)
7926.400(d)	6254.18(b)(4)
7926.405	6254.18(a)

Proposed Provision(s)	Existing Provision(s)
7926.410	6254.18(c)
7926.415	6254.18(d)
7926.415(a)	6254.18(d) 1st sent
7926.415(b)	6254.18(d) 3d sent
7926.415(c)	6254.18(d) 2d sent
7926.420	6254.18(e)
7926.425	6254.18(f)
7926.430	6254.18(g)
7926.500	6270.7
7927.000	6254(r)
7927.005	6254.10
7927.100	6254(j)
7927.105	6267
7927.200	6254(b)
7927.205	6254.25
7927.300	6254(e)
7927.400	6254.20
7927.405	6254.1(b)
7927.410	6254.16
7927.415	6254.1(a)
7927.420	6252.6
7927.500	6254(a)
7927.600	6254.6
7927.605	6254.15
7927.700	6254(c)
7927.705	6254(k)
7928.000	6254 (*l*)
7928.005	6268(a)
7928.010-7928.015	6268
7928.010(a)	6268(b)
7928.010(b)	6268(c)
7928.015	6268.5
7928.100	6254(m)
7928.200-7928.230	6254.21 (except (f))
7928.200(a)	6254.21(e)
7928.200(b)	6254.21(g)
7928.205	6254.21(a)
7928.210	6254.21(b)
7928.215-7928.225	6254.21(c)
7928.215	6254.21(c)(1)
7928.215(a)	6254.21(c)(1)(E)
7928.215(b)	6254.21(c)(1)(A)
7928.215(c)	6254.21(c)(1)(B)
7928.215(d)	6254.21(c)(1)(C)
7928.215(e)	6254.21(c)(1)(D)
7928.220	6254.21(c)(3)
7928.225	6254.21(c)(2)
7928.230	6254.21(d)
7928.300	6254.3
7928.400	6254.8
7928.405	6254(p)(1)
7928.410	6254(p)(2)
7928.700	6253.31
7928.705	6254(h)
7928.710(a)	6254.26(c)
7928.710(b)	6254.26(a)
7928.710(c)	6254.26(b)
7928.715	6254.33
7928.720	6261
7928.800	6270.6
7929.000	6254(d)
7929.005	6254.12
7929.200	6254(aa)
7929.205	6254(ab)
7929.205(a)	6254(ab) 2d sent
7929.205(b)	6254(ab) 1st sent
7929.205(c)	6254(ab) 3d sent
7929.210	6254.19
7929.215	6254.23
7929.400-7929.430	6254(ad)
7929.400	6254(ad)(1)
7929.405	6254(ad)(2)
7929.410	6254(ad)(3)
7929.415	6254(ad)(4)
7929.420	6254(ad)(5)
7929.425	6254(ad)(6)
7929.430	6254(ad)(7)
7929.600	6254.1(c)
7929.605	6254(g)
7929.610	6254.13
7930.000	6275
7930.005	6276
7930.100-7930.215	6275-6276.48
7930.100	6276.01
7930.105	6276.02
7930.110	6276.04
7930.115	6276.06
7930.120	6276.08
7930.125	6276.10
7930.130	6276.12
7930.135	6276.14
7930.140	6276.16
7930.145	6276.18
7930.150	6276.22
7930.155	6276.24
7930.160	6276.26
7930.165	6276.28
7930.170	6276.30
7930.175	6276.32
7930.180	6276.34
7930.185	6276.36
7930.190	6276.38
7930.195	6276.40
7930.200	6276.42
7930.205	6276.44
7930.210	6276.46
7930.215	6276.48

Contents

Notes:_____

Mind Your [RF] Ps & Qs

Thursday, October 17, 2019 General Session; 8:00 – 9:30 a.m.

Christine Crowl, Partner, Jarvis, Fay & Gibson, LLP
Clare Gibson, Senior Partner, Jarvis, Fay & Gibson, LLP

JARVIS FAY & GIBSON, LLP

LOCAL GOVERNMENT LAW

MIND YOUR [RF] PS & QS

Prepared By:

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MIND YOUR [RF] PS & QS

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I. INTRODUCTION

In the wild west of public contract procurement, requests for proposals (RFPs) and requests for qualifications (RFQs) are the outlaws—or at least they often seem to be treated that way. Unlike public bidding requirements which are specified in numerous statutes, there are few specific statutory requirements for when an RFP or RFQ must be used, the required contents of an RFP or RFQ, or how an RFP or RFQ process must be conducted. [1] Perhaps that explains why RFPs and RFQs are often treated—by both attorneys and laypersons alike—as though they are really not "legal documents." As a result, in many cities, RFPs and RFQs are prepared and issued without adequate legal consultation or review. And the negative consequences that can and do ensue from that lack of legal oversight can be costly.

A. Overview

We wish to make the case that RFPs and RFQs are indeed full-fledged legal documents, and that RFP/RFQ documents and procedures should be subject to legal review and guidance. And we hope that our paper and presentation will provide practical information and resources to help city attorneys ensure that RFP and RFQ procurements are used under appropriate circumstances and in accordance with applicable law and best practices. Part I examines some threshold considerations, including terminology and general legal principles. Part II of this paper discusses when—and when not—to use an RFP or RFQ. Part III provides general recommendations of what to include in an RFP or RFQ, including the information and instructions for respondents, and the applicable procedures and legal limitations.

B. What are RFPs and RFQs and what's the difference?

What do we mean by an RFP or RFQ, and what's the difference between the two? Either an RFP or an RFQ—or both—may be used for a competitive procurement process, usually for services other than construction services, but they are not *bidding* procedures. An RFP generally invites proposals for providing services, where price may be one of several selection criteria. An RFQ invites statements of qualifications (SOQs), where choosing the most qualified service provider is the city's paramount objective.[2] RFP/RFQ procurement allows for consideration of multiple,

[1] One noted exception are the RFQ and RFP requirements that apply to design-build procurement, including the provisions of Public Contract Code section 22160 et seq., which govern local agency design-build delivery (discussed further below).

[2] Understandably, and yet regrettably, informal requests for quotes are also referred to as "RFQs." Obviously, this can create some confusion. If an "RFQ" is referenced, make sure it's clear whether the subject is a request for *qualifications* or a request for *quotes*. In this paper, it only means a request for qualifications.

and sometimes subjective, selection criteria. By contrast, with public bidding it all boils down to submitting a bid—i.e., a lump sum price—and selection of the responsive bid from responsible bidders is based solely on the best price.

Sometimes, particularly for significant, high-profile procurements, a city may use a two-step process, by first using an RFQ process to narrow a pool of qualified respondents, then inviting only the qualified respondents to submit proposals pursuant to an RFP process. More often, we see combined hybrid RFQ/RFP procurements, in which an RFQ and RFP are combined in a single document which might request a price, proposal, and information on experience and qualifications. Sometimes that is clear from the title of the document (e.g., "RFQ/RFP"), but often a hybrid might be called an RFQ, even if it also functions as an RFP, or vice versa. For purposes of this paper, however, we will distinguish between RFPs and RFQs.

A simple at-a-glance comparison of the primary public contract procurement methods, including RFPs and RFQs, is attached as **Appendix A**.

C. Legal concerns and principles

There are numerous statutes governing public bidding requirements and an abundant body of case law construing those statutes. By comparison, neither the Legislature nor the courts have had quite so much to say about RFPs and RFQs. However, there are a few legal limits and principles that city attorneys should consider when reviewing a draft RFP or RFQ.

1. Don't use RFP/RFQ forms and procedures if public bidding is required.

If public bidding is required by statute or the city's own municipal requirements, an RFP or RFQ should not be used. While this may seem obvious, use of RFP or RFQ forms and procedures instead of bidding forms and procedures occurs *frequently*, but generally (we think) due to a lack of understanding of the substantial difference between these procurement methods rather than an intentional failure to comply with public bidding requirements. However, the consequences of using the wrong procurement forms and procedures can be significant. It is well-established under California law that if a public contract is not awarded in compliance with the applicable legal requirements, it is void as a matter of law:

> "Certain general principles have become well established with respect to municipal contracts, and a brief statement of these principles will serve to narrow the field of our inquiry here. The most important one is that **contracts wholly beyond the powers of a municipality are void**. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality; and ordinarily no recovery in *quasi* contract can be had for work performed under them. It is also settled that the mode of contracting, as prescribed by the

municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable."[3]

There are two intertwined takeaways from this frequently cited statement. First, a municipal contract is void and unenforceable if it is not awarded in compliance with generally applicable state laws. Second, if a city's own charter or municipal code requires public bidding for a given type of procurement, that has the same effect as a statutory requirement.

If *bidding* is required for a procurement, whether pursuant to state law or a city's own municipal requirements, a contract awarded by use of an alternative procurement method, e.g., RFP or RFQ procurement, will be void and unenforceable as a matter of law. And any bidding should be implemented with proper bid forms and bidding procedures. RFP/RFQ forms and procedures should not be treated as an interchangeable alternative when bidding is required.

2. Proposals and SOQs must be evaluated based on the stated criteria.

While RFP and RFQ procurement allows for some degree of subjective criteria, e.g., "best value" or "best qualified" selection, the evaluation process itself cannot be open-ended. Only the stated criteria for selection may be considered when proposals or SOQs are evaluated and ranked. In *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209 (*Eel River*), the county improperly deviated from its own stated evaluation criteria and procedures in its RFP by adding a *new* criterion (local preference) during the evaluation process.

3. Submittals in response to an RFP are not subject to immediate disclosure.

Unlike bids, which generally must be opened and announced in public, and which are subject to immediate disclosure as public records,[4] the California Supreme Court has held that proposals submitted to a public agency in response to an RFP are not subject to disclosure under the California Public Records Act[5] until the agency has completed negotiations with proposers.[6] The court applied the "catchall" exception set forth in Government Code section 6255, and concluded that the public interest in protecting an agency's bargaining position during contract negotiations outweighs the public interest in disclosing proposals before the negotiations are

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[3] *Miller v. McKinnon* (1942) 20 Cal.2d 83, 88 (emphasis added); see also *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104 (holding that an oral amendment to a consulting services contract was not enforceable because the city charter required that all contracts be in writing).

[4] In *Bid Protests: Minimizing and Managing Liability*, presented at the City Attorneys' Department Spring Conference on May 6, 2015, cities were advised to respond promptly to requests for copies of bids in the very different context of public bidding for public works contracts. See https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2015/2015-Spring-Conference/5-2015-Spring-Claire-Gibson-Bid-Protests-Minimizin.aspx [last accessed July 31, 2019].

[5] Govt. Code section 6250 et seq.

[6] *Michaelis, Montenari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1072-75.

concluded. This is an important exception since it is not unusual for a respondent to ask for copies of its competitors' proposals, often for purposes of trying to improve its relative bargaining position.

II. WHEN—AND WHEN NOT—TO USE AN RFP OR RFQ

A. Check general legal and municipal requirements.

As a starting point, city staff should comply with both generally applicable state law and the city's own municipal requirements to determine whether an RFP or RFQ could or should be used. As stated above, RFP/RFQ forms and procedures should *not* be used for a procurement that is subject to public bidding requirements, e.g., the general municipal requirements for public bidding of "public projects,"[7] the requirements for formal or informal bidding under the Uniform Public Construction Cost Accounting Act (UPCCAA),[8] or a city's own charter or municipal code.

In most cases, while it is not unlawful, it is likely to be overkill to use an RFP or RFQ for routine procurement of supplies or equipment, where the best price is the only objective. A well-written (i.e., reasonably clear and specific) request for price quotes or even a public bidding procedure is often the most efficient procurement method for obtaining the best price for goods. Government Code section 54202 provides the following regarding procurement of supplies and equipment:

> "Every local agency shall adopt policies and procedures, including bidding regulations, governing purchases of *supplies and equipment* by the local agency. Purchases of supplies and equipment by the local agency shall be in accordance with said duly adopted policies and in accordance with all provisions of law governing same. No policy, procedure, or regulation shall be adopted which is inconsistent or in conflict with statute."

Obviously, in keeping with section 54202, a city should follow its own policies and procedures for procurement of supplies and equipment. However, sometimes it's a good idea to revisit policies and procedures that have been enacted pursuant to section 54202 to make sure that they comply with current laws and make sense as a practical matter.

So when *should* an RFP or RFQ be used?

[7] Public Contract Code section 20160 et seq.

[8] Public Contract Code section 22000 et seq., including section 22034 (informal bidding) and section 22037 (formal bidding).

B. An RFQ and RFP must be used for statutory design-build procurement.

An RFQ *and* an RFP *must* be used—and in that order—pursuant to the local agency design-build requirements set forth in Public Contract Code section 22160 et seq. Section 22164(b) specifies what must be included in the RFQ, and section 22164(d) specifies what must be included in the subsequent RFP.

A city using design-build procurement for a public project must ensure that: (1) the project qualifies for design-build procurement;[9] (2) that it first uses an RFQ, as specified, to pre-qualify or short-list design-build entities;[10] and (3) that it next issues an RFP, as specified, to solicit proposals from pre-qualified or short-listed design-build entities.[11] Even if a city already has generic RFQ or RFP templates for general use, these templates should be carefully adapted when used for a design-build procurement to ensure that they fully comply with these detailed statutory requirements.

A guide for preparing an RFQ and RFP for design-build services in compliance with Public Contract section 22160 et seq. is attached as **Appendix B**.

C. An RFP and/or RFQ should be used for "architectural and engineering services."

In 2000, California voters approved Proposition 35, amending the State Constitution to make it easier for state and local agencies to contract out with private entities for architectural and engineering services. Known as the "Public Works Project Act of 2000" (the 2000 Act), this ballot initiative added Article XXII to the State Constitution, and added Government Code section 4529.10 et seq. For purposes of applying these provisions, "architectural and engineering services" is defined broadly to include "all architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services."[12]

The core requirements under the 2000 Act for public procurement of private architectural and engineering services (as defined above), are set forth in Government Code section 4529.12, which states (emphasis added):

> *All* architectural and engineering services shall be procured pursuant to a *fair, competitive selection process* which prohibits governmental agency employees from participating in the selection process when they have a financial or business relationship with any private entity seeking the contract, and the procedure shall require compliance with all laws regarding political contributions, conflicts of interest or unlawful activities.

[9] See Public Contract Code section 22161(g)(1) regarding qualifying projects, and section 22162 regarding prior authorization of governing body and $1,000,000 project threshold.
[10] See Public Contract Code section 22164(b) regarding RFQ requirements, and section 22164(c) regarding the "enforceable commitment" to use a "skilled and trained workforce."
[11] See Public Contract Code section 22164(d) regarding RFP requirements.
[12] Government Code section 4529.10; emphasis added.

Interestingly, the 2000 Act makes no mention of bidding, RFPs, RFQs, or of any particular procurement method, other than the general requirement that the selection process be both "fair" and "competitive."[13] However, an RFP or RFQ procurement procedure which complies with the minimal requirements of the 2000 Act, is generally regarded as both appropriate and sufficient for compliance. While public bidding *could* be used instead of RFP or RFQ procurement, as a matter of practice, an RFP or RFQ procedure affords much greater flexibility to the awarding agency, including the ability to include subjective criteria, e.g., "best value" instead of the lowest price.

It is important to note that the "fair, competitive selection process" is required for "all" of the listed services. Unlike most public bidding laws, there is no minimum dollar threshold for these procurement requirements.

Whether a city seeking "architectural or engineering services" uses an RFQ, an RFP, a two-step RFQ and RFP, or a hybrid RFQ/RFP, is going to be a matter of preference that may be informed by the nature of the services needed, the magnitude of the project, and the city's own charter or municipal code requirements. For example, for architectural services required on an on-call basis and not limited to a single project, an RFQ which focuses on the relevant types of experience and available staffing might be an ideal option. Alternatively, for design services required for a particular project where lump sum price comparisons are an important consideration, an RFP might be a better choice. For major, high-profile projects, a two-step RFQ/RFP process, similar in general terms to the approach required for design-build procurement, may be appropriate for casting a wide net for the RFQ stage, then narrowing it to the best-qualified for the RFP stage. A single, hybrid RFQ/RFP process can provide a more expedient approach to getting the benefits of both an RFQ and an RFP.

D. RFP or RFQ procurement may be appropriate for services not subject to bidding laws.

An RFP and/or RFQ procurement is often appropriate for other types of services that are not subject to public bidding requirements, e.g., consulting services, other professional services, and even maintenance services. It bears emphasizing that cities should follow their own requirements (charter, municipal code, or purchasing policy) even when there are no specific statutory requirements.

Government Code section 37103 (last amended in 1949) confers broad authority on cities with respect to certain professional services (emphasis added):

[13] Curiously, even though the 2000 Act has been in effect for nearly 20 years, many private firms and even some public agencies labor under the mistaken impression that procurement of architectural and engineering services must comply with the more restrictive two-step qualifications-based procedures set forth in Government Code section 4525 et seq. (known as the "little Brooks Act"). See *Professional Engineers v. Kempton* (2007) 40 Cal.4th 1016 for further discussion of the impact of the 2000 Act on Government Code section 4525 et seq.

> "The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, *engineering*, legal, or administrative matters.
>
> It may pay such compensation to these experts as it deems proper."

Unless the city's own requirements require use of a particular procurement procedure for the services encompassed under section 37103, any of these services could be awarded *without* using an RFP, RFQ, or any other type of competitive procurement procedure—with the noted exception of "engineering" services (emphasized above), which are subject to the later-enacted 2000 Act, as previously discussed, which applies to "architectural and engineering services."

However, even though section 37103 does not require any particular procurement procedure, cities often elect to use an RFP or an RFQ for these types of consulting services—even when it is not required under the city's own requirements. There's nothing wrong with that. In fact, use of a basic RFP or RFQ procedure, even if it is not expressly required, can ensure that a city is making an informed choice and can also provide transparency, including evidence of the basis for selection.

E. An RFP or RFQ should be used if required by a funding source.

Grant funding for professional services, including federal funding for local projects, may require use of an RFP and/or RFQ procurement process. If so, a city should ensure that it fully complies with all of the funding agency requirements *in addition to* any applicable state law or municipal requirements. In the event of a conflict or inconsistency between federal, state, or municipal requirements, the most restrictive requirements will generally apply. However, it is always best to check with the funding agency representative in the event of a potential conflict between different agency requirements. For example, for street and transit projects funded by state or federal funds administered under the Caltrans' *Local Assistance Procedures Manual*, the procurement procedure may depend on the scope of services.[14]

F. Choosing between an RFP and an RFQ.

If there are no statutory, municipal, or funding condition requirements that specify use of an RFP or RFQ, selection between these two related procurement methods will likely be based on the nature of the procurement itself. For example, an RFP is often the preferred option for a *project-based procurement* where the specific scope of services is known in advance and one of the primary criteria will be the best *lump sum price* for providing the specified services (although experience and qualifications may also be considered). By comparison, an RFQ is often preferable for *ongoing or on-call* professional or consulting services, e.g., legal or financial

[14] See Chapter 10 of 2019 *Local Assistance Procedures Manual*, available from the Caltrans Division of Local Assistance, at https://dot.ca.gov/programs/local-assistance/guidelines-and-procedures/local-assistance-procedures-manual-lapm [last accessed July 31, 2019].

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services, where there is no single, defined project and the *qualifications and experience* of the consultant are the primary criteria (although hourly rates may also be considered).

III. WHAT TO INCLUDE IN AN RFP OR RFQ

Given that there are very few legal limitations or requirements for RFPs and RFQs, cities have some flexibility in terms of what to include in the request. However, just as RFP/RFQ documents and procedures should not be used for bidding, bidding documents and procedures should not be used for an RFP or RFQ. It is not advisable to convert public works bidding documents into an RFP or RFQ by the simple expedient of changing "bid" to "proposal" or "SOQ," and "bidder" to "proposer" or "respondent." Bidding and RFP/RFQ procurement are simply too different for this to work well; the end result is inevitably a clunky, confusing mess. We recommend that cities develop (or improve) their own RFP and RFQ templates that can be tailored depending on the nature of the particular procurement. There are some basic, essential provisions that should be included in both RFPs and RFQs, and this Part III will provide some general recommendations, including sample provisions.

At the outset, there are some general considerations to keep in mind when drafting an RFP or RFQ. First, RFPs and RFQs should include all information that will inform potential respondents about the project or services and how to submit a response. Second, an RFP or RFQ should be structured to allow for an apples-to-apples comparison of responses. Third, the nature of the procurement will play a large role in what to include in an RFP or RFQ. For project-based procurements that will be awarded for a lump sum price, it is especially important to be specific about the project and required services, and to provide relevant information that may affect pricing. Otherwise, the service provider may later claim—and with good reason—that it is entitled to additional payment for services or tasks that were not mentioned in the RFP, and therefore not included in the original price.

RFPs and RFQs are typically structured in the following manner:

1. Introduction and Information
2. Scope of Services
3. Contents of the Response
4. Submittal Instructions
5. Evaluation Criteria
6. Selection and Award
7. Disclaimers, Reservation of Rights, and Conflicts of Interest

Following this standard organization, Subpart A, below, addresses the information and instructions that should be included in an RFP or RFQ (Items 1 through 4). Subpart B then addresses procurement procedures and administration of the procurement, as well as legal limitations (Items 5 through 7).

For purposes of illustration, we will use two examples from the fictional California city of Hometown. Hometown is issuing a project-based RFP for architectural services to design its new Recreational Center. Hometown is also issuing an RFQ for ongoing services for recreational program development.

A. Information and Instructions for Respondents

An effective RFP or RFQ should inform the potential respondent. It should specifically identify the type of services it is seeking, and if it is project-based, provide information about the project. It should also ensure that potential respondents are provided or have access to all relevant information. And as a practical matter, it should specify what must be submitted, how, and by when.

1. Introduction and Information

Respondents need to know what the city is seeking by way of the request. They should not have to guess or rely on assumptions. And it is in the city's best interest to ensure that potential respondents have the information necessary to provide quality responses.

a. Introductory Provisions

An RFP or RFQ should start with an introduction that clearly identifies the general purposes of the RFP or RFQ, including the type of services required, such as the following introductory paragraph for a project-based RFP:

SAMPLE PROVISION – RFP INTRODUCTION

> The City of Hometown, California ("City"), requests proposals ("Proposals") from qualified architectural firms ("Respondents") to provide architectural design services ("Services") for the City's planned new Recreational Center Project ("Project"). The Project location, including the planned size, siting, and required components is more fully described in Attachment A, Project Description, which is attached hereto and incorporated herein.

This sample introductory paragraph is packed with information, including the type of services needed and the specific purpose. A similar approach should apply to an RFQ for ongoing services:

SAMPLE PROVISION – RFQ INTRODUCTION

> The City of Hometown, California ("City"), requests statements of qualifications ("SOQs") from qualified recreational program consultants ("Respondents") for providing recreational program development services on an as-needed basis ("Services") at the City's new Recreational Center. The Services and the general

programming needs are more fully described in Attachment A, Scope of Services, which is attached hereto and incorporated herein.

Again, this simple introduction includes some of the key basic information. Subsequent introductory provisions may include additional general information that is relevant to the procurement, e.g., the size of the City or pertinent history, the budget for the project or financial constraints, and specific needs or concerns. For example, in its RFQ for a recreational programming consultant, the City of Hometown may wish to specify that it operates a year-round recreational program, and that the program needs range from preschool classes to senior center activities. Relevant details matter.

Relevant background information for an RFP/RFQ may also include staff reports, geotechnical reports, preliminary scoping documents, maps, diagrams, environmental documents, and so on. In its RFQ for architectural design services, the City of Hometown could provide information on relevant Council approvals and direction regarding the new Recreational Center Project, the City's design review requirements, required environmental mitigations, etc. Relevant information may either be attached to the RFP or RFQ or made accessible online via a city's website, with access information provided in the RFP or RFQ.

b. Additional Information

(1) Pre-Submittal Meetings

In addition to the written information provided in the RFP or RFQ, a city can also schedule a meeting with prospective respondents in advance of the submittal deadline, so they can meet directly with responsible city staff and ask questions about the RFP or RFQ, the project, or the services. Often this can be an opportunity for the city to identify gaps or ambiguities in its RFP or RFQ, and to then amend the RFP or RFQ by addendum. It's best if potential problems can be addressed before the responses are due.

If a pre-submittal meeting is scheduled, it is important to specify whether the meeting is mandatory or optional. The advantage of mandatory attendance is that all respondents will have the same information. The disadvantage is that it could limit the field of qualified respondents, if an otherwise qualified respondent is unable to attend. Unless there is a compelling reason to require mandatory attendance, it may be preferable to simply *encourage* attendance, as shown in the sample provision below. But if attendance is mandatory, the RFP or RFQ should clearly state the consequence of non-attendance.

SAMPLE PROVISION – RFP PRE-PROPOSAL MEETING

A Pre-Proposal Meeting will be held on March 11, 2020, from 2:00 to 3:00 p.m., in City Hall Conference Room B at 1234 Pleasant Street. Prospective Respondents are strongly encouraged to attend and will have the opportunity to

ask questions about the RFP, including the submittal requirements and procedures, the Services, and the Project.

Staff should ensure that each attendee at a pre-submittal meeting signs in with their name and the name of the party they represent. That can be useful if an attendee later claims it was unaware of information specifically addressed at the pre-submittal meeting. In addition, the city should establish a protocol to make sure that all potential respondents receive or know how to access subsequent addenda, e.g., by posting addenda on the city's website.

(2) Requests for Information

Even if a pre-submittal meeting is scheduled, it is also advisable to establish a required procedure for potential respondents to submit requests for information or objections to the RFP/RFQ requirements or procedures. In order to maintain a level playing field, and to ensure that respondents are not questioning individual staff members (and receiving disparate information), the procedures should require that all requests for information be submitted in writing to a single point of contact, as indicated in the following sample provision:

SAMPLE PROVISION – REQUESTS FOR INFORMATON AND ADDENDA

Questions or objections relating to the RFQ, the RFQ procedures, or the required Services may only be submitted via email to JSmith@Hometown.ca.us by March 18, 2020. Any questions or objections that are not submitted within the time and manner specified will be deemed waived. The City will not be bound by the oral representations of any City employees or officials. The City reserves the right to issue addenda responding to such questions or objections, which will become part of the RFQ. Addenda will be posted on the City's website at: http://www.Hometown.gov/BusinessOpportunities/RecreationalProgrammingSOQ. Each Respondent is solely responsible for reviewing any and all addenda before submitting its SOQ.

Of course the city should ensure that it has a clearly established *internal* protocol for reviewing and responding—in writing—to the written requests for information or objections, including a clear record of all inquiries and chain of authority as needed for responses.

2. Scope of Services

In addition to an understanding of the city's needs and relevant background information, respondents need a clear understanding of what will be expected of them. A well-thought-out and carefully written scope of services is the heart of any RFP or RFQ for services. Obviously, each scope of services is going to differ depending on the services and/or the project, so it is not possible to create a generic template for the scope of services. However, an RFP or RFQ template can include prompts to assist staff in fleshing out the specifics for a given scope of services. This can include suggestions for identifying the various stages that may be involved,

e.g., for design development, or specific tasks or subtasks that may be required, including deliverables.

Often the scope of services that is attached to the RFP or RFQ is later attached to and incorporated into the resulting agreement, so it is important that the scope of services is reviewed as if it is a contract document. As such, it is preferable if the scope of services is written using clear and complete sentences, that specify what the consultant must do and by when. While this requires slightly more effort than a bullet-point list of sentence fragments, it is generally worth the effort to ensure that it clearly communicates the city's requirements.

Again, for agreements that will be awarded for a lump sum price, respondents must be fully informed of what services and tasks are included in the services. Otherwise, the selected consultant can later claim that it is entitled to additional compensation for requirements or limitations that were not provided in or with the RFP or RFQ.

3. Contents of the Response

While the specific information requested may vary from one procurement to another, the required contents for a response should be tailored to serve two closely related objectives: (1) obtaining the information necessary to make an informed decision, and (2) obtaining information that closely corresponds with the stated selection criteria (discussed below in Subpart B).

For example, an RFP or RFQ will usually seek basic information about the respondent, e.g., the name, location, and type of business; the business structure, including owners and management. An RFP will often request a lump sum price for providing the services, whereas an RFQ might require submission of an hourly rate schedule. RFPs and RFQs often ask for information about the key personnel that would be assigned to provide the services, using a provision such as the following:

SAMPLE PROVISION – KEY PERSONNEL INFORMATION

In part E of your SOQ, list each of the key personnel who will be assigned to provide the Services, including the following information for each:

1. Name and title
2. Years with your firm
3. Education and qualifications, including degrees, certifications, and licenses (provide license numbers)
4. Summarize relevant experience in relation to the Services
5. Identify proposed role in providing the Services, e.g. project manager, primary architect

An RFP or RFQ might require information on some or all of the following areas, depending on what is important to the city (though this list is by no means exhaustive):

- General information about the responding firm
- Summary of qualifications, e.g., education, training, licensing
- Summary of experience with similar services and/or projects
- Proposed approach to providing the services
- References and contact information
- Evidence of financial stability and insurance
- Lump sum price and/or hourly rate schedule

It is generally not helpful to ask for information that is of limited interest or importance: padding an RFP or RFQ with requests for details that are not germane to the city's review and selection process will make it more laborious for potential respondents to prepare a response, and more tedious for the city to review and compare the responses.

4. Submittal Instructions

Respondents need to know exactly what they must do and by when in order to submit a response. The RFP or RFQ should include submittal instructions that address the *what*, *when*, and *how* for submitting the response.

a. *What* must be submitted?

Apart from specifying whether a proposal (for an RFP) or an SOQ (for an RFQ) must be submitted, the RFP or RFQ should identify exactly what information must be provided in the response, and in what order to facilitate comparisons during the review phase. For example, the city may want to require a cover letter that summarizes the key elements of the proposal or SOQ, or completion of a proposal form provided by the city. The following sample provision is fairly typical for an RFP that also seeks information on experience and qualifications.

SAMPLE PROVISION – RFP PROPOSAL CONTENTS

Proposal Contents. Each Proposal must be submitted in compliance with the requirements of this RFP. Clarity and brevity are preferable to volume. Each Proposal must include the following, organized as Sections A through E:

A. Cover Letter. Section A of the Proposal must be a cover letter containing a summary of the Proposal. It must also include the name, address, phone and email of Respondent's representative.

B. Executive Summary. Section B must summarize the key provisions of the Proposal, including proposed key personnel, price, and proposed schedule for providing the Services.

C. Respondent's Qualifications. Section C must include the number of years Respondent has been in business and a description of Respondent's qualifications, including contact information for general references.

D. Project Experience. Section D must identify projects Respondent has completed in the last 10 years that are similar in scope and nature to the City's Recreational Center Project. For each project, provide the project name, project owner, location, description of the services provided, final project cost, and contact information for reference.

E. Proposal. Section E must include Respondent's proposal for performing the Services identified in the Scope of Services, including proposed schedule and sequencing, assignment of key personnel, and planned measures to ensure cost-effective delivery of the Services and Project completion.

b. *When* are submittals due (and other key dates)?

Often the date and time for submitting responses will be featured prominently on the cover page of an RFP or RFQ. But other dates and deadlines may be relevant as well, e.g., a pre-submittal meeting (if applicable), the last date to submit a request for information, when the city will announce its selection, when the agreement is likely to be awarded, and even when the services must be provided. Often an RFP or RFQ will include a schedule–and ideally, such as in the following sample provision, it should be identified as the *planned* schedule, and one that may be subject to change, just to leave some wiggle room for when things do not go as planned.

SAMPLE PROVISION – PLANNED RFP SCHEDULE

The following schedule is provided for planning purposes based on current information. However, all dates are subject to revision, including the Proposal Deadline, and may be amended by addenda to this RFP:

Activity	Planned Date
RFP Issued	March 4, 2020
Pre-Proposal Meeting	March 11, 2020
Request for Information Deadline	March 18, 2020
Proposal Deadline	April 1, 2020
Interview Finalists	Week of April 13, 2020
Notice of Selection	April 20, 2020
Council Award of Agreement	April 28, 2020
Commence Design Services	May 15, 2020

c. *How* are responses to be submitted?

Clear information should be provided for how hard copy and/or electronic copy responses should be submitted, including identifying information, as shown in the following sample provision. Whether to require a hard copy and/or an electronic copy is a matter of preference.

SAMPLE PROVISION – SOQ SUBMITTAL INSTRUCTIONS

The Respondent must submit five paper copies of the SOQ in a sealed envelope AND email an electronic (PDF) copy of the SOQ. The paper copies and the electronic copy must be received by the City by or before the SOQ Deadline, as defined above. "Recreational Programming SOQ" should be written in the subject line for the email submittal AND on the lower left of the sealed envelope for the hard copy submittal, with the submittals addressed as follows:

For Electronic Submission:
JSmith@Hometown.ca.us

For Hard Copy:
City Hall
1234 Pleasant Street
Hometown, CA 94444
Attn: City Clerk

B. Procurement Procedures and Legal Limitations

The second major component in drafting an RFP or RFQ includes determining and specifying the procurement procedures, including evaluation criteria and the process for selection and award. This also includes adding all necessary disclaimers and legal limitations to protect the city and ensure effective administration of the procurement process from request to award.

1. Evaluation Criteria

The city should first determine what criteria it will use to evaluate and compare responses to an RFP and RFQ, and the resulting RFP or RFQ should clearly identify that criteria. The evaluation criteria should be tailored to the specific services and concerns and should reflect what matters most for a particular procurement. Is it price? Hourly rates? Experience with similar projects? It is important to make these determinations in advance because an RFP or RFQ can only be

evaluated based on the stated criteria and procedures.[15] A city should not apply any criterion that is not specifically stated in the RFP or RFQ.[16]

Before drafting the evaluation criteria, the city should consider the extent to which either *objective* or *subjective* criteria—or both—should be used. Objective criteria include price, hourly rates, and possession of required credentials or licensing. Subjective criteria might include consideration of relevant experience or proposed approach to project delivery. Use of strictly objective criteria can reduce exposure to challenges based on alleged favoritism. However, subjective criteria can potentially allow for a greater degree of flexibility and nuanced considerations. The following are fairly typical criteria:

- Price/rates
- Qualifications, e.g., degrees, training, certifications, or licenses
- Experience providing similar services
- Responsiveness
- References

The evaluation criteria should be sufficiently detailed to enable meaningful comparisons, as reflected in the following sample provision:

> *SAMPLE PROVISION – EXPERIENCE CRITERION*
>
> Experience: Describe the Respondent's experience designing recreational facilities. For each relevant past project, provide the following information:
> 1. The title, size, location, cost, and nature of the project
> 2. Respondent's role (e.g., whether it was the architect of record or a subconsultant, and the design phases that were involved)
> 3. Respondent's key personnel for that project
> 4. Green building or LEED standards used for the project

While an agreement awarded pursuant to an RFP or RFQ process could be awarded based on price or rates alone, inclusion of additional relevant selection criteria can provide more flexibility in making the best choice when cost is not the sole concern.

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[15] *Eel River, supra,* 221 Cal.App.4th at 236-40.

[16] *Cypress Security, LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003, 1011-15 [holding that a public entity's failure to use correct and exclusive criteria to award a public contract pursuant to an RFP may constitute an abuse of discretion].

2. Selection and Award

a. Basis for selection

An RFP or RFQ will often indicate how the stated criteria will be applied in order to rank the responses. While this is not a legal requirement, it is a sensible practice to ensure a fair, competitive process that will not be tainted by favoritism or even the appearance of favoritism. This is typically accomplished by assigning a value to each criterion either in terms of a raw score or a weighted percentage.

To determine the relative value to assign to each criterion, the city should first prioritize and rank the criteria based on the city's specific priorities. For example, if the city has a tight budget, the price or hourly rates could be paramount. If the city is seeking a consultant with specific niche experience, the respondents' relative experience might be the primary criterion.

Tables 1 and 2 below are examples of how a response might be scored using raw scores and weighted scores, respectively.

Table 1 - Raw Score

General qualifications	1 - 10 points
Experience with similar projects	1 - 10 points
Price	1 - 10 points

The benefits of a raw score approach is its relative simplicity and ease of application. Each submittal is scored in each category using the assigned point range. For example, if five proposals are submitted, the proposal with the lowest price will get the highest number of points for the "price" criterion, and the proposal with the highest price will get the lowest points for that criterion. The submittal with the highest total score is the winner.[17]

Table 2 - Weighted Score

General qualifications	20%
Experience with similar projects	35%
Price	45%

[17] It is important to determine the scoring scale relative to the specific review process that will be used. For example, scoring responses based on a 1-5 or 1-10 scale can be useful if multiple reviewers are going to individually review responses and then average or total the results. If a panel is going to score as a group on a consensus basis or if the city expects numerous responses, a wider range (e.g. 1-25) might be helpful to avoid ties.

Using a weighted score can be trickier and somewhat less transparent. A typical approach is to rank each response in each category on a 1-10 basis, then multiply the raw score by applicable weight and total the results. For example, if Respondent A receives a raw score of 1 for price (because its price was highest), that will be multiplied by 45 to produce a weighted score of 45 points for price. If Respondent B received a raw score of 5 for price (because its price fell squarely in the mid-range), its weighted score for price will be 225. Weighted scoring can operate to amplify minor differences between responses, which can be useful if the criteria and assigned weights are carefully considered in advance.

b. Review and Award

The city's planned process for review of the submittals and award of the agreement should also be included in the RFP or RFQ. Again, disclosure of the review and award process ensures transparency and avoids opportunities for or the appearance of favoritism. This should include identifying w*ho* will evaluate the responses and *when* the contract will be awarded, if at all. For a major, high-profile procurement, the city may appoint a panel of evaluators that includes experts in the field from outside the city. For more routine, small-scale procurements, city staff can usually handle the evaluation.

Regardless of who is doing the reviewing, the process can be limited to review of the written responses, or the city can also short-list the top contenders based on the submittals, then conduct interviews with the finalists in order to make the final selection. Interviewing the finalists can be particularly helpful if city staff are not already familiar with the respondents and want to get a better sense before making a final recommendation for award. The potential pitfalls of an interview stage are (1) introducing a subjective element to the scoring, and (2) providing disparate information to the competing respondents, either of which can subject a city to allegations of favoritism. Therefore, it is important to establish clear parameters for such interviews, and to instruct the reviewer(s) to ensure consistency for each interview.

SAMPLE PROVISION – RFP SELECTION PROCESS

> Proposals will be reviewed on April 2, 2020, by a five-person panel made up of four members of City staff and the Director of Parks and Recreation, using the scoring method described above. Each of the three Respondents whose Proposals receive the highest scores will be invited to participate in a 30-minute interview to be conducted by the review panel during the week of April 13, 2020. To ensure fairness during the interviews questions from the Respondents will not be considered with the sole exception of any questions that are intended to clarify questions from the review panel. An additional 1-10 points may be added to each Proposal score following the interviews, based on the Respondent's demonstrated understanding of the City's needs and evidenced ability to provide Services within the City's planned schedule. The Agreement will be awarded, if at all, by City Council resolution at the regular Council meeting on April 28, 2020.

The city should also consider documenting its scoring process using simple scoresheets that exactly track the criteria and scoring instructions provided in the RFP or RFQ. If the results are challenged, the scoring sheets can provide evidence that the city complied with its stated criteria.

3. Disclaimers, Reservation of Rights, and Conflicts of Interest

Like any other legal document an RFP or RFQ should include appropriate disclaimers and reservations of rights, such as the following:

> *SAMPLE PROVISION – DISCLAIMERS AND RESERVATION OF RIGHTS*
>
> Upon receipt, each Proposal becomes the sole property of the City and will not be returned to the Respondent. Each Respondent is solely responsible for the costs it incurs to prepare and submit its Proposal. The City reserves, in its sole discretion, the right to reject any and all Proposals, including the right to cancel or postpone the RFP or the Project at any time, or to decline to award the Agreement to any of the Respondents. The City reserves the right to waive any immaterial irregularities in a Proposal or submission of a Proposal. The City reserves the right to reject any Proposal that is determined to contain false, misleading, or materially incomplete information.

Conflict of interest limitations should also be addressed in the RFP or RFQ. For those involving procurement of "architectural and engineering services" pursuant to the 2000 Act, the RFP/RFQ should include a provision such as the following to comply with Government Code section 4529.12 (quoted on page 5, above):

> *SAMPLE PROVISION - CONFLICT OF INTEREST*
>
> City of Hometown employees are prohibited from participating in the selection process for this RFQ if they have any financial or business relationship with any Respondent. This RFQ process will be conducted in compliance with all laws regarding political contributions, conflicts of interest, or unlawful activities, including, but not limited to, the City's Conflict of Interest Policy.

In addition, it is important to be aware of potential Government Code section 1090 violations in the RFP/RFQ context. Section 1090 provides that public agency officers and employees "shall not be financially interested in any contract made by them in their official capacity...." However, case law—including some recent published decisions—and Fair Political Practices

Commission opinions have construed this prohibition to apply to *consultants* who have the potential to exert considerable influence over contracting decisions.[18]

The fact pattern to watch for is one in which a consultant that is involved in preliminary activities that will affect a future contract. For example, an architect involved in preliminary scoping for a planned project will not be eligible for award of the future contract because that architect was involved in determining the scope of the future contract. The consequences of running afoul of the 1090 prohibition, is that the resulting contract will be void as a matter of law.[19] Applying this to our hypothetical, if Hometown had awarded an earlier contract to an architectural firm to assist with the preliminary planning and scoping for the Recreational Center Project, that firm should have been advised at the outset that it would be barred from consideration for the future full design contract.

4. Protest Procedures

While contract awards pursuant to an RFP or RFQ are less likely to be subject to protests than conventional bidding, protests can occur, usually involving an unsuccessful respondent who claims that the successful respondent is less qualified, or that the city failed to follow its stated procedures, or both. While there's an argument that including protest procedures in an RFP or RFQ may actually encourage protests, the counterargument is that if the city doesn't already have protest procedures in its municipal code, it will have little leverage to manage the protest, including timing deadlines. A streamlined protest provision, such as the following, can make it easier to deal with any protests that do arise, and to do so without derailing or delaying the award process:

SAMPLE PROVISION – PROTEST PROCEDURES

> Any protest challenging the City's selection or the selection process must be submitted within five business days following the City's issuance of the Notice of Selection. The protest must be submitted in writing via email to JSmith@Hometown.ca.us, and must clearly specify the basis for the protest. The protest will be reviewed by the Director of Parks and Recreation in consultation with the City Attorney, and their determination on the protest is final. No public hearing will be held on the protest. Time being of the essence, the City reserves the right to proceed with award of the Agreement and commencement of the Services notwithstanding any pending protest or legal challenge.

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[18] See, e.g., *California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115; *McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235; and *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261.

[19] At this writing, Assembly Bill 626 is currently pending to amend Government Code section 1091.5 to provide an exception for engineers, architects, landscape architects, land surveyors, and planners under specified circumstances.

If a protest procedure is used, it is best to structure it so that the protest can be fully resolved before the city council is scheduled to take action to award the contract based on staff's recommendation. While issuance of a "Notice of Selection" (or similar notification) is not a legal requirement, it can be of practical use for (1) informing the respondents of the intended recommendation, and (2) establishing the applicable time period for submitting a protest.

5. Form of Agreement

Finally, the RFP or RFQ should attach the form of the agreement using a provision such as the following:

> *SAMPLE PROVISION – FORM OF AGREEMENT*
>
> A copy of the City's standard Consulting Services Agreement ("Agreement") is attached as Exhibit C to this RFQ and incorporated herein. By submitting a Proposal, the Respondent agrees that it will enter into the Agreement using the attached form with no exceptions to the form of the Agreement.

This streamlines the procurement by providing the contract terms up front and eliminating the possibility of protracted contract negotiations with the selected respondent. In addition, all respondents are fully informed as to the contract requirements, including insurance and indemnity requirements.

V. CONCLUSION

While this paper addresses many of the most frequent issues that arise in the context of RFPs and RFQs in the wild west of public contract procurement, it is by no means exhaustive. The authors hope that the specific recommendations and sample provisions prove to be useful resources, and that the primary takeaways include (1) a recognition that RFPs and RFQs should be subject to legal review like any other legal document; (2) a better understanding of how RFPs and RFQs can and should be used for procurement of non-construction services; and (3) an appreciation of the importance of tailoring each RFP and RFQ to the particular procurement based on the city's objectives and priorities. RFPs and RFQs really do not have to be outlaws after all.

APPENDICES:
A - Public Contract Procurement Methods Compared
B - Design-Build RFQ and RFP Requirements

Mind Your [RF] Ps and Qs
APPENDIX A

Public Contract Procurement Methods Compared

This at-a-glance comparison of the primary procurement methods available for municipal contracts is intended solely as a *general* reference based on applicable state law, in order to illustrate the differences between procurement methods. *A city should always follow its own procurement requirements, even if they are more restrictive than general state law requirements.*

	Typically used for:	**Award based on:**	**Notice:**
Bidding	Public works projects*	Lowest responsive bid/lowest responsible bidder	Newspaper publication may be required per statute, e.g., Public Contract Code sections 20164 and 22037
Request for Quotes	Goods	Lowest price	Generally requires selection of enough qualified vendors to ensure competitive quotes
Request for Proposals	Non-public works services (often project-based)	Usually best price and other factors	Generally sent to known potential respondents; no newspaper publication required or needed
Request for Qualifications	Non-public works services (often for ongoing or on-call services)	Usually best qualified and other factors	Generally sent to known potential respondents; no newspaper publication required or needed
Discretionary selection (non-competitive)	Certain professional services, e.g., financial, economic, accounting, legal, or administrative services per Govt. Code section 37103	City discretion	N/A - Discretionary selection; may be sole sourced

* General law cities that are <u>not</u> subject to the Uniform Construction Cost Accounting Act (Public Contract Code section 22000 et seq.) ("UPCCAA") should use the definition of "public project" in Public Contract Code section 20161. Cities that <u>are</u> subject to UPCCAA should use the definition of "public project" provided in section 22002(c). The two definitions are similar, but not *exactly* alike.

Mind Your [RF] Ps and Qs
APPENDIX B

Design-Build RFQ and RFP Requirements

The current procurement requirements for local agency design-build projects are set forth in Public Contract Code section 22160 et seq.[1] This statutory scheme requires a two-step process which includes issuing a request for qualifications (RFQ) followed by a request for proposals (RFP), each of which must meet certain mandatory requirements, mostly set forth in section 22164. This Appendix summarizes the basic statutory requirements for local agency design-build RFQs and RFPs—based on laws current as of August 2019.

When drafting an RFQ or an RFP for a design-build project, the city should consider all of the generally applicable recommendations in Part III of *Mind Your [RF] Ps and Qs*, in addition to the statutory requirements outlined in this Appendix.

A. Threshold Requirements

There are three threshold matters that should be addressed well in advance of preparing the RFQ and RFP.

1. Qualified Project

First, the project itself must qualify for design-build procurement. For cities, that means the project must (a) be a council-approved project, (b) in excess of $1,000,000, that (c) meets the definition of "project" in section 22161(g)(1), which applies to city and county design-build procurement:

> "(1) Except as specified in subdivision (h), for a local agency defined in paragraph (1) of subdivision (f), 'project' means the construction of a building or buildings and improvements directly related to the construction of a building or buildings, county sanitation wastewater treatment facilities, and park and recreational facilities, but does not include the construction of other infrastructure, including, but not limited to, streets and highways, public rail transit, or water resources facilities and infrastructure. For a local agency defined in paragraph (1) of subdivision (f) that operates wastewater facilities, solid waste management facilities, or water recycling facilities, 'project' also means the construction of regional and local wastewater treatment facilities, regional and local solid waste facilities, or regional and local water recycling facilities."

2. Conflict of Interest Guidelines

Second, the city must establish conflict of interest guidelines, as specified in section 22162(c):

[1] All statutory references in this Appendix are to the Public Contract Code unless otherwise specified.

> "The local agency shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity, that performs services for the local agency relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team. This conflict-of-interest policy shall apply to each local agency entering into design-build contracts authorized under this chapter."

The key requirement to note here is that any outside consultant that prepares the preliminary project documents that are used for the RFQ and RFP—the "bridging documents" discussed below—is ineligible to submit a proposal as a design-build entity (DBE) or to later join the design-build team.

3. Project Requirements (Bridging Documents)

Finally, the city must prepare a set of documents setting forth the scope and estimated price of the project.[2] The documents—informally referred to as "bridging documents"—may include the size, type, and desired design character of the project, performance specifications covering the quality of materials, equipment, workmanship, preliminary plans or building layouts, or any other information necessary to describe the city's needs.[3]

These bridging documents are critical, since they serve as the basis for the RFQ/RFP procurement and will subsequently serve as the basis for the design-build contract. Typically, this includes preliminary designs and outline specifications at the 25% stage relative to design development, and should include all of the "must haves" for the project, including size, site requirements, performance standards, green building standards (if applicable), etc. Failure to fully specify the mandatory project requirements at this stage can lead to costly change orders at the design-build stage.

B. Design-Build RFQ

Once the threshold requirements are met, the city must issue an RFQ to prequalify or short-list responding DBEs.[4] Therefore, before it even begins preparing the RFQ, which invites statements of qualifications (SOQs), the city must decide whether it will prequalify or short-list DBEs. Typically for prequalification, an SOQ must achieve a predetermined minimum score in order to be eligible to participate in the RFP stage. By contrast, for short-listing, the top scoring respondents (typically the top three or five depending on the number of SOQs expected) become eligible to participate in the RFP stage without applying a minimum score requirement.

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[2] § 22164(a)(1).
[3] *Ibid*.
[4] § 22164(b).

The theoretical advantage of prequalifying is the ability to weed out unqualified DBEs, but a process that is too restrictive could result in limiting competition. With short-listing the top scoring DBEs can submit proposals without having to achieve a minimum score. Regardless of whether the city uses prequalification or short-listing, the following minimum statutory requirements apply to a design-build RFQ:

- ✓ The RFQ must identify the basic scope and needs of the project or contract, the expected cost range, the methodology that will be used by the city to evaluate proposals, the procedure for final selection of the design-build entity, and any other information necessary to inform respondents of the opportunity. (§ 22164(b)(1).)

- ✓ The RFQ must also state the significant factors that the city reasonably expects to consider in evaluating qualifications, including technical design and construction expertise, acceptable safety record, and all other non price-related factors. (§ 2164(b)(2).)

- ✓ Pursuant to section 22164(b)(3), the RFQ must include a standard template request for SOQs prepared by the city that requires the following information from respondents:

    - For certain types of entities, a listing of all of the shareholders, partners, or members known at the time of SOQ submission who will perform work on the project;
    - Evidence that the members of the design-build team have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, and a financial statement that ensures that the design-build entity has the capacity to complete the project;
    - The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration;
    - Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance;
    - Information concerning workers' compensation experience history and a worker safety program;
    - For certain types of entities, a copy of the organizational documents or agreement committing to form the organization; and
    - An acceptable safety record.

Section 22164(c) sets forth the "skilled and trained workforce" requirement that applies to *all* statutory design-build projects, and provides the alternatives for meeting this requirement (emphasis added):

> "(c) (1) A design-build entity shall not be prequalified or shortlisted unless the entity provides an *enforceable commitment* to the local agency that the entity and its subcontractors at every tier will use a *skilled and trained workforce* to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades, in accordance with Chapter 2.9 (commencing with Section 2600) of Part 1.
> (2) This subdivision shall *not* apply if any of the following requirements are met:
> (A) The local agency has entered into a project labor agreement that will bind all contractors and subcontractors performing work on the project or contract to use a skilled and trained workforce, and the entity agrees to be bound by that project labor agreement.
> (B) The project or contract is being performed under the extension or renewal of a project labor agreement that was entered into by the local agency prior to January 1, 2017.
> (C) The entity has entered into a project labor agreement that will bind the entity and all its subcontractors at every tier performing the project or contract to use a skilled and trained workforce.
> (3) For purposes of this subdivision, 'project labor agreement' has the same meaning as in paragraph (1) of subdivision (b) of Section 2500."

For cities that do not have a project labor agreement in place pursuant to subdiv. (2)(A)-(3), one approach to establishing the required "enforceable commitment," is to require each responding DBE to warrant that submission of an SOQ constitutes an enforceable commitment to use a skilled and trained workforce as required by section 22164(c). We think it is questionable whether any such "commitment" can be legally binding and enforceable before the parties have entered into a contract, but until the courts provide guidance on this provision, this may be a reasonable approach for cities that are not and will not be using a project labor agreement.

C. Design-Build RFP

After the city has prequalified or short-listed entities through the RFQ process, the city must prepare an RFP that invites the qualified DBEs to submit competitive sealed proposals. Before preparing the RFP, the city must decide if it will award the contract on the basis of "low bid" or "best value."[5] If "low bid" is used as the final selection method, the competitive bidding process must result in lump-sum bids by the DBEs, and award must be made to the lowest responsible bidder.[6] However, if "best value" is used as the final selection method, competitive proposals must be evaluated by using only the criteria and selection procedures specifically identified in the RFP.[7] In our experience, most cities opt for "best value," since that affords greater flexibility

[5] § 22162(a).

[6] § 22164(e).

[7] § 22164(f).

during the selection process, and is one reason design-build procurement is attractive in the first place. Depending on which selection method is used, the RFP must meet the following requirements:

- ✓ It must identify the basic scope and needs of the project or contract, the estimated cost of the project, the methodology that will be used by the city to evaluate proposals, whether the contract will be awarded on the basis of low bid or best value, and any other information necessary by the city to inform the entities of the contracting opportunity. (§§ 22162(a), 22164(d).)

- ✓ The RFP must also state the significant factors that the city reasonably expects to consider in evaluating proposals, including cost or price and all non price-related factors, and the relative importance or weight assigned to each of the factors. (§ 22164(d).)

- ✓ If a best value selection method is used, the city may reserve the right to request proposal revisions and hold discussions and negotiations with responsive DBEs, in which case the city must specify in the RFP and publish separately or incorporate into the RFP applicable procedures to be observed by the city to ensure that any discussions or negotiations are conducted in good faith. (§ 22164(d).)

Clearly, the "best value" selection method includes some additional requirements. The city must evaluate and weigh, as deemed appropriate by the city, the following minimum factors:

- price, unless a stipulated sum is specified;
- technical design and construction expertise; and
- life-cycle costs over 15 or more years.[8]

The city may also hold discussions or negotiations with entities using the process articulated in the RFP.[9] When the evaluation is complete, the city must rank at least three entities based on a determination of value provided.[10] Award must be made to the responsible DBE whose proposal is determined by the city to have offered the best value to the public.[11]

D. Conclusion

While this outline is not exhaustive as to all requirements that can and should be included in a design-build RFQ or RFP, we hope it will provide guidance for cities that are contemplating design-build procurement by providing a summary narrative of the minimum requirements and general sequencing.

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[8] § 22164(f)(1).

[9] § 22164(f)(2).

[10] § 22164(f)(3).

[11] § 22164(f)(4).

Notes:_____

General Municipal Litigation Update

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

Javan N. Rad, Chief Assistant City Attorney, Pasadena

Notes:_____

General Municipal Litigation Update

Cases Reported from May 10, 2019
Through September 16, 2019

Prepared by
Javan N. Rad
Chief Assistant City Attorney
City of Pasadena

League of California Cities
2019 Annual Conference
City Attorney's Department Track

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V. Civil Rights

VI. Miscellaneous

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.

Notes:_____

Everything You Need to Know about SB 1421 and AB 748

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

Howard Jordan, Consultant, Management Strategies Group
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EVERYTHING YOU NEED TO KNOW ABOUT SB 1421 AND AB 748

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Effective January 1, 2019, a new California law dramatically altered the ability of the public (and the press) to obtain previously highly confidential police personnel records. Senate Bill 1421 amended Penal Code section 832.7 to broadly allow the release of records relating to officer use-of-force incidents, sexual assault and acts of dishonesty. Previously, such records were only available through a *Pitchess* motion and private review by a judge or arbitrator. Recently, cities, counties and state agencies have been inundated with SB 1421 Public Records Act requests. To complicate matters, there are significant disagreements between unions, public agencies and other affected parties concerning the scope of what is covered and whether the law applies to records pre-dating the statute.

In addition, another bill, Assembly Bill 748, went into effect on July 1, 2019. As with SB 1421, AB 748 contains new disclosure provisions, broadly allowing audio and video recordings of "critical incidents" to be released to the public.

This paper is intended to inform readers about the new laws, what they cover, how to respond to California Public Records Act requests for disclosable records, and how to deal with competing viewpoints regarding interpretation of the statutes.

1. Prior Law – *Pitchess* and Confidentiality

For more than 40 years, peace officer personnel records have been classified as confidential under the California Penal Code and associated statutory schemes. Following the seminal California Supreme Court decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, which held that a criminal defendant could discover information regarding a peace officer's personnel file upon an adequate showing, the Legislature enacted a statutory rubric under which a party to litigation must file a written motion and establish "good cause" for the discovery of otherwise confidential peace officer personnel records (otherwise known as a "*Pitchess* motion"). If a court finds good cause, it will conduct an *in camera* inspection of the requested records and disclose any relevant information to the requesting party.

Importantly, until the recent passage of SB 1421 and AB 748, the *Pitchess* scheme was generally the exclusive means by which a party could obtain access to peace officer personnel records. Notably, under Penal Code section 832.8, "personnel records" is given an expansive interpretation and includes files containing records relating to any of the following: "[p]ersonal

data, including marital status, family members, educational and employment history, home addresses or similar information," "[m]edical history," "[e]lection of employee benefits," "[e]mployee advancement, appraisal or discipline," "[c]omplaints, or investigations of complaints" regarding events in which an officer participated or performance of duties, and "[a]ny other information the disclosure of which would constitute an unwarranted invasion of personal privacy." (Penal Code § 832(a).)

Because the categories of information above are so broad, peace officers have possessed strong privacy rights in nearly every facet of their personnel files, which, until now, could only be intruded upon through a showing of good cause and relevance for specific information necessary to preserve a litigant's rights in a civil or criminal proceeding (including, for instance, where so-called "*Brady*" information existed implicating an officer's truthfulness). Under Evidence Code section 1043, a party to an action had to file a *Pitchess* motion to provide officers with notification that their confidential personnel records were being sought and to enable them to oppose the disclosure of such information. (Evid. Code § 1043(a); *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419.) Absent compliance with this motion procedure and a resulting court order, an agency was not permitted to produce such documents. (*See*, *e.g.*, *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1423-1424 ["It has repeatedly been held that Evidence Code sections 1043 *et seq*. constitute the exclusive means by which a litigant in a civil action may obtain discovery of records governed by those statutes."].)

In the current social and political environment, including a number of high-profile use-of-force and officer-involved shooting incidents, the protections and confidentiality surrounding peace officer personnel records have faced increasing scrutiny, with many advocates pushing to obtain access to complaints and investigative documents that may provide objective details as to these incidents. SB 1421 was introduced by State Senator Nancy Skinner, and sponsored by advocacy groups such as the ACLU of California, Anti-Police Terror Project, Black Lives Matter, California Faculty Association, California News Publishers Association and Youth Justice Coalition.

According to the proponents of the new legislation, SB 1421 was intended to "lift the veil of secrecy," and provide transparency and accountability with regard to law enforcement. Regarding its purpose, the bill states, in part, as follows:

> Section 1. The Legislature finds and declares all of the following:
>
> (a) Peace officers help to provide one of our state's most fundamental government services. To empower peace officers to fulfill their mission, the people of California vest them with extraordinary authority – the powers to detain, search, arrest, and use deadly force. Our society depends on peace officers' faithful exercise of that authority. Misuse of that authority can lead to grave constitutional violations, harms to liberty and the inherent sanctity of human life, as well as significant public unrest.
>
> (b) The public has a right to know all about serious police misconduct, as well as about officer-involved shootings and other serious uses of force. Concealing crucial public safety matters such as officer violations of civilians' rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety.

Notwithstanding the rationale behind this legislation – regardless of whether one agrees or disagrees with the changes – there are significant issues with its application and enforcement, including vague and undefined terms, timelines that may be unrealistic and inconsistent, and the issue of whether or not the new law should be applied "retroactively," such as to require disclosure of records already in existence that were previously protected by rights of privacy and discoverable only pursuant to motion.

Effective January 1, 2019 and July 1, 2019, respectively, SB 1421 and AB 748 substantially changed the law with regard to the confidentiality of peace officer personnel records.[1] As discussed below, these statutes mandate that certain types of personnel records and files previously disclosable only pursuant to a court order, must be released subject to a routine request under the California Public Records Act. For readers who may not be entirely familiar, the Public Records Act is a law passed by the California State Legislature in 1968, requiring inspection or disclosure of governmental records to the public upon request, unless exempted by

[1] It bears noting that Penal Code section 832.7 applies only to the records of peace officers as defined in Penal Code section 830, *et seq*., and not to civilian or non-sworn employees.

law. The law is similar to the federal Freedom of Information Act enacted by the United States Congress in 1966.

2. Senate Bill 1421

SB 1421 amended Government Code section 832.7 to generally require the disclosure of records and information under the California Public Records Act (Government Code section 6250, *et seq*.) concerning the following types of incidents and investigations:

- Records relating to the report, investigation or findings of an incident involving the discharge of a firearm at a person by a peace officer or a custodial officer.

- Records relating to the report, investigation or findings of an incident in which the use of force by a peace officer or a custodial officer against a person results in death or great bodily injury.

- Records relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public. "Sexual assault" under Section 832.7 includes the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or any other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault.

- Records relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction of evidence or falsifying or concealing of evidence.

(Penal Code 832.7(b).)

As indicated above, most of the documents under these categories would have previously fallen within the definition of peace officer personnel records under Penal Code section 832.8, and therefore, been protected from a Public Records Act disclosure by the *Pitchess* statutory scheme. However, the amended Penal Code section 832.7 provides that, where applicable, records to be released shall include:

> [A]ll investigative reports, photographic, audio, and video evidence; transcripts or recordings of interviews; autopsy reports; all materials compiled and presented for review to the district attorney or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take; documents setting forth findings or recommended findings; and copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to the Skelly or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

(Penal Code. § 832.7(b)(2).)

In essence, the statute requires the full universe of investigation and disciplinary documents to be produced in response to a Public Records Act request for records falling within the four enumerated categories (i.e., discharge of a firearm at a person, use of force resulting in death or great bodily injury, an incident involving a "sustained" finding of sexual assault by an officer against a member of the public, and an incident involving a "sustained" finding of dishonesty).

Notably, the statute does *not* provide for the release of separate and prior investigations involving unrelated incidents, unless such records are "independently subject to disclosure" pursuant to the categories enumerated in the statute. (Penal Code § 832.7(b)(3).) Where this provision might come into play is an instance in which an officer is subjected to "progressive discipline" after misconduct stemming from an occurrence of one of the four types of incidents identified in the statute, but who has previously been disciplined for misconduct of a different variety. In such instances, a law enforcement agency might reference and attach the *prior* discipline to the discipline stemming from the current violation; however, if the prior discipline does not separately fall within the four categories in the new section 832.7, such documents would not be subject to release (and therefore should be redacted if the remainder of the file is disclosed in response to a Public Records Act request).

Another exception to disclosure under the amended statute relates to incidents or investigations involving multiple officers. The new section 832.7(b)(4) provides that, in such

situations, "information about allegations of misconduct by, or the analysis or disposition of an investigation of, an officer shall not be released pursuant to subparagraph (B) or (C) of paragraph 1, unless it relates to a sustained finding against that officer." (Gov. Code § 832.7(b)(4).) In other words, where there is an investigation of sexual assault by a peace officer against a member of the public, or of dishonesty by a peace officer, allegations or findings against *another* peace officer in the same investigation which do not relate to those categories is not disclosable. Nevertheless, the statute clarifies that, "factual information about that action of an officer during an incident, or the statements of an officer about an incident, shall be released if they are relevant to a sustained finding against another officer" under subparagraph (B) or (C). (*Id*.) Thus, while allegations or findings against a separate officer are not disclosable, purely factual information or statements relevant to the subject officer would be disclosable.

Significantly, the amended section 832.7 allows – and seemingly requires - law enforcement agencies to redact records it produces under the Public Records Act, under specified circumstances. These circumstances include: (a) to remove personal data or information, including home addresses, telephone numbers and the identities of family members; (b) to preserve the anonymity of complainants and witnesses; (c) to protect confidential medical, financial or other information protected by federal law or which would cause "an unwarranted invasion of personal privacy that clearly outweighs the strong public interest in records about misconduct and serious use of force"; and (d) where there "is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person." (Penal Code § 832.7(b)(5).)

Additionally, the statute includes a "catch-all" provision, stating that, "an agency *may* redact a record disclosed pursuant to this section, including personal identifying information, where, on the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information." (Penal Code § 832.7(6) [emphasis added].) As discussed further below, this provision is quite vague and appears particularly susceptible to subjective interpretation.

While we will not get into all of the details and timelines here, the statute permits agencies to temporarily withhold records of an incident involving the discharge of a firearm or use of force that is the subject of an active criminal or administrative investigation, and provides a litany of deadlines and requirements in such cases depending on the nature of the ongoing proceedings. (Penal Code § 832.7(b)(7).) It is important that agencies be aware of these provisions and review section 832.7(b)(7) carefully if one of these incidents is being actively investigated or prosecuted, before committing to produce any documents pursuant to a Public Records Act request.

Finally, the statute provides that, "[t]his section does not supersede or affect the criminal discovery process outlined [in relevant code sections] … or the admissibility of personnel records pursuant to subdivision (a), which codifies the court decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531." This provision is a reference to section 832.7(a), which reaffirms that for personnel records *not* falling within the four enumerated categories for which the new statute allows records to be disclosed in response to a Public Records Act request, the remainder of peace officer personnel records remain "confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to sections 1043 and 1046 of the Evidence Code." (Penal Code § 832.7(a).) Accordingly, the new section 832.7 is not intended to affect the previous statutory scheme for peace officer personnel records except for those records falling within the four categories of incidents identified. Also, as before, the statute clarifies that the confidentiality of such records does not apply to investigations of the conduct of police officers conducted by a grand jury, District Attorney's office or the Attorney General's office.

3. Assembly Bill 748

AB 748, which is seen as something of a companion statute to SB 1421, requires law enforcement agencies to produce, in response to Public Records Act requests, video and audio recordings of "critical incidents," which are defined as incidents involving the discharge of a firearm at a person by a peace officer or custodial officer, or an incident in which the use of force by a peace officer or custodial officer against a person resulted in death or great bodily injury. (Gov. Code § 6254(f)(4).)

The legislative preamble notes that, while existing Public Records Act laws required that public records be made available to the public for inspection, records of investigations conducted by state or local policies agencies were expressly exempt from such requirements. (See https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB748 [Legislative Counsel's Digest].) Existing law also required specified information regarding the investigation of crimes to be disclosed to the public unless disclosure would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation. (*Id*.) Such information generally included details regarding arrestees as well as typical information that would be found in a police blotter, such as the date and time of an incident, a narrative summary, a case number and the most serious arrest charge.

The Legislative Counsel's Digest concerning AB 748 provides that the statute was intended to modify the Public Records Act to "allow a video or audio recording that relates to a critical incident … to be withheld for *45 calendar days* if disclosure would *substantially interfer*e with an active investigation, subject to extensions, as specified." (*Id*. [emphasis added].) The Digest further indicates that the bill would allow the recording to be withheld if the public interest in doing so "*clearly outweighs* the public interest in disclosure because the release of the recording would … violate the reasonable expectation of privacy of a subject depicted in the recording, in which case the bill would allow the recording to be redacted to protect that interest." (*Id*. [emphasis added].) Accordingly, even where the interest in withholding a recording of a critical incident otherwise "clearly outweighs" the public interest, it still must be produced under the new law, with appropriate redactions.

One of the biggest imports of this new statute, which went into effect on July 1, 2019, is that the public will now have greater rights to obtain access to video footage from body worn cameras as well as other audio and video recordings obtained by any law enforcement agency or prosecutor's offices. Under AB 748, a public agency may delay disclosure for between 45 days and one year during an *active* criminal or administrative investigation if disclosure will "substantially interfere" with the investigation, including endangering a witness' or confidential source's safety. (Gov. Code § 6254(f)(4).) However, after one year, the agency may only continue to withhold the recording where it demonstrates, by clear and convincing evidence, the disclosure would still substantially interfere with an ongoing investigation. (*Id*.) Under the

statute, the public agency must also continually reassess the withholding of any recordings and notify the Public Records Act requester, in writing, every 30 days. (*Id.*)

Once the specific grounds for withholding the recording of the critical incident are resolved, the recording must be disclosed, subject to the potential for redactions where legitimate privacy interests are implicated.

4. Potential Pitfalls and Ambiguities in SB 1421

The implementation of these new statutes, as well as their application and enforcement has thus far resulted in a myriad of actual and potential challenges stemming from issues surrounding the legislation. In particular, with regard to SB 1421, these issues include vague and undefined terms, timelines that may be difficult to abide by and may be internally inconsistent, and confusion over whether or not the statute was intended to apply "retroactively" (i.e., whether it requires disclosure of records in existence prior to January 1, 2019).[2]

a. Vague or Non-Existent Definitions

One of the foremost issues with SB 1421 is that various terms embedded throughout the statute are either not defined or may be subject to differing interpretations. For example, section 832.7(b)(1)(C) mandates that records relating to incidents involving a "sustained" finding of "dishonesty" must be disclosed where the dishonesty by a peace officer is "directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying or concealing of evidence." (Gov. Code § 832.7(b)(1)(C).)

Although this section provides the above specific examples of "dishonesty," the definition is extremely broad and does not delineate circumstances beyond relatively obvious conduct that falls within these categories. For example, what about an instance where an officer is investigated and there is a sustained finding for failing to report certain information that he or she had a duty to report? Depending on the specific facts, such conduct could potentially be

[2] Insofar as AB 748 was more recently enacted into law, its ambiguities are still being discovered; however, as with SB 1421, it is likely that AB 748 will see its share of legal challenges.

encompassed within the definition of "dishonesty," but it may not always be the case in every circumstance. Similarly, the statute references sustained findings of dishonesty "relating to … a crime" or "relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer." (*Id*.) Although we are dealing with hypotheticals, it is not difficult to envision a scenario where there is a sustained finding of dishonesty, but the incident does not relate to criminal activity, but rather an internal matter within the agency, such as falsifying a time sheet, failing to report equipment damage or providing a false/misleading statement to a supervisor. While it seems likely that most dishonesty findings would still fall within the remainder of the category, i.e., "related to the reporting of, or investigation of misconduct by" a peace officer, terms such as "false statements" or "destruction … of evidence" are inherently subjective and do not automatically equate to dishonesty where an officer did not *intend* to make false statements or to remove evidence that perhaps the officer was not aware at the time needed to be maintained. Because of the latent vagueness in the statute, there can be substantive disagreements regarding when a finding amounts to dishonesty for purposes of the statute as opposed to more benign misconduct.

> ***Practice Tip***: These types of ambiguities existed even before these new statutes and could affect what level of discipline was warranted in a particular instance, insofar as "dishonesty" is generally seen as a terminable offense in law enforcement. However, given the introduction of SB 1421, Internal Affairs departments must take more care in crafting their decisions to alleviate these types of potential issues that may affect whether the agency ultimately has to make the findings (and reports) available publicly.

Additionally, while the term "sustained" *is* defined in section 832.8, the definition is not necessarily clear. (Gov. Code § 832.8(b).) According to the statute, "sustained" means "a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy." (*Id*.) This definition is critical as it essentially triggers when a matter is sufficiently "closed" such that records relating to the investigation or discipline in sexual assault or dishonesty cases must be released under the Public Records Act. (*Id*.; see also Gov. Code § 832.7(b)(1)(B)-(C).)

The term "opportunity for an administrative appeal" may be a potential source of dispute as is the one-year deadline for completing an investigation and issuing a notice of intent to discipline contained in section 3304. Should an agency fail to complete its investigation and issue its disciplinary notice within the one-year statutory time period, the discipline may be voided and it is arguable that there would be no "sustained" violation at that juncture even where there is no real dispute that a police officer committed an act of dishonesty or engaged in sexual assault within the meaning of section 832.7(b)(1)(B). In such cases, a Public Records Act requester may demand the records while the officer and/or department may contend that the finding was not "sustained" within the meaning of section 832.8.

Notably, there are also other possible controversies regarding the term "sustained." Often, a law enforcement agency accepts a peace officer's voluntary resignation where there are pending charges of dishonesty or other serious allegations currently under investigation. In other cases, an officer may resign in lieu of termination. If the investigation is concluded and results in sustained findings before the officer's resignation, it seems likely a court would determine such findings to be sufficiently "final" under section 832.8, such as to warrant disclosure. But, if the investigation is not completed, there may be a strong argument that the records are not disclosable even where there is near-certainty that the allegations would have been sustained. Other problems may arise where an officer is *charged* with dishonesty, but the actual findings come short of characterizing the misconduct as such (see examples above involving unintentional "false statements" or "destruction" of evidence).

While there are not necessarily universal answers to each of these hypotheticals, agencies must be aware that how sustained findings are ultimately categorized is significant insofar as it may determine whether or not such records are disclosable under a Public Records Act request or subject only to disclosure through the *Pitchess* process.

> ***Practice Tip***: More than ever, it will be important for law enforcement agencies to adhere to the one-year statute of limitations in Government Code section 3304 for completing investigations and issuing a notice of proposed disciplinary action. Not only do departments run the risk of potential discipline being voided, but now also face the possibility of disputes regarding whether records shall become public when an investigation is halted prior to its normal conclusion for whatever reason, including an officer's resignation.

The above examples are just some of uncertainties within the statute that are likely to be answered more concretely as cases involving the interpretation and application of this statute continue over the next several years.

b. Timing

As discussed further below, the Public Records Act requires that responsive records be produced "promptly." (Gov. Code § 6253.) An agency normally has 10 days from receipt of a request to determine whether the request seeks copies of disclosable public records in the agency's possession and to notify the requester accordingly. In "unusual circumstances" (discussed in Section 5, *infra*), this time period may be extended by an additional 14 days, where there is an extenuating need for more time to search for and collect records. Importantly, the notification to the requester does not need to include the actual records, but must indicate whether the agency has records to produce, whether any exemptions (see Gov. Code § 6254) apply and should provide a time estimate for the production.

Notwithstanding the requirements of the Public Records Act, SB 1421 provides additional timelines for the disclosure of records in various circumstances for records disclosable under the "discharge of a firearm" and "use of force" provisions. The additional time provisions apply only when there is an active criminal or administrative investigation or an active criminal prosecution. This additional time may be anywhere from an additional 60 days to additional 18 months depending on the specific facts and nature of the ongoing proceedings; however, once the proceedings are completed, records subject to Public Records Act disclosure must be produced "promptly." (See Gov. Code § 832.7(b)(7); Gov. Code § 6253(b).)

c. "Retroactivity"

Another major source of contention – the biggest so far – between proponents of the new law and some police departments and employee organizations is whether the statute was designed to apply "retroactively" to previously-existing records and investigations created prior to January 1, 2019, when SB 1421 took effect. As discussed at the outset, peace officers in California have long possessed privacy rights in their personnel records, which could generally be disclosed only through the *Pitchess* process and a court order. Even then, the records were

subject to *in camera* review in a court's chambers and only documents that were particularly relevant to the issues immediately before the court would be released.

The new legislation does not directly speak to whether it was intended to be applied on a "going-forward" basis only or whether it was meant to provide for the public release of records that were previously subject to *Pitchess*. While this issue has been a frequent battle over the past several months since the law first went into effect, courts so far have consistently taken the latter approach, meaning that *all* records falling within the categories enumerated in the statute have been treated as disclosable pursuant to a Public Records Act request regardless of when they came into existence. This issue is discussed in greater detail in Section 6, *infra*.

5. Responding to Public Records Act Requests

As mentioned above, under the Public Records Act, an agency generally has 10 days from receipt of a request to determine whether the request seeks copies of disclosable records in the agency's possession and to notify the requester of the determination and the reasons therefor. (Gov. Code § 6253(c).) In "unusual circumstances," the agency may extend this deadline by up to 14 days by providing written notice to the requesting party as to the reasons for the extension. (*Id*.) "Unusual circumstances" includes the following:

- The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

- The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records demanded in a single request.

- The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

- The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

Although the Public Records Act does not set a specific deadline by which the records must actually be disclosed, it requires public agencies to make disclosable records available "promptly" upon payment of fees covering direct costs of duplication, or a statutory fee, if applicable. (Gov. Code § 6253(b).) The agency must also provide a direct copy of such records

unless "impracticable" to do so. (*Id*.) A reasonable time for responding to the request may depend, in part, upon how voluminous the requested records are, how long of a time period the records encompass and where the records may be stored (including the possibility that they may be stored off-site or in archives).

With regard to fees for copying, a local agency may require payment in advance, before providing the requested copies of documents; however, no payment can be required merely to look at a record where the requester does not seek copies. (*Id*.) Direct costs of duplication include the expense of running the copy machine and perhaps the expense of the employee operating it; however, it does not include related tasks associated with the retrieval, inspection and handling of the file from which the copy is extracted. (*North County Parents Organization v. Dept. of Education* (1994) 23 Cal.App.4th 144, 148.)[3] In other words, the agency cannot charge for hours of staff time that may be expended performing the search and review process. That said, where a particular request requires the production of electronic records that are otherwise produced only at regularly scheduled intervals, or production of the record would require data compilation, extraction, or programming, the agency can shift the burden of the costs onto the requester. (Gov. Code § 6253.9.) In such cases, the agency should usually insist that the fees are paid in advance given that they could be substantial. (See FN 1, *supra*, *The People's Business: A Guide to the California Public Records Act*," League of Cities, at p. 26.)

Notably, there is currently a case on review at the California Supreme Court – *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* – which will decide the issue of whether an agency may charge fees for the time to redact audio and video files. (See *National Lawyers Guild v. City of Hayward* (2018) 431 P.3d 1151 [granting review].) The California Court of Appeal ruled in favor of the city in allowing the collection of fees for time spent redacting body-worn camera footage. Numerous media organizations signed onto an *amicus* brief aimed at overturning the appellate decision, claiming that permitting agencies to collect "thousands of dollars" for redacting videos "threatens all electronic records, as the redaction process can apply not only to body-worn camera footage, but also to, for example, PDF

[3] For a terrific overview of all aspects of the CPRA, see "*The People's Business: A Guide to the California Public Records Act*," League of Cities, Revised April 2017: https://www.cacities.org/Resources/Open-Government/THE-PEOPLE%E2%80%99S-BUSINESS-A-Guide-to-the-California-Pu.aspx.

documents, audio files, or any other electronic records held by a government agency."[4] The California Supreme Court's decision will likely have a significant effect on the process for redacting and producing documents under SB 1421, and particularly, AB 748.

> ***Practice Tip***: Depending on the volume of records, scope of necessary redactions, and whether audio/video files are involved, there may be significant staff costs and time expended. Public agencies must be realistic and cannot automatically respond that a request will take "one year" or a similarly long period, but must understand and strive to accurately estimate the actual length of time needed to produce the records. Agencies should also be realistic as to potential costs and fees for the records, if applicable. Costs associated with copying, redactions and/or other recoverable expenses may conceivably be split between multiple requestors under certain circumstances.

6. Court Challenges

Since SB 1421 went into effect on January 1, 2019, there have already been a number of legal challenges to the statute. One of the earliest and most significant challenges involves whether or not the new statute applied to peace officer personnel records that were already in existence prior to January 1, 2019.

Nothing in SB 1421, or in the amended sections of the Penal Code, specifies whether it was intended to apply to records already in existence as of the statute took effect. Many police unions took the position that the law should only apply to new personnel records on a going-forward basis, particularly in light of the strict confidentiality and application of the *Pitchess* process that law enforcement officers have enjoyed in these records over the past several decades. Fundamentally, according to the challenging parties, the application of SB 1421 on a "retroactive" basis would take away privacy rights that the Legislature had already carefully bestowed upon such officers in their already-existing records, regardless of the Legislature's ability to modify such protections to personnel records created in the future.

In the first ruling on this issue, Judge Charles Treat on the Contra Costa County Superior Court issued a 32-page opinion in which it rejected petitions filed by six separate police unions seeking to limit SB 1421 to records created after January 1, 2019. The court reasoned that the dates of the underlying conduct at issue and the law enforcement agency's resulting investigation

[4] https://www.rcfp.org/wp-content/uploads/2019/05/2019-05-31-NLG-v-Hayward-CA-Supreme-Court.pdf (p. 3.)

were not relevant to the law's application on a prospective basis, stating that, "A law is not retroactive merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." With respect to the unions' argument that the new law altered liability for acts occurring before enactment, the court ruled that SB 1421 did not change the legal consequences for the pre-2019 conduct of police officers nor violate any vested rights of privacy. The court found that the only change the new statute mandated was who could obtain access records, not the manner in which police misconduct is investigated, adjudicated or criminally prosecuted.

While recognizing that SB 1421 dramatically altered the legal landscape concerning the disclosure of peace officer personnel records, the court found that the Legislature's intent was clear: "Concealing crucial public safety matters such as officer violations of civilians' civil rights, or inquiries into deadly use of force incidents, undercuts the public's faith in the legitimacy of law enforcement, makes it harder for tens of thousands of hardworking peace officers to do their jobs, and endangers public safety." The court reasoned that it was inconceivable that the Legislature intended to require release of records created only after January 1, 2019. While the court denied the unions' application for a preliminary injunction to prevent the release of pre-2019 records, it stayed the ruling to allow the unions to take up the matter to the court of appeal. Following the Contra Costa decision, in a span of a few months, judges on several other trial courts (including San Francisco, Los Angeles, San Diego) reached similar conclusions, finding SB 1421 to apply "retroactively" to records in existence prior to January 1, 2019. While most of these suits sought to block the disclosure of pre-2019 records, one suit by the Downey Police Officers' Association sought permission to destroy such records.

However, one court, the Ventura County Superior Court, which was the second court to issue a ruling on the retroactivity question, held in favor of the Ventura County Deputy Sheriff's Association, issuing a preliminary injunction preventing the County from releasing records of pre-2019 incidents. That said, the court did not rule on the merits of the issue, but blocked the release of such records pending a ruling from a higher court.

On March 29, 2019, the first Court of Appeal decision was published concerning SB 1421, resulting from an appeal of the Contra Costa County opinion issued by Judge Treat.

(*Walnut Creek Police Officers' Association v. City of Walnut Creek* (2019) 33 Cal.App.5th 940.) As they had argued in the trial court, the six police unions claimed that the retroactive application of the new law to pre-2019 was improper. Unlike the 32-page decision authored by the trial court, the First District Court of Appeal issued a two-page opinion finding the unions' argument to be "without merit." The court stated, "[a]lthough the records may have been created prior to 2019, the event necessary to 'trigger application' of the new law – a request for records maintained by an agency – necessarily occurs after the law's effective date." (*Id.* at 941-42.) Accordingly, the date of the request, rather than the date of the records' creation, is the primary factor under SB 1421.

Although the Contra Costa County case is not currently on appeal, the California Supreme Court summarily denied an appeal in March 2019 of a Los Angeles County Superior Court decision rejecting the Los Angeles Deputy Sheriffs Association's efforts to prevent release of pre-2019 records. The California Supreme Court denied the appeal without comment, and did not rule on the merits insofar as it was not required to accept review of the case. It is expected that this issue will eventually reach the California Supreme Court, but in the meantime, the First District Court of Appeal's decision is binding on all trial courts throughout California, meaning all public agencies are required to fully comply with SB 1421.

While retroactivity is one issue involving SB 1421, there are numerous other challenges that could crop up over the next years involving public records act requests for police records, including what types of documents fall within the enumerated categories in the statute, what types of redactions may be appropriate to avoid unwarranted invasions of privacy, and how long potentially discoverable records must be maintained.

7. Practical Difficulties/Challenges for Public Agencies

The passage of SB 1421 and AB 748 present significant challenges for public agencies. Before SB 1421 went into effect at the beginning of 2019, it is reported that several media outlets throughout the state already had public records requests prepared and ready to distribute to cities, counties and other law enforcement agencies. Here is just a brief snapshot of the issues facing local and state agencies in light of these new laws:

- Dealing with a large volume of requests for records falling within the enumerated categories of SB 1421 by all peace officers in a particular agency

- Complying with the Public Records Act's mandate that the responsive records be produced "promptly," while balancing that requirement with ongoing investigations into use-of-force incidents and the discharge of a firearm

- Allocating staff time searching for, compiling, and redacting electronic/hard copy documents and video footage and audio recordings

- Addressing competing legal positions between unions and employees, media outlets, individual requesters and other stakeholders

- Determining which personnel records and investigative files are disclosable considering the possible ambiguities in the statutes

- Evaluating record retention policies in light of new disclosure requirements

- Absorbing costs associated with time spent reviewing and redacting electronic and hard copy files and potentially video/audio recordings depending on outcome of current litigation before the California Supreme Court

- Handling public relations issues associated with increased spotlight and scrutiny on officer/department misconduct, including the manner in which Internal Affairs investigations are conducted

Undoubtedly, there will be various other issues that creep up with regard to SB 1421 and AB 748. The above is just a sampling of the more obvious challenges that the new legislation presents in both the short and long term.

8. Closing Thoughts and Bottom Line

The amendments to the Penal Code section 832.7, as well as the passage of AB 748, represent a significant change to the landscape of which materials from law enforcement agencies will become publicly available. Police and sheriff's departments (and their parent cities or counties) should assume that anything that gets released under the Public Records Act is likely to get broadly disseminated and shared online through social media and otherwise. Accordingly, agencies need to be well prepared as to how to deal with the myriad of issues discussed above.

Here are some steps public agencies can take now to ready themselves for the challenges and inquiries that lie ahead (or which have already materialized):

- Have a specific team of personnel (both from the law enforcement agency and the wider organization) assigned to handle and respond to Public Records Act requests, including reviewing, compiling and redacting disclosable materials. This team should be trained regarding the specific requirements of SB 1421 and AB 748, including the files and documents required to be produced.[5]

- For any matters under investigation relating to the discharge of a firearm at a person or use-of-force resulting in great bodily injury, maintain a tracking system to ensure that any withholdings of otherwise disclosable files comply with the timelines and requirements of Penal Code section 832.7(b)(7), including a triggering mechanism when the investigation has been concluded so disclosable files may be produced "promptly" in accordance with the Public Records Act.

- Require that costs of copying records be paid in advance by Public Records Act requesters. This may have the ancillary benefit of dissuading requesters from issuing broad requests for all conceivable documents that may be disclosable throughout an agency. Pursuant to Government Code section 6253.9, for records that are otherwise produced only at regularly scheduled intervals, or where production of the record would require data compilation, extraction, or programming, the agency can shift the burden of costs onto the requester for any programming or computer services that may be necessary.

- Because there is a current California Court of Appeal decision allowing public agencies to charge for time spent redacting video/audio recordings (including body worn cameras), public agencies should keep track of staff time spent performing such work. However, the agency should keep in mind that – depending on the outcome of current litigation in the *City of Hayward* matter – such costs may or may not ultimately be recoverable.

- The agency's legal team (or outside counsel) must be aware of current legal requirements and changes as the interpretation of these laws continues to develop. Most notably, the prevailing issue thus far is that of "retroactivity" or whether the new disclosure requirements apply to personnel records and investigation files pre-dating January 1, 2019. The answer thus far has been "yes" in nearly all of the courts that have heard such challenges and the plain language of the statute does not appear to carve out any exemptions for files already in existence.

[5] Because there can be difficulty redacting audio recordings, some agencies are first having recordings transcribed before doing any redactions. Costs of the transcriptions can often be significant.

- The spokesperson or communications team for the agency *and* its law enforcement department should be apprised well in advance of the disclosure of any documents or video/audio files produced in response to SB 1421 or AB 748. Many of these materials are likely to be highly-sensitive and can be spread widely over the Internet and in news articles. Because the information will be public as soon as it is released, the public relations officials should be prepared to respond to inquiries promptly.

- An agency should, to the extent possible, attempt to minimize disputes over records that may be disclosable. In some cases, the agency may need to disclose materials over a union's and/or employee's objections where necessary to comply with the law. However, where the parties can agree on general practices in responding to Public Records Act requests affected by the new legislation, it may help avoid unnecessary disputes.

- For any questionable determinations as to whether materials are required to be disclosed under SB 1421 and/or AB 748, it is important that the agency consult with its legal team. As discussed herein, there are numerous ambiguities that may give rise to different interpretations depending on the precise facts and findings at issue. An agency must keep in mind both the risks of violating the Public Records Act and, at the same time, the risk of violating the peace officer's privacy rights when turning over documents publicly to Public Records Act requesters.

There are surely going to be other important aspects of which to be aware with regard to responding to requests under the new statutes, but these are a sampling of tasks agencies can work on immediately while these areas continue to develop. Each law enforcement agency in California is likely to be impacted in some way by these changes and will almost certainly see the number of Public Records Act requests increase as a result. However, with proper planning and care, agencies can comply with the new legislation and minimize the amount of disruption, legal risks and potentially adverse publicity upon its law enforcement officers and management.

Municipal Tort and Civil Rights Litigation Update

Thursday, October 17, 2019 General Session; 2:45 – 4:00 p.m.

Timothy T. Coates, Managing Partner, Greines, Martin, Stein & Richland

Notes:_____

MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

ANNUAL CONFERENCE

October 17, 2019

Presented By: Timothy T. Coates
Managing Partner
Greines, Martin, Stein & Richland LLP
Los Angeles California

I. CIVIL RIGHTS—LAW ENFORCEMENT LIABILITY

A. *Nieves v. Bartlett*, __U.S.__, 139 S. Ct. 1715 (2019)

- **Probable cause defeats a retaliatory arrest claim, absent evidence that offense does not typically result in arrest.**

In *Nieves v. Bartlett*, __U.S.__, 139 S. Ct. 1715 (2019), plaintiff Bartlett was arrested by defendant police officers Luis Nieves and Bryce Weight for disorderly conduct and resisting arrest during "Arctic Man," a raucous winter sports festival held in a remote part of Alaska. Nieves was speaking with a group of attendees when a seemingly intoxicated Bartlett started shouting at them not to talk to the police. When Nieves approached him, Bartlett began yelling at the officer to leave. Rather than escalate the situation, Nieves left. Bartlett later approached officer Weight in an aggressive manner while he was questioning a minor, stood between Weight and the teenager, and yelled with slurred speech that Weight should not speak with the minor. When Bartlett stepped toward Weight, the officer pushed him back. Nieves saw the confrontation and initiated an arrest. According to Bartlett, Nieves said "bet you wish you would have talked to me now."

Bartlett sued under 42 U.S.C. § 1983, claiming that the officers violated his First Amendment rights by arresting him in retaliation for his speech—i.e., his initial refusal to speak with Nieves and his intervention in Weight's discussion with the minor. The district court granted summary judgment for the officers, holding that the existence of probable cause to arrest Bartlett precluded his claim. The Ninth Circuit reversed. It held that probable cause does not defeat a retaliatory arrest claim and concluded that Bartlett's affidavit about what Nieves allegedly said after the arrest could enable Bartlett to prove that the officers' desire to chill his speech was a but-for cause of the arrest.

The Supreme Court granted review and reversed. Writing for the Court, Chief Justice Roberts invoked the Court's prior decision in *Hartman v. Moore*, 547 U.S. 250 (2006), where the Court had held that probable cause would defeat a retaliatory prosecution claim. The Court concluded that the same policy concerns dictated a rule that probable cause would generally defeat a retaliatory arrest claim. However, the Court also created a major exception to the rule, holding that probable cause would not defeat a retaliatory arrest claim where the plaintiff was able to present evidence that the offense for which he or she was arrested did not typically result in arrest.

Although initially hailed as a major victory for law enforcement, *Nieves* is somewhat problematic given the clear exception it draws for the very sort of borderline arrest claims that usually spawn these sorts of lawsuits. In many respects it counsels law enforcement officials—and their employing public entities—to cabin officer discretion in making arrests in crowd control situations, ironically very likely prompting officers to routinely make arrests in situations where they might not otherwise do so, simply in order to guard against future claims of retaliation.

B. *McDonough v. Smith*, __ U.S. __, 139 S. Ct. 2149 (2019)

- **Claim for fabrication of evidence accrues when underlying proceeding terminates in favor of the plaintiff, not when evidence is first used against plaintiff.**

McDonough v. Smith, __ U.S. __, 139 S. Ct. 2149 (2019), arose from plaintiff's claim that defendant had fabricated voting fraud evidence against him, which he used to secure an indictment, leading to two criminal proceedings, one resulting in a hung jury and the latter in an acquittal. Plaintiff sued for malicious prosecution under state and federal law, as well as for fabrication of evidence in violation of due process. The lower trial and appellate courts held that the malicious prosecution claim was barred by prosecutorial immunity, and that the due process claim based on fabricated evidence was

barred by the statute of limitations. As to the latter issue, the courts held that the cause of action had accrued when the plaintiff was first aware that the evidence had been used against him.

The Supreme Court reversed. Writing for the majority, Justice Sotomayor held that the cause of action did not accrue until conclusion of the second trial which resulted in a favorable decision for the plaintiff, i.e., an acquittal. The Court analogized to the tort of malicious prosecution, which required a favorable termination of the underlying action before any statute of limitations could commence. In addition, the Court noted delaying accrual until favorable resolution of the underlying action was consistent with its decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that a plaintiff could not pursue a civil rights claim that might undermine the basis for his or her criminal conviction unless and until the conviction was reversed, i.e., the action was resolved in their favor.

McDonough provides clarification on accrual of claims based on misconduct in the course of criminal proceedings. Rather than having to try and parse out different limitations periods for different acts occurring at different stages of criminal proceedings, *McDonough* suggests that virtually all such claims will not be ripe to adjudicate, i.e., will not accrue, until the underlying proceeding terminates with a favorable judgment for the plaintiff.

C. *Nehad v. Browder*, 929 F.3d 1125 (9th Cir. 2019)

- **Officer not entitled to qualified immunity for firing on possibly armed suspect advancing on officer, given failure to find a weapon, absence of warning and availability of less intrusive alternatives to subdue suspect.**

In *Nehad v. Browder*, 929 F.3d 1125 (9th Cir. 2019), Officer Browder received a call shortly after midnight that an individual armed with a knife had threatened the caller

and was in a nearby alley. Browder pulled his police car into the alley and moved forward slowly, illuminating the suspect—Nehad—who began walking towards him. Browder got out of the car, weapon drawn, and ordered Nehad to stop, but Nehad kept walking towards him. When Nehad was approximately 17 feet away, Browder shot him. No weapon was found, but Nehad had been carrying a metallic pen. Nehad died.

Browder's attorney refused to allow him to answer questions at the scene. Five days after the shooting, Browder reviewed surveillance tape of the incident with his attorney, and then gave a statement explaining that Nehad had been moving towards him "aggressively," he believed Nehad had a knife, and he shot him because he thought he might be stabbed.

Nehad's parents filed suit on behalf of themselves and his estate, asserting claims for violations of due process and the Fourth Amendment. The district court granted summary judgment to Browder. It concluded that the parents' due process claim was barred because there was no evidence that the use of force was unrelated to any legitimate law enforcement purpose. The district court also found that the excessive force claim was barred because Browder was entitled to qualified immunity given the absence of any case law addressing use of force in the particular circumstances faced by Browder.

The Ninth Circuit affirmed dismissal of the due process claim, but reversed the judgment on the excessive force claim, holding that if plaintiffs' evidence was properly credited, Browder would not be entitled to qualified immunity. The court concluded that a jury could doubt Browder's account of the incident, given his failure to give a reason for shooting Nehad at the scene and only claiming self-defense days later after reviewing video and consulting with an attorney. The jury could also conclude that Browder should have seen that Nehad only had a pen, and that Browder unnecessarily exposed himself to attack. In addition, the court noted that Browder never identified himself as a police

officer, had not given a warning before shooting, and could have used a lesser level of force—a taser.

Nehad is a very troubling decision. Several factors that it identifies as key to denying qualified immunity in excessive force cases—the availability of less intrusive levels of force, an officer's access to counsel at the scene and afterwards, and tactical decisions to confront a suspect rather than retreat—are present in most, if not all cases. The level of second guessing, and wholesale adoption of a police practices expert's opinion as setting the constitutional standard to be applied in such cases is extraordinary, even for the Ninth Circuit. *Nehad* will likely have a direct, adverse impact on litigation of excessive force cases.

D. *Guillory v. Hill,* 36 Cal.App.5th 802 (2019)

- **Limited financial success and outrageously excessive fee request justifies denial of any attorney fees in wrongful detention action.**

Guillory v. Hill, 36 Cal.App.5th 802 (2019) arose from execution of a search warrant that caused the 13 plaintiffs to be detained for several hours. Over the course of the litigation various theories of recovery and defendants were dropped, ultimately resulting in a trial against a single defendant on a single claim. The jury found for the plaintiffs, but awarded a little less than $5,400 total to be divided among them. Plaintiffs' counsel then filed a 392 page application for attorney fees, seeking $3.8 million. The trial court denied the motion and refused to award any fees or costs, noting that plaintiffs had sought millions of dollars in damages but received only trivial award, and that the fee application was excessive and indeed "cringeworthy" in terms of the amount of inflated billing. Plaintiffs appealed.

The Court of Appeal affirmed the denial of fees. The court noted that in evaluating the reasonableness of a fee request that key factor was the degree of success

obtained, and that here plaintiffs had been unsuccessful in prosecuting their claims for damages, as the jury only awarded them minor amounts. Moreover, plaintiffs established no new legal principle, nor had they obtained any injunctive relief or change in policy. Given the lack of success, plaintiffs were not entitled to fees. In addition, the Court of Appeal noted that the denial of fees was warranted given the grossly excessive amount of fees sought.

Guillory is an extremely helpful case that provides strong authority in opposing excessive fee requests, particularly in cases where the plaintiff has obtained only a de minimis damage award.

E. *Rodriguez v. City of San Jose*, 930 F.3d 1123 (9th Cir. 2019)

- **Community care-taking exception to Fourth Amendment permits police officers to briefly detain or seize items from a member of the public without a warrant, and state administrative review proceedings will be given preclusive effect in subsequent federal suit.**

In *Rodriguez v. City of San Jose*, 930 F.3d 1123 (9th Cir. 2019), the plaintiff made a 911 call to police asking them to conduct a welfare check on her husband, who suffered from mental illness. The officers found him in a highly agitated and delusional state and eventually detained him under Welfare & Institutions Code section 5150. Learning from plaintiff that there were guns in the house, officers seized 12 weapons—one of which was plaintiff's personally registered firearm—pursuant to Welfare & Institutions Code section 8102, subdivision (a) which requires law enforcement officers to confiscate any firearm or other deadly weapon that is owned, possessed, or otherwise controlled by an individual who has been detained under section 5150.

The City then filed a petition in state court seeking forfeiture of the guns under Welfare & Institutions Code section 8102, subdivision (c) based on a determination that returning the guns would likely endanger plaintiff's husband and the general public, given that he could potentially access the guns notwithstanding the fact that he would be prohibited by law from owning a gun. Plaintiff opposed the petition, arguing that confiscation would violate her rights under the Second Amendment. The trial court granted the petition, and the California Court of Appeal subsequently affirmed the trial court order.

Plaintiff then filed suit in federal court, arguing that the confiscation violated her rights under the Second Amendment, and that the initial seizure of the weapons violated the Fourth Amendment. The district court granted summary judgment to the City, and plaintiff appealed.

The Ninth Circuit affirmed, concluding that plaintiff's Second Amendment claims were barred by principles of issue preclusion, in that the California Court of Appeal had previously rejected the claims and its decision was a final judgment which the federal courts were required to recognize under the Full Faith and Credit Clause. As to the Fourth Amendment claim, the Ninth Circuit held that the initial warrantless seizure of the firearms was justified under the community care-taking exception, which allows seizure of persons or property in order to safeguard the public.

Rodriguez is a helpful case for public entities in two respects. First, it provides a clear discussion of issue preclusion based on prior state court adjudication, and reaffirms that federal courts must give preclusive effect to state court proceedings. This is important, as many federal suits are preceded by state court administrative proceedings, which should be examined for potential preclusive effect. Second, although the Ninth Circuit emphasized that its determination of the Fourth Amendment issue was based on the particular facts of the case, nonetheless the opinion appears to broaden the

community-caretaking exception, which had previously been confined largely to vehicle seizures.

F. *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019)

- **Officers entitled to qualified immunity for warrantless entry of home and subsequent use of tear gas and destruction of property, because no clearly established law would have put them on notice that plaintiff's consent to enter was not voluntary or that the search exceeded the scope of any consent.**

In *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), plaintiff's grandmother phoned police and advised them that plaintiff's boyfriend, Salinas, a known gang member with a history of violence and firearms theft, was at plaintiff's house, suicidal, and threatening plaintiff with a BB gun. Officers already had a felony warrant for Salinas's arrest, and arrived at plaintiff's house to execute the warrant. Officers called plaintiff's cell phone several times, but received no answer. They called plaintiff's grandmother, who repeated the threats made by Salinas, but noted that she thought that plaintiff might have left the house.

While the officers were discussing how to proceed, Sergeant Joe Hoadley noticed plaintiff walking down the sidewalk toward her house. Hoadley and Officer Richardson approached plaintiff. Richardson asked plaintiff where Salinas was; she responded that he "might be" inside her house. Richardson followed up: "Might or yes?" He told plaintiff that Salinas had a felony arrest warrant, so if Salinas was in the house and she did not tell the police, she could "get in trouble" for harboring a felon. "Is he in there?" At that point, plaintiff told Richardson that Salinas was inside her house, even though she did not know if he was still there; she had let Salinas into the house earlier in the day to retrieve his belongings, but she left the house while he was still there. Plaintiff felt

threatened when Richardson told her that she could get in trouble if she were harboring Salinas, because plaintiff's mother had been arrested previously for harboring him.

After plaintiff told Richardson that Salinas was in the house, Richardson walked away to confer with the other officers. They discussed whether to contact the SWAT team, but plaintiff did not know that the SWAT team might become involved. Richardson returned to Plaintiff about 45 seconds later. He said: "Shaniz, let me ask you this. Do we have permission to get inside your house and apprehend him?" Plaintiff nodded affirmatively and gave Richardson the key to her front door. Plaintiff knew that her key would not open the door because the chain lock was engaged, but it is unclear whether Richardson also knew that. After handing over the key, plaintiff called a friend to pick her up, and she left in the friend's car. Hoadley then called the local prosecutor's office and reported to the on-call prosecutor that plaintiff consented to having officers enter her house to arrest a person who was subject to a felony arrest warrant. The prosecutor told Hoadley that the officers did not need to obtain a search warrant.

A SWAT team arrived at plaintiff's house late in the afternoon. They made repeated announcements telling Salinas to come out of the house, but he did not appear. After waiting about 20 minutes, members of the team used 12-gauge shotguns to inject tear gas into the house through the windows and the garage door. After deploying the tear gas, the SWAT team continued to make regular announcements directing Salinas to come out of the house, but still he did not appear. After about 90 minutes the team entered the house. They used plaintiff's key to unlock the deadbolt on the front door, but they could not enter because of the chain lock. They then moved to the back door, which they opened by reaching through the hole created earlier by shooting the tear gas through the back door's window. The SWAT team searched the entire house without finding Salinas.

Plaintiff sued the officers for violations of the Fourth Amendment, asserting that her consent to entry was not voluntary in that it was coerced based on the threat to arrest her. She also contended that even if she consented to entry, the search was unreasonable in scope and unnecessarily destructive. The district court denied the officers' motion for summary judgment based on qualified immunity, concluding that if plaintiff's version of events was taken as true, no reasonable officer would have believed that plaintiff had voluntarily consented to entry without a warrant, much less an entry conducted in such a destructive fashion.

The officers appealed, and in a 2-1 decision the Ninth Circuit reversed. The majority held that the officers were entitled to qualified immunity because no clearly established case law would have put them on notice that plaintiff's consent was ineffective, or that the manner of entry would be beyond the scope of any consent. In so holding, the majority noted that the Supreme Court has emphasized that in the Fourth Amendment context a plaintiff must identify case law involving highly analogous facts in order to overcome qualified immunity, and that here no case involving similar facts suggested there could be liability. The majority emphasized that scattered decisions by other circuits, and district courts could not "clearly establish" the law for purposes of qualified immunity in the Ninth Circuit.

West is an extremely helpful case in defending Fourth Amendment claims against police officers. The opinion emphasizes the need to stringently apply the Supreme Court's admonition that officers are entitled to qualified immunity absent specific case law involving highly analogous facts. *West* represents one of the most rigorous applications of the Supreme Court's "clearly established law" standard in the Ninth Circuit.

G. *Nicholson v. City of Los Angeles*, __F.3d.__, 2019 WL 3939352 (9th Cir. 2019)

- **Officer could be liable for improperly prolonged detention of suspects based on initial detention, but is entitled to qualified immunity for excessive force claim based on absence of clearly established law.**

In *Nicholson v. City of Los Angeles*, __F.3d__, 2019 WL 3939352 (9th Cir. 2019), plaintiffs were among a group of teenagers who would meet in an alleyway near their school to listen to and sing rap music. One of the teenagers was shot by LAPD Officer Gutierrez after Gutierrez mistook a plastic replica gun held by one of the other teenagers for an actual weapon. Gutierrez initially handcuffed several of the plaintiffs, but was separated from them as part of the investigation into the shooting. The plaintiffs were then held five hours before finally being released.

The district court denied Gutierrez's motion for summary judgment based on qualified immunity. Gutierrez appealed, and the Ninth Circuit affirmed in part and reversed in part. The court held that the trial court properly denied summary judgment on the prolonged detention claim because Gutierrez had initially taken the plaintiffs into custody and was therefore an "integral participant" in the prolonged detention, even if he was not otherwise involved in determining how long they would be detained. However, the Ninth Circuit held that Gutierrez was entitled to qualified immunity on the excessive force claim because there was no existing case law involving closely analogous facts that would have put him on notice that his conduct could potentially subject him to liability.

Nicholson is a somewhat mixed opinion. It reaffirms the Ninth Circuit's "integral participant" doctrine which expands potential civil-rights liability to almost every law enforcement officer who is involved in a particular incident. On the other hand, it strongly reaffirms the Supreme Court's command that in the absence of an obvious

constitutional violation, officers are entitled to qualified immunity in excessive force cases unless the plaintiff can cite to existing case law involving highly analogous facts.

II. FIRST AMENDMENT

A. *American Legion v. American Humanist Assn.*, __ U.S. __, 139 S. Ct. 2067 (2019)

- **Longstanding commemorative cross on public land does not violate Establishment Clause.**

American Legion v. American Humanist Assn., __ U.S. __, 139 S. Ct. 2067 (2019) arose from a challenge to a large commemorative cross on a public traffic median. The cross had been erected to honor local soldiers who died during World War I. The district court dismissed the action, but the Fourth Circuit reversed, concluding that the cross violated the Establishment Clause, applying the Supreme Court's test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Supreme Court reversed. Writing for the plurality, Justice Alito noted that notwithstanding the fact that the cross is the preeminent symbol of Christianity, the memorial had been erected for largely secular purposes, i.e., to honor local soldiers who had died in World War I, and that over the decades it had become an important historical memorial. Viewed in context, it did not convey any endorsement of religion, and hence did not violate the Establishment Clause.

The decision is notable, in that it extends the approach first taken by the Court in *Van Orden v. Perry*, 545 U.S. 677 (2005)—a Ten Commandments case—in evaluating religious symbols on public property based on how the symbol would be perceived by a reasonable observer. It also suggests that in some circumstances a decision to remove religious imagery from public property might constitute hostility to religion, and so violate the Establishment Clause. The latter point may have some impact in California,

where the Ninth Circuit has repeatedly held that such memorial crosses on public land violate the "No Aid" provision of the California Constitution. An interpretation of the California Constitution that suggests it requires removal of religious imagery from an otherwise secular memorial would seem to run afoul of *American Legion*.

B. *Perez v. City of Roseville*, 926 F.3d 511 (9th Cir. 2019)

- **Police officials entitled to qualified immunity for terminating probationary officer for engaging in extramarital affair with another officer while on duty.**

In *Perez v. City of Roseville*, 926 F.3d 511 (9th Cir. 2019), the plaintiff was fired from her position as a probationary police officer when it was determined that she had engaged in an extramarital affair with a fellow officer, and had engaged in inappropriate private cell phone use while on duty in connection with the affair. The plaintiff sued, asserting that the termination violated her right to intimate association under the First Amendment. The district court granted summary judgment to the defendants, and the Ninth Circuit initially reversed in a 2-1 decision, holding that plaintiff had asserted a valid claim under the First Amendment and that defendants were not entitled to qualified immunity.

However, shortly after the opinion was issued, and before disposition of any petition for rehearing, the author of the opinion, Judge Reinhardt, died. Judge Ikuta was selected to replace him on the panel, and then authored a 2-1 opinion affirming the judgment for defendants. Judge Ikuta concluded that the defendants were entitled to qualified immunity, because no clearly established law would have put defendants on notice that plaintiff's termination would constitute a First Amendment violation. Plaintiff was terminated based on her on duty conduct, i.e., the personal cell phone use in connection with the affair.

Perez is helpful in that it clarifies that otherwise protected conduct might still be the subject of discipline insofar as it impacts on duty performance.

C. *Tschida v. Motl,* 924 F.3d 1297 (9th Cir. 2019)

- **Regulation barring disclosure of ethics complaint against unelected official or employee is overbroad and violates First Amendment.**

In *Tschida v. Motl*, 924 F.3d 1297 (9th Cir. 2019), a state official challenged a state statute that barred disclosure of an ethics complaint against an unelected official or employee until a state regulatory disposed of the complaint. The statute did not prohibit a complainant from discussing the complaint's contents, nor limit disclosure once the complaint was resolved.

The Ninth Circuit found that the statute violated the First Amendment in that it was overbroad. The court acknowledged that unelected official and public employees had a right to privacy with respect to some highly personal information such as medical conditions or social security numbers, However, the state statute prohibited disclosure of a complaint regardless of the nature of the information contained in the complaint and therefore improperly limited speech in violation of the First Amendment.

Tschida is a reminder that any regulation of speech must be strictly scrutinized to avoid a First Amendment challenge. Many local entities have regulations limiting disclosure of certain personnel complaints or related matters, and as a result, are at least potentially subject to a First Amendment claim unless the provision is very narrowly drawn and directly advances an important public interest.

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

- **Ordinances imposing dress code on employees at quick-service facilities and prohibiting lewd conduct are neither vague nor do they burden conduct protected by the First Amendment.**

Edge v. City of Everett, 929 F.3d 657 (9th Cir. 2019), arose from a challenge to ordinances enacted by the City of Everett to stringently regulate scantily clad baristas at quick-service coffee stands, which the City contended were encouraging prostitution and other sex crimes. Various baristas and coffee stands filed suit, asserting that the ordinance prohibiting lewd conduct was vague in that it was not clear precisely what was prohibited in terms of display of body parts, and that the dress code ordinance burdened their right of free expression under the First Amendment. The district court agreed and granted a preliminary injunction barring enforcement of the ordinances.

The Ninth Circuit reversed. It held that the ordinance barring lewd conduct was sufficiently specific in its description of what acts constituted improper conduct so that a person of reasonable intelligence could understand what conduct might subject them to criminal penalties. The Court also held that the statute did not burden any expressive conduct under the First Amendment, as merely being scantily clad in order to solicit tips at a commercial establishment selling coffee was not related to any ostensible message of "female empowerment."

Edge is a very helpful case with respect to providing clear guidelines on regulation of adult businesses. It has an excellent discussion of the vagueness doctrine that provides public entities with substantial leeway in attempting to regulate lewd conduct, and provides a straightforward analysis of precisely what sort of expressive conduct is subject to First Amendment protection.

E. *CTIA - The Wireless Association v. City of Berkeley, California,* 928 F.3d 832 (9th Cir. 2019)

- **Ordinance compelling vendors to provide truthful, uncontroversial statements concerning a commercial product does not violate First Amendment.**

In *CTIA - The Wireless Association v. City of Berkeley, California*, 928 F.3d 832 (9th Cir. 2019), a cell phone trade organization filed suit to enjoin an ordinance that required cell phone vendors to provide warnings that carrying a cell phone in a particular manner might expose purchasers to radiation in excess of levels deemed safe by the FCC. The district court denied a preliminary injunction, and the Ninth Circuit affirmed the judgment, however the Supreme Court subsequently granted certiorari and remanded for reconsideration in light of its decision in *National Institute of Family and Life Advocates v. Becerra*, __ U.S. __, 138 S. Ct. 2361 (2018) ("*NIFLA*"). In *NIFLA*, the Court had struck down a statute requiring pregnancy counseling centers to display information concerning the availability of other pregnancy counseling options, including abortion, on the ground that compelled disclosure of controversial information violated the First Amendment.

On remand, the Ninth Circuit again affirmed the judgment, holding that the ordinance did not violate the First Amendment. The court noted that in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the Supreme Court had held that the government could compel truthful disclosure in commercial speech so long as the disclosure was reasonably related to a substantial government interest. In *Zauderer*, the public interest was prevention of deceptive advertising, but the Ninth Circuit held that compelled speech could be justified by other governmental interests, such as public safety, as was the case here. In addition, there was nothing controversial about the information that was subject to disclosure, as it merely

reflected federal regulations. The court also concluded that the ordinance was not unduly burdensome, in that it merely required display of a letter size poster containing the information, or providing customers with a 5 inch by 8 inch handout with the information.

CTIA provides a helpful road map for local entities seeking to require vendors of potentially hazardous products or service to disclose public safety information to consumers, without running afoul of the First Amendment.

F. *Capp v. City of San Diego*, __F.3d __, 2019 WL 4123515 (9th Cir. 2019)

- ***Nieves* supports First Amendment retaliation claim against social worker for urging parent to seek sole custody and absence of similar cases does not entitle social worker to qualified immunity.**

In *Capp v. County of San Diego,* __F.3d__, 2019 WL 4123515 (9th Cir. 2019) the plaintiff sued various social workers and a county, asserting that the social workers had urged his wife to seek sole custody of their children and had him listed on a child abuse reporting data base in retaliation for his complaining about the social workers interviewing his children without his consent and treating him in a rude manner. Plaintiff also asserted that interviewing the children violated the Fourth Amendment, and that listing him in the data base violated his rights to due process. The district court dismissed the action with prejudice, concluding that plaintiff had failed to allege sufficient facts to state any claims, and that in any event the defendants were entitled to qualified immunity, because the law was not clearly established as to any of his claims.

The Ninth Circuit reversed as to the First Amendment retaliation claim. Applying the Supreme Court's recent decision in *Nieves,* the court held that plaintiff adequately pled that the allegations were groundless, and that even if there was some basis for the

social workers to urge his wife to seek sole custody, to the extent plaintiff's protected conduct was a factor in defendants' decision, then he was entitled to proceed on his claim. The court also held that the defendants were not entitled to qualified immunity, because it was clearly established that the First Amendment bars public employees from taking retaliatory action in response to protected activity. The court emphasized that there was no need to identify a case involving similar acts of retaliation, because the conduct – retaliation –was clearly wrongful, regardless of its specific form.

Capp is troubling in several respects. First, it applies *Nieves*'s exception very broadly. Although the court acknowledges there might have been the equivalent of probable cause for the investigation, it concludes that the plaintiff sufficiently pled differential treatment. Second, the court's reliance on the general proposition that retaliation is barred by the First Amendment, runs afoul of recent Supreme Court authority requiring application of qualified immunity in the absence of a cases involving highly similar facts. Finally, the court's reaffirmation of a general causation standard for retaliation cases – retaliatory motive need only be a factor, not the only factor in order to state a claim – makes such claims much easier to assert in the face of even valid actions by public employees.

III. MUNICIPAL TORT LIABILITY

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

- **Government Code immunities are not jurisdictional and may be waived by failure to raise them by way of affirmative defense.**

In *Quigley v. Garden Valley Fire Protection District*, 7 Cal.5th 798 (2019), plaintiff, a U.S. Forrest Service firefighter, was run over and injured while sleeping at a fire camp. She sued the defendant public entity for dangerous condition of public property. Following the plaintiff's opening statement at trial, defendant moved for

nonsuit, for the first time arguing that suit was barred based on the immunity for failure to maintain firefighting equipment under Government Code section 850.4. The trial court granted the motion, noting that governmental immunity was jurisdictional and could not be waived. The Court of Appeal affirmed, and the Supreme Court granted review.

The Supreme Court reversed. The Court held that the immunities of the Government Code are not jurisdictional, in that they do not deprive a court of the power to adjudicate a case, and are merely affirmative defenses to liability that can be waived if not properly preserved. In so holding, the Court expressly disapproved more that 30 years of case law to the contrary. The Court remanded to the Court of Appeal to determine if the defense had been preserved via an affirmative defense.

Quigley represents a sea change in California law concerning governmental immunity. It makes it essential that all relevant governmental immunities be specifically pleaded as an affirmative defense in order to avoid a claim of waiver at some later date.

B. *La Mere v. Los Angeles Unified School District*, 35 Cal. App. 5th 237 (2019)

- **Timely claim must be submitted to a public entity, or claim relief obtained, even in the face of actual knowledge of the factual and legal basis for the suit.**

In *La Mere v. Los Angeles Unified School District*, 35 Cal.App.5th 237 (2019), plaintiff asserted various causes of action against a school district arising from alleged retaliation for engaging in protected activity as an employee. The trial court ultimately sustained a demurrer without leave to amend as to the Second Amended Complaint and dismissed the action, finding that plaintiff had failed to alleged facts sufficient to establish liability, and concluding that a recently added cause of action for violation of

the Labor Code was barred because plaintiff was unable to allege compliance with the claims statue, Government Code section 911.2.

On appeal, plaintiff asserted that since the lawsuit had been underway for more than a year before she added the Labor Code cause of action, the defendant was well aware of the factual and legal basis of any claim and hence compliance with the claims statute as to this newly added cause of action was unnecessary. The Court of Appeal disagreed and affirmed the judgment. The court noted that compliance with the claims statute was a prerequisite to bringing a tort suit against a public entity, and that it is well established that compliance with the claims statue was required even if a public entity is already aware of the potential claim. The court reaffirmed that the filing of a complaint is not the equivalent of filing a claim.

La Mere is a very helpful case given the opinion's reaffirmation that the claim presentation requirements must be followed, even if a public entity is involved in ongoing litigation that might otherwise put it on notice of a potential ground for liability.

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

- **Height differential in sidewalk ranging from 9/16 of an inch to one inch constituted "trivial defect" under Government Code section 831.2, and could not support liability for dangerous condition on public property.**

The plaintiff in *Huckey v. City of Temecula*, 37 Cal.App.5th 1092 (2019) tripped and fell on a city sidewalk. He sued the city, alleging the sidewalk was in a dangerous condition because the sidewalk had a height differential ranging from 9/16 of an inch to one inch. The trial court granted summary judgment to the city, concluding that the sidewalk height differential constituted a "trivial defect" under Government code section

831.2 and hence could not support a claim for liability for dangerous condition on public property. Plaintiff appealed.

The Court of Appeal affirmed, noting that the minor height differential in the sidewalk coupled with the absence of any similar accidents involving the sidewalk supported the conclusion that the height differential was a "trivial defect" under section 831.2 and precluded liability for dangerous condition. The court rejected the contention that alleged lack of compliance with ADA standards had any relevance to whether the sidewalk height differential was a "trivial defect" for purposes of dangerous condition liability.

Given how ubiquitous tort claims arising from trip and falls on sidewalks are, *Huckey* is a very helpful case. The court's rejection of ADA standards as defeating a defense of "trivial defect" cuts off a potential end run around the statute. In addition, the case provides helpful guidance on how to successfully assert a "trivial defect" argument, including the emphasis on the absence of prior accidents as strongly indicating that any defect is trivial.

D. *Lee v. Department of Parks and Recreation*, 38 Cal.App.5th 206 (2019)

- **Stairway leading to trail constitutes integral part of trail for purposes of immunity under Government Code section 831.4.**

In *Lee v. Department of Parks and Recreation*, 38 Cal. App.5th 206 (2019) the plaintiff was injured when she slipped and fell on a stairway connecting a campground to a parking lot. The trial court granted the State's motion for summary judgment, finding that the State was immune from liability under Government Code section 831.4, which shields public entities from liability arising from the condition of a trail. The trial court also granted the State's motion for defense cost under Code of Civil Procedure section 1038.

The Court of Appeal affirmed judgment for the State on liability, but reversed the order granting defense costs. The Court held that the stairway constituted an integral part of the trail, and hence fell within the immunity as it was a major access point for the trail. In addition, the nature of the stairway – crudely built with natural materials – suggested that it was part of the trail system. The court found that defense costs were not warranted, in that no existing case law had held that such stairways could fall within the trail immunity and hence plaintiff's lawsuit was not unreasonable as a matter of law.

Lee is a very helpful case in that it provides an excellent analysis of the factors pertinent to determining whether a particular path or roadway falls within the trail immunity. It also gives the statute a very broad reading, which will be helpful in defending actions arising from injuries on recreational property.

E. *Fuller v. Department of Transportation*, 2019 WL 3933563 (2019)

- **Liability for dangerous condition under Government Code section 835 requires a finding that the condition created a foreseeable risk of the kind of injury that occurred.**

In *Fuller v. Department of Transportation*, 2019 WL 3933563 (2019), plaintiff was injured, and his wife killed, in a head-on collision when a driver crossed over the center line of the highway. Plaintiff asserted two dangerous conditions caused the accident – inadequate sight lines, and the presence of a T-intersection leading from a vista point. The jury found that the property was in a dangerous condition, but also found that the dangerous condition did not create a foreseeable risk that this kind of incident would occur. The trial court entered judgment against the plaintiff.

On appeal, plaintiff argued that the jury verdict was fatally inconsistent in that having found that the property was in a dangerous condition, the jury necessarily had to find that this sort of roadway accident was foreseeable. The Court of Appeal rejected the

contention and affirmed the judgment. The court emphasized that under Government Code section 835 mere general foreseeability is insufficient – a plaintiff must establish that the condition created the risk of the sort of accident that actually occurred. The court noted that the jury could have concluded that the property was in a dangerous condition, but that the nature of the T intersection and the inadequate sight line had nothing to do with the accident, which was caused by a reckless driver who crossed over the center line.

Fuller is an excellent case for public entities. It provides a very clear discussion on causation in dangerous condition cases, and emphasizes that Government Code section 835's standards must be rigorously enforced.

F. *Wilson v. County of San Joaquin,* 38 Cal.App.5th 1 (2019)

- **Statutory immunity afforded to a public entity receiving "fire protection" or "firefighting service" from another public entity under Government Code section 850.6 does not extend to conduct by firefighters unrelated to protecting public from, and fighting, fires.**

In *Wilson v. County of San Joaquin*, 38 Cal.App.5th 1 (2019) plaintiffs brought suit against the County of San Joaquin, asserting that their infant son died as a result of negligent medical care by City of Stockton Fire Department personnel, who had provided service in the County pursuant to a mutual aid agreement. The trial court granted summary judgment to the County, finding that suit was barred by Government Code section 850.6 which provides public entities receiving "fire protection or firefighting service" from another public entity with immunity from liability "for any act or omission of the public entity providing the service or for any act or omission of an employee of the public entity providing the service."

The Court of Appeal reversed. The court held that section 850.6 only applies to fire fighting activities, and not to emergency medical services rendered by Fire Department personnel.

Wilson is somewhat troubling, in that it expands potential liability arising from mutual aid agreements. As the court notes, in the face of such expanded liability, public entities might want to modify existing mutual aid agreements to provide for express indemnity and defense. In addition, public entities might want to seek legislative action to broaden the scope of immunity in section 850.6.

Notes:_____

Is Your City's Website ADA Compliant? What You Should Know!

Thursday, October 17, 2019 General Session; 2:45 – 4:00 p.m.

Stephanie Gutierrez, Associate, Burke, Williams & Sorensen, LLP
Traci Park, Partner, Burke, Williams & Sorensen, LLP

BURKE, WILLIAMS & SORENSEN, LLP

Is your City's Website ADA Compliant? What You Should Know

League of California Cities Annual Conference & Expo October 16-18, 2019

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I. OVERVIEW

The Americans with Disability Act ("ADA") has been law since 1990. This federal statute prohibits discrimination against disabled individuals in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.

Title II of the ADA applies to state and local government, and prohibits discrimination by public entities against disabled individuals in all programs, activities, and services. Among other things, Title II requires public entities to reasonably modify its policies, practices, or procedures to avoid discrimination, and mandates that public entities ensure effective communication with individuals with speech, hearing, vision and other disabilities. California state law has similar requirements.

While most public entities offer a broad range of auxiliary aids and services, such as large print materials, assistive listening devices, or sign language interpreters, one area where many organizations fall short is with electronic and information technology. The internet age has made the provision of information about municipal programs, activities, and services such as applying for permits, paying bills, and renewing licenses online standard practice for many public agencies. However, little attention has been given to ensuring that such electronic information, access, and services are equally accessible to individuals with disabilities.

Poorly designed websites and mobile-based applications can create barriers for people with disabilities, just as poorly designed buildings prevent some people with disabilities from entering. Access problems often occur because website designers mistakenly assume that everyone sees and accesses a webpage in the same way. Many people with disabilities use assistive technology, such as screen readers, text enlargement software, or programs that enable people to control a computer with their voice instead of a mouse or keyboard.

Unfortunately, the lack of regulatory guidance on exactly what needs to be done to ensure website and mobile applications are ADA-compliant has been stalled. In 2010, the Justice Department began to draft formal regulations for websites to meet ADA goals. However, in 2017, the DOJ announced that it was withdrawing its rulemaking process in alignment with the Trump administration's rollback of federal regulations.[1] This lack of guidance has fueled the proliferation of ADA web accessibility litigation.

II. ADA WEB ACCESSIBILITY LITIGATION IS ON THE RISE

When Congress passed the ADA in 1990, the Internet was in its infancy. However, Congress intended that the ADA "…keep pace with the rapidly changing technology of the times."[2] Congress acknowledged that technological advances may "…require public accommodations

[1] https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced
[2] H.R. Rep. No. 101-485, pt. 2, at 108.

to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities."[3]

An emerging legal issue is whether and to what extent the ADA protections extend to the digital world. In the last couple of years, thousands of lawsuits against both public and private entities have been filed in state and federal court. Of those, at least 4,249 arose in California federal courts in 2018 alone.[4] While the Department of Justice ("DOJ") has consistently maintained that the ADA applies to websites, federal and state courts are now following suit.

Among the common issues being raised in the trending ADA web accessibility litigation are websites and applications not compatible with screen readers, lack of refreshable Braille displays, lack of alternative text for images, graphics, and links, lack of closed captioning for video content, and lack of resizable text. The vast majority of these cases have resulted in settlements mandating that the business or government website be updated and made accessible to disabled users. The settlements specifically require compliance with Web Content Accessibility Guidelines (WCAG). These guidelines are intended to provide "a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally."[5]

Numerous public entities across the nation have entered into settlement agreements due to alleged violations of the ADA. For example, in 2015, as part of a settlement between Merced County and the DOJ, the County agreed to remove any barriers preventing full access to its website. The United States, pursuant to 28 C.F.R. Part 35, Subpart F, reviewed Merced County's programs, activities, services and facilities to ensure compliance with Title II of the ADA. The United States "concluded that qualified individuals with disabilities are, by reason of such disabilities, excluded from participation in or are denied the benefits of many of Merced County's programs, services, or activities." [6] Through this compliance review, the United States required Merced County to "…establish, implement and post online a policy that their web pages be accessible, create a process for implementation and ensure that all new and modified web pages are accessible."[7] The settlement further required the County to:

> "Retain an independent consultant, approved by the United States, who is knowledgeable about accessible website development, title II of the ADA, and WCAG 2.0 to evaluate Merced County's website and any proposed online services for compliance with the ADA and, at minimum, WCAG 2.0 Level A and Level AA Success Criteria and other Conformance Requirements (WCAG 2.0 AA), and who shall be responsible for the annual website accessibility evaluation. Merced County will bear all costs and expenses of retaining and utilizing this independent consultant, including the costs and expenses of any staff. Merced

[3] *Id.*
[4] Minh N. Vu, Kristina M. Launey & Susan Ryan, Number of ADA Title III Lawsuits Filed in 2018 Tops 10,000 ADA Title III (2019), https://www.adatitleiii.com/2019/01/number-of-ada-title-iii-lawsuits-filed-in-2018-tops-10000/ (last visited Jul 24, 2019).
[5] w3c_wai, Web Content Accessibility Guidelines (WCAG) Overview Web Accessibility Initiative (WAI), https://www.w3.org/WAI/standards-guidelines/wcag/ (last visited Jul 24, 2019).
[6] Department of Justice Case No. 204 11E 383
[7] *Id.*

> County will compensate this independent consultant without regard to the outcome."[8]

In March 2019, Flagler County in Florida settled an ADA web accessibility lawsuit brought by visually impaired individuals who were unable to access PDF files of agendas and budgets posted on the County website. According to the County's Communications Director, the County website contained more than 7,500 informational documents posted in PDF format that must be reformatted and republished to make the website ADA compliant.

As a precautionary measure, some cities have even stopped broadcasting city meetings on-line until they can acquire the equipment to add closed-captioning for deaf or hearing impaired viewers.

Many state and private colleges have been the targets of ADA web accessibility actions. For example, the University of California, Berkeley, was investigated by the DOJ for failing to ensure its free audio and video content available online to the public through its YouTube channel, iTunes U platform, and its Massive Open Online Courses ("MOOCs") was accessible to individuals with hearing, visual, or manual disabilities.[9] The DOJ's Letter of Findings concluded, "Based on our findings of accessibility barriers, we conclude that UC Berkeley is in violation of title II because significant portions of its online content are not provided in an accessible manner when necessary to ensure effective communication with individuals with hearing, vision or manual disabilities. In addition, UC Berkeley's administrative methods have not ensured that individuals with disabilities have an equal opportunity to use UC Berkeley's online content. While the University of California's Information Technology Accessibility Policy adopts the WCAG 2.0 AA technical standard, which provides clear parameters for ensuring online content is accessible to individuals with disabilities, UC Berkeley has not ensured compliance with its policy…Finally, UC Berkeley has not established that making its online content accessible would result in a fundamental alteration or undue administrative and financial burdens.[10] Among other remedial measures, UC Berkeley was ordered to develop a system to monitor compliance with the technical standards embodied in its policies, develop and implement procedures to ensure that its on-line content is accessible to individuals with vision, hearing, and manual disabilities, develop mechanisms and implement procedures for UC Berkeley to solicit, receive and respond to feedback regarding any barriers to access to the online content, and to Pay compensatory damages to aggrieved individuals for injuries caused by UC Berkeley's failure to comply with title II.

Similarly, in *Aleeha Dudley and United States v. Miami University, et al.*[11], a blind plaintiff filed an action against Miami University alleging that Miami University uses technology in its programs, services, and activities that are inaccessible to individuals with disabilities in violation of Title II of the ADA. The case was resolved in 2016 by consent decree, under which, Miami University would, within six months, make significant improvements to ensure that all forms of technology are accessible to individuals with disabilities. The Court also identified individuals to whom Miami University will provide a monetary payment of $25,000.00.

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[8] *Id.*
[9] Department of Justice Case No. 204-11-309
[10] *Id.*
[11] 2016 WL 8814603 (S.D.Ohio)

Notably, the Ninth Circuit on January 15, 2019 re-affirmed this premise in *Robles v. Domino's Pizza, LLC.*[12] Although the suit was brought forth as a violation under Title III of the ADA, the same considerations have been made in settlement agreements with public entities. Robles, a visually impaired plaintiff, accesses the internet using screen reading software. On multiple occasions, he had attempted to order a customized pizza online from a nearby Domino's. Unable to do so, Robles filed suit seeking damages and injunctive relief. The Ninth Circuit held that "the ADA mandates that places of public accommodation, like Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind."[13] The Court furthermore found, "[t]his requirement applies to Domino's website and app, even though customers predominantly access them away from the physical restaurant: 'The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute.'"[14] The Court clarified that the ADA equally applies to Domino's app: "…Domino's website and app facilitate access to the goods and services of a place of public accommodation – Domino's physical restaurants. They are two of the primary (and heavily advertised) means of ordering Domino's products to be picked up or delivered from Domino's restaurants." Although the Ninth Circuit did not expressly outline what Domino's must do to satisfy these requirements, the Court did note that ADA accommodations must be "effective." On June 13, 2019, Domino's filed a petition asking the U.S. Supreme Court to review and reverse this decision.

Most recently, on September 3, 2019, the California Court of Appeal, Second Appellate District, Division Eight, published an opinion that affirmed the premise that the ADA mandates restaurant websites be accessible to customers using screen reader software. In *Thurston v. Midvale Corporation*[15], a blind plaintiff brought a suit against Midvale Corporation alleging violation of the Unruh Civil Rights Act[16] and the ADA, stating she could not access their Whisper Lounge restaurant website with her screen reader software. Unlike *Robles*, where the Ninth Circuit did not expressly outline what Domino's must do, the Court of Appeal expressly mandated compliance with WCAG 2.0 standards stating, "…the trial court determined appellant [Midvale Corporation] could not or would not redesign its website to comply with ADA standards without specific guidance, and so it selected what it believed to be a widely used technical standard to provide guidance."[17] Citing *Robles*, the Court further confirmed its ability to mandate compliance with WCAG 2.0 standards stating, "A court 'can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA.'"

Here in California, state and federal courts have seen a significant uptick in the number of ADA web accessibility cases filed in recent months, most seeking injunctive relief, an order directing the defendant to bring its website into full compliance with the ADA, and attorney's fees and costs. Although an individual may not be awarded punitive damages in a Title II action,

[12] 2019 WL 190134
[13] *Robles v. Domino's Pizza, LLC,* 2019 WL 190134 , *See also* 28 C.F.R. § 36.303
[14] *Robles v. Domino's Pizza, LLC,* 2019 WL 190134 citing *Nat'l Fed'n of the Blind v. Target Corp.,* 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)
[15] 2019 WL 4166620
[16] Civ. Code § 51 et seq.
[17] *Thurston v. Midvale Corporation, Supra.*

compensatory damages, injunctive relief, attorney fees, and reimbursement of costs for violation of the ADA under 42 U.S.C. § 12133 are available to a plaintiff who prevails on an ADA claim.

The Governor has also signed into law Assembly Bill 434 entitled "State Web Accessibility: Standard and Reports." The Assembly Privacy and Consumer Protection Committee stated in its bill analysis, "[A]ccording to a 2014 Bureau of State Audits (BSA) report on state government Internet Web site accessibility (2014-131), BSA found that the state websites they reviewed were 'not fully accessible.' 47% of Californians report using the internet to access government services, yet despite the high levels of usage, BSA found violations of applicable accessibility standards on each department's website."[18] As a result, AB 434 requires the director and chief information officer (CIO) of each state agency or state entity to post a signed certification on the front page of the state agency's Internet Web site that it is in compliance with WCAG 2.0 accessibility standards before July 1, 2019.[19] Although this new law only applies to state agencies, laws requiring the same of local governments are likely to be established in the future, and compliance with AB 434 by local governments would certainly be a best practice to avoid, or at least defend against, ADA web accessibility lawsuits.

III. COMMON PROBLEMS AND SOLUTIONS TO WEBSITE ACCESSIBILITY

There are a number of basic web-based hurdles that can lead to ADA claims. For example, vision-impaired people may use different technologies to access information displayed on a computer screen. One common tool is a screen reader, which speaks the visible text, but this technology cannot read or interpret visual data, such as images, graphics, or logos, even if words appear in those items. Thus, a photo of the mayor on a city's website would remain inaccessible to a visually impaired user using a screen reader. A relatively simple solution is to add a text caption, such as "Photograph of Mayor Smith greeting children at the library." For more complex images, such as a map of city library locations, a text equivalent could simply provide the addresses.

Another common problem is documents posted online in PDF format. Like photos, a PDF is an image based format that cannot be viewed by a text reader. To address this barrier, documents should also be posted in HTML or RTF format, which is more compatible with assistive technologies.

Similarly, videos and other multimedia content can present access problems for hearing or vision impaired users. To address this, consider incorporating features such as audio descriptions of images and text captions synchronized to the video images.

Some visually-impaired users may only be able to see web content if it appears in certain colors, and others cannot see it at all if it is too small. Users should be able to manipulate the color and

[18] California Legislative Information, Bill Text - AB-434 State Web accessibility: standard and reports., http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB434 (last visited Jul 24, 2019).
[19] WCAG 2.0, a set of guidelines established by the World Wide Web Consortium, defines how to make web content more accessible to people with disabilities. Section 508 of the federal Rehabilitation Act incorporates these standards for local government websites if the government agency receives any federal funding.

font settings in their web browsers or operating systems to make pages readable. Avoid designing your agency's website so that these features cannot be adjusted by an individual user.

When navigation links are used, people who use a screen reader must listen to all the links before proceeding. A "skip navigation" link at the top of the webpage allows people who use screen readers to ignore navigation links and skip directly to webpage content.

An agency with an inaccessible website may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line. These alternatives, however, are unlikely to provide an equal degree of access in terms of hours of operation and the range of options and programs available.

III. WHAT CAN BE DONE TO MEET ADA OBLIGATIONS?

There are several things public agencies can do to ensure they are meeting their obligations under the ADA. First, establish, implement, and post a policy on your web pages indicating that it will be accessible to disabled users, and then create a process for implementation. Second, work with IT professionals to ensure your web-based content and subsequent updates are accessible to disabled users. Third, train in-house staff and contractors responsible for webpage content and development on compliance issues. Fourth, provide a way for visitors to request accessible information or services by posting a telephone number or email address on your home page and ensure a quick response to users with disabilities who are trying to obtain information or services in this way. Finally, ensure that there are alternative ways for people with disabilities to access the information and services that are provided on your website. Remember, some people may not have, or be able to use, a computer at all.

For additional resources, please see:

ADA Best Practices Tool Kit for State and Local Governments
https://www.ada.gov/pcatoolkit/chap5toolkit.htm

Accessibility of State and Local Government Websites to People with Disabilities
https://www.ada.gov/websites2.htm

Web Content Accessibility Guidelines
https://www.w3.org/WAI/standards-guidelines/wcag/

Land Use and CEQA Litigation Update

Thursday, October 17, 2019 General Session; 4:15 – 5:30 p.m.

Bill Ihrke, City Attorney, La Quinta, Partner, Rutan & Tucker LLP

Notes:_____

LAND USE AND CEQA LITIGATION UPDATE
OCTOBER 2019

RUTAN & TUCKER, LLP
Bill Ihrke, Partner, Costa Mesa Office

LEAGUE OF CALIFORNIA CITIES
2019 Annual Conference
Long Beach, CA

October 17, 2019
*Cases Updated Through September 12, 2019

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LAND USE CASES

Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High School District
(Apr. 26, 2019) 34 Cal.App.5th 775

The issue in this case is whether a school district must analyze different development "sub-types" when performing a nexus study and imposing a school impact fee that is applicable to residential development generally. The court held a school district does not need to separately analyze development sub-types or individual projects when analyzing and imposing a generally applicable school impact fee.

The background and procedural history of the case are as follows: Tanimura & Antle Fresh Foods ("Tanimura") developed a 100-unit agricultural employee housing complex ("Project") located within the boundaries of the Salinas Union High School District ("District") to accommodate some of the company's seasonal farmworkers. The Project was designed for "agricultural employees only, without dependents." When the District adopted a school impact fee applicable to "new residential construction in its service area," Tanimura paid its fee in protest. They argued that the fee was not reasonably related to the need for school facilities, citing the Project's lack of school-aged children. Tanimura filed a petition for writ of mandate seeking the return of the fee paid, which was granted. The District appealed.

Under applicable law, Education Code section 17620, a school district is authorized to levy fees against new residential construction within the boundaries of the district to fund the construction or reconstruction of school facilities. The fees must be limited to the school facilities identified in a needs analysis as being attributable to projected enrollment growth from the construction of new residential units. (Gov. Code, § 65995.5(f).) The Mitigation Fee Act (Gov. Code § 66000 *et seq*., "MFA") requires a local agency implementing a fee to establish a reasonable relationship between the fee's use, the need for the public facility, and "the type of development project on which the fee is imposed." (Gov. Code, § 66001(a).)

Here, the District argued that the Project's designation as being only for employees without children does not qualify it as a separate type of development. The court of appeal agreed, reasoning that the MFA's definitions of development project and residential construction are extremely broad and do not contain exceptions for this type of use. As such, the court was not convinced that the Project's intended use qualified it as a separate type of construction, stating "the adult-only restriction on the employee housing complex does not alter or expand the range of housing defined as 'residential.'"

The District also argued that statutory language does not require project-specific reasonable relationship findings for the imposition of a districtwide school impact fee. Again, the court of appeal agreed. The court explained that in quasi-legislative actions, as was the case here, the relationship between the fee's use and need, and the "type" of development project clearly applies to decisions to impose fees on a class of development projects rather than particular ones. It found that the statutory language defeats Tanimura's argument that some nexus must be found between the fee and its specific project. Therefore, the court held that the District was not

required to anticipate and analyze agricultural employee-only housing as a distinct subtype of residential housing when assessing the fee.

* * *

Boatworks, LLC. v. County of Alameda
(May 15, 2019) 35 Cal.App.5th 290

This case decided that, when imposing Development Impact Fees ("DIFs"), local agencies must ensure that nexus studies do not rely solely on infrastructure which already exists; rather, the study must show the DIFs to be directly imposed to offset the burden imposed by the future development. Specifically, when imposing DIFs for the purpose of park facilities, the local agency must ensure that the imposed fees are calculated to offset the *actual costs* of offsetting the burdens caused by the new development. Moreover, where a petitioner prevails in challenging a fee ordinance on its face, as was the case here, the petitioner could be entitled to attorney's fees.

In 2014, the City of Alameda ("City") adopted an ordinance establishing fees that would be imposed as a condition for approving future development. Petitioner presented a facial challenge to the ordinance under Code of Civil Procedure section 1085, alleging that the "park facility" fees lacked a reasonable relationship to the burden of future development and hence violated the Mitigation Fee Act (Gov. Code § 66000 *et seq*., "MFA"). The trial court agreed and ordered the City to specifically excise and vacate the portions of the ordinance authorizing the fees. The City and Petitioner cross-appealed. The court of appeal affirmed in part and reversed in part.

First, the court of appeal found that the City could not impose a fee for the need to purchase 19.82 acres of new parkland where the City already owned the vast majority of the 19.82 acres of parkland at issue. In its nexus study, the City included those 19.82 acres of parkland at a cost of $28.5 million of the overall cost of $39 million as a basis on which to impose its fee. The court found this was inappropriate, as the City acknowledged that it would never have to pay that acquisition cost, because the City already owned the land. The court decided, "A calculation that is based on the cost of buying new land – untethered from whether the City actually plans to do so – is not reasonably related to the burden posed by anticipated new development."

Second, the petitioner challenged the inclusion of portions of open space that were not open to the public in their inventory of current parks, which would increase the calculated DIF amount. Relying on the nexus study, the court of appeal found that the open space could not be "current parks" for the purposes of justifying a fee that would be used to actually build those parks.

Third, relying on evidence in the record that demonstrated certain portions of "Open Space" as designated in the City's General Plan were in fact developed, the court of appeal concluded the City did not err in considering those portions of land as "parks" for the nexus study.

Fourth, in rejecting one of petitioner's arguments, the court of appeal interpreted Government Code section 66001 in the MFA as not precluding any fee in this case, including fees that may result in some rehabilitation, provided that the fee imposed is based on a "reasonable relationship" to the "burden of new development." The court rejected any categorical argument that no fees can be applied to address existing problems with local agencies' park facilities.

When addressing the remedy, the court of appeal ruled that the trial court lacked the authority to compel the City to perform a legislative act to vacate and excise portions of the ordinance in a traditional mandamus action, noting that such relief would violate the concept of separation of powers. Thus, the trial court was directed to issue a judgment declaring the parks and recreations fee as imposed invalid and unenforceable, but the City was allowed to impose any fees that would be otherwise lawful.

As a cautionary note for local agencies, the trial court in this case awarded the petitioner over $500,000.00 in attorney's fees under the State's private attorney general statue (Code Civ. Proc. § 1021.5). Recognizing that its decision only reversed a minor substantive issue on which the fees were based, the court of appeal found that the fees award was reasonable.

In summary, when imposing fees under the MFA, local agencies must be careful to ensure that they are relying on what the City *actually* intends to do in response to the burdens imposed by new development. Local agencies should not attempt to use these fees to recoup costs that it (a) has already paid, or (b) when it has no intention to actually develop the infrastructure referenced in the supporting nexus study.

* * *

County of Sonoma v. Gustely
(May 31, 2019) 36 Cal.App.5th 704

Where the trial court has issued a default judgment against respondent, finding various violations of county codes on respondent's property and ordering respondent to pay abatement costs and civil penalties, the trial court does not have the ability to unilaterally decrease the penalties that were lawfully assessed by the county.

Beginning in January 2017, inspection officers from the Permit and Resource Management Department ("PRMD") of the County of Sonoma ("County") conducted inspections of the respondent's property, and found multiple violations of the County's code, such as unpermitted retaining walls, and unpermitted grading and terracing that contributed to bank failure and deposit of material into a nearby watercourse, which eventually lead to a mudslide blocking a local roadway. The County issued four separate notices, and an additional notice of violation, ordering the respondent to abate the violations.

Respondent requested an administrative hearing to challenge the violation determinations, at which point the hearing officer found that the respondent violated the Sonoma County Code ("County's Code"), and imposed civil penalties of $45 per day of violation, for a total of $2,880, and $8,476 in abatement costs, and noted that the penalty would continue to accrue until the violations were remedied. Respondent did not seek judicial review of this administrative order, but the County ultimately filed a complaint in superior court against respondent, seeking to enforce the County's Code and abate the nuisance allegedly caused by respondent.

Respondent did not file a response to the County's complaint, and the clerk of the superior court entered default. The County filed a motion for default judgment, and sought to recover its accrued abatement costs, civil penalties pursuant to the County's Code, the unchallenged administrative order, and the County's attorney's fees. The trial court granted the majority of the

County's motion, but, as relevant here, reduced the penalty amount from $45 to $20 per day, without any substantive analysis or justification for the reduction in the penalty amount.

In reversing the trial court, the court of appeal noted that respondent had no avenue to challenge the administrative order because respondent did not challenge the order under either Code of Civil Procedure section 1094.5 or Government Code section 53069.4. The court of appeal found that the trial court could not unilaterally reduce a penalty lawfully imposed by the County (pursuant to its regulations) without making a finding that the County somehow abused its discretion.

The PRMD hearing officer based its daily penalty rate on its consideration of factors enumerated in the County's Code (*i.e.*, the "seriousness of the code violation" and the "culpability and sophistication of the violator"). Because the calculation was made after affording respondent a full administrative hearing in which the respondent fully participated, the court of appeal rejected the trial court's attempt to impose a penalty rate that "better reflected" the trial court's sense of seriousness of the violations without any justification. The County's Code controlled who was supposed to determine the penalties in the first instance. Because the County's enforcement and hearing officers properly implemented the code, the trial court could not unilaterally reduce the penalty rate unless it could point to some sort of flaw in the process by which the penalty was imposed.

* * *

California Charter Schools Association v. City of Huntington Park, et al.
(April 25, 2019) 35 Cal.App.5th 362

The legal question in this case is whether reference to "numerous inquiries and requests for the establishment and operation of charter schools" established a "current and immediate threat to the public health, safety or welfare" justifying an urgency ordinance and imposing moratorium on processing of new charter school applications. The court of appeal reversed judgment from the trial court denying a petition for writ of mandate. The court of appeal concluded that the urgency ordinance's reference to "numerous inquiries and requests for the establishment and operation of charter schools" did not establish a "current and immediate threat to the public health, safety or welfare" as would be required for the City of Huntington Park ("City") to enact the interim urgency ordinance pursuant to Government Code section 65858 ("Section 65858").

In September 2016, the city council held a series of public hearings to consider whether to enact an urgency interim zoning ordinance, under the authority of Section 65858, to impose a temporary moratorium on the establishment, construction, and development of new charter schools within its borders. At the hearings, the city council noted that the City has more schools than any other community in the southeast portion of Los Angeles County and more than twice the amount of educational facilities than that needed to serve City's school-age population. The city council further noted that many of those attending the schools are not City residents and that the population density and high number of schools attracting students from outside the City contributes to traffic, parking, and noise problems in the neighborhoods.

The Huntington Park Municipal Code ("HPMC") requires charter schools to obtain a conditional use permit ("CUP"), which could be either approved or disapproved at the discretion of City. The HPMC, however, contained no development standards for charter schools.

Due to what it described as "a proliferation of inquiries and requests for the establishment and operation of charter schools," the Huntington Park Community Development Department requested the urgency ordinance to give staff time to assess whether the HPMC was adequate to ensure that future charter schools, and expansion or relocation of existing charter schools, could be done in a manner that protected the public and satisfied the goals and objectives of the City's General Plan.

The city council enacted a forty-five-day urgency ordinance (later extended by an additional ten months and fifteen days) that imposed a temporary moratorium on the establishment and operation of new charter schools. The ordinance contained findings that a "current and immediate threat" to public health existed because, among other reasons, City had received "numerous inquiries and requests for the establishment and operation of charter schools," "the HPMC did not have development standards specifically for charter schools," and "certain locations in Huntington Park had already experienced adverse impacts from charter schools."

When analyzing Section 65858, the court of appeal noted that the general purpose of the statute is to allow a city to adopt an urgency ordinance that prohibits any uses that may conflict with a contemplated land use regulation the city is considering, studying, or intends to study within a reasonable time. Section 65858, subdivision (c), limits that power by providing, "The legislative body shall not adopt or extend any interim ordinance pursuant to this section unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare."

The court of appeal held that the facts as presented did not meet the urgency standard under Section 65858. In particular, the court emphasized that no actual CUP applications or pending charter school permits were in the record, citing the City planner's testimony that the City had received "at least five inquiries and . . . had several serious sit down discussions" with charter school representatives within the preceding year. On this point, the court found the holding in *Building Industry Legal Defense Foundation v. Superior Court* (1999) 72 Cal.App.4th 1410—"[l]imiting the reach of an interim ordinance to those situations where actual approval of an entitlement for use is imminent"—persuasive. In that case, the Fourth District Court of Appeal rejected an urgency ordinance adopted by a city after a developer sought approval of a residential subdivision, reasoning that processing a development application did not constitute a current and immediate threat because the submission of an application "merely starts the wheels rolling" and does not guarantee the landowner any right to an approval.

* * *

Sacramentans for Fair Planning v. City of Sacramento
(July 3, 2019) 37 Cal.App.5th 698

This case involved whether a charter city's approval of a project under a general plan policy allowing projects more intense than permitted by the general plan and zoning ordinance violated

constitutional protections of due process and equal protection or an implied-in-law zoning contract requiring uniformity in zoning. The court decided in the negative. There is no constitutional uniformity requirement, and the general plan policy was rationally related to providing high-quality infill development, "significant community benefit" is not an unconstitutionally vague standard, and there is no social contract requiring uniformity.

Here, a developer applied to the City of Sacramento ("City") for permits to build a mixed-use 15-story building that would contain 177,032 square feet of space, with one floor of commercial space, three levels of parking, 134 residential condominiums on 10 floors, and one floor with resident amenities ("Project"). The Project would have a Floor Area Ratio ("FAR") of 9.22 on a .44 acre site in downtown. The Project complied with the City's general plan designation and zoning ordinance, except for the building intensity, which permitted mixed-use projects to have a FAR of 0.3-3.0. However, Land Use provision "LU 1.1.10" in the City's General Plan permitted the City to allow a development to exceed the maximum FAR if the City determined that the project provides a significant community benefit.

Staff determined the Project would not have a significant effect on the environment and qualified for review using the streamlined Sustainable Communities Environmental Assessment ("SCEA") instead of a traditional negative declaration or environmental impact report under the California Environmental Quality Act ("CEQA"). The planning commission approved the Project and the SCEA. Plaintiff appealed the decision to the city council, which unanimously denied the appeal, adopted the SCEA, and approved the Project's entitlements. In doing so, the City made the findings that the Project would: (i) help achieve the City's housing goal of 10,000 new residential units; (ii) reduce dependency on personal vehicles and cut carbon emissions; (iii) advance City and regional goals of developing at higher densities than traditionally seen, and (iv) "[S]et a precedent for environmentally responsible development through the choice of materials and green design."

Plaintiff filed a petition for writ of mandate, which was denied by the trial court. The court of appeal affirmed, ruling that the City's approval of the Project did not violate the Fourteenth Amendment or a nonexistent zoning contract, and that the use of the SCEA did not violate CEQA.

Government Code section 65852 requires zoning ordinances in general law cities to be "uniform for each class or kind of building or use of land throughout each zone." However, the City is a charter city, and Section 65852 does not apply to charter cities. (Gov. Code, § 65803.) The Plaintiff thus turned to constitutional claims.

Plaintiff argued that the approval and LU 1.1.10 were illegal "spot zoning" because equal protection requires that restrictions on one parcel in a zone apply to all parcels in the zone, and that each parcel in the zone have the same opportunity to develop as any other parcel in the zone. The court of appeal disagreed, deferring to the City's findings of fact as adequately demonstrating the approval and LU 1.1.10 are rationally related to the legitimate public interest of providing "high quality infill development" that the City's General Plan and Zoning Code may not have otherwise allowed. Additionally, the court of appeal concluding this is not a spot zoning case because the property had not been given lesser development rights than its neighboring properties. Even if the City's approval were somehow seen as spot zoning, it would

be subject to the same rational basis test that applies in equal protection analyses, where spot zoning may be invalidated when a limitation on property use is "unreasonable, oppressive and unwarranted." The court of appeal concluded, "This is not that case."

Plaintiff also argued that LU 1.1.10's standard of "significant community benefit" was too vague in violation of the U.S. Constitution's Fourteenth Amendment Due Process Clause. Again the court of appeal disagreed, reasoning that "significant community benefit" is no more vague that "general welfare," which has previously been found to not be unconstitutionally vague.

Plaintiff additionally argued that the approval violated an implied social contract of zoning uniformity. The court of appeal once again disagreed, finding no such constitutional or common law doctrine exists and that, by simply enacting a zoning ordinance, a charter city does not agree to be held to a higher standard than the constitutionally required rational basis. The court of appeal reasoned that uniformity may be a fundamental rule in zoning, but it is not a constitutional limitation.

As far as the environmental challenges, Plaintiff contended the approval of the Project violated CEQA in two respects: (1) the City could not rely on a regional transportation and emissions reduction plan to justify reviewing the project in an SCEA because the plan was inadequate for that purpose; and (2) the SCEA improperly tiered to prior environmental impact reports to avoid analyzing the project's cumulative impacts. The court of appeal disagreed on both counts.

The State Legislature identified certain types of development, such as the transit priority project in this case, as eligible for SCEA streamlined review, which limits certain impact analyses and allows for deferring to regional environmental impact reviews ("EIRs") on cumulative impact analysis, if such review exists. Applying the "substantial evidence" standard of review for CEQA cases, the court of appeal held the City did not abuse its discretion by relying on the regional council of government's (here, "SACOG's") Sustainable Communities Strategy because it was developed, in part, in reliance on the member cities' and counties' General Plans and accompanying environmental review for those planning documents. Moreover, the City did not abuse its discretion under cumulative impact analysis by relying on prior General Plan and strategy environmental review and mitigation measures for the specific Project. Therefore, the court of appeal affirmed the trial court's decision of no CEQA violation.

* * *

City of Hesperia v. Lake Arrowhead Community Services District, et al.
(July 19, 2019) 37 Cal.App.5th 734

In this case, the court of appeal held there was no error in setting aside a resolution adopted by the Lake Arrowhead Community Services District ("District") to exempt its proposed solar energy project from the City of Hesperia's ("City") zoning requirements. The court reasoned that, because the District's project includes the transmission of electrical energy, the exemption contained in Government Code section 53091(e) ("Section 53091(e)") does not apply to the project. Further, because the administrative record did not contain substantial evidence to support the District's Board of Directors' ("Board") finding that there was no feasible alternative to the proposed location of the project, the District prejudicially abused its discretion when

determining that the exemption contained in Government Code section 53096(a) ("Section 53096(a)") applied to the project.

The District is a community services district within the City attempting to develop a solar energy project on property it owns and that the City has zoned as "Rural Residential." The City objected to the project as a violation of Hesperia Municipal Code section 16.16.063(B), which prohibits solar farms in residential zones or within 660 feet of agriculturally designated property. The District then entered into an agreement with Southern California Edison Company ("Edison"), where the District's solar project would produce electricity for use by Edison through its electrical grid distribution system in exchange for bill credits to the District. The Board adopted a resolution declaring the City's zoning ordinances inapplicable to the District's solar project because it is exempt under Sections 53091(e) and 53096(a).

Section 53091(a) creates a statutory requirement that a local agency must comply with the zoning ordinances of the city and county in which its proposed solar energy project is located. Section 53091(e) provides an absolute exemption for "the location or construction of facilities . . . for the production or generation of electrical energy," but also creates an exception to the exemption if the facilities are "for the storage or transmission of electrical energy." Section 53096(a) provides a qualified exemption if the agency can show that the proposed facilities are "related to storage or transmission of water or electrical energy," and four-fifths of the agency's members adopt a resolution that "there is no feasible alternative to [the agency's] proposal."

After the District adopted its resolution, the City filed a petition for a writ of mandate and declaratory and injunctive relief, arguing that the solar project is beyond the scope of the District's authority and that the siting, development, and construction of the solar farm are subject to the City's zoning ordinances. The trial court ruled that the solar project was not exempt from the City's zoning ordinances.

Applying *de novo* review, the court of appeal concluded that the plain and common sense meaning of section 53091(e) would allow an exemption from the City's zoning ordinances for the solar project, but that the exception to the exemption applies because the solar project includes the "transmission of electrical energy." The court focused on the language of the agreement between the District and Edison, which provided that the District "will *export electrical energy* to the grid" and make "all necessary arrangements (including scheduling) for *delivery of electricity*." (Italics added by court.) Applying the dictionary definitions of "export" and "delivery," the court found that both words are synonymous with "transmit," and thus the exception to the exemption applies because the project involves the transmission of electrical energy.

Regarding section 53096(a), even though there is a presumption that an agency's findings are supported by substantial evidence, the court found that the City succeeded in establishing that the administrative record did not contain substantial evidence to support the Board's finding that there was no feasible alternative to the project site. "[B]ecause the administrative record does not contain any evidence of an alternative location for the project, the record necessarily does not contain any evidence of economic, environmental, social, or technological factors associated with an alternative location." Therefore, the court concluded that the District's resolution to

render the City's zoning ordinances inapplicable to the solar project was a prejudicial abuse of discretion.

* * *

Weiss v. City of Del Mar
(Aug. 7, 2019) -- Cal.App.5th --; 2019 WL 4170912; 2019 Cal. App. LEXIS 834

The issue in this case is whether the 90-day filing and service requirements for actions challenging certain land use and planning decisions apply to a city's ordinance-based determinations even if the ordinance is not codified in the "zoning" title of the city's municipal code. Under the facts of this case, the court of appeal held that the 90-day requirements under Government Code section 65009(c)(1)(E) do apply.

In 2014, Weiss purchased a condominium in the City of Del Mar ("City") due, in part, to its white water ocean views. In August 2016, Weiss applied for a determination pursuant to the City's "Trees, Scenic Views, and Sunlight Ordinance" ("Ordinance") whether a neighboring property owner, Torrey Pacific Corporation ("Torrey Pacific"), had unreasonably obstructed Weiss's white water ocean views.

The Ordinance was adopted to preserve and maintain the "benefits derived from trees, scenic views, and plentiful sunlight" and to provide individuals with "the right to seek restoration and preservation of scenic views or sunlight that existed at the time they purchased or occupied property or in the last ten years, whichever is shorter, when such scenic views from the primary living area . . . have subsequently been unreasonably obstructed by the growth of trees or vegetation located within . . . 300 feet of the Applicant's property boundary." (Del Mar Mun. Code, § 23.51.030.) In her August 2016 determination application, Weiss claimed that Torrey Pacific's trees and other vegetation were so overgrown that her view was unreasonably obstructed.

In April 2017, the City's planning commission held a public hearing, at which Weiss acknowledged that Torrey Pacific trimmed the trees and restored Weiss's original view but wanted Torrey Pacific to adhere to a "preservation plan of periodic trimming of the vegetation." The planning commission denied Weiss's application. Weiss appealed the planning commission's decision to the city council, which reviewed the matter de novo and had a split on whether the view had been unreasonably obstructed. Under the City's local rules, the decision reinstated the planning commission's decision to deny Weiss's application, thereby denying the administrative appeal on July 17, 2017.

On September 19, 2017, Weiss filed a petition for a writ of administrative mandate against the City (Respondent) and Torrey Pacific (Real Party in Interest). The City and Torrey Pacific jointly moved to dismiss under Government Code section 65009(c)(1)(E), which imposes 90-day filing and service requirements for actions challenging certain land use and planning decisions. Evidence was presented that the City was not served with the petition and summons until December 13, 2017, more than 90 days after the city council denied her appeal on July 17, 2017.

The trial court granted the motion. Weiss appealed, arguing that Section 65009(c)(1)(E)'s 90-day filing and service requirements do not pertain to her because: (1) the City's ruling on her

application is not controlled by the statute; and (2) the statute governs zoning determinations, and this Ordinance is not found within the "Zoning" Title of the City's Municipal Code.

The court of appeal affirmed, holding the location of the Ordinance's codification within the City's Municipal Code is not controlling. Rather, the court of appeal noted Government Code section 65009(c)(1)(E) provides the 90-day requirements apply to actions that "attack, review, set aside, void, or annul any decision on the matters listed in Section 65901." Government Code section 65901 identifies a zoning board's decisions on "'conditional uses or other permits' or 'variances,' or the board's 'exercise [of] any other powers granted by local ordinance.'"

The court of appeal interpreted this to mean that Government Code section 65009 specifically incorporates Section 65901 for the limited subject matter of zoning and similar land use determinations made by a governmental entity under the authority of a local ordinance. Given the substance and purpose of the Ordinance, the court of appeal determined it was "essentially identical" to the stated purpose of the City's "Zoning" title because both seek to regulate the use of property as it relates to views and landscaping for the promotion of a better quality of life for residents and landowners.

Additionally, the "any other powers" language in Government Code section 65901 broadly encompasses a public agency's determinations on a range of issues other than the designation of property use in specific geographic zones and exceptions to those designations through conditional permits and variances. As such, the court of appeal held that the 90-day limitation applies to the agency's exercise of powers granted by local ordinance which concern zoning and similar land use determinations made by the agency under the authority of local ordinance.

Lastly, the court of appeal rejected Weiss's argument that the 90-day rule was inapplicable because it conflicts with Code of Civil Procedure section 1094.6. The court of appeal noted that Section 1094.6 addresses only a filing timeline and says nothing about when a filed petition must be served. Thus, there was no inconsistency between that statute and the 90-day service requirement in Government Code section 65009.

* * *

Cleveland National Forest Foundation v. County of San Diego
(Aug. 21, 2019) 37 Cal.App.5th 1021

In this case, the court of appeal held that a residential use on land subject to a Williamson Act contract cannot be subordinate (or minor) to the land's primary agricultural use, but it must be used with, or functionally necessary to, the primary use so as to be concomitant with, or facilitate, that primary use.

By way of brief background, the Legislature enacted the Williamson Act (Gov. Code, § 51220 *et seq.*, also known as the "California Land Conservation Act of 1965") to protect the public interest in agricultural land and discourage premature and unnecessary conversion of agricultural land to urban uses. The provisions of the Williamson Act should be interpreted to "prevent frustration of the land preservation goals of the Williamson Act" and effectuate its intent and spirit. (*Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840, 860.) In relevant part, the Subdivision Map Act (Gov. Code, § 66410 *et seq.*, "Map Act") requires a legislative body to

deny approval of a tentative map if it finds that the subdivision will result in residential development not incidental to the commercial agricultural use of the land, and the land is subject to a Williamson Act contract. (*Id.*, § 66474.4.)

Here, an application was submitted to the County of San Diego ("County") to subdivide 1,416.5 acres of land designated as an agricultural preserve. Approximately 1,291.5 acres of the property was subject to a Williamson Act contract (the "Contract") requiring that the premises "shall not be used for any purposes other than agricultural uses or compatible uses[.]" The Contract also prohibited subdivision unless it met specified requirements that included 40-acre minimum lot sizes on all but 161 acres, and 160-acre minimum lot sizes on the remaining 161 acres.

A project description proposed a 24-lot subdivision with minimum 40-acre lot sizes, with each lot including "active agriculture"—*i.e.*, managed cattle grazing and breeding—and a residence. The project prohibited construction of the dwellings during the Contract term but allowed for the construction of improvements such as building pads, leach fields, driveways, and roads. The Environmental Impact Report ("EIR") for the project contained an agricultural study, which determined that, while "[t]he project has been designed to encourage agricultural operations on each parcel, thereby preserving the entire site in potential agriculture[,]" the site was "not an important agriculture resource." In approving the project, the County found that it "support[ed] existing and continued agricultural operations onsite" and did not conflict with the Contract because the project met the 40-acre minimum parcel size and required agricultural use of each parcel *vis-a-vis* the continued cattle grazing. The County also found that the residential development in the project was incidental because, of the 1,416.5 acres, 1,204.1 acres remained agricultural. The Cleveland National Forest Foundation ("Cleveland") filed a petition for writ of mandate alleging, among other things, the residential uses were not "incidental" to the agricultural use of the land. The trial court denied the petition, and Cleveland appealed.

Cleveland argued that the project was not incidental to the agricultural uses as required by the Map Act. Since incidental is not defined in Government Code section 66474.4 and is susceptible to more than one reasonable interpretation, the court of appeal looked to the statute's legislative history to determine its meaning. In doing so, the court found that the legislative policy underlying this section was to prohibit subdivision of Williamson Act land for "residential purposes." Thus, the court held that "incidental" must be associated with or dependent on the primary commercial agricultural use so as to be concomitant with and functionally necessary to the agricultural use. In doing so, the court reasoned that this interpretation was in line with the legal definition of the word and best effectuated the Williamson Act.

While the County interpreted "incidental" to mean that residential development had to be "subordinate" or "minor" in relation to the agricultural use, the court of appeal disagreed, reasoning that the County's interpretation would permit residential development and infrastructure unrelated to any agricultural operation as long as the agricultural uses predominated a project.

Turning to the project, the court of appeal determined that the infrastructure improvements were not necessary for the managed grazing and breeding of cattle. The court reasoned that the ranchers who manage the agricultural operations lived elsewhere, so the residential infrastructure was unrelated as well. Finally, the court found that the limited number of cattle proposed to be

onsite did not amount to a commercial operation. The court found that the residential development and associated infrastructure were not incidental to the agricultural uses. Therefore, the court of appeal held that the County abused its discretion in approving the project.

* * *

CEQA / NEPA / ENVIRONMENTAL QUALITY CASES

Union of Medical Marijuana Patients, Inc. v. City of San Diego
(Aug. 19, 2019) 7 Cal.5th 1171

In this landmark case, the California Supreme Court resolved a conflict among the courts of appeal regarding the proper definition of the word "project" and the interplay of Public Resources Code sections 21065 and 21080 of the California Environmental Quality Act ("CEQA"). Specifically, the State Supreme Court concluded that the examples of actions found in Section 21080 are not always "projects" for the purposes of CEQA, holding that even those actions must meet the requirements of Section 21065 in order to constitute a "project" requiring CEQA review.

In 2014, the City of San Diego ("City") adopted a zoning ordinance that allowed the development of medicinal cannabis dispensaries throughout the City ("Ordinance"). The Ordinance itself imposed many restrictions on the quantity, location, and operations of these dispensaries. In adopting the Ordinance, however, the City found that CEQA was inapplicable because its adoption was not a "project" and specifically noted that the "[a]doption of the ordinance did not have the potential for resulting in either a direct physical change in the environment, or reasonably for[e]seeable indirect physical change in the environment."

The petitioner, a civil rights group "devoted to defending and asserting the rights of medical cannabis patients as well as promoting safe access to medical marijuana," challenged the adoption of the Ordinance, arguing that the City was required to conduct environmental review under CEQA. After the City adopted the Ordinance, petitioner sought mandamus relief, arguing the adoption of the Ordinance constituted a project under CEQA and, therefore, the City erred in not conducting the requisite environmental review.

The trial court rejected the petitioner's argument and found in favor of the City. On appeal, the petitioner raised an additional argument, arguing that Public Resources Code section 21080, which states that CEQA "shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances**,**" classifies zoning amendments and their adoptions as "projects" as a matter of law regardless of their potential to impact the environment. The court of appeal rejected this argument, expressly disagreeing with the holding in *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690.

The California Supreme Court accepted review to settle the conflict among the courts of appeal and affirmed this part of the court of appeal's holding; however, the State Supreme Court ultimately found that the adoption of the Ordinance here qualified as a "project" due to its potential to cause indirect effects.

With regard to the first argument, the State Supreme Court interpreted Public Resources Code section 21080's list of public agency activities "merely to offer generic examples" of the type of discretionary activities proposed to be carried out or approved by public agencies to which CEQA could apply. As such, the State's high court overruled those prior opinions that reached the contrary result.

With regard to the second issue, despite having found that Public Resources Code section 21080 does not automatically convert all of the listed activities into "projects," the California Supreme Court still found that the Ordinance here did qualify as a "project" under Section 21065. Recognizing that adoption of the Ordinance is an "activity directly undertaken by any public agency[]" (§ 21065(a)), the State Supreme Court found that the "City erred in determining that the adoption of the Ordinance was not a project." As explained in the opinion, prior to the Ordinance, no medical marijuana dispensaries were permitted to operate in the City. The Ordinance, therefore, amended the City's zoning regulations to permit the establishment of a sizable number of new retail businesses to accommodate these new businesses. Therefore, the theoretical effects mentioned were sufficiently plausible to raise the possibility that the Ordinance may cause a reasonably foreseeable indirect physical change in the environment, warranting the Ordinance's adoption and consideration as a "project."

* * *

Center for Biological Diversity v. Ilano
(9th Cir., June 24, 2019) 928 F.3d 774

The question in this case is whether the U.S. Forest Service's designation of land as facing heightened risk of harms from pine-beetle infestation and a corresponding project to combat the infestation require environmental review under the National Environmental Policy Act ("NEPA"). Answering this question with a "no," the Ninth Circuit Court of Appeals found that the designation of land as facing a heightened risk does not change the status quo; it merely designates land for projects that may happen, and the court of appeals will defer to a federal agency's reliable study concluding there are no extraordinary circumstances, even when there are contradicting studies.

In 2014, the U.S. Congress amended the Healthy Forests Restoration Act ("HFRA") to address "[t]he outbreak of the pine bark beetle afflicting states across the nation," which was "creating potentially hazardous fuel loads in several western states." The amendments were intended "to give forest managers greater opportunity to identify and manage risk in the forest." To accomplish this objective, the amendments created a two-step process to combat insect infestations and diseased forests. Under the first step, large areas of forest land that face a heightened risk of harms from infestation and disease are designated as "landscape-scale areas." Under the second step, treatment projects, which may be categorically exempt from NEPA, are created and implemented to combat issues faced in the landscape-scale areas. In 2015, California designated 5.3 million acres of land as landscape-scale areas and initiated the Sunny South Project ("Project") across 2,700 of those areas. The Forest Service issued two memos: one stating that the designation of landscape-scale areas did not require NEPA analysis because it does not affect the environment, and the other stating that the Project was categorically excluded from NEPA and that there were no extraordinary circumstances. The Center for Biological

Diversity filed suit alleging that both matters required NEPA analysis. The district court granted summary judgement in favor of the Forest Service. Plaintiff appealed.

Under NEPA, federal agencies must prepare an EIS for major federal actions that "have a significant environmental impact" unless it is categorically excluded. (*Northcoast Envtl. Ctr. v. Glickman* (9th Cir. 1998) 136 F.3d 660, 668; *See, e.g.*, 16 U.S.C. § 6591b(a).) An EIS is not necessary where a proposed federal action would not change the status quo. (*Ibid.*)

The court of appeals ruled that the amendments did not "change the status quo" because designating landscape-scale areas does not mark the commencement of any particular projects; it only identifies land where certain priority projects *may* be implemented.

Furthermore, the court of appeals reasoned that, unlike a statute permitting the Department of Energy to designate certain areas as national interest electric transmission corridors for fast track approval in *California Wilderness Coalition v. United States Department of Energy* (9th Cir., 2011) 631 F.3d 1072, the amendments lacked a provision requiring compliance with environmental laws. As such, the court held that the amendments did not require environmental review because to do so would require the Forest Service to "consider the environmental effects that speculative or hypothetical projects might have," which "NEPA does not require."

Plaintiff argued that the Sunny South Project could not be categorically excluded from NEPA because it involved extraordinary circumstances requiring further analysis pursuant to 40 C.F.R. § 1508.4. Plaintiff cited a study, which contradicted a Forrest Service study, stating that the Project would negatively impact the protected spotted owl in the Project area. The Forest Service's study found that, while individual owls may be negatively impacted in the short-term, the species would benefit from the project in the long-run. The court of appeals disagreed with the Plaintiff's position that agencies must have the discretion to rely on its own qualified experts, and the court must defer to agency decisions so long as those conclusions are supported by studies "that the agency deems reliable." Instead, the court of appeals held that neither the HFRA amendments nor the Project required environmental review under NEPA.

* * *

Center for Biological Diversity v. Department of Conservation, etc.
(May 16, 2019) 36 Cal.App.5th 210

The issue in this case is whether a legislatively mandated Environmental Impact Report ("EIR") prepared by the Department of Conservation ("Department") to provide the public with detailed information regarding any potential environmental impacts of well stimulation in the State complied with requirements of the legislative mandate as well as the California Environmental Quality Act ("CEQA"). Answering in the affirmative, the court of appeal affirmed a judgment denying a petition for writ of mandate challenging a legislatively mandated EIR prepared by the Department and held: (i) the Department, in regulating well stimulation activities, was not carrying out a program or project of well stimulation treatments, supporting the trial court's finding that Center for Biological Diversity's ("Center") CEQA action was not ripe; (ii) the EIR's disclosure of the existence of another legislatively mandated independent study and statement as to the absence of any identified "substantive conflicts" between the documents was

adequate, absent evidence of legislative intent to link the preparation of the two studies; (iii) the Legislative mandate limited the scope of the EIR to well stimulation treatments only, rather than requiring inclusion of indirect impacts, and (iv) consistent with interpretation allowing a program EIR to defer discussion of site-specific impacts and mitigation measures to later project EIRs, where appropriate, the Department sufficiently committed itself to specific performance criteria, as would support deferral of formulation of mitigation measures to future site and/or project specific EIRs.

The facts and procedural history are as follows: The Center petitioned for writ of mandate challenging an EIR prepared by the Department's Division of Oil, Gas, and Geothermal Resources pursuant to a law known as Senate Bill No. 4 (stats. 2013, ch. 313, § 2, "SB 4"), which added sections 3150 through 3161 to the Public Resources Code to address the need for additional information about the environmental effects of well stimulation treatments such as hydraulic fracturing and acid well stimulation. As relevant here, SB 4 required the Department to prepare an EIR "pursuant to CEQA to provide the public with detailed information regarding any potential environmental impacts of well stimulation in the state." (Pub. Res. Code § 3161(b)(3)(A).)

Well stimulation treatments, such as hydraulic fracturing, are techniques used to enhance oil and gas production by increasing the permeability of the underground geological formation. In passing SB 4, the Legislature changed the regulatory environment for hydraulic fracturing and other well stimulation treatments by: (i) defining relevant industry terms, including defining "well stimulation treatment" to include "treatment of a well designed to enhance oil and gas production or recovery by increasing the permeability of the formation" such as hydraulic fracturing treatments and acid well stimulation treatments; (ii) requiring the Natural Resources Agency ("NRA") to complete a scientific study on well stimulation treatments, including, but not limited to, hydraulic fracturing and acid well stimulation treatments; (iii) directing the Department to adopt permanent regulations specific to well stimulation treatments to include rules and regulations governing construction of wells; (iv) establishing new permit requirements for conducting well stimulation treatments on oil and gas wells, and (v) requiring compliance with CEQA, where applicable.

The Department prepared and certified an expansive EIR containing a programmatic analysis of the environmental impacts of well stimulation treatment. The certification statement explains:

> The EIR mandated by Senate Bill 4 is not an ordinary EIR, but rather is a rare, and possibly unique, CEQA document in that it was mandated by statute without any accompanying 'proposed project' requiring action by [the Department] or any other public agency. The subject of the EIR, 'well stimulation in the state,' is not a pending 'project' in any ordinary sense. Rather, the subject of the EIR is a set of ongoing activities likely to continue to be carried out throughout some parts of a huge and very diverse [s]tate. Such activities were legally occurring at the time SB 4 was passed, and in fact had been occurring for decades.

The Center challenged the EIR, arguing that the Department violated SB 4 and CEQA by: (a) failing to incorporate the complete NRA study into the EIR; (b) failing to consider the first volume of the study (which was available at the time the EIR was certified); (c) failing to supplement the EIR or issue a subsequent EIR after the second and third volumes were issued; (d) failing to analyze indirect or secondary impacts of well stimulation treatments; (e) failing to adequately analyze the use of well stimulation treatments at three specific oil fields; (f) failing to adopt enforceable mitigation measures, and (g) failing to make findings and adopt a mitigation monitoring and reporting plan.

The Department demurred to the first amended petition on ripeness grounds, arguing the EIR was an informational document only, unconnected to any proposed project requiring discretionary approval by the Department (or any other agency). The trial court sustained the demurrer in part as to the Center's cause of action for violations of CEQA and subsequently denied Center's petition on the merits of it remaining claims.

On appeal, the court initially found that the Department was not carrying out a program or project of well stimulation treatments, supporting the trial court's finding that Center's CEQA action was not ripe. The court of appeal rejected the Center's contention that, though the Department may not have approved a project in reliance on the EIR, the Department nonetheless was "carrying out" a program of regulating, overseeing and permitting well stimulation in reliance on the EIR, and that program was itself a "project" within the meaning of CEQA, distinguishing the Department's role in regulating well stimulation activities from "directly undertak[ing]" such activities.

The court of appeal next turned to the Center's claims for deficiencies concerning the EIR's treatment of an NRA study and determined that SB 4's requirement that the NRA study be completed by a certain date, in conjunction with the requirement directing the Department to prepare an EIR regarding any potential environmental impacts of well stimulation and to certify such EIR on or before a date six months later, did not necessarily require the Department to incorporate the NRA study into the EIR or to consider the NRA study in preparing the EIR, absent evidence of legislative intent to link the preparation of the NRA study to the preparation of the EIR. Rather, the court found that the EIR's disclosure of the existence of the NRA study and statement of the absence of any identified "substantive conflicts" between the documents was adequate.

In dealing with the Center's claim that the EIR failed to address indirect impacts of well stimulation treatments, the court of appeal found SB 4's requirement that the Department prepare an EIR to provide the public with "detailed information regarding any potential environmental impacts of well stimulation in the state" limited the scope of the EIR to well stimulation treatments only, rather than requiring inclusion of indirect impacts of additional oil and gas production made possible by well stimulation treatments.

Finally, recognizing that a program EIR may appropriately defer discussion of site specific impacts and mitigation measures to later project EIRs where such "'impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases[,]'" the court of appeal concluded that the Department sufficiently committed itself to

specific performance criteria as would support deferral of formulation of mitigation measures to subsequent site and/or project specific EIRs.

* * *

San Diego Gas & Electric v. San Diego Regional Water Quality Control Board
(June 18, 2019) 36 Cal.App.5th 427

For decades, San Diego Gas & Electric ("SDG&E") operated a power plant on the San Diego Bay ("Bay"), which discharged waste into the Bay as a part of its operations. The discharge included various metals and toxic chemical compounds that settled into the Bay's sediment and accumulated, along with similar waste discharged by unrelated shipyard companies. The discharge negatively impacted the beneficial uses of water and threatened aquatic life, aquatic-dependent wildlife, and human health.

After years of investigation culminating in a report of over 2,000 pages, a link was established between some of the toxic chemicals and SDG&E's cooling tunnels, switchyard, and wastewater ponds that drained or flowed into the Bay. Based on these findings, the San Diego Regional Water Quality Control Board ("Regional Board") issued a cleanup and abatement order ("CAO") to SDG&E and other entities, finding that "SDG&E caused or permitted waste to be discharged into the Bay and thereby created, or threatened to create, pollution and nuisance conditions" pursuant to the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act" or "Act," Water Code section 13300 *et seq.*).

SDG&E argued that it was not a responsible "person" under Water Code section 13304(a) and that its actions were not a substantial factor in creating, or threatening to create, a condition of pollution or nuisance. SDG&E filed a petition for writ of mandate seeking vacation of the CAO, arguing that the shipyard companies comparatively discharged greater amounts of pollutants and that the court must apply the "substantial factor" test to determine whether SDG&E created or threatened to create a condition of pollution or nuisance.

The court of appeal rejected SDG&E's arguments, and affirmed the trial court's order, holding that the "disputed nuisance creation element of section 13304—'creates, or threatens to create, a condition of pollution or nuisance'—does not require application of the common law substantial factor test for causation." The court of appeal noted that the Legislature's goal when enacting the Porter-Cologne Act was "to attain the highest water quality which is reasonable," considering all demands being made on those waters and the total of all values involved, beneficial and detrimental, economic and social, tangible and intangible.

The court further noted that the Act allows a regional board to require a party to clean up pollutants if the board finds "Any person who . . . has *caused or permitted, causes or permits, or threatens to cause or permit* any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the State and creates, or threatens to create, a condition of pollution or nuisance." The act does not mention "substantial factor causation" and neither does the legislative history nor relevant case law require the application of such a test before a regional board issues a CAO.

Because it was undisputed on appeal that SDG&E directly discharged, and thus "caused or permitted" waste to enter the Bay, and because SDG&E did not challenge the sufficiency of evidence in support of the Regional Board's nuisance creation finding, the court of appeal ruled that the Regional Board demonstrated SDG&E had created, or threatened to create, a condition of pollution or nuisance warranting a CAO.

* * *

Hollywoodians Encouraging Rental Opportunities v. City of Los Angeles
(June 28, 2019) 37 Cal.App.5th 768

In this case, the court of appeal held that, where a property has been lawfully vacated, the appropriate baseline for a project under the California Environmental Quality Act ("CEQA") assumes that the project would have no housing-related impacts from the destruction of a pre-existing building that previously housed tenants.

The subject real property was a vacant 18-unit apartment building, which had previously been subject to a rent stabilization ordinance of the City of Los Angeles ("City"). In 2013, the owner filed a notice of intent to withdraw all 18 units from the rental market pursuant to the Ellis Act (Government Code section 7060 *et seq*.). Later that year, the rental units were vacated. In 2015, the owner submitted a new application for a hotel project to convert the property into a boutique hotel with 24 guest rooms.

The City prepared an initial study and noted that the project could have some impacts, but otherwise the City found that impacts to population and housing would cause either a less than significant impact or no impact. Petitioners challenged the City's approval of the hotel project, specifically challenging the City's findings of no impact or less than significant impacts to the "supply of rent-stabilized housing and the dislocation of tenants from such housing." The trial court denied the petition for writ of mandate concluding, in part, that the City applied the appropriate baseline as no housing was available at the project site at the time it processed the application.

In affirming the trial court's decision, the court of appeal held that the City applied the correct baseline. Although petitioner (again) argued the City was required to "prepare an EIR for the Project because substantial evidence in the record supports a fair argument that the cumulative environmental effect of this Project and similar related projects will be the elimination of rent-stabilized housing units in Hollywood" and displacement of a substantial number of renters who rely on rent-stabilized housing, the court of appeal rejected this argument, finding petitioners' "CEQA claim fails because the relevant baseline in 2015 was a vacant building that already had been withdrawn from the residential rental market." Therefore, according to the court of appeal, the record did not support a fair argument that the project would have a substantial adverse impact on Hollywood's stock of rent-stabilized housing or on displacement of residents.

* * *

Hubbard v. Cal. Coastal Commission
(July 31, 2019) 38 Cal.App.5th 119

The issue in this case: If a permit is granted based on an application containing intentionally false and misleading information, is the California Coastal Commission ("Commission") required to revoke the permit under section 131059, subdivision (a) of title 14 of the California Code of Regulations? The answer is no. Even if the application contains misleading information, the Commission does not need to revoke the permit when: (1) the misleading information is immaterial to the granting of the permit, and (2) the Commission still would have granted the permit and would not have imposed additional conditions to the permit even if all the accurate information had been provided.

Under the California Coastal Act of 1976 ("Act"), any proposed developments in designated protected zones must receive a Coastal Development Permit ("CDP") from the Commission, or if a Local Coastal Program ("LCP") has been certified by the Commission, from the local governmental agency.

Here, Malibu Valley Farms ("MVF"), an equestrian facility in the Santa Monica Mountains, was damaged in a fire in 1996. MVF sought to rebuild the facility but needed a CDP because the facility and proposed development were in an environmentally sensitive habitat area ("ESHA"). At the time MVF submitted its application for its permit, the Commission had not certified Malibu's LCP, so the Commission had the authority to issue the CDP to MVF. In 2006, MVF sought after-the-fact approval from the Commission by submitting its CDP application for a six-acre equestrian facility after MVF had already begun construction.

One of the criteria the Commission uses when reviewing CDP applications is whether it is complete, which includes preliminary approvals from other local governmental agencies for the development. Here, MVF submitted approvals from the Environmental Review Board ("ERB"), Department of Fish and Wildlife ("Fish and Wildlife"), and the Water Resources Control Board ("Water Board") along with its CDP application. None of these submitted approvals, however, were based on the merits of the development. In addition to the submissions, MVF's application included a "Comprehensive Management Plan" to minimize the environment impact on the ESHA.

On March 21, 2007, the Commission deemed MVF's application complete. On July 9, 2007, the Commission held a public hearing on the CDP application and approved the project with conditions, such as the implementation of MVF's Comprehensive Management Plan. On December 8, 2008, appellants filed a request for revocation of MVF's CDP. In July 2009, in response to a writ of mandate from a separate group not part of this case, the Commission issued a staff report explaining its approval of the CDP. On October 5, 2009, appellants filed an amended request relating to the July 2009 staff report, challenging MVF's representations.

The Commission agreed that there were several intentional misrepresentations relating to the approvals submitted from the ERB, Fish and Wildlife, and Water Board in MVF's CDP application, but the Commission nonetheless decided that incomplete and inaccurate permit applications do not necessarily require revocation of a permit. Indeed, the Commission concluded that, even if accurate information about the approvals had been provided, that

different, accurate information would not have caused the Commission to deny the permit or require additional conditions.

On August 15, 2011, appellants filed a petition for administrative mandate in the superior court, seeking an order setting aside the Commission's denial of their revocation request. The trial court denied the petition on the grounds that the outcome of the permit would have been the same because accurate and complete information would not have caused the Commission to deny the permit or require additional conditions. The court of appeal affirmed.

Grounds for revocation under Public Resources Code section 13105(a) state that a "permit may be revoked for '[i]ntentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application, where the commission finds that accurate and complete information would have caused the commission to require additional or different conditions on a permit or deny an application.'" The court of appeal found this to mean that only material omissions or misrepresentations in a CDP application warrant revocation, and if accurate and complete information would not have caused the Commission to act differently, then the CDP stands.

The court of appeal further explained that the Commission's conclusion—that grounds for revocation only exist if the Commission's decision would have been different if the correct information had been provided—is a proper conclusion that balances the Commission's need for accurate information in a CDP application against the need for an applicant to rely on a CDP that is issued. Additionally, the court of appeal determined that, even if a CDP application contains inaccuracies regarding the approvals it received from other local agencies, but still meets the policies of Chapter 3 of the Act, then the issuance of a CDP need not be revoked. Finally, the court of appeal also considered MVF's Comprehensive Management plan, which set out measures to protect the ESHA and supported the Commission's decision to grant the CDP.

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Discretion - The Gateway To And Limitation On CEQA

Thursday, October 17, 2019 General Session; 4:15 – 5:30 p.m.

Stephen Velyvis, Partner, Burke Williams & Sorensen, LLP

Notes:_____

DISCRETION – The Gateway to and Limitation on CEQA

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I. Introduction

An often repeated (albeit slightly modified) Shakespeare quote famously states that "discretion is the better part of valor."[1] As discussed herein, discretion is also a paramount consideration under the California Environmental Quality Act ("CEQA") because while a discretionary project approval is certainly a pre-requisite, or gateway, to CEQA's application, less than full discretion over a project by a lead agency can also act as a significant limitation on CEQA. This paper seeks to better explain and explore the nuances of what I refer to as the ministerial/discretionary dichotomy and how to apply it when conducting your own CEQA analysis.

With respect to the ministerial/discretionary dichotomy, the indisputable starting point is the fact that CEQA only applies to discretionary project approvals, not ministerial approvals. However, defining the line between a ministerial and a discretionary approval is not always easy, and just because a project approval affords the agency decision maker *some* discretion does not mean the lead agency has carte blanche authority to deny or condition a project approval to mitigate all issues and potential environmental impacts cognizable under CEQA. This is so because CEQA does not expand a lead agency's underlying discretion, but simply tracks it.

Specifically, this paper does the following three things: (1) provides a basic summary of the three possible components or tiers involved in an agency's CEQA compliance process; (2) explores the important ministerial/discretionary dichotomy associated with the second and third tiers in that process and explains why it is so important under CEQA; and (3) concludes with a case study that takes an inside look at the 8-unit, multi-family residential project and CEQA challenge underlying the First District Court of Appeal's recent published decision in *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80 ("*McCorkle*"), which addressed and applied these concepts in a remarkable way to find that the City's approval of that project was exempt from CEQA.

II. Overview of the Three-Step CEQA Compliance Process

"The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390,

[1] *See* William Shakespeare, *Henry the Fourth*, Part 1, Act 5, scene 4, 115-121("Fallstaff: To die is to be a counterfeit, for he is but the counterfeit of a man who hath not the life of a man; but to counterfeit dying, when a man thereby liveth, is to be no counterfeit, but the true and perfect image of life indeed. **The better part of valor is discretion, in the which better part I have sav'd my life**.")

citing *Friends of Mammoth v. Board of Supervisors* (1975) 8 Cal.3d 247, 259.) Through CEQA, the Legislature intended that "all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage . . .." (Pub. Res. Code § 21000(g).) CEQA's scope, however, is not unlimited. Under Public Resources Code Section 21080(a), CEQA only applies to "discretionary projects proposed to be carried out or approved by public agencies." As further discussed below, that seemingly simple provision declaring CEQA's scope is anything but simple in practice. Before delving into the ministerial/discretionary dichotomy, however, it is important to set the stage by presenting an overview of the three steps, or tiers, of the CEQA compliance process.

To guide agencies in their efforts to comply with CEQA and prevent environmental damage, CEQA Guidelines Section 15002(k) describes a three-step process to assist agencies in first determining whether a project is subject to CEQA and if so what type of environmental document – a Negative Declaration, Mitigated Negative Declaration or Environmental Impact Report – must be prepared and adopted/certified before a final project approval decision can be made.[2] To that end, CEQA Guidelines Section 15002(k) states as follows:

> Three Step Process. An agency will normally take up to three separate steps in deciding which document to prepare for a project subject to CEQA.
>
> (1) In the first step the lead agency examines the project to determine whether the project is subject to CEQA at all. If the project is exempt, the process does not need to proceed any farther. The agency may prepare a notice of exemption. See Sections 15061 and 15062.
>
> (2) If the project is not exempt, the lead agency takes the second step and conducts an initial study (Section 15063) to determine whether the project may have a significant effect on the environment. If the initial study shows that there is no substantial evidence that the project may have a significant effect, the lead agency prepares a negative declaration. See Sections 15070 et seq.
>
> (3) If the initial study shows that the project may have a significant effect, the lead agency takes the third step and prepares an EIR. See Sections 15080 et seq.

[2] *See also* Appendix A to the CEQA Guidelines, which provides a handy process flow chart with specific questions and actions pertaining to each of the three possible steps.

Interestingly, in its recent decision in *Union of Medical Marijuana Patients, Inc. v. City of San* Diego ("*UMMP*") (2019) 7 Cal.5th 1171,[3] the California Supreme Court explained this three-step process a bit differently than CEQA Guidelines Section 15002(k), essentially breaking Section 15002(k)'s first step into two distinct tiers and merging Section 15002(k)'s second and third steps into a single, final third tier.

Citing and relying heavily on its prior decision in *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372 ("*Muzzy Ranch"*), the Court in *UMMP* began by explaining that "[a] putative lead agency's implementation of CEQA proceeds by way of a multistep decision tree, which has been characterized as having three tiers." The court expanded on that explanation by stating:

> First, the agency must determine whether the proposed activity is subject to CEQA at all. Second, assuming CEQA is found to apply, the agency must decide whether the activity qualifies for one of the many exemptions that excuse otherwise covered activities from CEQA's environmental review. Finally, assuming no applicable exemption, the agency must undertake environmental review of the activity, the third tier.

(*UMMP*, *supra*, 250 Cal.Rptr.3d at p. 826.) The Court in *UMMP* went on to name and expand on these tiers, as follows.

The Court summarized the first tier, which it defined as a preliminary review to determine "CEQA's applicability," as follows:

> When a public agency is asked to grant regulatory approval of a private activity or proposes to fund or undertake an activity on its own, the agency must first decide whether the proposed activity is subject to CEQA. In practice, this requires the agency to conduct a preliminary review to determine whether the proposed activity constitutes a "project" for purposes of CEQA. If the proposed activity is found not to be a project, the agency may proceed without further regard to CEQA.

(*UMMP*, *supra*, 250 Cal.Rptr.3d at p. 826 [citations omitted].)[4]

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[3] At the time this paper was prepared, pinpoint cites were only available for the Pacific and California Reporter decisions so all subsequent citations are to the California Reporter decision at 250 Cal.Rptr.3d 818.

[4] The *UMMP* decision focused solely on this first step and held: (1) that Public Resources Code Section 21080 does not declare every zoning amendment to be a CEQA project as a matter of law (*Id.* at pp. 830-834); and (2) the City of San Diego's medical marijuana dispensary ordinance

The second tier, which the Court in *UMMP* defined as a determination regarding whether the project qualifies for an "[e]xemption from environmental review," entails the following:

> If the lead agency concludes it is faced with a project, it must then decide "whether the project is exempt from the CEQA review process under either a statutory exemption or a categorical exemption set forth in the CEQA Guidelines." The statutory exemptions, created by the Legislature, are found in section 21080, subdivision (b). Among the most important exemptions is the first, for "[m]inisterial" projects, which are defined generally as projects whose approval does not require an agency to exercise discretion. The categorical exemptions, found in Guidelines sections 15300 through 15333, were promulgated by the Secretary for Natural Resources in response to the Legislature's directive to develop "a list of classes of projects which have been determined not to have a significant effect on the environment." If the lead agency concludes a project is exempt from review, it must issue a notice of exemption citing the evidence on which it relied in reaching that conclusion. The agency may thereafter proceed without further consideration of CEQA.

(*Id.*, at p. 827 [citations omitted].)

Finally, the Court defined the third tier as "[e]nvironmental review" and summarized it as follows:

> Environmental review is required under CEQA only if a public agency concludes that a proposed activity is a project and does not qualify for an exemption. In that case, the agency must first undertake an initial study to determine whether the project "may have a significant effect on the environment." If the initial study finds no substantial evidence that the project may have a significant environmental effect, the lead agency must prepare a negative

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at issue was a project subject to CEQA under this preliminary, first tier project decision analysis because under Section 21065 it was an activity undertaken by the City that, theoretically, may cause either a direct or reasonably foreseeable indirect physical change in the environment (*Id.* at pp. 834-839).

> declaration, and environmental review ends. If the initial study identifies potentially significant environmental effects but (1) those effects can be fully mitigated by changes in the project and (2) the project applicant agrees to incorporate those changes, the agency must prepare a mitigated negative declaration. This too ends CEQA review. Finally, if the initial study finds substantial evidence that the project may have a significant environmental impact and a mitigated negative declaration is inappropriate, the lead agency must prepare and certify an environmental impact report before approving or proceeding with the project.

(*Id.*, [citations omitted].)

With that three-step process in mind, we now focus in on the second step and explore the ministerial/discretionary dichotomy in more detail.

III. Understanding and Applying the Ministerial/Discretionary Dichotomy

Under the preliminary review conducted pursuant to CEQA's first step, an activity is a "project" and thus subject to CEQA if it has two essential elements – it involves an activity that may cause a direct (or reasonably foreseeable indirect) physical change in the environment and is an activity that will either be directly undertaken by a public agency, supported in whole or in part by a public agency, or involves the issuance by a public agency of some form of entitlement, permit, or other authorization (*e.g.*, contracts, grants, subsidies, loans, etc.) (Pub. Res. Code § 21065; CEQA Guidelines § 15378(a); see also *UMMP* and *Muzzy Ranch*, *supra.*)

Once it is determined that a proposed activity is a project subject to CEQA, one must move on to the second step and to assess and determine whether the project is exempt from CEQA. This entails assessing whether the project is subject to any of the numerous statutory and/or categorical exemptions,[5] including determining whether the

[5] Because this paper is focused on the ministerial exemption only, all of the other potential statutory and categorical exemptions are not specifically addressed here. Indeed, while all 33 classes of categorical exemptions are contained within CEQA Guidelines Sections 15301-15333, and most of the statutory CEQA exemptions are contained within CEQA Guidelines Sections 15260-15285, other statutory CEQA exemptions are not specifically referenced in the CEQA Guidelines but are found elsewhere in the CEQA statute itself or in other provisions of the Public Resources, Business and Professions, Education, Fish and Game, Government, Health and Safety, Water, and the Military and Veterans Codes. There are even some uncodified CEQA exemptions for specific projects. For a good discussion of and tables listing both these codified and uncodified statutory CEQA exemptions, *see* Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2019) Statutory Exemptions, §§ 5.5-5.67.

project entails/requires a discretionary agency approval.[6] If no discretionary approval is involved because the agency decision in question is ministerial the project is statutorily exempt as CEQA makes clear that it "does not apply to . . . [m]inisterial projects proposed to be carried out or approved by public agencies." (Pub. Res. Code § 21080(b)(1); *see also* CEQA Guidelines § 15268 (a) ["Ministerial projects are exempt from the requirements of CEQA."].)

A. Definitions Of Ministerial vs. Discretionary

Accordingly, our discussion turns next to the definitions of ministerial and discretionary. CEQA Guidelines Section 15369 defines ministerial as:

> A governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out.

Guidelines Section 15369 continues by noting that:

> Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial **if the ordinance requiring the permit limits the public official** to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the

[6] In addition to the ministerial/discretionary dichotomy, CEQA and the CEQA caselaw spend considerable effort defining when an agency's discretionary "support" of/for a project amounts to an "approval." While not addressed in detail here, this area of the law is equally important as CEQA compliance is only required to be completed before a public agency proposes to "approve" a project (Pub. Res. Code § 21080(a); CEQA Guidelines § 15004), which is generally defined as a decision "commit[ing] the agency to a definite course of action in regard to a project (CEQA Guidelines § 15352(a)). For a good discussion of the types of decisions that *have* and *have not* amounted to such an approval, see *Save Tara v. City of W. Holly wood* (2008) 45 Cal.4th 116 and *Cedar Fair LP v. City of Santa Clara* (2011) 194 Cal.App.4th, respectively.

> Uniform Building Code, and the applicant has paid the fee. (Emphasis added.)[7]

In contrast, CEQA Guidelines Section 15357 defines a discretionary project as:

> A project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statues, ordinances, regulations, or other fixed standards. The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project.

B. Projects Involving Both Ministerial And Discretionary Actions

In addition to the above-referenced definitions, the CEQA Guidelines provide additional guidance for approvals including elements of both ministerial and discretionary actions. Specifically, after outlining the exemption for ministerial projects, CEQA Guidelines Section 15268(d) ends by declaring that "[w]here a project involves an approval that contains elements of both a ministerial action and a discretionary action, **the project will be deemed to be discretionary and will be subject to the requirements of CEQA**." (Emphasis added.)

This statement has led untold numbers of CEQA practitioners to fatally conclude that *any* amount of discretion is enough to trigger CEQA's full application and provides authority to address any/all of the resource issues/impacts cognizable under CEQA. As discussed and demonstrated below, that simply is not the case. The reason is because CEQA is the "cart behind the horse" in that it does not expand a lead agency's discretion, but simply tracks it. This concept is firmly set in both the CEQA statute and the CEQA Guidelines. Specifically, Public Resources Code Section 21004, entitled "[l]egislative intent; public agency authority," unequivocally states:

> In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division. However, a public agency may use discretionary powers provided by such other law for the purpose of mitigating or avoiding a significant effect on the environment

[7] I emphasized the bolded language in CEQA Guidelines Section 15369 above because as further discussed below, the language of the applicable local law is truly the key to the ministerial/discretionary dichotomy.

> subject to the express or implied constraints or limitations that may be provided by law.

And CEQA Guidelines section 15040, entitled "[a]uthority [p]rovided by CEQA," similarly echoes this critical limitation by stating:

> (a) CEQA is intended to be used in conjunction with discretionary powers granted to public agencies by other laws.
>
> (b) CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws.
>
> (c) Where another law grants an agency discretionary powers, CEQA supplements those discretionary powers by authorizing the agency to use the discretionary powers to mitigate or avoid significant effects on the environment when it is feasible to do so with respect to projects subject to the powers of the agency. Prior to January 1, 1983, CEQA provided implied authority for an agency to use its discretionary powers to mitigate or avoid significant effects on the environment. Effective January 1, 1983, CEQA provides express authority to do so.
>
> (d) The exercise of the discretionary powers may take forms that had not been expected before the enactment of CEQA, but the exercise must be within the scope of the power.
>
> (e) The exercise of discretionary powers for environmental protection shall be consistent with express or implied limitations provided by other laws.

Thus, in sum, CEQA provides no separate grant of authority to require project changes or allow project denials in the name of environmental protection beyond the authority and discretion other non-CEQA laws afford an agency. Those other laws generally flow from the general police power or from overarching state laws (e.g., zoning, planning and/or subdivision laws) and are typically codified in the various Municipal/County Codes and Charters that exist across the state. Interestingly, these concepts and provisions have formed the basis for numerous CEQA decisions highlighting the importance of those other, non-CEQA laws and requiring a unique focus on the type/scope of authority and discretion they afford.

C. CEQA's Reach May Be Curtailed By An Agency's Limited Discretion

The concept that CEQA's reach is limited to the amount and type of the underlying agency discretion afforded by the applicable local law is typically linked to the decision in *Friends of Westwood v. City of Los Angeles* ("*Friends of Westwood*") (1987) 191 Cal.App.3d 259, a case requiring the court to assess whether the building permit required by the City of Los Angeles for the 26-floor office tower in question there was discretionary and thus subject to CEQA, or ministerial and exempt therefrom. In analyzing the ministerial/discretionary dichotomy, the *Friends of Westwood* Court emphasized that:

> The purpose of CEQA is to minimize the adverse effects of new construction on the environment. To serve this goal the act requires assessment of environmental consequences where government has the power through its regulatory powers to eliminate or mitigate one or more adverse environmental consequences a study could reveal. Thus the touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report. And when is government foreclosed from influencing the shape of the project? Only when a private party can ***legally compel*** approval without any changes in the design of its project which might alleviate adverse environmental consequences.

(*Friends of Westwood, supra,* at pp. 266-267 [emphasis in original].)

And while the *Friends of Westwood* Court deemed the building permit process pursuant to the local ordinance at issue there to be discretionary and thus subject to CEQA, the decision is better known and cited more for the "functional test" the Court set out to help clarify the line between discretionary and ministerial project approvals. The *Friends of Westwood* Court explained its functional test as follows:

> The functional distinction between "ministerial" and "discretionary" projects under CEQA. . . . To properly draw the line between "discretionary" and "ministerial" decisions in this context, we must ask why it makes sense to exempt the ministerial ones from the EIR requirement. The answer is that for truly ministerial permits an EIR is irrelevant. No matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project the government agency would lack the power (that is,

> the discretion) to stop or modify it in any relevant way. The agency could not lawfully deny the permit nor condition it in any way which would mitigate the environmental damage in any significant way. The applicant would be able to legally compel issuance of the permit without change. Thus, to require the preparation of an EIR would constitute a useless – and indeed wasteful – gesture.
>
> Conversely, where the agency possesses enough authority (that is, discretion) to deny or modify the proposed project on the basis of environment consequences the EIR might conceivably uncover, the permit process is discretionary within the meaning of CEQA.

(*Id.* at p. 272.)

Citing *Friends of Westwood*, the California Supreme Court embraced this concept in noting that "[t]he statutory distinction between discretionary and purely ministerial projects implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise." (*Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 117.)

Numerous recent cases have arguably expanded on this concept to add heightened focus on not only the question of whether the agency possesses any authority/discretion, but on evaluating the type/kind of discretion afforded by local laws to ensure that the discretion afforded coincides with and gives the local agency the authority to remedy the environmental concerns at issue. Indeed, in determining that the County of Sonoma's erosion control ordinance afforded some discretion but didn't confer the right type of discretion and thus holding that the issuance of the erosion control permit at issue was a ministerial act exempt from CEQA, the First District Court of Appeal recently stated "[f]ollowing *Friends of Westwood*, courts recognize that CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead, to trigger CEQA compliance the discretion must be of a certain kind; it must provide the agency with the ability and authority to mitigate environmental damage to some degree." (*Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 23.)

Similarly, in *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934, the Fourth District Court of Appeal held that no subsequent or supplemental EIR was required for the large waterfront redevelopment project at issue because the only remaining project approval - design review - did not provide the City with the discretion or authority to address the project's alleged water-supply, public-services, groundwater contamination, air pollution and greenhouse

gas/climate change-related impacts advanced by project objectors. (See also, *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144 [same].)

Additional cases fall under this same rule and reason that an activity is ministerial and exempt from CEQA if the local law governing the permit/approval decision does not give the agency the relevant authority to address the environmental concerns implicated by the project or being raised by objectors. Thus, if the agency lacks the authority to refuse to approve the proposed activity, or to condition/modify it to mitigate the potential environmental impacts of concern, the action is ministerial and exempt from CEQA. (See, e.g., *Friends of the Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 308 [demolition permit ministerial under Palo Alto Municipal Code][8]; *Central Basin Mun. Water Dist. v. Water Replenishment Dist. of S. Cal* (2012) 211 Cal.App.4th 943, 949 [water district declaration of water emergency ministerial because no discretion to address potential impacts of carryover water rights and/or delayed water replacement]; *Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 394 [City's operation of water reservoir system ministerial such that CEQA does not apply to City's transfer of water from one reservoir to another]; *Tower Lane Props. v. City of Los Angeles* (2014) 224 Cal.App.4th 262 [no CEQA review required for grading permit whose approval was ministerial under local ordinance]; *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 178 [approval of lot line adjustment is ministerial under Subdivision Map Act]; *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1014-1015 ["CEQA does not enlarge an agency's authority beyond the scope of a particular [design review] ordinance"]; *Prentiss v. City of S. Pasadena* (1993) 15 Cal.App.4th 85 [building permit to expand historic residence ministerial].)[9]

There are two final notes before moving on to take an inside "case study" look at the recent published decision in *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80 ("*McCorkle*"), which addressed and applied these concepts in a remarkable way to find that the City's approval of an 8-unit multi-family apartment project was exempt from CEQA.

First, some advice for City Attorneys: CEQA requires local agencies to adopt local implementing procedures including, *inter alia*, "a list of projects or permits over which the public agency has only ministerial authority." (CEQA Guidelines §

[8] But see *San Diego Trust & Sav. Bank v. Friends of Gill* (2981) 121 Cal.App.3d 203, holding permit to demolish historical structure discretionary because the agency retained authority to deny the permit by making a discretionary determination that an alternative be implemented.
[9] Of course, there are also numerous cases that have held, based on the specific language of the applicable local laws, that the local agency permit/approval at issue was discretionary and thus subject to CEQA. (See, e.g., *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118 [building permit]; *Friends of Westwood, supra* [building permit]*; People v. Department of Hous. & Community Dev.* (1975) 45 Cal.App.3d 185, 193 [building permit]; *Day v. City of Glendale* (1975) 51 Cal.App.3d 817, 823 [grading permit].)

15022(a)(1)(B).) To help avoid controversy and minimize litigation over which local permit approvals are ministerial and which are discretionary (and thus which are exempt from and subject to CEQA), local agencies should take advantage of this opportunity by adopting such CEQA procedures and ministerial project lists. Indeed, CEQA acknowledges that "the determination of what is 'ministerial' can most appropriately be made by the particular public agency involved based upon its analysis of its own laws. (CEQA Guidelines § 15268(a).)[10]

Second, a note of caution: The California Supreme Court is poised to weigh in on these issues once again, this time in the context of two cases involving permits for well drilling projects. Specifically, the Court granted review of an unpublished opinion holding that such permits in Stanislaus County are discretionary (*Protecting Our Water & Env'tl Resources v. Stanislaus County* [review granted Nov. 14, 2018, S251709]) and issued a "grant and hold" order regarding a similar, but opposite decision holding that well permits issued under the County of San Luis Obispo's well ordinance are ministerial (*California Water Impact Network v. County of San Luis Obispo* [review granted Nov. 14, 2018, S251056; superseded opinion at 25 Cal.App.5th 666, 679]). Briefing is complete in *Protecting Our Water* and the parties in both cases are waiting for oral argument to be scheduled.

IV. ***McCorkle Eastside Neighborhood Group v. City of St. Helena*: A Case Study**

In order to demonstrate the concept of marrying the discretion afforded by the local law with the environmental concerns at issue embodied in the above-referenced cases, I thought a deeper dive into the facts of the *McCorkle* case would be helpful.[11]

The original *McCorkle* project entailed a proposal to demolish an old, run down house within the City of St. Helena's High Density Residential Zoning District ("HR District") and replace it with a ten-unit multi-family residential project to provide the City with much-needed workforce housing. The project site had been zoned for such high density residential uses since at least 1993; however, the City's Zoning Ordinance had long-required a conditional use permit for any such projects containing more than 4 residential units. Thus, when the project application was originally submitted, it required a use permit application. The project site's soil was also contaminated with lead due to a prior owner's hoarding and messy auto repair hobby.

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[10] However, while a local agency's categorization of its ministerial permits as part of its adopted CEQA procedures is entitled to judicial deference, it is not dispositive. (See *Friends of Westwood, supra,* 191 Cal.App.3d at p. 270*; Day, supra,* 51 Cal.App.3d at p. 823.)

[11] Full disclosure - together with the City Attorney for the City of St. Helena and counsel for the Real Party in Interest, I successfully represented and defended Respondent City of St. Helena in the *McCorkle* litigation, both in the Napa County Superior Court and the First District Court of Appeal.

In an effort to address constraints on multi-family residential development, the California Department of Housing and Community Development ("HCD") encouraged the City to adopt Housing Element policies to address those constraints and conditioned its certification of the City's 2015-2023 Housing Element on an Implementing Action contained therein that committed the City to amend its Zoning Ordinance to eliminate the use permit requirement for multi-family residential projects in the City's HR District. After the City adopted its 2015-2023 Housing Element and HCD certified it, the City promptly followed through and amended its Zoning Ordinance to eliminate the use permit requirement for multi-family projects in the HR District. Notably, within the public reports and during the public meetings regarding that Zoning Ordinance amendment, City staff and the City Attorney discussed the legal significance of the proposed change, highlighting the fact that as a permitted or "by right" use, the City's future discretion over individual multi-family projects in the HR District would be limited to aesthetic issues only under the City's Design Review Ordinance, and that the City would not have discretion over broader land use-related issues such as project density, traffic, air quality, etc.

After the City amended its Zoning Ordinance to eliminate the use permit requirement for multi-family projects in the HR District, the project applicant revised his application to downsize the project to eight multi-family units and make a series of other voluntary changes to assuage concerns raised during a neighborhood meeting. The applicant also entered into a voluntary agreement with the County of Napa to remediate the site's lead-contaminated soil. As such, and pursuant to the City's amended Zoning Ordinance, the project's proposed multi-family residential land use was permitted by right and only required design review approval. However, because the original application was submitted before the Zoning Ordinance was amended to eliminate the use permit requirement, City staff had already made a preliminary determination that CEQA applied and requested biological and traffic studies from the applicant in an effort to determine whether CEQA's Class 32 categorical exemption for in-fill projects applied. After completing its review of the project, its design drawings and the applicant's consultants' biological and traffic reports, staff prepared a report demonstrating that the project did indeed fall under CEQA's in-fill exemption and that all required demolition permit and design review findings could be made and were supported by the record. Thus staff recommended that the Planning Commission find the project exempt from CEQA and issue design review approval for the project.

The Planning Commission approved the project over the objections of two local unincorporated associations named McCorkle Eastside Neighborhood Group and St. Helena Residents for an Equitable General Plan, which challenged the claimed CEQA exemption based on allegations of traffic, noise, public safety, and soil contamination-related impacts and on an alleged inconsistency with General Plan policies regarding historic resources (because there were several listed historical homes on the street).

Those same groups appealed the approval to the City Council, which denied the appeal and issued the design review approval based on similar findings that the project was categorically exempt from CEQA pursuant to the in-fill exemption and consistent with the General Plan and Design Review Ordinance. Notably, in addition to citing the opponents' lack of evidence in support of their alleged environmental impacts, both the Planning Commission and the City Council relied on statements and advice from the City Attorney noting that because only design review approval (and no use permit) was required, the City's discretion and thus the scope of its CEQA authority under the Design Review Ordinance was limited to aesthetic impacts and did not allow them to deny or modify the project to address the larger alleged land-use related impacts raised by the appellants. The appellants filed a Petition for Writ of Mandate challenging the City's claimed CEQA exemption and asserting that they were not afforded a true appeal on the whole of the project due to the City Attorney's advice. The trial court denied the Petition and the Petitioners appealed.

Before delving into the Court of Appeal decision, it is important to look at St. Helena's Design Review Ordinance because, as noted above, whether the approval at issue is discretionary or ministerial for purposes of CEQA depends largely if not entirely on the language of the applicable local law, not on anything in CEQA.

The City of St. Helena's Design Review Ordinance contains three very important provisions. First, the Ordinance's statement of policy expressly acknowledges that Design Review is separate and distinct from discretionary land use zoning provisions found elsewhere in the Municipal Code and is intended only to cover the general form, special relationships and appearance of a project's proposed design. (St. Helena Municipal Code ("SMC"), § 17.164.010.) Second, the Ordinance limited the applicable design criteria to issues such as scale, orientation, bulk, mass, materials and colors. (SMC, § 17.164.030.) Third, and perhaps most important, in a section entitled "[l]imitations of review," the Ordinance expressly prohibited the City from denying design review approval based on non-design criteria items or from using design review to unduly restrict building types or to vary the Zoning Ordinance's specific allowances or other development controls. (SMC, § 17.164.040.)

In their briefing on appeal, the Appellants focused primarily on the argument that they were not afforded a true/full appeal to the elected City Council as required under Public Resources Code Section 21151 due to the City Attorney's advice regarding the City's limited discretion, which they felt led the City Councilmembers to ignore the traffic, public safety and soil contamination impacts they believed would result from the project's underlying multi-family residential land use. Because Public Resources Code Section 21151 was an odd vehicle to advance Appellants' main argument, because the administrative record fully supported the City's claimed in-fill exemption, and because no published CEQA decision had yet applied the above-referenced

ministerial/discretionary concepts in the same design review-only context,[12] the City's defense focused primarily on the fact that appellants received a full and fair appeal hearing and on the fact that the project satisfied all elements of the in-fill exemption and no exceptions applied. That is, until the Court of Appeal issued an order shortly before oral argument essentially directing the parties to focus their arguments on the Municipal Code and be prepared to argue whether the design review approval was ministerial or discretionary.

The rest is history, and documented in the Court of Appeal's published *McCorkle* decision. In short, the Court of Appeal essentially moved quickly to the ministerial/discretionary issue and, citing the aforementioned Municipal Code sections at length, held that the City didn't need to rely on the in-fill exemption because the City Attorney's statements and advice were correct - the City had no discretion to disapprove the project based on the type of non-design related land use matters and impacts alleged by the Appellants. In essence, the Court held that the City's design review approval of the multi-family residential land use was ministerial as the project's proposed land use was permitted by right and the City's findings regarding the project's consistency with the applicable design criteria focused on aesthetic and General Plan consistency issues were supported by substantial evidence.

One final note is necessary as some have argued that the *McCorkle* decision is in conflict with two other recent decisions similarly involving aesthetic issues subject to local design review. (See *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358 and *Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129.) In both *Georgetown Preservation Society* and *Protect Niles*, Mitigated Negative Declarations were rejected and full Environmental Impact Reports were required based on the projects' potentially significant aesthetic impacts. However, unlike the facts of *McCorkle*, those cases involved bigger projects proposed in truly and particularly sensitive contexts, namely a historic landmark Gold –rush era downtown in *Georgetown Preservation Society* and an officially mapped historic district in *Protect Niles*. Importantly, the parties in those cases apparently didn't argue that the agency's scope of

[12] **Writ Litigation Practice Tip**: Including unpublished decisions in your Administrative Record. An unpublished decision on all fours with the facts of *McCorkle* did exist, see *Venturans for Responsible Growth v. City of San* Buenaventura (2013) 2103 WL 3093788. There, the Second District Court of Appeal held that the City of Ventura's design review approval tied to exterior improvements and a sign variance for a 24-hour grocery store (otherwise allowed by right without any operating hour restrictions) was ministerial and exempt from CEQA because the City of Ventura had no discretion to address the challenger's alleged air quality and traffic impacts under its Design Review Ordinance. While not binding precedent, the St. Helena City Council expressly referred to the *Venturans for Responsible Growth* decision and took notice of it in its *McCorkle* administrative findings such that it was proper to include the opinion in the administrative record and refer the trial court and court of appeal to it in our briefing.

discretion was so limited that CEQA did not apply and it is unclear from those decisions whether use permits (as opposed to design review only) were required for those projects. Most importantly, the opponents in those cases specifically advanced alleged aesthetic impacts whereas in *McCorkle* the opponents were more concerned with traffic and public safety related impacts associated with the underlying and permitted by right multi-family residential land use. In sum, upon a closer look there is no conflict between *McCorkle*, on the one hand, and *Georgetown Preservation Society* and *Protect Niles*, on the other hand.

V. Conclusion

CEQA only applies to discretionary project approvals, not ministerial approvals. But the defining the line between a ministerial and a discretionary approval is not always easy, and CEQA practitioners should not jump to the conclusion that an agency has the discretion to deny or condition a project based on any/all issues and potential environmental impacts cognizable under CEQA simply because the agency approval involves some discretionary aspects. The discretion must be of the type that allows the agency to meaningfully address the specific impact(s) of concern. As the housing crisis worsens and the Governor and Legislature continue to look for more ways to facilitate/force new housing on cities (including by limiting cities' discretion on certain types of housing in certain locations [i.e., infill near transit]), it will be imperative for city attorneys to fully understand the ministerial/discretionary dichotomy and the CEQA provisions and decisions that address it.

Notes:_____

Labor and Employment Litigation Update

Friday, October 18, 2019 General Session; 8:00 – 10:00 a.m.

Suzanne Solomon, Partner, Liebert Cassidy Whitmore

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Labor and Employment Litigation Update

Suzanne Solomon, Partner, Liebert Cassidy Whitmore

ANTI- DISCRIMINATION LAWS

U.S. Supreme Court Concludes That County Forfeited Its Late Objection That an EEOC Complaint Failed to Reference a Protected Status the Employee Pursued in A Title VII Action

Fort Bend County, Texas v. Davis, 139 S.Ct 1843 (2019)

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in employment based on race, color, religion, sex, or national origin. Title VII requires an employee to file a charge with the Equal Employment Opportunity Commission ("EEOC") or a State fair employment agency before commencing a Title VII action in court. Once the EEOC receives a complaint, it notifies the employer and investigates the allegations. The EEOC may then resolve the complaint through informal conciliation, or may sue the employer. If the EEOC chooses not to sue, it issues a right-to-sue notice, which allows the employee to initiate a lawsuit. An employee must have this right-to-sue notice before initiating a lawsuit.

Lois Davis filed an EEOC complaint against her employer, Fort Bend County. She alleged sexual harassment and retaliation for reporting harassment. While the EEOC complaint was still pending, the County fired Davis because she went to church on a Sunday instead of coming to work as requested. Davis attempted to amend her EEOC complaint by handwriting "religion" on an EEOC intake form; however, she never amended the formal charge document. Upon receiving her right-to-sue notice, Davis sued the County in federal court for religious discrimination and retaliation for reporting sexual harassment.

After years of litigation, the County alleged for the first time that the court did not have jurisdiction to decide Davis' religious discrimination claim because that protected status was not included in her formal EEOC charge. The trial court agreed and dismissed the suit. On appeal, the Fifth Circuit reversed and held that an EEOC complaint was not a jurisdictional requirement for a Title VII suit, and therefore, the County forfeited its defense because it waited years to raise the objection. The U.S. Supreme Court then agreed to hear the case.

The U.S. Supreme Court had to decide whether an EEOC complaint is a jurisdictional or procedural requirement for bringing a Title VII action. When a jurisdictional requirement is not met, a court has no authority whatsoever to decide a certain type of case. A procedural requirement, in contrast, is a claim-processing rule that is a precondition to relief that may be waived if there is no timely objection. The Court noted that a key distinction between the two is

that jurisdictional requirements may be raised at any stage of the proceedings, but procedural requirements are only mandatory if the opposing party timely objects.

The Supreme Court concluded that Title VII's complaint-filing requirement is not jurisdictional because those laws "do not speak to a court's authority." Instead, those complaint-filing requirements speak to "a party's procedural obligations." Therefore, the Court found that while filing a complaint with the EEOC or other State agency is still mandatory, the County forfeited its right to object to Davis' failure to mention religious discrimination in her EEOC complaint because the County did not raise the objection until many years into the litigation.

Ninth Circuit Withdraws Its 2018 Opinion and Upholds Probationary Release of Officer for On-Duty Calls and Texts to Paramour-Officer

Perez v. City of Roseville, 926 F.3d 511 (9th Cir. 2019).

Janelle Perez, a probationary police officer, began a romantic relationship with Shad Begley, another officer employed at the same municipal police department. Both officers separated from their respective spouses once they began working together.

The department then received a written citizen's complaint from the male officer's wife, alleging that the two officers were having an extramarital relationship, on-duty sexual contact, and numerous on-duty communications via text and telephone.

The department's internal investigation found no evidence of on-duty sexual relations, but did find that the officers called or texted each other several times while on duty. The investigation ultimately sustained charges that both officers: (i) violated the department's telephone policies; (ii) violated the department's "unsatisfactory work performance" standard; and (iii) engaged in "conduct unbecoming" for their personal, on-duty contact.

On August 16, 2012, the department sent a letter to Begley's wife informing her that its investigation into her citizen complaint was completed. The letter also listed the sustained charges against the officers.

Based on the department's custom of terminating probationary officers who violate policies, the Internal Affairs Captain overseeing the investigation recommended that Perez be terminated. The Chief disagreed, and decided that each officer should receive a written reprimand. Both officers appealed the written reprimands. While the appeals were pending, the officers continued their personal relationship. Before the date of Perez's administrative hearing, the Chief received negative comments about Perez's job performance from several sources.

Perez's administrative appeal of her reprimand concluded in September 2012. Based on the evidence, the Chief sustained her reprimand for violating the department's telephone policy. However, based on the recent negative comments about Perez's job performance and the sustained policy violation, the Chief released Perez from probation on September 4, 2012. The Chief confirmed that the officers' affair played no role in his decision to release Perez.

Perez then sued the city, the police department, and individual members of the department. She claimed, among other things, that her release violated her constitutional right to privacy and intimate association because it was impermissibly based in part on management's disapproval of her private, off-duty sexual conduct. The district court granted summary judgment in favor of the city defendants on all claims, and Perez appealed.

In its first decision in this case in 2018, the Ninth Circuit reversed the city defendants' summary judgment victory as to Perez's privacy and intimate association claims. In that 2018 decision, the Ninth Circuit opined that Perez had presented sufficient evidence that "[a] reasonable factfinder could conclude that [the Captain overseeing the investigation] was motivated in part to recommend terminating Perez on the basis of her extramarital affair, and that he was sufficiently involved in Perez's termination that his motivation affected the decision-making process."

Following the death of Judge Stephen Reinhart, who was on the panel that issued the 2018 opinion, the Ninth Circuit withdrew the 2018 opinion and issued a new one. The second opinion gave the summary judgment victory back to the individual defendants based on qualified immunity.

The Ninth Circuit noted that under the doctrine of qualified immunity, courts may not award damages against a government official in his or her personal capacity "unless the official violated a statutory or constitutional right, and the right was clearly established at the time of the challenged conduct." To determine whether there is a violation of clearly established law, courts assess whether any prior cases establish a right that is "sufficiently definite."

The Ninth Circuit first examined *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), which explicitly rejected a rule that a police department can never consider its employees' sexual relations. Rather, *Thorne* held that a police department could not inquire about or consider a job applicant's past sexual history that was irrelevant to on-the-job considerations.

Similarly, in *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), the Ninth Circuit held that a police department could fire a probationary police officer over criminal sexual conduct that occurred before he was hired because it "compromised [the officer's] performance as an aspiring police officer" and "threatened to undermine the department's community reputation and internal morale."

The Ninth Circuit held that *Thorne* and *Fleisher* did "not clearly establish that a police department is constitutionally prohibited from considering an officer's off-duty sexual relationship in making a decision to terminate her, where there is specific evidence that the

officer engaged in other on-the-job conduct in connection with that relationship that violated department policy."

The Ninth Circuit held the individual defendants did not violate any clearly established law in terminating Perez because there was evidence from the investigation that Perez's on-duty personal telephone use was a clear violation of department policy that reflected negatively on the department. Therefore, the individual defendants had qualified immunity on the privacy and intimate association claims.

Perez also claimed that the individual defendants violated her constitutional right to due process under the Fourteenth Amendment by failing to: give her adequate opportunity to refute the charges made against her; and allow her to clear her name before she was released from probation. Specifically, Perez argued the department managers violated her right to due process by disclosing the charges sustained against her in the August 16, 2012 letter to the officer's wife.

The Ninth Circuit disagreed. To trigger a procedural opportunity to refute the charges, the employee must show: (i) the accuracy of the charge is contested; (ii) there is some public disclosure of the charge; and (iii) the charge is made in connection with termination of employment. The Ninth Circuit stated that the letter to the officer's wife regarding her citizen's complaint was not made "in connection with termination of employment" because there was an insufficient temporal nexus between that letter and Perez's release 19 days later. Therefore, the Ninth Circuit found the individual defendants had qualified immunity as to Perez's due process claim because they did not violate any clearly established law in terminating her.

Perez's complaint also claimed that her release was due to gender discrimination in violation of Title VII of the Civil Rights Act of 1964 and California's Fair Employment and Housing Act. But she conceded on appeal that the only "gender-related" discrimination she was alleging was based on her relationship with the other officer. The relationship, however, triggered only her rights to privacy and intimate association. In view of Perez's concession, the Ninth Circuit affirmed the grant of summary judgment to the individuals, the city and the department on those claims.

Employee Must Show an Adverse Employment Action Would Not Have Occurred But For a Disability

Murray v. Mayo Clinic (2019) 2019 WL 3939627.

Dr. Michael Murray sued the Mayo Clinic ("Clinic") and various individuals alleging disability discrimination in violation of the federal Americans With Disabilities Act ("ADA") after the Clinic terminated his employment. During the trial, Dr. Murray requested that the district court instruct the jury that he would prevail if he established that his disability "was a *motivating factor*" in the Clinic's decision to terminate his employment. The district court denied Dr. Murray's request and instead instructed the jury that Dr. Murray needed to establish that he "was

discharged *because* of his disability." This is known as the "but for" causation standard. The jury returned a verdict in favor of the defendants. Dr. Murray appealed.

On appeal, Dr. Murray argued that the district court was required to instruct the jury on the "motivating factor" standard rather than the "but for" standard based on the Ninth Circuit precedent stated in the case *Head v. Glacier Northwest, Inc*., 413 F.3d 1053 (9th Cir. 2005.) However, a three-judge panel of Ninth Circuit disagreed.

The court noted that while the Ninth Circuit's decision in *Head* had been consistent with the plain meaning of the ADA and the interpretation of other courts, the U.S. Supreme Court ("USSC") had subsequently issued decisions to change the applicable causation standard. For example, the USSC held that an employee must "prove that age was the 'but-for' cause of the employer's adverse action" in order to prevail on a claim under the federal Age Discrimination in Employment Act in *Gross v. FBL Financial Services Inc.*, 557 U.S. 167 (2009). The USSC declined to extend the "motivating factor" causation standard to Title VII retaliation claims in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). Accordingly, the court noted that the USSC has retreated from the "motivating factor" causation standard.

The court noted that while a three-judge panel generally cannot overrule a prior Ninth Circuit decision, it may overrule prior authority when an intervening USSC case undermines the existing precedent. The court concluded that because the USSC's decisions in *Gross* and *Nassar* were clearly irreconcilable with the Ninth Circuit's decision in *Head*, *Head* was overruled. Thus, the court found that an employee bringing a discrimination claim under the ADA must show that the adverse employment action would not have occurred but for the disability.

This case confirms that California courts should apply the "but for" causation standard when considering ADA discrimination cases. This standard is more generous towards employers than the "motivating factor" causation standard.

California Workplace Nondiscrimination Laws Amended to Protect Traits Historically Associated With Race, Including Hair Texture, Braids, Locks, and Twists

Senate Bill No. 188 (amending California Government Code section 12926)

On July 3, 2019, Governor Gavin Newsom signed into law a bill that extends California's workplace and school discrimination protections to cover race-related traits, including hair. SB-188 expands the definition of "race" under the Fair Employment and Housing Act and the nondiscrimination provisions of the Education Code. Effective January 1, 2020, "race" will include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." The law further specifies that "protective hairstyles" "includes, but is not limited to, such hairstyles as braids, locks, and twists." This change in the law includes protection from such discrimination against employees and students.

The bill was introduced by State Senator Holly J. Mitchell, and sponsored by a coalition comprised of the National Urban League, Western Center on Law & Poverty, Color of Change, and personal care brand Dove. Effective January 1, 2020, it amends Government Code section 12926 and adds section 212.1 to the Education Code.

The bill appears primarily intended to prevent unequal treatment related to natural African-American hairstyles. The bill includes a legislative declaration that "Despite the great strides American society and laws have made to reverse the racist ideology that Black traits are inferior, hair remains a rampant source of racial discrimination with serious economic and health consequences, especially for Black individuals." The declaration also states that "Workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group."

Although the bill specifically references Black hairstyles, the statutory changes it establishes may be broader. For example, under the new statutory language, it appears employers and schools are prohibited from discriminating based on any trait "historically associated with race." The parameters of this standard, i.e. whether a particular trait qualifies as "historically associated with race" will be subject to debate. In addition, although the findings and declarations speak to Black hairstyles, the new statutory language does not limit protection to African American individuals with traditionally Black hairstyles.

PERB Rules Employer Has No Obligation to Provide Union or Employee With Written Complaint Until After Initial Investigatory Interview

Contra Costa Community College District (2019) PERB Decision No. 2652.

The Public Employment Relations Board found that the Contra Costa Community College District ("District") did not violate the Educational Employment Relations Act when it withheld copies of written discrimination complaints against two faculty members in advance of investigatory interviews.

PERB found that a union has a right to reasonable notice of the alleged wrongdoing before the investigatory interview, but the union does not have a right to a copy of the written complaint until after the initial investigatory interview is completed.

The District received two student complaints against two faculty members, and subsequently hired an attorney to investigate the complaints. The District required the two accused faculty members to attend investigatory interviews. The faculty members requested union assistance in connection with the interviews, and the union agreed to assist them. The union then requested copies of the complaints prior to the interviews. The District, through its attorney, informed the union that its policy was not to provide copies of complaints before an

interview. The District asserted the need to protect the integrity of the investigation and the complainants' privacy rights as primary reasons for denying requests for copies of the complaints.

PERB held that the employer must provide reasonable notice of the alleged misconduct. This must be timely and include sufficient information about the alleged wrongdoing "to enable a union representative to represent an employee in a meaningful manner during the interview." Whether an employer has met this obligation is a case-by-case determination. However, "the employer has no obligation to provide the underlying written complaint until after the employer conducts an initial investigatory interview."

Notice is timely if it gives the accused employee enough time to consult with his or her representative. Notice is sufficient if it provides the accused employee and his or her representative with enough information about the allegations to allow for representation in a meaningful manner during the interview.

PERB also explained that after an investigatory interview, the employer may not deny the union's request for information on the basis that a disciplinary meeting or proceeding falls outside the scope of the bargaining agreement or on the basis that the union has no duty of fair representation.

Similarly, the employer may not deny the union's request for information by simply asserting a third party's right to privacy. PERB reaffirmed the rule that after the employer raises the legitimate privacy rights of a third party, such as a student, the employer cannot simply refuse to provide any information. Rather, the employer must meet and confer in good faith to reach an accommodation of both the union's and the accused employee's right to obtain the information and the third party's right to privacy. Such accommodations could include redacting information that is not relevant, or entering into agreements limiting use of the information.

Statements Made During Internal Investigation Were Protected Under Anti-SLAPP Statute, But University's Decision to Investigate Was Not

Laker v. Board of Trustees of California State University, 32 Cal.App.5th 745 (2019).

Dr. Jason Laker is a professor at San Jose State University. A student told Dr. Laker that the then-Chair of his department sexually and racially harassed her. The student brought a formal Title IX complaint against the Chair, and after investigation, the University sustained the charges against the Chair. The University disciplined the Chair, and later, the University announced it was looking into how the matter was handled.

University administrators received an e-mail a few months later from the student. She stated she experienced ongoing stress and anxiety relating to the issue. The student noted the investigative report stated that at least two professors were aware of the behavior before her

complaint. The Associate Vice President responded to the student and agreed it was concerning that other faculty members appeared to have received information regarding troubling behavior and did not notify administrators. Laker was one of those faculty members. Separately, the University received and investigated three complaints into Laker's alleged conduct.

After exhausting administrative remedies, Laker filed a lawsuit against the University and the Associate Vice President for defamation and retaliation arising from the internal investigations. Laker alleged he was falsely accused of knowing about the sexual harassment and failing to report it. Laker also alleged the Associate Vice President and other University officials called him a "liar" when he said other students had complained of sexual harassment by the Chair. Laker also argued the University and others retaliated against him because he both opposed the Chair's harassment and assisted the student with her complaint.

The University responded to Laker's lawsuit with an anti-SLAPP motion, which is a special motion that allows a court to strike a lawsuit that attacks the defendant's protected free speech in connection with a public issue. The University argued Laker's complaint should be stricken because his claims arose from protected activity under the Anti-SLAPP law, and Laker had no probability of prevailing on either claim.

Courts evaluate anti-SLAPP motions using a two-step process: 1) whether the nature of the conduct that underlies the allegations is protected under California's anti-SLAPP statute; and 2) whether the plaintiff can show likely success on the merits of the claim.

The University argued that Laker's defamation claim arose from the statements made by the Associate Vice President and others during the investigation into the complaint against the Chair. The University claimed that Laker's retaliation claim arose from the University's investigation of the three complaints against Laker. Laker argued, in part, that the anti-SLAPP statute did not protect the University's decision to pursue three investigations into his conduct.

The Court of Appeal concluded Laker's defamation claim involved conduct protected under the anti-SLAPP statute. The statements, including the Associate Vice President's email response to the student, were made during and in connection with the ongoing internal investigation and were protected as an "official proceeding authorized by law." Furthermore, these statements formed the crux of Laker's defamation claim. The Court of Appeal concluded Laker could not demonstrate a probability of success on the merits of his defamation claim because statements made during the investigation were privileged under Civil Code section 47. Thus, the University met its burden as required by the anti-SLAPP statute to strike this part of Laker's claims.

The Court of Appeal concluded the University could not show that the part of Laker's retaliation claim, which was based on the allegations that the University pursued three meritless investigations of him, arose from any protected conduct. As a result, the University could not defeat this part of Laker's retaliation claim using the anti-SLAPP statute. The Court noted that this part of the retaliation claim was based on the University's decisions to investigate and not on communicative statements by University officials.

California Supreme Court Holds That Anti-SLAPP Statute Can be Used to Screen Claims Alleging Discrimination and Retaliation

Wilson v. Cable News Network, Inc., 7 Cal.5th 871 (2019).

Plaintiff Stanley Wilson, who is African-American and Latino, worked at CNN for over 17 years, covering matters of general public importance, including multiple presidential elections and Hurricane Katrina. In his lawsuit, he alleged that after raising concerns about the network's treatment of African-American men, and after taking a five-week paternity leave, the network gave him menial assignments and denied him promotions in favor of less experienced Caucasian candidates. The network fired him after he drafted a story covering the unexpected retirement of Los Angeles County Sheriff Lee Baca and an editor reviewing the draft flagged several passages that appeared similar to another news organization's published story.

In Wilson's lawsuit, he asserted multiple causes of action alleging that CNN discriminated and retaliated against him. CNN filed an anti-SLAPP motion, arguing that the discrimination and retaliation causes of action arose from CNN's decision to terminate his employment, and that that decision arose from CNN's right to determine who should speak on its behalf on matters of public interest. The trial court agreed with those arguments and granted the anti-SLAPP motion.

A divided Court of Appeal reversed. The majority reasoned that discrimination and retaliation do not qualify as protected activity. The dissent disagreed, pointing out that the claims arose from CNN's decision about who would report the news on its behalf, a decision in furtherance of CNN's exercise of free speech rights. The Court of Appeal's decision "added to a growing divide over whether, in an employment discrimination or retaliation case, the employer's alleged [wrongful] motive … eliminates any anti-SLAPP protection that might otherwise attach to the employer's … practices." (Opinion, page 5.) The Supreme Court therefore took review to resolve the split.

The Supreme Court began its analysis by pointing out that whether an act is unlawful often depends on whether the person has a good reason for doing it, "or, at least, has no bad reason for doing it." (Opinion at p. 9.) The Court noted that it is permissible for an employer to decide to fire an employee, but not permissible to make that decision based on the employee's protected status or protected activity. The Supreme Court then noted that the Court of Appeal had reasoned that because CNN's adverse actions against Wilson would have been lawful in the absence of the allegedly illegal motives (discrimination and retaliation), Wilson's claims were not actually based on CNN's exercise of free speech rights.

The Supreme Court stated that the Court of Appeal's view "cannot be squared with either the statutory text or our precedent in interpreting it." Even if a plaintiff's claim is based on an employer's alleged illegal motives, if the claim is also based on the employer's conduct that

meets the definition of protected activity under the anti-SLAPP statute, then the anti-SLAPP protections apply.

The Court then analyzed whether CNN's decisions regarding Wilson met the definition of protected activity. It explained that not every staffing decision a news organization makes is done in furtherance of its exercise of free speech rights. The Court held that because Wilson's written work was vetted and reviewed by others, and because he did not have authority to decide, on his own, what would appear on CNN's website, and he did not appear on air, CNN's decisions about his employment had no substantial relationship to CNN's ability to speak on matters of public concern. Therefore, the adverse actions fell outside the protection of the anti-SLAPP statute. But, the Court held that to the extent CNN's decision to terminate Wilson was based on its belief that he had committed plagiarism, that was protected activity, because preventing plagiarism is a decision that "protects the ability of a news organization to contribute credibly to the discussion of public matters."

RETALIATION

Prosecutor Engaged in Protected Activity by Disclosing What He Reasonably Believed to Be Noncompliance With Laws Regarding Criminal Prosecutions

Ross v. County of Riverside, 36 Cal.App.5th 580 (2019).

Plaintiff Christopher Ross worked for Riverside County as a deputy district attorney, assigned to the homicide unit. Ross was assigned a case that had been initially handled by another attorney. That other attorney told Ross that she believed the defendant was innocent, and that his confession to the crime had been coerced. The other attorney gave Ross a memo recommending dismissing the case for those reasons.

Based on the memo Ross received from the other attorney, he emailed his supervisor stating that he did not believe the District Attorney's ("DA") office could prove the case beyond a reasonable doubt, and he recommended further DNA testing. Two days later, he sent additional evidence out for DNA testing, and again emailed his supervisor about the weakness of the case, recommending that it be dismissed. Though Ross believed that the DA's office was violating the defendant's due process rights by engaging in a malicious prosecution, he never expressly informed his supervisor that he believed the DA's office was violating any law.

Five months later, Ross received the DNA testing results, which exculpated the defendant. Ross turned the results over to defense counsel. A year later, Ross received "corrected" DNA results that exculpated the defendant with further certainty; he turned those over to defense counsel as well. Ross informed his supervisor and the Assistant District Attorney ("ADA") about the DNA results and again recommended dismissing the case. The ADA told Ross not to provide the results to defense counsel, and appeared upset when Ross told him he had already done so.

Several months after that, Ross learned of a new witness in the case. The witness was interviewed and stated that the defendant was innocent and that the defendant's roommate had committed the murder. In recorded phone calls that the roommate had made while in jail, he admitted committing the murder. Ross had the evidence sent to defense counsel. A few days later, the ADA asked Ross whether he had provided the phone call evidence to defense counsel. Ross answered by asking the ADA if he wanted Ross to turn the information over. The ADA said he would take care of that, and would take over the case. (By this point, Ross had been transferred to a different unit.) The District Attorney's office ultimately dismissed the case against the defendant.

Around the same time these events were occurring, Ross asked for accommodations of a medical condition. A lengthy disability interactive process occurred. Ross asked to be removed from certain assignments due to an asserted medical need to avoid stress and take time for medical testing regarding neurological conditions and auto-immune disorders. Ross missed several weeks of work to attend out-of-state medical appointments. Ross never provided the County with any documentation from a health care provider regarding any work restrictions or limitations on his ability to perform his duties. The interactive process broke down and Ross resigned.

Ross sued the County for whistleblower retaliation in violation of Labor Code section 1102.5, and various disability-related causes of action. The County moved for summary judgment on the retaliation claim, asserting that Ross had not engaged in protected activity. The trial court granted the motion.

On appeal, Ross argued that his recommendation to dismiss the homicide case was based on his belief that continuing the case would violate the defendant's due process rights as well as a prosecutor's ethical obligations under state law. The Court of Appeal held that Ross' unexpressed belief that a law was being violated was enough to establish a cause of action under section 1102.5. The court stated that section 1102.5 does not require such an express statement; it only requires that an employee disclose information and that the employee reasonably believe the information discloses unlawful activity.

EVALUATING AND DISCIPLINING EMPLOYEES

Sheriff's Sergeant Not Entitled to an Administrative Appeal For Release From Probationary Promotion

Conger v. County of Los Angeles, 36 Cal.App.5th 262 (2019).

On November 1, 2015, the Los Angeles County Sheriff's Department (Department) promoted Thomas Conger from sergeant to lieutenant, subject to a six-month probation period. A few months later, the Department informed Conger that he was under investigation for events occurring before his promotion. Shortly thereafter, the Department relieved Conger of duty,

placed him on administrative leave, and extended his probationary period indefinitely due to his "relieved of duty" status.

On May 20, 2016, the Department notified Conger that it was releasing him from his probationary position of lieutenant based on investigatory findings that he had failed to report a use of force while he was still a sergeant. The Department provided Conger with a "Report on Probationer" (Report), which indicated that on May 21, 2015, Conger and two deputy sheriffs moved a resisting inmate from one cell into an adjacent cell. The Report said that Conger violated Department policy by failing: to report the use of force; to document the incident, and to direct his subordinates who used or witnessed the use of force to write the required memorandum. The Report concluded that Conger did not meet the standards for the position of lieutenant, and recommended Conger's release from probation and demotion back to the sergeant.

Subsequently, Conger filed a written appeal with the County's human resources office and a request for a hearing pursuant to the Public Safety Officers' Procedural Bill of Rights Act, at Government Code section 3304 subdivision (b), with the County's Civil Service Commission. Section 3304, subdivision (b) provides that "[n]o punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal." Section 3303 defines "punitive action" as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

After both the human resources office and the Civil Service Commission denied Conger's requests, Conger petitioned the trial court for an order directing the County to provide him with an administrative appeal. Conger argued that releasing him from his probation based on alleged pre-promotion misconduct constituted a "denial of promotion on grounds other than merit" under section 3304, subdivision (b), and entitled him to an administrative appeal. The trial court denied the petition, ruling that the Department could properly consider Conger's pre-probationary conduct in rescinding his promotion and that the decision to rescind was merit-based due to Conger's failure to report a use of force. Conger appealed.

The Court of Appeal affirmed. First, the court determined whether Conger's release from his probationary promotion was a "denial of promotion" or a "demotion." The court noted that this was an important distinction because under section 3304, subdivision (b), an employer can deny a promotion without triggering the appeal right, so long as the denial is based on merit. The court concluded that the Department's decision was indeed a denial of a promotion. The court noted that Conger had not completed his probationary period at the time the Department returned him to his previous rank because the Department had extended the probationary period indefinitely. Therefore, Conger did not yet have a vested property interest in the lieutenant position. Because Conger lacked permanent status as a lieutenant, his release from his probationary promotion constituted a denial of promotion rather than a demotion.

Next, the Court of Appeal considered whether the Department denied Conger's promotion on merit-based grounds. The court noted that because lieutenants are high-level supervisors in the Department, complying with Department procedures and ensuring that subordinates do so as well is substantially related to successful performance in that position. The court reasoned that Conger did not demonstrate competence as a supervisor when he failed to report a use of force or instruct his subordinates to do so. Further, the court noted that nothing in section 3304, subdivision (b) suggests that the term "merit" should be limited to the merit of an officer's performance during the probationary period. Thus, the court concluded that the Department's grounds for denying Conger's promotion were merit-based.

Finally, the court evaluated whether Conger was entitled to an administrative appeal because the Report could lead to future adverse consequences. Conger argued that he was entitled to an administrative appeal because the Department placed the Report in his personnel file and could rely on it in future personnel decisions that could lead to punitive action. The court said that the mere fact that a personnel action may lead to a denial of promotion on merit grounds does not transform it into a punitive action for purposes of section 3304. Moreover, Conger did not provide any evidence that the Report would lead to punitive action or affect his career because the only action the Report recommended was release from the promotion.

PRIVACY AND PERSONNEL RECORDS

Law Enforcement Agencies May Disclose Particular "Brady List" Officers to Prosecutors Despite *Pitchess* Statutes

Association for Los Angeles Deputy Sheriffs v. Superior Court (Los Angeles County Sheriffs Department), No. S243855 (August 26, 2019).

The California Supreme Court held that the Los Angeles County Sheriff's Department (LASD) could share with prosecutors the names of deputies on its "*Brady* list" in particular cases without seeking a court order after a *Pitchess* motion. In particular, Court held that the LASD would not violate *Pitchess* "by sharing with prosecutors the fact that an officer, who is a potential witness in a pending criminal prosecution, may have relevant exonerating or impeaching material in that officer's confidential personnel file." In so holding, the Court decided a novel question of constitutional and statutory law.

The theoretical background of the case is as follows. Under the U.S. Supreme Court's holding in *Brady v. Maryland*, the prosecution in a criminal case must disclose to the defense all exculpatory evidence in the prosecution's possession. This includes impeachment evidence of a police witness, which is sometimes found in the officer's personnel file. Indeed, prosecutors have a duty under *Brady* and its progeny to inquire whether the relevant law enforcement department is in possession of exculpatory evidence.

At the same time, California Penal Code sections 832.7 and 832.8 afford confidential status to officer personnel records and impose an obligation on law enforcement agencies to maintain the

confidentiality of such records – and information contained therein. These statutes, along with others in the Evidence Code, provide procedures for a criminal defendant to access information relevant to his or her defense from an officer's personnel file. To do so, the criminal defendant must file a written motion, supported by declarations or affidavits, demonstrating good cause for the disclosure. If the motion is granted, the trial court privately reviews the officer's personnel records and directs the custodian of records to provide the defendant any relevant information. The same requirements apply to a prosecutor seeking evidence from an officer's personnel file. The relevant statutory sections are commonly referred to as the "*Pitchess* statutes," after *Pitchess v. Superior Court*, the California Supreme Court case on which they are based. Likewise, motions filed pursuant to these statutes are known as "*Pitchess* motions."

Against this backdrop, the LASD here compiled a so-called "*Brady* list," consisting of names and serial numbers of deputies whose personnel files contained sustained allegations of misconduct that could subject the deputies to impeachment in a prosecution. Many police agencies across the state maintain such lists, which typically include officers found to have engaged in dishonesty or other acts of moral turpitude.

In an effort to comply with *Brady*, the LASD proposed an internal policy under which it would disclose its *Brady* list to the district attorney's office and other prosecutorial agencies. In turn, if an LASD deputy was a witness in a criminal case, the prosecution would know to file a *Pitchess* motion to obtain relevant information from the deputy's personnel file, or alternatively to alert the defense so it could file its own *Pitchess* motion. Under the policy, details of investigations or portions of the deputies' personnel files would only be disclosed in response to a formal *Pitchess* motion and accompanying court order.

The LASD transmitted a letter to deputies, notifying them of the proposed policy. The Association for Los Angeles County Deputy Sheriffs (ALADS), a union representing non-supervisory deputies, opposed the proposed policy. It filed a lawsuit seeking to prohibit the LASD from disclosing the names of deputies on the list to anyone outside the LASD, absent full compliance with the *Pitchess* statutes.

The trial court ultimately issued a preliminary injunction barring general disclosure of the *Brady* list to the district attorney or other prosecutors, except pursuant to the *Pitchess* statutes. The trial court's injunction, however, provided an exception for deputies who were potential witnesses in a pending criminal prosecution. i.e., it allowed for a type of *Brady* "alerts." Under the injunction, the names of these deputies could be disclosed on an individual basis outside the *Pitchess* process. On appeal, however, the Court of Appeal approved the injunction and went a step further to hold that even *Brady* alerts were improper. Absent compliance with the *Pitchess* processes, the LASD could not disclose to prosecutors the names of any deputies on the *Brady* list, even those deputies who were potential witnesses in a pending criminal prosecution.

The California Supreme Court granted review of the case. In an opinion by Chief Justice Cantil-Sakauye, the Supreme Court reversed the decision of the Court of Appeal and held that the

"confidentiality" language of the *Pitchess* statutes authorized a sheriff's department to share *Brady* alerts with prosecutors for particular cases.

The Court first evaluated the extent to which the new law SB 1421, effective January 1, 2019, affected its analysis. That law, which was passed and went into effect while this case was pending, made non-confidential, and in fact open for public inspection, many types of police officers personnel records that could cause an officer to be included on a *Brady* list. This includes, among other specific types of records, those relating to incidents in which a sustained finding was made of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime and also any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence." The Court found basically that although some of this SB 1421 information might constitute what places an officer on a *Brady* list, it was not exhaustive of the types of misconduct and information that might do so. Thus, the passage of SB 1421 did not make it so *Brady* lists and alerts contain only non-confidential information, and the Court still had to resolve the issue presented by this case. (The Court also observed in a footnote that it was not deciding at this point whether SB 1421 affects the confidentiality of records that existed before the statute's January 1, 2019 effective date.)

In reaching the merits, the Court held that the "confidentiality" requirement of the *Pitchess* statutes should be interpreted to allow law enforcement agencies to comply with their constitutional obligations under *Brady* by providing limited alerts to prosecutors. The Court reasoned as follows:

"In common usage, confidentiality is not limited to complete anonymity or secrecy. A statement can be made 'in confidence' even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately." . . . So, for example, it is hard to imagine that the term "confidential" would categorically forbid one employee of a custodian of records, tasked with maintaining personnel files, from sharing those records with another employee assigned to the same task. Put differently, deeming information "confidential" creates insiders (with whom information may be shared) and outsiders (with whom sharing information might be an impermissible disclosure). The text of the *Pitchess* statutes does not clearly indicate that prosecutors are outsiders, forbidden from receiving confidential *Brady* alerts."

The Court concluded: "Viewing the Pitchess statutes 'against the larger background of the prosecution's [*Brady*] obligation,' we instead conclude that the Department may provide prosecutors with the *Brady* alerts at issue here without violating confidentiality."

The Court did not hold that a sheriff's department could forward an entire *Brady* list to prosecutors, but addressed *Brady* alerts, in particular the process by which a sheriff's department advises prosecutors that a witness in a particular case is on the list. The Court's holding will greatly facilitate the ability of law enforcement and prosecutorial agencies to work together to comply with obligations under *Brady*, without, as the Court explained, significant compromise of officer state law rights secured by the *Pitchess* statutes.

Certain Peace Officer Personnel Records Created Before 2019 Are Also Public Records Under New California Law

Walnut Creek Police Officers' Association v. City of Walnut Creek, 33 Cal.App.5th 940 (2019).

Senate Bill No. 1421 ("SB 1421"), which went into effect on January 1, 2019, allows the public to obtain certain peace officer personnel records by making a request under the California Public Records Act. Prior to SB 1421, these records were only available by court order and in narrow circumstances. The peace officer personnel records that are now public records include those relating to: a peace officer who shoots a firearm at a person; a peace officer's use of force that results in death or great bodily injury; or a sustained finding that a peace officer either sexually assaulted a member of the public or was dishonest.

Since SB 1421 went into effect, numerous public agencies across California have been involved in lawsuits over whether the new law applies to records created before 2019.

In its first published decision addressing the issue, the California Court of Appeal held that applying SB 1421 to pre-2019 records does not make the new law impermissibly retroactive. The court noted that "[a]lthough the records may have been created prior to 2019, the event necessary to 'trigger application' of the new law – a request for records maintained by the agency – necessarily occurs after the law's effective date." The court reasoned that the new law "does not change the legal consequences for peace officer conduct described in pre-2019 records . . . Rather, the new law changes only the public's right to access peace officer records." Thus, SB 1421 allows the public to request certain peace officer personnel records that were created before January 1, 2019.

LABOR NEGOTIATIONS AND THE MMBA

County Violated MMBA by Removing Leadership Duties from Hospital Division Chief

Reese v. County of Santa Clara, PERB Decision No. 2629-M (2019).

Jeffrey Reese began working for the County of Santa Clara as a urologist in 1990. In 1996, Reese began serving as the division chief of urology in the surgery department at Santa Clara Valley Medical Center ("SCVMC"), a County hospital. Reese reported to Gregg Adams, the chair of the surgery department.

In 2010, Valley Physicians Group ("VPG") became the exclusive representative for the County's physician bargaining unit. Between November 2011 and April 2012, Reese participated in the joint labor-management committee focused on implementing the negotiated terms of the first memorandum of understanding ("MOU") between VPG and the County. In the fall of 2013, Reese joined VPG's bargaining team for successor MOU negotiations.

Starting in 2012, Jeffrey Arnold served as SCVMC's chief medical officer and was primarily responsible for managing the provider staff, hiring and firing physicians, and determining their salaries. Arnold participated as a member of the County's bargaining team from late 2013 through late 2014.

In the negotiations for a successor MOU between the County and VPG, Arnold indicated that physician workload needed to increase. Members of the VPG bargaining team, including Reese, expressed their concerns that if physician workloads became excessive, patient safety and service quality would be at risk. After bargaining, Reese continued to raise these concerns with Arnold.

After one of SCVMC's five urologists left and approximately 50,000 new patients were eligible to be served by the County health system, Arnold vetted urologist Dr. Tin Ngo for hire. Arnold offered Ngo a position without consulting or notifying Reese. Ngo was not Medical Board-certified at the time.

Before Ngo officially began work, Arnold told Adams that Reese was not the "correct" person to be chief and suggested that Ngo replace Reese. Adams objected to Arnold's plan because it would violate his department's policies, which required a division chief to be Medical Board-certified. Adams also thought the decision to replace Reese was premature.

Arnold then informed Adams that he was proposing to have Ngo named as "interim chief." Once again, Adams rejected Arnold's proposal because Ngo was not yet Medical Board-certified. Instead, Arnold decided to install Ngo as a "medical director," and give Ngo most of Reese's authority as chief. Arnold increased Ngo's pay to equal Reese's. While Reese did not suffer a pay loss, 90% of his leadership duties were removed.

To prove that an employer has discriminated or retaliated against an employee in violation of the Meyers-Milias Brown Act ("MMBA"), the employee must show that: 1) he or she exercised rights under the MMBA; 2) the employer had knowledge of the exercise of those rights; 3) the employer took adverse action against the employee; and 4) the employer took the action because of the exercise of those rights. If the employee proves these elements, the burden shifts to the employer to demonstrate that it would have taken the same action, even in the absence of the protected conduct.

The Public Employment Relations Board concluded that the County removed Reese's division chief duties because of his involvement with VPG, which violated the MMBA. PERB noted that "Reese first contested Arnold's stated interest in increasing the physicians' workload during successor MOU bargaining and thereafter continued to advocate for additional staffing to ease the urology staff's workload." PERB also noted that removing Reese's duties as division chief limited his ability to oppose Arnold's plan to increase physicians' workload. Thus, "Arnold's managerial concerns about Reese were directly related to the very matters he had raised in the course of his protected conduct."

Fire Protection District Violated MMBA When It Denied Represented Employees Longevity Differential

United Chief Officers Association v. Contra Costa County Fire Protection District, PERB Decision No. 2632-M (2019). [Judicial Appeal Pending]

The PERB found that a County Fire Protection District violated the MMBA when it granted unrepresented employees a longevity differential but denied the benefit to employees represented by the union.

In 2006, the Contra Costa County Board of Supervisors passed a resolution that provided about 600 classifications of County employees a longevity differential consisting of a 2.5% increase in pay for 15 years of service. The resolution described the eligible County employees as "Management, Exempt and Unrepresented Employees."

The United Chief Officers Association ("Association") represented the Fire Management Unit of the Contra Costa County Fire Protection District ("District"), one of the County's special districts. In subsequent labor negotiations between the Association and the District, the Association demanded the same longevity differential previously granted to unrepresented management employees. The District rejected the Association's proposal, and admitted on several occasions that it did so to ensure that unrepresented employees are paid more than represented employees.

In 2008, the County Board of Supervisors adopted a resolution that extended the 2.5% longevity differential for 15 years of service to more than 1,000 unrepresented supervisory and managerial employees of the District. This effectively extended the differential to all unrepresented management employees of the District, except those in the represented Fire Management Unit. The Association filed a grievance, but the matter was not resolved. Subsequently, the Association filed an unfair practice charge alleging that the District interfered with the union and employee rights, and discriminated against them by treating them differently based on protected activity.

PERB discussed the difference between interference and discrimination charges. PERB noted that for interference, the focus is on the actual or reasonably likely harm of an employer's conduct to the protected rights of employees or employee organizations. Thus, to establish interference, the employee or employee organization does not need to prove the employer's motive, intent, or purpose. PERB noted that an interference violation will be found when the resulting harm to protected rights outweighs the business justification or other defense asserted by the employer. In contrast, the employer's unlawful motive, intent, or purpose is necessary to establish a case for discrimination. A charge of discrimination will be sustained if the employee shows that the employer would not have taken the complained-of conduct but for an unlawful motivation, purpose, or intent.

PERB found that the District interfered with the Association and employees' protected rights in violation of the MMBA. PERB noted that the District expressly distinguished between represented and unrepresented employees as the basis for granting employment benefits. Thus, the District's conduct discouraged employees from participating in organization activities, which is a quintessential protected right under the MMBA. PERB rejected the District's affirmative defenses outright, and concluded that the resulting harm outweighed the District's explanations.

PERB also found that the District discriminated against employees by treating Association-represented employees differently from unrepresented employees. The District only offered the differential to unrepresented employees in order to maintain "separation" in employment benefits between represented and unrepresented employees. Thus, PERB concluded that the District's conduct provided direct evidence of motive and inherently discriminatory conduct sufficient to support a discrimination allegation.

PERB ordered the District to pay each eligible current and former member of the District's Fire Management Unit the 2.5% longevity differential for 15 years of service.

Court of Appeal Declines to Invalidate Initiative Placed on Ballot in Violation of MMBA

Boling v. Public Employment Relations Bd., 33 Cal.App.5th 376 (2019).

The City of San Diego's Mayor Jerry Sanders championed a citizens' initiative in 2010 that would eliminate traditional defined benefit pensions for most newly-hired City employees, and replace them with defined contribution plans. The affected unions argued that Mayor Sanders was acting in his official capacity to promote the initiative and, in doing so, was making a policy determination that required meeting and conferring with the unions under the MMBA. The City's voters eventually adopted the initiative, without the City ever meeting and conferring with the unions.

In 2018, the California Supreme Court held that the City violated the MMBA because Mayor Sanders made a policy decision to advance a citizens' pension reform initiative without meeting and conferring with the affected employees' unions. The California Supreme Court then remanded the case to the Court of Appeal to determine the appropriate remedy for the City's violation of the MMBA.

On remand, the Court of Appeal declined to invalidate the citizens' pension reform initiative. The Court of Appeal concluded that because the voters adopted the initiative and the initiative has taken effect, the initiative can only be challenged in a special quo warranto proceeding. Thus, the validity of the initiative was beyond the scope of the court's review.

However, the Court of Appeal did order the City to meet and confer with the unions over the effects of the initiative and to pay the affected current and former employees the difference, including interest, between the compensation the employees would have received before the

initiative went into effect, and the compensation the employees received after the initiative became effective. The court reasoned that this remedy reimburses the employees for the losses they incurred and reduces the City's financial incentive for refusing to bargain.

Additionally, the Court of Appeal ordered the City to cease and desist from refusing to meet and confer with the unions. Instead, the Court found that the City is required to meet and confer upon the unions' request before the City can place a measure on the ballot that affects employee pension benefits or other negotiable subjects.

PERB Holds that Its Jurisdiction Includes Claims Brought By Employee Organizations that Represent Police Officers and Deputy Sheriffs

Association of Orange County Deputy Sheriffs v. County of Orange, PERB Decision No. 2675-M.

This case concerned whether PERB has jurisdiction to hear claims brought by employee organizations that represent peace officers as that term is defined in Penal Code 830.1, and whether the County was obligated to bargain changes to an ordinance creating an Office of Independent Review (OIR) that advised the Sheriff-Coroner on certain in-custody incidents and complaints against law enforcement personnel. The Board held for the Association on the jurisdictional issue and for the County on the merits. This decision is very significant as it provides a very clear holding from PERB that it believes that employee organizations (labor associations and unions) that represent only sworn peace officers (officers and sheriffs) can directly file unfair practice charges with PERB and that PERB has jurisdiction to adjudicate those charges.

During the relevant time period, the Association of Orange County Deputy Sheriffs (Association) was a bargaining unit composed of 1693 peace officers, as that term is defined in Penal Code 830.1, and 115 non-peace officers. (Penal Code 830.1 defines persons who are peace officers to include deputy sheriffs and police officers.)

In 2008, the County passed an ordinance creating an OIR to advise the Sheriff-Coroner regarding in-custody incidents involving death or serious injury and complaints against law enforcement personnel. In 2015, the County notified the Association of its intent to change its OIR ordinance to extend OIR authority to cover the District Attorney's Office, among other changes. The Association argued that the decision to change the OIR ordinance and the effects of the decision were matters within the scope of representation. In December 2015, the County implemented changes to the OIR without meeting and conferring with the Association. The Association then filed an Unfair Practice Charge (UPC) in June 2016.

As part of its response to the UPC, the County moved to dismiss, arguing PERB lacked jurisdiction to hear claims brought by 830.1 peace officers. According to the County, section 3511 of the MMBA bars claims by persons who are peace officers as defined in section 830.1 of the Penal Code, as well as claims that impact Penal Code 830.1 peace officers. The ALJ

disagreed, relying on a 2015 PERB Decision that found the Board had jurisdiction over charges brought by employee organizations representing bargaining units that include, in whole or in part, persons who are peace officers. The County then excepted to the ALJ's ruling on jurisdiction and the matter was heard before the PERB Board.

After a lengthy discussion of statutory history and statutory framework, the Board affirmed the ALJ's decision and rejected the County's arguments, holding that PERB has jurisdiction over claims brought by employee organizations that represent or seek to represent bargaining units composed partially *or entirely* of Penal Code 830.1 peace officers. In other words, while section 3511 of the MMBA prohibits natural persons who are peace officers pursuant to Penal Code 830.1 from filing claims with PERB, *their Associations may do so*.

The Board found for the County on whether the County had an obligation to bargain changes to its OIR ordinance that expanded the jurisdiction of the OIR, authorized the OIR to work with departments beyond the Sheriff-Coroner, and authorized the OIR to provide legal advice on non-law enforcement employee misconduct. According to the Association, the changes to the OIR were within the scope of representation because legal advice provided by the OIR attorneys could influence disciplinary decisions, which, according to the Association, would affect the discipline process and disciplinary procedure. Disciplinary procedure is a mandatory subject of bargaining under the MMBA. The Board disagreed, finding the changes to the OIR ordinance only concerned management's direction to its legal counsel for the performance of legal services, which is outside the scope of representation and the MMBA's meet-and-confer requirement. PERB drew a distinction between citizen review board procedures and advice of legal counsel, finding that the directions an employer gives its legal counsel about how to provide it with legal advice is so attenuated from the employment relationship that it is outside the scope of representation. The Board concluded, "[u]ltimately, the OIR ordinance functions much like a contract for legal services and concerns only how OIR attorneys and staff will provide the County with legal advice; it does not change or have effects on the disciplinary procedure."

RETIREMENT

Employee Who Settles a Pending Termination for Cause and Agrees Not to Seek Reemployment Is Not Eligible for Disability Retirement

Martinez v. Public Employees' Retirement System, 33 Cal.App.5th 1156 (2019).

In 2001, Linda Martinez began working at the State Department of Social Services ("DSS") after working for the State since 1985. During this time, Martinez also served in various positions with her union.

In 2014, DSS sought to terminate Martinez's employment and provided her with a notice citing numerous grounds for her dismissal. Martinez challenged the dismissal, believing that her termination "was taken in retaliation for her union activities."

The parties later negotiated a settlement. DSS agreed to: pay Martinez $30,000; withdraw the notice for dismissal; and remove certain matters from her personnel file. In return, Martinez agreed to voluntarily resign effective September 30, 2014. DSS also agreed to cooperate with any application for disability retirement filed by Martinez within the six months following her voluntarily resignation.

Martinez filed her disability retirement application on the grounds that she could longer function in her role at DSS because of various job-related conditions. The California Public Employees Retirement System ("CalPERS") cancelled her application. CalPERS notified Martinez that she was not eligible for disability retirement because she was "dismissed from employment for reasons which were not the result of a disabling medical condition" and that "the dismissal does not appear to be for the purpose of preventing a claim for disability retirement." Martinez appealed the denial to the Board of CalPERS, which denied Martinez's petition for reconsideration.

Martinez and her union then sued CalPERS, its Board, and DSS to request the court to order the Board to set aside and reverse its decision. The trial court denied Martinez's petition.

Ordinarily, governmental employees lose the right to apply for disability retirement if they are terminated for cause. However, prior decisions have carved out exceptions to this general rule. For example, in *Haywood v. American River Protection District*, 67 Cal.App.4th 1292 (1998), the court held that a terminated-for-cause employee can still qualify for disability retirement when the conduct which prompted the termination was the result of the employee's disability. In *Smith v. City of Napa*, 120 Cal.App.4th 194 (2004), the court concluded that a terminated employee may qualify for disability retirement if he or she had a "matured right" to a disability retirement prior to the conduct that prompted the termination.

Further, relying on *Haywood* and *Smith*, the CalPERS Board determined that an employee loses the right to apply for disability retirement when the employee settles a pending termination for cause and agrees not to seek reemployment. The CalPERS Board reasoned that such a situation is "tantamount to dismissal." (*In the Matter of Application for Disability Retirement of Vandergoot*, CalPERS Precedential Dec. No. 12-01 (2013).)

On appeal, Martinez argued that *Haywood* and *Smith* have been superseded by statute and that the Board's decision in *Vandergoot* is no longer precedential. Specifically, Martinez relied on a 2008 amendment to the retirement law that provides "[i]n determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process." Thus, Martinez argued that determinations of eligibility for disability retirement can only be made because of competent medical opinion.

However, the Court of Appeal disagreed. The court noted that the section Martinez relies on "is but a single sentence in a single statute, and cannot be examined to the exclusion" of the entire retirement law. The Court noted that Martinez's voluntary resignation "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement." As a result, the Court said that the 2008 amendment to the retirement law did not supersede *Haywood* and *Smith*. Further, the Court concluded that the Board's decision that a settlement not to seek reemployment is "tantamount to dismissal" was "eminently logical." Thus, the precedent established in *Haywood*, *Smith*, and *Vandergoot* remains the law.

Interim Finance Manager Retained Through Regional Government Services Was an Employee Entitled to CalPERS Membership and Contributions

Fuller v. Cambria Community Services District, PERS Case No. 2016-1277.

Tracy Fuller served as an Interim Finance Manager for the Cambria Community Services District ("CCSD") from March to November of 2014 following the former Finance Manager's retirement. Fuller previously worked with other CalPERS member agencies, and retired within the CalPERS system. Throughout Fuller's retention, CCSD actively sought to (and eventually did) hire a permanent Finance Manager replacement. CCSD retained Fuller through Regional Government Services ("RGS"), a joint powers authority that does not contract with CalPERS. RGS has worked with over 200 local agencies since approximately 2002. RGS hires retirees as employees of RGS, and classifies itself as an independent contractor which is not subject to CalPERS pension laws.

CalPERS audited CCSD in late 2014, and issued a report finding Fuller was not an independent contractor and should have been enrolled in CalPERS as an eligible employee. CCSD appealed CalPERS' determination. Throughout the audit and appeal, CCSD, RGS and even Fuller agreed and characterized her service as a third-party contractor and RGS employee.

The CalPERS Board of Administration adopted the Administrative Law Judge's ("ALJ") proposed decision and determined that Fuller was a common-law employee of CCSD. Thus, CCSD was required to pay pension contributions on Fuller's behalf as a CalPERS member. The Board noted that the California Supreme Court has held that the retirement law's provisions regarding employment incorporate the common law test. Under this test, an employer-employee relationship exists if the employer has the right to control the manner and means of accomplishing the desired result (as opposed to simply the result, which instead establishes an independent contractor relationship). Courts will also consider a number of other secondary factors in this analysis.

The Board and the ALJ primarily relied on the following factors to determine that Fuller was a common law employee who must be enrolled in CalPERS: 1) CCSD ultimately had the right to control the manner and means in which Fuller accomplished her assignments; 2) RGS could not reassign Fuller without CCSD's consent; 3) Fuller ultimately reported to CCSD's General Manager; 4) CCSD's General Manager and Administrative Services Officer ("ASO")

determined and issued her particular assignments, not RGS; 5) CCSD's General Manager and ASO evaluated her work; 6) Fuller's work, although different in kind from her predecessor, simply reflected the particular financial work CCSD needed at the time, and was not sufficiently distinguishable from any other past Finance Manager's duties; 7) CCSD provided Fuller with an office, phone, limited access to its computer systems, and an email address; 8) CCSD paid for Fuller's local housing; 9) CCSD described Fuller as a staff member in its board minutes; 10) RGS did not provide any specialized services and the ALJ held "operating as an Interim Finance Manager for a public agency is not a distinct occupation or business, and is work usually done under the principal's direction"; 11) RGS and CCSD's independent contractor agreement provided for an option to extend the agreement on a month-to-month basis, past the specified four-month term; and 12) although CCSD paid Fuller indirectly through RGS, Fuller was still paid by the hour, not the job. Accordingly, the Board and ALJ concluded that the weight of the factors supported a finding that Fuller was a CCSD employee. Further, because the Board determined CCSD should have known Fuller was improperly classified, it imposed additional liability on CCSD.

Newest Developments in Workplace Drug and Alcohol Laws

Friday, October 18, 2019 General Session; 8:00 – 10:00 a.m.

Burke Dunphy, Partner, Sloan Sakai Yeung & Wong
Madeline Miller, Senior Counsel, Sloan Sakai Yeung & Wong LLP

Notes:_____

Newest Developments in Workplace Drug and Alcohol Law

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Newest Developments in Workplace Drug and Alcohol Law

By Burke Dunphy and Madeline Miller

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I. INTRODUCTION

The rules governing drug testing for public employers in California represent a confluence of constitutional, discrimination, health and safety, and criminal law. As a general rule, nearly all public employers in the state of California must certify that they provide a drug-free workplace[1] and most must also follow the regulations of the Federal Drug Free Workplace Act of 1988.[2] While it would appear as though this is a simple directive for employers – ensure that your employees are not impaired by drugs or alcohol at work – employers' efforts to comply are complicated by, among other things, (i) inconsistencies in the treatment of marijuana under state and federal law, (ii) the need to balance their interest in ensuring a drug-free workplace with employees' constitutional right to privacy, and (iii) the treatment of certain types of drug use under state and federal anti-discrimination laws.

The purpose of this paper is to provide guidance to public employers to help them navigate the various laws that must be considered when developing and implementing workplace drug and alcohol policies. Specifically, the below discussion focuses on the complications faced by employers related to marijuana usage by employees and, more generally, the rules related to drug and alcohol testing considering the limitations dictated by both state and federal (i) constitutional protections and (ii) disability discrimination laws.

II. IMPACT OF CALIFORNIA MARIJUANA STATUTES ON EMPLOYER DRUG POLICIES

A. MEDICAL MARIJUANA

Use of marijuana for medicinal use has been permissible in California for over twenty years, since the passage of the Compassionate Use Act of 1996. The Compassionate Use Act of 1996, among other things, amended the California Health and Safety Code to decriminalize the cultivation, possession, and use of marijuana by patients suffering from certain serious medical conditions upon the recommendation of a licensed physician.[3] The law protects patients and their primary caregivers from criminal prosecution and penalties for possessing (i) up to 8 ounces of dried marijuana and (ii) up to 6 mature or 12 immature marijuana plants.[4] Physicians who prescribe medical marijuana are also protected from both criminal prosecution and from losing their medical license or other privileges as a result of recommending medical

[1] Cal. Gov. Code §§ 8350, et seq. (requiring employers who contract with or receive grants from the State of California to certify that they provide a drug-free workplace).

[2] 41 U.S.C. Ch. 81 (requiring employers who enter into a federal contract for the procurement of property or services valued at $100,000 or more, or who receive a federal grant, to follow the regulations of the Drug-Free Workplace Act of 1988).

[3] Cal. Health & Safety Code §11362.5

[4] Cal. Health & Safety Code §11362.77(a)

marijuana use.[5] Courts have interpreted this provision of the Health and Safety Code as permitting qualified patients to possess an amount of marijuana that is "reasonably related to [their] current medical needs."[6]

One apparent hole in the state's medical marijuana legislation is that the Compassionate Use Act of 1996, as originally adopted and implemented by the State legislature, was silent as to any employment law impacts. Specifically, it neither required employers to accommodate the use of medical marijuana in the workplace, nor did it explicitly exempt employers from such accommodation. In an attempt to clarify the rules around the use of medical marijuana, the California legislature enacted further legislation in 2003. Part of this legislation – the Medical Marijuana Program Act[7] - explicitly provided that medical marijuana need not be accommodated *in the workplace or during work hours*.[8]

However, it did not address whether employers were required to accommodate off-site or off-hours medical marijuana usage. In what remains the seminal case on this issue in California, the California Supreme Court held in *Ross v. RagingWire Telecommunications*[9] that employers *are not* obligated to hire employees who test positive for marijuana usage, regardless of when and where they actually used the marijuana or if they were legally prescribed the drug. Specifically, the Court in *RagingWire* was asked to determine whether an employer violated the California Fair Employment and Housing Act ("FEHA") by failing to accommodate a job applicant's off-work medical marijuana usage. The job applicant suffered from chronic pain for which he was prescribed medical marijuana. Following a conditional employment offer, the plaintiff was directed to take a pre-employment drug test and disclosed his medical marijuana usage to the testing agency. When the test came back positive, his conditional employment offer was revoked and the plaintiff sued alleging, among other things, violations of the anti-discrimination and reasonable accommodation provisions of FEHA. The Court found that the Compassionate Use Act of 1996 did not give marijuana the status of other legally prescribed drugs given that it remained (and remains) illegal under federal law. Accordingly, and consistent with precedent,[10] the Court held that employers do not violate FEHA by failing to hire individuals who test positive for marijuana usage, even if that usage is permissible under the Compassionate Use Act of 1996.

A more recent case interpreting FEHA and the Compassionate Use Act of 1996, *Shepherd v. Kohl's Department Stores, Inc.*,[11] relied on the holding in *RagingWire* in dismissing a series of alleged FEHA violations stemming from Kohl's decision to terminate the employment of an individual who tested positive for marijuana but who was using it pursuant to the Compassionate Use Act of 1996. In *Kohl's*, the plaintiff was using medical marijuana to treat an anxiety disorder but had not disclosed his medical marijuana use to his employer. He suffered a back injury at work and was sent to the worker's compensation doctor for Kohl's, who, for reasons that are not fully discussed in the Court's opinion, ran a drug screen on the plaintiff. The plaintiff's test included a positive result for marijuana metabolites and he was fired.

The plaintiff sued Kohl's for alleged violations of FEHA, defamation and breach of implied contract. The Court allowed these latter two claims to move forward.[12] The plaintiff's defamation claim was based on

[5] Cal. Health & Safety Code §11362.5(c)

[6] *People v. Trippert* (1997) 56 Cal.App.4th 1532, 1549.

[7] Cal. Health & Safety Code §§11362.7-11362.83.

[8] Cal. Health & Safety Code §11362.785(a).

[9] *Ross v. RagingWire*, (2008) 42 Cal.4th 920.

[10] *Id*. at 926-928 (citing *Loder v. City of Glendale* (1997) 14 Cal.4th 846).

[11] *Shepherd v. Kohl's Dept. Stores* (E.D. Cal. Aug. 2, 2016) 2016 WL 4126705, *4.

[12] The plaintiff's claim of breach of implied contract and the covenant of good faith and fair dealing is not particularly relevant in the public employment context. The vast majority of public employees are covered by collective

the statement in his notice of termination that he was fired, in part, because he was under the influence of marijuana at work and used, consumed or sold marijuana on company property.[13] The employee alleged, contrary to the statement in his notice of termination, Kohl's had no evidence that he actually used marijuana on Kohl's property or was under the influence at work.[14] Kohl's only evidence of his marijuana usage was a positive drug test, and the plaintiff offered evidence that marijuana metabolites can remain in one's system for up to thirty (30) days after use, even though that individual would no longer be impaired by the drug.[15] The parties in *Kohl's* jointly agreed to dismiss the lawsuit,[16] with prejudice, so the question of whether an employer who is not sufficiently precise in, or otherwise overstates, the rationale for terminating the employment of an individual who tests positive for marijuana may be held liable for defamation remains open. The best way for an employer to avoid a potential defamation claim is to use precise language in any disciplinary document and, specifically, not overstate the evidence supporting discipline (e.g. if the only evidence of drug usage is a positive drug test, do not conclusively state in the disciplinary documentation that the employee was using drugs at work).

B. RECREATIONAL MARIJUANA

In November 2016, voters in the California approved Proposition 64, also known as the Adult Use of Marijuana Act (the "AUMA"), which legalized the use, licensed growth, distribution and sale of recreational marijuana. The usage provisions of the AUMA took effect almost immediately while the growth, distribution, and sale provisions were to take effect no later than January 1, 2018. Under the AUMA, it is legal for a person aged 21 or older to (i) possess and use up to one ounce of marijuana and (ii) smoke marijuana in private homes and licensed businesses. The AUMA also provided extensive regulation on the cultivation, distribution, sale and use of marijuana.

Apparently learning from experience with the Compassionate Use Act of 1996, the AUMA explicitly does not restrict employers from maintaining drug-free workplace nor does it require employers to make accommodation for employee recreational marijuana use. The relevant portion of the AUMA states:

> Nothing in [this law] shall be construed or interpreted to amend, repeal, affect, restrict, or preempt: . . .
>
> (f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law."[17]

For this reason, the AUMA does not represent a significant legal change for employers. Employers still have the ability to drug test applicants and employees, subject to certain limitations described below and are still permitted – and generally required – to maintain drug-free workplace policies. This is particularly

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bargaining agreements, meaning there are few situations in which the parties would resort to looking to an "implied contract." Accordingly, we have not discussed this claim here.

[13] *Shepherd*, *supra*, at *10.

[14] *Ibid.*

[15] *Ibid.*

[16] Case No. 14-cv-01901 (E.D. Cal. October 4, 2016).

[17] Cal. Health & Safety Code, §11362.45.

important for employers who receive federal funding or who have employees that are subject to federal Department of Transportation (the "DOT") drug testing requirements, as marijuana remains a controlled substance under federal law.

C. LEGISLATIVE EFFORTS RELATED TO REASONABLE ACCOMMODATION

Since the passage of the AUMA, legislators in California have renewed attempts to expand protections for employees who use marijuana, particularly for medical purposes. Most recently, Assembly Bill 2069, which was introduced in February 2018, would have "prohibit[ed] an employer from engaging in employment discrimination against a person on the basis of his or her status as, or positive drug test for cannabis by, a qualified patient or person with an identification card."[18] The bill was subsequently amended to provide for the "reasonable accommodation" of medical marijuana under FEHA, including engagement in the interactive process.[19]

In an effort to avoid a conflict with federal law, the bill included a carve-out that would have allowed employers to "refus[e] to hire an individual or discharge[e] an employee who is a qualified patient or person with an identification card, as those terms are defined in Section 11362.7 of the Health and Safety Code, if hiring the individual or failing to discharge the employee would cause the employer to lose a monetary or licensing-related benefit under federal law or regulations." This provision, presumably, would have allowed employers who are subject to federal drug-free workplace laws – including most public employers – to maintain and enforce those policies. AB 2069 also would have allowed employers to "terminat[e] the employment of, or tak[e] other corrective action against, an employee who is impaired on the property or premises of the place of employment or during the hours of employment because of the use of cannabis." The bill appears to have been shelved in May 2018 and, as of the writing of this paper, has not become law.

D. PRACTICAL IMPACTS OF CALIFORNIA'S MARIJUANA LAWS IN THE EMPLOYMENT CONTEXT

As the law stands currently, employers in California are not obligated to hire individuals who test positive for marijuana, nor are they obligated to accommodate such usage by current employees, even when the applicant or employee's marijuana usage is permissible under the AUMA or the Compassionate Use Act of 1996. While this appears to a bright line rule, employers nevertheless face practical difficulties in applying it.

- Imprecise Testing: Testing for marijuana metabolites is part of most standard drug screens, including those required by federal DOT regulations. However, these tests remain inexact. Though the impairing effects of marijuana may wear off within hours of its use, marijuana metabolites may remain in an individual's system for up to thirty (30) days after usage. This means that a positive test for marijuana metabolites does not necessarily establish that an employee was impaired at work. For that reason, as illustrated in the *Kohl's* case, ***it is critical that documentation related to discipline or termination precisely state the reason for said discipline and provide sufficient factual details to support discipline.***

- Consistency in Application of Drug-Free Workplace Policies: As in any other disciplinary situation, it is important that drug-free workplace policies be applied consistently. What

[18] 2017 California Assembly Bill No. 2069, California 2017-2018 Regular Session (Feb. 7, 2018).

[19] 2017 California Assembly Bill No. 2069, California 2017-2018 Regular Session (Apr. 16, 2018).

makes this particularly challenging in the context of marijuana use is that a positive drug test is not dispositive as to whether the employee was impaired at work. Therefore, by relying on drug test results, employers may face a decision about whether to discipline an employee based on their off-hours marijuana usage. This will be a particular challenge in situations in which a "good" employee has a positive drug test, but has shown no signs of impairment at work. Their supervisor may not want to discipline them – but may seek to discipline other employees for the same conduct. To the extent an employer determines not to terminate or otherwise discipline a particular employee based solely on a positive drug test without evidence of actual impairment, they will likely be obligated to apply that same standard to all employees. This, in turn, could significantly limit an employer's ability to hold employees who test positive for marijuana use accountable for violations of the employer's drug-free workplace policy. As a recommended middle ground where the only evidence of marijuana usage is a positive drug test, employers may not want to apply "zero-tolerance" policies but rather start with a lower level of discipline. This will allow the employer to hold employees accountable for violations of their drug-free workplace policies but not leave employers in a position where their only options are to do nothing or discharge the employee.

- Potential for Disability Discrimination Claims: Though this type of claim failed in *Ross v. RagingWire*, the decision in that case was limited to the facts presented there, in which the employer was not aware of the plaintiff's disability until after receiving his positive drug test results. This decision appears to leave room for employees to assert disability discrimination claims when they are able to show evidence that their termination was a result of discrimination based on their underlying disability (as defined in the FEHA) and not their marijuana usage.

- Impacts of Public Agency Policies Related to Marijuana Sales & Revenues: With the passage of Proposition 64, many public agencies view marijuana sales as a potentially significant revenue generator for their communities and are welcoming marijuana dispensaries. This public support for cannabis, and its related revenues, can pose a challenge when a public agency seeks to hold its employees accountable for marijuana use – particularly where there is no evidence that an employee is actually impaired at work.

III. REGULATIONS RELATED TO APPLICANT AND EMPLOYEE DRUG TESTING

Most public employers in California, as recipients of state and federal government funding, are required to maintain "drug free workplaces."[20] One step in ensuring compliance with these laws is implementing and maintaining a workplace drug and alcohol policy, which should include, among other provisions, a process for testing employees for illegal drugs and alcohol.

There is some tension between these legal requirements to maintain a drug-free workplace and both (i) the significant privacy rights granted to employees under the California and federal Constitutions and (ii) the protections for people suffering from disabilities under FEHA and the federal Americans with Disabilities Act (the "ADA"). To establish that a test for drugs or alcohol falls within Constitutional limits in California,

[20] 41 U.S.C. Ch. 81, *supra*, note 2; Cal. Gov. Code §§8350, et seq., *supra*, note 1.

an employer must show "(1) a significant and specific work problem traceable to substance use, (2) that testing is a reasonable means to address that problem, and (3) that no less intrusive alternative to testing is available."[21] Accordingly, as a general rule, unless an individual is employed in a position that (i) is subject to federal Department of Transportation regulations or (ii) is "safety-sensitive," they *cannot* be subjected to suspicion-free or random drug testing. If an employee refuses to participate in a drug or alcohol test that does not violate either state or federal constitutional law, such refusal may constitute insubordination.[22] Similar limitations apply to job applicants. California law recognizes a lesser privacy interest for job applicants than employees, but nevertheless limits pre-hire, suspicion-free drug testing to (i) positions that are subject to federal Department of Transportation rules and (ii) positions where there is a nexus between the job's duties and the need to ensure the person engaged in those duties is not under the influence of drugs.[23] In addition, both testing and accountability measures must take into account that FEHA (i) treats drug and alcohol addiction as "disabilities" for which an employer cannot discriminate against a job applicant or employee[24] and (ii) protects the use of drugs that are lawfully prescribed and being used according to doctor's orders but which may have an intoxicating effect on employees.

As discussed below, the rules for drug and alcohol testing are largely driven by whether or not an employee is subject to federal DOT regulations. Employers are significantly more limited in their ability to test non-DOT employees, for whom courts have held the balance weighs more heavily on protecting employee privacy rights given the nature of their work.

A. NON-DOT EMPLOYEES

The majority of public employees are not subject to federal DOT regulations, which are largely limited to individuals operating "commercial motor vehicles."[25] In general, though the standards for reasonable suspicion testing are relatively consistent with those applicable to DOT-covered employees, the rules related to pre-hire and random testing are significantly more restrictive for employees not covered by DOT regulations, tending to place more weight on employees' privacy interest.[26]

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[21] *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 911.

[22] *Flowers v. State Personnel Board* (1985) 174 Cal.App.3d 753.

[23] *Lanier v. Woodburn* (9th Cir. 2008) 518 F.3d 1147

[24] Drug and/or alcohol addiction is considered a disability even if an individual suffering from such addiction is not currently in treatment, as long as they are not currently using illegal drugs or using alcohol at work. 42 U.S.C. §12114(a)-(b) provides that while illegal drug use is not generally protected under the ADA, if an individual "(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use," they are protected against discrimination based on their addiction under the ADA.

[25] Commercial motor vehicles are defined as vehicles with a gross vehicle weight of at least 26,001 pounds, vehicles designed to transport 16 or more people, or vehicles that transport hazardous materials. 49 C.F.R. §382.107.

[26] Although the rules around when testing is permissible are narrower, employers often use the same measures for what constitutes a positive test for both DOT-covered and non-covered employees. Those measures are detailed below.

1. PRE-HIRE TESTING

a) TESTING FOR DRUGS

California law recognizes a lower privacy standard for individuals prior to hiring than for current employees and thus permits broader testing of job applicants.[27] In its decision in *Loder v. City of Glendale*, the California Supreme Court held that drug testing was permissible, even absent reasonable suspicion, for public employees who have been given a conditional offer of employment.[28] In reaching this conclusion, the Court placed significant weight on a public employer's interest in maintaining a drug-free workplace.[29] However, when an employer tests an applicant for drugs prior to making a conditional offer of employment, the employer is not permitted to conduct any other tests on the applicant's sample. [30]

The holding in *Loder*, though, appears to have been narrowed by a more recent decision from the Ninth Circuit. In *Lanier v. City of Woodburn*, the Ninth Circuit held that public employers must establish a "special need" to justify pre-hire drug testing. As set forth in *Lanier*, employers must show evidence of "specific and substantial" interest supporting the drug testing of all applicants, not merely a symbolic one (such as wanting to ensure a drug-free workplace).[31] However, if an employer can establish a nexus between the duties of a particular job and the need to ensure the person engaged in those duties is not under the influence of drugs – for example, public safety jobs – it would likely satisfy the *Lanier* standard.[32]

Despite the apparent narrowing of the scope of pre-hire drug testing, employers are not wholly prohibited from inquiring as to an employee's current illegal drug use.[33] An individual who currently uses drugs illegally is not protected under the ADA or FEHA.[34] Accordingly employers may ask about current illegal drug use without violating either of those statutes. However, because *past* drug use is generally considered a disability under both state and federal law, employers are discouraged from asking questions about *past* addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program.[35] Importantly, while past drug *addiction* is considered a disability, past casual drug use is not.[36]

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[27] *Loder*, *supra*, 14 Cal.4th at 883.

[28] *Id. at 900*

[29] *Id. at 883-84.*

[30] *Leonel v. American Airlines, Inc.*, 400 F.3d 702, 708-09 (2005); Cal. Health & Safety Code §120980(f)

[31] *Lanier*, *supra*, 518 F.3d at 1150-51.

[32] *Id*. (citing *Skinner v. Ry. Labor Executives' Ass'n* (1989) 489 U.S. 602, 628-29 (operation of railway cars); *Nat'l Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 677-78 (1989) (armed interdiction of drugs); *IBEW, Local 1245 v. United States NRC* (9th Cir. 1992) 966 F.2d 521, 525-26 (work in nuclear power facility); *AFGE Local 1533 v. Cheney* (9th Cir.1991) 944 F.2d 503, 506 (national security service); *IBEW, Local 1245 v. Skinner* (9th Cir.1990) 913 F.2d 1454, 1461-63 (operating natural gas pipelines); *Bluestein v. Skinner* (9th Cir.1990) 908 F.2d 451, 456 (aviation industry); *Int'l Bhd. of Teamsters v. Dep't of Transp.* (9th Cir.1991) 932 F.2d 1292, 1295 (operation of commercial motor vehicles)).

[33] EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (https://www.eeoc.gov/policy/docs/guidance-inquiries.html).

[34] 42 U.S.C. §12114(a)(1994); 29 C.F.R. §1630.3(a)(1998); 2 CCR §11071(d).

[35] 29 C.F.R. §1630.3(b)(1), (2)(1998); EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (10/10/1995), available at https://www.eeoc.gov/policy/docs/preemp.html

[36] EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (https://www.eeoc.gov/policy/docs/preemp.html).

For similar reasons, an employer generally may not ask about prescription drug use as such questions may be likely to elicit information about an individual's disability.[37] The federal Equal Employment Opportunity Commission (the "EEOC") has recognized a narrow exception to this general prohibition, permitting employers to ask questions about prescription drug usage after a positive drug test. The rationale for allowing such questions is that they may allow the employer to validate results or offer a possible explanation for the positive result other than illegal drug use.[38]

b) TESTING FOR ALCOHOL

Testing applicants for alcohol usage is even more restrictive than testing for drug usage. This is because under both state and federal law, testing for alcohol usage is considered a "medical examination," which can only be required following a conditional offer of employment.[39]

2. TESTING OF CURRENT EMPLOYEES

Following hire, more weight is placed on the privacy rights of an individual and, consequently, employers are more limited in their ability to drug or alcohol test current employees. Limitations around testing are also driven by the context in which the employee is directed to undergo the test.

a) POST-ACCIDENT TESTING

Unlike with DOT-covered employees, employers are expected to possess some suspicion of impairment before ordering an employee to undergo drug or alcohol testing following a workplace accident. The exception to this standard is for "safety sensitive" job classifications. In *Skinner v. Railway Executives' Ass'n*, the U.S. Supreme Court held that employees – in this case railway workers – could be tested post-accident without reasonable suspicion because the employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[40]

The restrictions on post-accident testing were emphasized in guidelines issued by the federal Occupational Health and Safety Administration ("OSHA") in 2016. Those regulations were issued as part of a broader effort to encourage the reporting of workplace injuries and to protect against retaliation by employers. In commentary accompanying these new rules, OSHA specifically discussed post-accident drug testing as a possible deterrent to reporting workplace injuries. As part of this commentary, OSHA appeared to effectively bar automatic post-accident drug tests. OSHA stated that post-accident drug testing should only be used in "situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use."[41]

OSHA issued clarifying guidance in October 2018, providing that post-accident drug tests would only violate its anti-retaliation rules if the test was conducted in order to "penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and

[37] *Ibid.*

[38] *Ibid.*

[39] *Leonel, supra*, 400 F.3d at 708-09 (citing 42 U.S.C. § 12112(d); Cal. Gov't Code §12940(d)).

[40] *Skinner, supra*, 489 U.S. at 628.

[41] OSHA Final Rule "Improve Tracking of Workplace Injuries and Illnesses" (May 12, 2016).

health."[42] The October 2018 guidance clarified that the following types of drug testing are permissible under OSHA's anti-retaliation rules:

1) Random drug testing;[43]

2) Drug testing unrelated to the reporting of a work-related injury or illness;

3) Drug testing under state worker's compensation law; and

4) Drug testing under other federal law, including federal Department of Transportation regulations.[44]

In addition, OSHA clarified that employers may drug test employees to evaluate the "root cause" of a workplace incident that "harmed or could have harmed employees" so long as all employees who could have contributed to the incident are tested – not just the person who reported the incident or injuries.[45]

b) RANDOM TESTING

Courts have determined that drug and alcohol tests constitute a search and seizure within the meaning of the Fourth Amendment of the U.S. Constitution.[46] Given the significant protections for individual privacy recognized under both the federal and California constitutions, random drug and alcohol testing is effectively prohibited. The only recognized exceptions are for "safety-sensitive" positions.[47] The broadest exception to this general prohibition is for employees who are subject to federal Department of Transportation regulations discussed below.

In light of these restrictions, it is critical that employers ensure that their drug and alcohol testing policies and procedures do not include provisions for random testing of all employees. Importantly, random testing policies are impermissible ***even if negotiated*** as part of a collective bargaining agreement between a public agency and an exclusive bargaining representative. Any random testing policy must be narrowly tailored so as to cover only "safety sensitive" jobs. "Safety sensitive" jobs have been defined to include, among others, railway car operators, law enforcement officers involved in the interdiction of drugs, employees who work in a nuclear power facility, national security employees, natural gas pipeline operators, aviation personnel, and commercial motor vehicle operators.[48] Thus, relatively few job classifications within a city government will qualify as "safety sensitive" permitting random drug testing.

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[42] OSHA Standard Interpretations "Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. §1904.35(b)(1)(iv)" (Oct. 11, 2018).

[43] Although the OSHA guidance provides that an actual "random" test is not retaliatory, such testing would still be subject to other restrictions and prohibitions discussed herein.

[44] *Ibid.*

[45] *Ibid.*

[46] *Skinner*, *supra*, 489 U.S. at 616-17.

[47] The U.S Supreme Court determined in its decision in *Nat'l Treasury Employees Union Treasury Employees v. Von Raab*, *supra*, 489 U.S. 656, 672, that U.S. Customs officers who were "directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty" may be subject to suspicion-less drug testing. See also *Skinner*, 489 U.S. at 624.

[48] *Lanier*, *supra*, 518 F.3d at 1150-51 (citing *Skinner v. Ry. Labor Executives' Ass'n* (1989) 489 U.S. 602, 628-29); *Nat'l Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 677-78 (1989); *IBEW, Local 1245 v. United States NRC* (9th Cir. 1992) 966 F.2d 521, 525-26; *AFGE Local 1533 v. Cheney* (9th Cir.1991) 944 F.2d 503, 506; *IBEW,*

c) REASONABLE SUSPICION TESTING

Current employees typically ***cannot*** be tested for drugs or alcohol absent reasonable, individualized suspicion that they are under the influence.[49] In order to survive a constitutional challenge, drug and alcohol tests must be reasonable. The reasonableness of a test is judged by balancing the legitimate governmental interest in the search against the employee's privacy interest.

In this context, if there is individualized suspicion that the employee is under the influence, the employer will likely satisfy the "reasonableness" standard. Reasonable suspicion is a belief based on objective evidence sufficient to lead a reasonably prudent person to suspect that an employee is under the influence of drugs and/or alcohol. As a best practice all supervisors – even those who do not supervise DOT-covered employees – should be receive training on reasonable suspicion testing and what to look for when an employee appears to be impaired at work.

It is critical that the observing supervisor appropriately document their observations prior to sending the employee for a drug test. This documentation may include detailed reports from other employees as objective evidence tending to support that the employee is under the influence at work. The supervisor may also choose to meet with the employee to inform them of the observations about their behavior and provide an opportunity for the employee to explain. Depending on the employee's response, the employer may elect to take one of a number of different options:

- If concrete, tangible evidence exists that the employee is under the influence of prohibited drugs at work (either based on the documented observations or the employee's own admission), the employer may require the employee to submit to a drug test. Should the employer send an individual for a drug test, it is important that the employee not be allowed to drive themselves to the drug testing site;
- If the evidence is insufficient to support an objective determination that the employee is under the influence of prohibited drugs (and the employee denies such conduct), the employer can permit the employee to return to work or allow the employee to take sick leave for the rest of the day, if they so elect;
- If the employee indicates that they have taken medical marijuana or alcohol the evening before but are no longer under the influence (e.g., perhaps a strong odor exists), the employer should tread carefully and must analyze whether there is reasonable, individualized suspicion that the employee is still under the influence of such substances before sending the employee for a drug test;[50]
- If the employee indicates that they are taking prescription medications, which are causing the perception that the employee is under the influence of prohibited drugs, the employer should not necessarily require the employee to divulge the medication (or underlying medical condition) at that time, but may need to initiate the interactive process under the ADA and FEHA to determine whether the employee needs reasonable accommodation.

Local 1245 v. Skinner (9th Cir.1990) 913 F.2d 1454, 1461-63; *Bluestein v. Skinner* (9th Cir.1990) 908 F.2d 451, 456; *Int'l Bhd. of Teamsters v. Dep't of Transp.* (9th Cir.1991) 932 F.2d 1292, 1295).

[49] *Loder*, *supra*, 14 Cal.4th at 877-81.

[50] Where marijuana is concerned, employers need to be particularly careful insofar as marijuana remains illegal under federal law and its use can be grounds for discipline, but as the law continues to develop, employees who use marijuana outside of work and are no longer under the influence at work, may argue that employer restrictions of such rights unduly interfere with their Constitutional privacy rights. To date, the authors are unaware of any published case authority to that effect, however.

A situation in which an employee discloses that prescription drugs may be impacting their performance is particularly challenging to navigate. Should the employer insist on a drug test and should the test come back as positive for illegal substances, the employer is permitted to make limited inquiries of the employee as to whether the prescription medication could be responsible for the positive result. The employer may also request, as part of the interactive process, that the employee provide documentation from their physician as to any necessary job restrictions or side effects from medications that may require accommodation.

It is the employee's responsibility to consult with their prescribing physician to ensure that the medication, when taken in proper dosage, will not present an immediate threat of harm to themselves or others. In a situation where the employee appears to be impaired, the employer may suggest to the employee that they take sick leave if the use of prescription medication is creating an immediate threat of harm. This will allow additional time for the employee to follow up with their physician and confirm whether the medications need to be re-evaluated or the dosage modified.

d) RETURN TO DUTY TESTING

Unlike with DOT-covered employees, there is no detailed statutory scheme setting forth "return to duty" requirements for employees who have tested positive for drug or alcohol use. That does not mean that employers should simply let employees come back to work without some assurances that they are no longer under the influence. Options for responses to positive drug tests include:

1. REHABILITATION

While an employer need not permit any drug or alcohol use on the job or at the worksite (aside from lawfully-prescribed medications), public employers generally must allow employees to enter rehabilitation programs and cannot discriminate against recovering drug and alcohol users who are covered by the disability provisions of the ADA and FEHA.[51] Accordingly, public employers are advised to make explicit in their drug and alcohol policies that leave is available for employees to attend rehabilitation programs, with the understanding that use of alcohol or illegal drugs on the job will constitute grounds for discipline, up to and including termination.

2. EMPLOYEE ASSISTANCE PROGRAMS (EAP)

Employee Assistance Programs ("EAPs") are intended to help employees deal with personal problems that might adversely impact their job performance, health and well-being. EAPs often provide employees with access to counseling and education services at no cost. EAPs (and "Wellness" programs) should be voluntary and employers should not require participation or penalize employees who do not participate.

[51] See 42 U.S.C. §12102; Cal. Gov. Code §§12926, 12926.1(a); Cal. Code Regs., Tit. 2, §7294(d)(2)(B) (past addiction to drugs protected under FEHA as a disability); *Brown v. Lucky Stores, Inc.* (2001 9th Cir.) 246 F.3d 1182, 1187 (recognizing alcoholism as a disability under the ADA analysis and providing that ADA analysis also applies to FEHA); *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805, 813 (alcoholism can be covered disability under FEHA) (unpublished).

3. LAST CHANCE AGREEMENT

Last chance agreements ("LCAs") are agreements between an employer and an employee (potentially also involving the employee's union) the purpose of which is to provide an employee who is otherwise facing termination or other serious discipline with a final opportunity to remain employed in exchange for the employee's agreement to enter into a rehabilitation program, refrain from further use of drugs or alcohol, and/or submit to periodic testing. While LCAs may also be used outside of the drug and alcohol context when an employee has performance issues or has engaged in other forms of misconduct, they are commonly employed in situations where an employee has tested positive for being under the influence of prohibited substances at work.

Typically, an LCA will have the following elements:

- Basis for the agreement, including a summary of the employee's conduct and employer's policies that were violated;
- Expectations regarding what requirements the employee must satisfy to avoid future discipline and/or termination;
- Progress/time frames for various stages of progress;
- Consequences for violation of the agreement
    - Typically, an LCA will provide that a violation will result in immediate termination (without any additional due process, which the employee will have agreed to waive, except for the ability to contest whether the violation occurred).
- An expiration date.

LCAs are a useful tool for both employers and employees alike insofar as they provide a strong incentive for the employee to avoid any future violations of drug or alcohol policies, while allowing the employee to retain their employment. LCAs may also alleviate the need for lengthy (and costly) administrative proceedings and/or litigation and allow for both parties to agree upon the consequences for additional violations during the term of LCA. Nevertheless, if a violation is particularly severe or dangerous (e.g., driving a vehicle or operating machinery while under the influence of drugs or alcohol), it may be necessary to resort to serious discipline immediately.

4. TERMINATION/DISCIPLINE

Employers may discipline, and in some cases, terminate employees who test positive for drug and alcohol usage. However, as part of the discipline/termination process, the employer must generally establish that there is "just cause" for termination or other serious discipline. This is particularly important if the employee is covered by a collective bargaining agreement that includes a discipline process. Factors such as the level of the offense, the employee's past disciplinary record, the nature of the employee's position or job functions, the employer's policies or collective bargaining agreement with an employee organization, treatment of similarly-situated employees and other considerations, may play a role in determining the

appropriate level of discipline for violations of workplace drug and alcohol policies.[52] Additionally, most public employees in California are entitled to "*Skelly*" rights, including reasonable notice of the grounds for discipline and pre-disciplinary due process rights to respond and meet with their employer to contest the factual basis for, or severity of, the discipline.[53] This includes presenting mitigating factors against severe discipline for a first offense or an offense of lesser severity. Accordingly, while an employer may not run afoul of statutory constraints such as the ADA or FEHA, in the context of public employment, the discipline imposed can still be overturned or reduced by arbitrator, civil service board or other adjudicatory body where it is deemed excessive or disproportionate.

Given the principles of "just cause" that apply to most employees working in the public sector, employers need to carefully balance "zero-tolerance" policies and compliance with state and federal drug-free workplace laws, on the one hand, with the appropriate level of discipline on the other, taking into account specific factual circumstances.

While legislative efforts to make medical marijuana users a protected class in California thus far have stalled, challenges to efforts to discipline employees for both medical and recreational marijuana use are likely to persist over the next several years, both in the California legislature and in the courts. This is true particularly in instances where an employee may test positive for marijuana use, but the employer lacks evidence that the employee was under the influence or impaired in any meaningful way at work. Again, where an employer must show "just cause" for discipline, neutrals may overturn or reduce discipline where the employer cannot demonstrate that the employee was impaired during the workday.[54]

B. DOT-COVERED EMPLOYEES

The federal government has promulgated a detailed regulatory scheme aimed at ensuring that individuals who operate commercial motor vehicles are not under the influence of drugs or alcohol while operating those vehicles.[55] DOT regulations further require employers to provide educational materials to their employees that explain the employer's policies related to these regulations.[56] The DOT regulations prohibit covered individuals from engaging in safety-sensitive functions[57] while under the influence of drugs or alcohol.

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[52] Elkouri & Elkouri, *How Arbitration Works (*Bloomberg BNA, Seventh Ed. 2012), Ch. 15.2.A.ii., Ch. 13.17.F.F.iii; Brand & Biren, *Discipline and Discharge in Arbitration* (Bloomberg BNA, Third Ed. 2015), Ch. 6.I, Ch. 6.II.A-F.

[53] A *Skelly* hearing derives its name from *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, in which a physician and permanent civil service employee was terminated from employment with the State of California. The California Supreme Court held that Dr. Skelly was deprived of his due process rights by not being provided "the materials upon which the action is based" prior to his employment being terminated. Subsequently, Skelly rights have been broadened to apply to lesser disciplinary actions, such as demotions and suspensions.

[54] Barsook, Platten & Vendrillo, *California Public Sector Employment Law* (Matthew Bender 2018), § 7.36 [1]-[3] (authored by Margot Rosenberg, et al.) includes a very comprehensive discussion of policy and disciplinary considerations relating to drug and alcohol use; see also *Lane Cty.*, 136 Lab. Arb. 585 (Jacobs, 2016) (arbitrator found county lacked just cause to terminate employee for use of medical marijuana despite no requirement to accommodate); McCarthy and A. Terpsma, *21st Century Arbitration Decisions on Discharges for Possession or Use of Marijuana*, Warner, Norcross & Judd, presented at ABA Conference on Alternative Dispute Resolution, February 2015.

[55] 49 C.F.R. §382.103.

[56] 49 C.F.R. §382.601

[57] Safety-sensitive functions are defined in 49 C.F.R. §382.107 as:

> [A]ll time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work.

Although the DOT regulations are extensive, they can largely be summarized as prohibiting employees who are under the influence of alcohol[58] or drugs[59] from reporting to duty, remaining on duty, or performing safety-sensitive functions, and require employers with knowledge that employees are under the influence of alcohol or drugs (or who have tested positive for such use) to prohibit those employees from engaging in safety-sensitive functions. [60] Importantly, these rules do include a narrow exception for the use of prescription drugs.[61]

The terms "controlled substances" and "drugs"[62] for purposes of the DOT regulations are defined to include marijuana, cocaine, amphetamines, phencyclidine (PCP), and opioids.[63] For purposes of DOT rules, alcohol screening tests are considered positive if the alcohol concentration level is 0.04 or greater.[64] The threshold for a positive drug test varies depending on the controlled substance. These thresholds are set forth in **Appendix A**.

DOT rules require multiple forms of testing for alcohol and drugs including pre-hire testing, random testing, reasonable suspicion testing, and return to duty or other follow-up testing after a positive test.[65]

1. PRE-HIRE TESTING

All employees whose work requires them to engage in safety-sensitive functions must be tested for drugs – but not alcohol – prior to first performing those functions.[66] Not only must employees submit to pre-employment drug tests, employees must also consent to having their previous employers turn over their drug and alcohol testing records to their current employer. This includes the results of positive alcohol and

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(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by §§392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of §393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

[58] 49 C.F.R. §§382.201, 382.205.

[59] 49 C.F.R. §§382.213(a), 382.215.

[60] 49 C.F.R. §§382.201-207, 213-217.

[61] 49 C.F.R. §382.213(b) provides that employees who are under the influence of a drug not listed as a "Schedule I" substance in 21 C.F.R. §1308.11, may not report to or remain on duty, *unless* that drug is used pursuant to a prescription from a licensed medical professional who (i) is familiar with the employee's medical history and (ii) has advised them that the substance will not adversely affected their ability to operate a commercial motor vehicle.

[62] These terms appear to be used interchangeably with the term "drugs" being used in 49 C.F.R. §40 et seq. and the term "controlled substances" being used in 49 C.F.R. §§382 et seq.

[63] 49 C.F.R. §§40.3, 382.107.

[64] 49 C.F.R. §382.201. However, 49 C.F.R. §382.505(a) provides that employees with alcohol concentration above 0.02 but less than 0.04 shall not be permitted to perform or continue performing safety-sensitive functions for at least twenty-four (24) hours following administration of the test.

[65] 49 C.F.R. §§382.301, 382.305, 382.307, 382.309, 382.311.

[66] 49 C.F.R. §382.301.

drug tests, any refusals to be tested, other DOT testing violations and the results of any return to duty tests, if applicable.[67] Though an employee can withhold this consent, they will not be permitted to engage in safety-sensitive functions.[68] Upon receipt of an employee's past drug and alcohol testing results, if an employer receives information that an employee has previously tested positive under DOT regulations, the employer cannot allow that employee to continue engaging in safety-sensitive duties unless and until they receive evidence that the employee has also complied with DOT return to duty rules.[69]

2. TESTING OF CURRENT EMPLOYEES

Following their hire, DOT-covered employees remain subject to periodic drug and alcohol testing. As discussed below, DOT-covered employees must be: (i) tested following certain accidents while operating commercial motor vehicles, (ii) subject to random testing, and (iii) as with non-DOT covered employees, tested when a trained manager has reasonable suspicion that the employee is under the influence of alcohol or drugs.

a) POST-ACCIDENT TESTING

Post-accident testing is not required after *all* workplace accidents or *all* accidents involving commercial motor vehicles. Rather, post-accident testing is only required in the following circumstances:

1) Where the driver receives a citation for a moving violation and the accident resulted in either:

    a. A bodily injury with immediate medical treatment away from the scene; or

    b. Disabling damage to any motor vehicle requiring a tow away from the scene; or

2) The accident results in a fatality, regardless of whether the driver receives a citation.[70]

When a post-accident test is required, the DOT regulations set forth strict timelines for the completion of those tests. Specifically, alcohol tests should be completed within two hours of the accident and cannot be completed if not conducted within eight hours of an accident.[71] Employees required to take a post-accident test are prohibited from using alcohol for: (i) eight hours following the accident or (ii) until they undergo a post-accident alcohol test, whichever occurs first.[72] The timeframe for completing drug tests is longer – 32 (thirty-two) hours[73] – owing to the time it takes a body to metabolize those substances. However, failure to complete either a drug or alcohol test within the applicable timeframe results in the same consequence - the employer is prohibited from testing the employee and must prepare and maintain on file a record stating the reasons why the test was not promptly administered.[74]

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[67] 49 C.F.R. §40.25(b).

[68] 49 C.F.R. §40.25(a).

[69] 49 C.F.R. §40.25(e).

[70] 49 C.F.R. §382.303(a)-(b).

[71] 49 C.F.R. §382.303(d)(1).

[72] 49 C.F.R. §382.209

[73] 49 C.F.R. §382.303(d)(2).

[74] *Ibid.*

b) RANDOM TESTING

As discussed *supra*, random drug and alcohol testing of employees is generally considered an impermissible and unconstitutional invasion of individual's privacy rights. However, given the nature of their work, in the case of employees who engage in safety-sensitive functions, the government's interest in ensuring these individuals are not under the influence of drugs or alcohol outweighs the individual's privacy interests. Accordingly, every DOT-covered employee must be subject to random drug and alcohol testing.[75] Section 382.305 of Title 49 of the Code of Federal Regulations sets forth in detail the standards for annual random alcohol and drug testing, including the percentage of employees to be tested and mechanisms to adjust these percentages.[76] In order to ensure randomness of the tests, the tests must be unannounced and spread throughout the calendar year.[77] When employees are selected for a random test, they are generally expected to proceed to the testing site immediately.[78] Employees will *only* be tested for alcohol use while they are performing safety-sensitive functions, just before they are to do so or directly after completing a safety-sensitive function.[79]

c) REASONABLE SUSPICION TESTING

Similar to employees not covered by DOT regulations, DOT-covered employees will be sent for drug and/or alcohol testing when a trained manager has reasonable suspicion that an employee is under the influence. 49 C.F.R. §382.307 requires employers who have reasonable suspicion that an employee has violated the prohibitions on alcohol or drug use set forth in 49 C.F.R. §§382.201-217 to send that employee for testing. Again, as a practical matter, it is important that an employee who is suspected of being under the influence not be allowed to drive themselves to the drug testing site. Options include having the supervisor drive the employee to the testing site or providing taxi or ride-share service to and from the testing site. Reasonable suspicion under the DOT regulations must be based on "specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver."[80] In the case of drug use, the reasonable suspicion may also be based on observation of "indications of the chronic and withdrawal effects of controlled substances."[81] For DOT-covered employees, the observations must be made by a supervisor who has completed at least sixty minutes of training on alcohol misuse and at least sixty minutes of training on controlled substances.[82]

In practice, supervisors should document their observations in writing and in specific detail, including observations of:

- Odors, such as the smell of alcohol or marijuana
- Unsteady movements, including signs of dizziness;
- Abnormal speech patterns, including slurred or slow speech or an inability to complete thoughts;

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[75] 49 C.F.R. §382.305(a).

[76] 49 C.F.R. §382.305(b)-(j).

[77] 49 C.F.R. §382.305(k).

[78] 49 C.F.R. §382.305(l). The exception to this general rule applies when an employee is in the midst of completing a safety-sensitive function other than driving a commercial motor vehicle. In that case, the employee may finish that function and proceed to the testing site as soon as possible thereafter.

[79] 49 C.F.R. §382.305(m).

[80] 49 C.F.R. §382.207(a)-(b).

[81] 49 C.F.R. §382.307(b).

[82] 49 C.F.R. §§ 382.307(c), 382.603.

- Dialated eyes;
- Flushed face;
- Unusually argumentative or irritable behavior; and/or
- Falling asleep on the job.

Importantly, however, a supervisor should not attempt to diagnose an employee or include subjective beliefs about what is going on with the employee. Rather, their documentation should only include their objective observations.

d) RETURN TO DUTY TESTING

Should an employee test positive for drugs or alcohol following an accident, as part of a random test, or upon reasonable suspicion that they were under the influence, that employee must be cleared by a substance abuse professional (the "SAP") prior to returning to performing safety-sensitive functions. The "return to duty" process is detailed in 49 C.F.R. 40, subpart O. In summary, the SAP has a significant authority to determine a course of education or treatment for the impacted employee and unless and until the SAP determines that the individual has successfully completed that course of education or treatment, they may not be returned to perform safety-sensitive functions.[83] Once the SAP has determined that the employee successfully completed the recommended education and/or treatment, the employee must undergo a drug or alcohol test. Only if the results of that test are negative may the employee return to performing safety-sensitive functions.[84] DOT regulations do not require an employer to return an employee to safety-sensitive duties simply because they have passed a return-to-duty test.[85] However, an employer's collective bargaining agreement or policies may require such a result.[86]

IV. BEST PRACTICES FOR ADDRESSING PRESCRIPTION DRUG USE IN THE WORKPLACE

One common pitfall that many employers fall into in the drafting of workplace drug and alcohol policies is not establishing appropriate parameters around the treatment of lawfully prescribed medication and illegal drugs – both of which may have an intoxicating effect on employees but use of only one of which (prescription drugs) is protected under the ADA and FEHA. In light of the requirements imposed by the ADA and FEHA aimed at protecting employees from discrimination based on medical conditions and/or the use of medication, below are a handful of best practices that will help employers avoid running afoul of these statutes.

A. EMPLOYERS' DRUG AND ALCOHOL POLICIES SHOULD CARVE OUT EXCEPTIONS FOR THE USE OF LAWFULLY-PRESCRIBED MEDICATIONS

As discussed above, an employee's use of lawfully-prescribed medication is an issue only where there is concrete, tangible and objective evidence that use of the medication either prevents the employee from performing the essential job functions of their position or creates a direct threat to the health or safety of

[83] 49 C.F.R. §§40.293, 40.295, 40.301, 40.303, 40.309.

[84] 49 C.F.R. §40.305(a).

[85] 49 C.F.R. §40.305(b).

[86] *Ibid.*

the employee or others,[87] and even then, the employer must engage in an interactive process to determine if a reasonable accommodation can eliminate that threat.[88]

According to federal regulations, a "direct threat" is defined as follows:

> ***Direct Threat*** means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" must be "based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) The imminence of the potential harm.[89]

Notably, the mere "*potential*" for poor performance or a threat to safety is not a sufficient basis to prohibit the use of legally-prescribed drugs or to impose reporting requirements or other restrictions. Workplace drug and alcohol policies should clearly state that prescription medications are not prohibited when taken in standard dosage and/or according to a lawful prescription. Policy language should also provide that it is the employee's responsibility to consult with the prescribing medical provider to ascertain whether the medication may interfere with the ability to safely and effectively perform job functions.

B. EMPLOYERS SHOULD GRANT LEAVE FOR EMPLOYEES TO ATTEND REHABILITATION PROGRAMS

While an employer need not permit any drug and alcohol use on the job or at the worksite (aside from lawfully-prescribed medications), public employers generally must allow employees to enter rehabilitation programs and cannot discriminate against recovering drug and alcohol users, who are protected by the ADA and FEHA. The ADA recognizes individuals who are not currently using illegal drugs, but are participating, or have participated, in a supervised rehabilitation program as having a protected disability. While FEHA does not specifically set forth the same protections, the language in FEHA recognizing conditions that "limit" major life activities essentially encompasses alcoholism as a chronic disease, and therefore, protects recovering alcoholics (assuming current use is not interfering with work) even if not necessarily attending rehabilitation.[90] Accordingly, public employers should make clear in their drug and alcohol policies that leave is available for employees to attend rehabilitation programs, with the understanding that use of alcohol or illegal drugs on the job will still constitute grounds for discipline.

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[87] EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (http://www.eeoc.gov/policy/docs/guidance-inquiries.html) (see No. 5); 22 C.C.R. §7294.2(d)(2).

[88] 29 C.F.R. §1630.2(r)(1)-(4); *Hibbing Taconite Co.*, *supra*, 720 F. Supp. 2d at 1082-1083.

[89] 29 C.F.R. §1630.2(r)(1)-(4).

[90] See *Brown v. Lucky Stores, Inc.* (2001 9th Cir.) 246 F.3d 1182, 1187 (recognizing alcoholism as a disability under the ADA and providing that ADA analysis also applies to FEHA); *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805, 813 (alcoholism can be a covered disability under FEHA) (unpublished).

It is well-settled that the current use of illegal drugs is not considered a disability under the ADA or FEHA.[91] Accordingly, a public employer is within its rights to take into consideration an employee's current illegal drug use in disciplinary decisions.[92] Nevertheless, under the ADA, an individual may have a protected disability where they have successfully completed a supervised drug rehabilitation after engaging in illegal drug use, have otherwise been rehabilitated successfully and are no longer engaging in illegal drug use or are currently participating in a supervised rehabilitation program and no longer engaging in illegal drug use.[93]

Individuals who are currently in a program or have undergone rehabilitation would also be protected under FEHA, even though such protections are not specifically articulated as they are under the ADA.[94] FEHA intentionally applies a broader definition of "disability" than the ADA, meaning that "alcoholism" may be considered a disability where it merely "limits" any major life activities (as contrasted to disabilities under the ADA, which must "substantially limit" major life activities).[95]

Again, because the definition of "disability" is construed broadly under both FEHA and the ADA, there should not be any punitive language in drug and alcohol policies that could be construed to discriminate against persons currently or previously enrolled in rehabilitation programs, who are not presently engaging in drug or alcohol use.

C. EMPLOYERS SHOULD MAKE CLEAR THAT MEDICAL MARIJUANA USE AT WORK VIOLATES THEIR DRUG-FREE WORKPLACE POLICIES

As mentioned above, medical marijuana is a prominent exception to the general prohibition against disciplining an employee for using lawfully-prescribed medications. Although medical marijuana use is legal in California, current state law does not require employers to accommodate its use.[96] Likewise, based on the express language of the ADA, an employer need not permit current illegal drug use, so employers who discipline an employee for medical marijuana use are also not subject to liability under federal law.[97] For sake of clarity and ensuring a shared understanding between employer and employee, any workplace drug and alcohol policy should clearly state that marijuana is considered a prohibited substance, regardless of whether it is being used lawfully pursuant to the Compassionate Use Act of 1996.

D. EMPLOYERS SHOULD MAKE READILY AVAILABLE AN EMPLOYEE ASSISTANCE PROGRAM

Many public employers maintain Employee Assistance Programs ("EAPs"), which are intended to help employees deal with personal problems that might adversely impact their job performance, health and well-being. EAPs often provide employees with access to counseling and education services at no cost. Where applicable, an EAP policy should be cross-referenced within the employer's drug and alcohol policy.

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[91] 42 U.S.C. §12114(a) ("… a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."); Cal Gov. Code §12696 subds. (j)(5), (m)(6) (excluding from the definitions of mental and physical disabilities conditions resulting from the "current unlawful use of controlled substances or other drugs").

[92] *Ibid*.; see also *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920.

[93] 42 U.S.C. §12114 (b)(1-3); see also Cal. Gov. Code §12940.

[94] Cal. Gov. Code §§12926, 12926.1(a); 42 U.S.C. §12102.

[95] *Ibid*.

[96] See *RagingWire, supra* note 9 and *Kohl's Dep't. Stores, supra* note 11.

[97] 42 U.S.C. §12114(a); *Brown v. Lucky Stores, Inc., supra,* 246 F.3d 1182, 1187.

It is strongly recommended that public employers include language in their drug and alcohol policies actively encouraging employees with a drug or alcohol problem to seek assistance.

V. CONCLUSION

It is critical for public employers to institute workplace drug and alcohol testing policies in order to ensure compliance with applicable state and federal laws requiring employers to certify that their workplaces are "drug-free." It is equally critical that these drug and alcohol testing policies comply with applicable anti-discrimination law and constitutional privacy protections. To ensure that a workplace drug and alcohol policy does not run afoul of these law, employers should ensure that they (i) do not include random drug testing except for employees covered by federal DOT regulations, (ii) do not lump prescription drugs in with illegal drugs (with the exception of medical marijuana), and (iii) do not result in discipline or other adverse actions for employees who participate in rehabilitation programs.

It is also important to remember that, despite recent changes to California law legalizing recreational marijuana, employers are not obligated to accommodate its use at work (for either recreational or medical purposes) and have the ability to reject applicants and discipline employees who test positive for marijuana use. For so long as marijuana remains illegal under federal law and no conflicting laws are adopted by the California legislature, it is likely advisable to maintain a drug-free workplace policy that treats marijuana like other illicit substances.

APPENDIX A

Type of Drug or Metabolite[98]	Initial Test*	Confirmation Test*
(1) Marijuana Metabolites	50	
(i) Δ-9-tetrahydrocannabinol-9-caroxylic acid (THCA)		15
(2) Cocaine metabolites	150	
(i) Benzoylecgonine		100
(3) Phencyclidine (PCP)	25	25
(4) Amphetamine/Methamphetamine	500	
(i) Amphetamine		250
(ii) Methamphetamine		250
(5) Methylenedioxymethamphetamine (MDMA)/ Methylenedioxyamphetamine (MDA)	500	
(i) MDMA		250
(ii) MDA		250
(6) Opioid Metabolites		
(i) Codeine/Morphine	2000	
a. Codeine		2000
b. Morphine		2000
(ii) 6-Acetylmorphine	10	10
(iii) Hydrocodone/Hydromorphone	300	
a. Hydrocodone		100
b. Hydromorphone		100
(iv) Oxycodone/Oxymorphone	100	
a. Oxycodone		100
b. Oxymorphone		100

*Measurements below are reflected as nanograms per milliliter.

[98] 49 C.F.R. §40.87.

CalPERS' Employee Grab: The View From the Trenches

Friday, October 18, 2019 General Session; 8:00 – 10:00 a.m.

Arthur Hartinger, Partner, Renne Public Law Group

Notes:_____

CalPERS' Employee Grab?

A View from the Trenches

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I. Introduction

Under Public Employees Retirement Law ("PERL"), participating employers are required to enroll in CalPERS "any person in the employ" of the employer. Fifteen years ago, in the landmark case *Metropolitan Water District v. Superior Court ("Cargill")*, 32 Cal. 4th 491 (2004), the Supreme Court held that the employer was required to enroll in CalPERS "common law employees," even though these workers were supplied by private companies. Since that time, employers continue to grapple with the issue of whether and how they may engage independent contractors without having to enroll them in CalPERS. This article explores case law and decisions following *Cargill*, and describes the audit process and current test employed by CalPERS to determine common law employment status.

II. The *Cargill* Case

PERL requires that participating employers enroll "any person in the employ" of the employer. *See* Gov't Code § 20028(b). Neither PERL nor CalPERS regulations define what constitutes a "person in the employ" of the employer. *Cargill* essentially held that, in the absence of a statutory definition, the common law employment test applies.

Importantly, *Cargill* did not actually decide *whether* the workers at issue were common law employees. Rather, the case presented "only the question of whether the PERL requires enrollment of all common law employees." 32 Cal. 4th at 497. The Supreme Court answered this question in the affirmative – CalPERS' compulsory enrollment requirement for its employees also includes common law employees.

Practitioners often invoke the phrase that "bad facts make bad law," and *Cargill* arguably illustrates this outcome. The allegations in the case – which the Supreme Court did not resolve but accepted as true for purposes of making its purely legal determination – were not helpful to the Metropolitan Water District ("MWD"). The workers were provided by third party "labor suppliers." They alleged:

- They worked at MWD for indefinite periods, and in some cases several years.

- MWD interviewed and selected them for the work.

- They were integrated into the MWD workforce and performed the work at MWD worksites.

- They performed work that was part of MWD's regular business.

- MWD supervisors directly oversaw and evaluated their work, determined their pay rate, determined their raises, determined their work schedules and approved their time sheets.

- MWD had full authority to discipline and terminate them.

- MWD had the full right to control the manner and means by which they worked.

32 Cal. 4th at 498-99.

Utilizing a test for common law employment recognized by the Supreme Court in *Tieberg v. Unemployment Ins. App. Bd*., 2 Cal. 3d 943 (1970), the *Cargill* court held that these allegations, if proven, could support a showing of common law employment, and that common law employees must be enrolled in CalPERS by a participating employer.

III. The *Tieberg* Test for Common Law Employment

In *Cargill*, the California Supreme Court discussed and endorsed the test for common law employment discussed in *Tieberg v. Unemployment Insurance Appeals Board*, 2 Cal. 3d 943 (1970). *Tieberg* involved the issue whether television writers were employees of the producer and, if so, whether the producer was liable for past unemployment insurance contributions.

Tieberg sets forth the test that is currently used by CalPERS. The primary and most important factor is *whether the employer retains the right to control the manner and means of accomplishing the work*. *Tieberg*, 2 Cal. 3d 943 at 950. Secondary factors to consider include:

- Whether or not the one performing services is engaged in a distinct occupation or business.

- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision

- The skill required in the particular occupation.

- Whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

- The length of time for which the services are to be performed.

- The method of payment, whether by the time or by the job.

- Whether or not the work is a part of the regular business of the principal.

- Whether or not the parties believe they are creating the relationship of employer-employee.

Tieberg also appears to endorse two additional factors that are included in the *Restatement of Agency* law: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; and (2) whether the principal is or is not in business for him or herself. *Tieberg*, 2 Cal. 3d at 949-50.

Utilizing these factors, the *Tieberg* court concluded that the writers were subject to the control and direction of the producers; that the other factors collectively did not tip the scale in favor of the producers; and the writers were appropriately considered common law employees.[1]

IV. The *Holmgren* Case and CERL

Unlike PERL, the County Employees Retirement Law ("CERL") defines "employee" as "any officer or other person employed by a county *whose compensation is fixed by the board of supervisors or by statute and whose compensation is paid by the county*, and any officer or other person employed by any district within the county." *Holmgren v. County of Los Angeles,* 159 Cal. App. 4th 593, 603 (2008) (emphasis added). In *Holmgren*, the issue concerned contractors who were hired to perform certain telecommunications work for the county. The contractors, in turn hired engineers for particular work orders. The core issue was whether the County misclassified engineers hired as independent contractors, or whether they were common law employees who must be enrolled in CERL.

The court of appeal rejected the claim that the engineers were common law employees. Interestingly, the plaintiffs asserted facts similar to those at issue in *Cargill*, including:

- They were screened, interviewed and effectively hired by the County.

- They were subject to the direction supervision and control by the County.

- They worked side by side with County employees.

159 Cal. App. 4th at 598.

Despite these facts, the court of appeal agreed that county employment is not governed by the common law definition of employment; that the County's civil service system determines

[1] Another case that is often cited is *Borello vs. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). *Borello* involved agricultural workers who challenged their independent contractor status. Citing *Tieberg* with approval, *Borello* held that the workers were not independent contractors, even though the employer presented significant evidence that it did not control the day-to-day details of the work at issue.

who is an employee, and how one becomes an employee; and that because the engineers did not meet the definition of an employee – either under the County's civil service rules or CERL – they were properly classified as independent contractors.

> ***RPLG Practice Pointer***: The *Holmgren* case raises the question whether local cities can defend against common law employment claims by defining employment more specifically, and thus assert similar defenses that were successful in a CERL context. Although similar issues were raised in *Cargill*, the Metropolitan Water District does not have the same constitutional right to control employment as do local agencies – particularly charter cities. At least with respect to charter cities, there appears to be no harm in using local codes to define employment in a way that would exclude or minimize common law employment claims.

V. *Dynamex* – The Emerging "ABC" Test

Last year, the California Supreme Court gave employers across the state a case of serious heartburn when it issued its ruling in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018). The decision amounts to a seismic change in the law that makes it very difficult for employers in certain industries and occupations to demonstrate that their workers are independent contractors rather than employees. But while the decision carries wide-ranging implications for private entities, its application in the public sector is uncertain.

In *Dynamex*, a group of drivers brought a class action against their employers asserting it deprived them of certain entitlements under California law by misclassifying them as independent contractors rather than employees. The California Supreme Court adopted a brand-new three-part test that "presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions":

> *(A) The hiring business has no control and direction over the performance of the work, both under the contract and in fact;*
>
> *(B) The work is outside the usual course of the hiring entity's business; and*
>
> *(C) The worker customarily engages in an independent business of the same nature as the work performed for the hiring process.*

Although Part A of the test largely resembles the preexisting common-law standard for employee classification, Parts B and C constitute a major shift in the law that is sure to wreak havoc on many private-sector companies, especially those in the gig economy.

The ABC test announced in *Dynamex* will carry fewer consequences for public-sector employers than for private-sector employers. By its own terms, the decision is limited to "workers who fall within the reach of the wage orders" — that is, legally binding orders that govern "obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees" in certain industries and occupations. At least one Court of Appeals case has confirmed that *Dynamex* only applies to claims arising under wage orders. *See Garcia v. Border Trans. Grp., LLC* (2018) Cal. App. 5th 558, 571.

Fourteen of California's 17 Wage Orders specifically exempt "employees directly employed by the State or any political subdivisions thereof, including any city, county, or special district," and courts have interpreted another Wage Order governing miscellaneous employees to exempt public employees. Moreover, charter cities, charter counties, and general law counties may rely on the "home rule doctrine" — which gives certain local entities control over employment matters despite conflicting state law — although some courts have found otherwise on this issue depending on whether the duties of the workers at issue implicate a statewide interest.

The impact of *Dynamex* remains to be seen, but it is certainly possible that the ABC criteria could be adopted in contexts outside of Industrial Wage Orders.

VI. Assembly Bill 5 – Lorena Gonzalez (D-San Diego)

This bill would purport to codify *Dynamex*. AB 5 has been one of the most contentious measures of the 2019 legislative session. While the stated intent of the measure was to target the "gig economy" – particularly rideshare companies such as Uber and Lyft – the effects will ultimately resonate with all California employers.

The lobbying efforts surrounding AB 5 were fast and furious. Numerous industry advocates proposed carve outs, with varying degrees of success. On September 11, after various unsuccessful attempts to insert employer friendly amendments, AB 5 passed out of the Senate on a party line, 29 to 11 vote. AB 5 is now in the process of being enrolled, and predictions are that it will almost certainly be signed by the Governor.

Notably the League and other public sector advocacy groups were largely silent and took no position on the measure. CalPERS itself took no position, even though it appears CalPERS would oppose its application to its member agencies. This is because it appears that AB 5 will *not* apply to local government. Litigation on this issue is likely, however.[2]

VII. CalPERS' Application of the Common Law Employee Test Since *Cargill*

The evidence suggests that CalPERS is taking an increasingly aggressive stance when evaluating independent contractor relationships. In connection with recent litigation, our office

[2] The author looks forward to further discussion on AB 5 at the Annual League Conference in Long Beach.

made a request under the Public Records Act for Office of Administrative Hearing ("OAH")[3] decisions involving employee/independent contractor status determinations. The decisions produced by CalPERS prompt two insights: [4]

First, even if no independent contractors have raised concerns about their status and they appear to be content with the independent contractor relationship, there is still a significant risk of an adverse audit determination. CalPERS regularly conduct audits of individual worker status and is unafraid of challenging independent contractor status. In fact, of the OAH cases reviewed, 42% of the cases began as an audit determination by CalPERS— and **not** a request for service credit from the worker. And, in our sample, CalPERS determined that a given worker was a common law employee in 67% of the cases.

Second, if a public agency appeals a CalPERS decision, the public agency has the burden of proof. Most OAH decisions hold it is the party challenging CalPERS' initial determination which must prove, by a preponderance of the evidence, that CalPERS was in error. In most cases, this means that the public agency must prove that the alleged employee is, in fact, an independent contractor. Due to the highly subjective multi-factor test under *Tieberg* and related case law, the OAH, and the CalPERS Board itself, have wide discretion in weighing various factors when determining whether to affirm or reject CalPERS' initial determination. And, in our sample, the OAH sided with CalPERS' initial determination 83% of the time.

California Government Code section 20125 provides that the CalPERS Board shall determine who are employees and is the sole judge under which persons may be admitted to and continue to receive benefits under this system.

A. CalPERS Has Not Issued Regulations to Define Independent Contractor Status

It is noteworthy that although CalPERS may propose and issue regulations on a wide variety of issues related to the Public Employees Retirement Law ("PERL"), it has not issued any regulations in an effort to define independent contractor status. Employers, and public agencies in particular, seek bright line tests for determining whether a worker may be appropriately classified as an independent contractor. It appears that CalPERS prefers no bright line, with determinations made on a case by case basis.

B. CalPERS "Precedential" Decisions

The CalPERS Board designates certain decisions as "precedential," meaning that they provide the essential blueprint for the applicable analysis. There are two precedential decisions concerning independent contractors, and whether certain workers meet the common law employees test.

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[3] The Office of Administrative Hearings is the State agency empowered to hold evidentiary hearings and make initial rulings regarding CalPERS reporting and eligibility rules. *See infra*

[4] Eleven cases were disclosed. With the *Fuller* decision (discussed *infra*), we our data sample included twelve cases.

In 2005, CalPERS designated as precedential the decision entitled *In the Matter of Lee Neidengard*, Precedential Decision No. 05-01, Case No. 6099, OAH No. L-2003100580 (effective Apr. 22, 2005(("*Neidengard*"). *Neidengard* involved Tri-Counties Regional Center ("Tri-Counties"), a non-profit that received state funding to provide services to developmentally disabled individuals. Tri-Counties contracted with CalPERS to provide retirement services for its employees. Respondent Neidengard was hired by Tri-Counties as a staff physician in the 1970's. Tri-Counties eventually faced a budget shortfall and attempted to make staff reductions by offering many of the staff "contract" positions that did not receive CalPERS benefits, but continued to perform largely the same work. Neidengard used the Tri-Counties medical facilities, and his patient files were housed at the Tri-Counties office and Tri-Counties exercised "considerable if not complete control over the manner and means by which Respondent performed his work." While Neidenbard signed several professional services agreement with Tri-Counties as an alleged independent contractor, the OAH -- applying *Cargill* and *Tieberg* -- found that he continued to be a common law employee of Tri-Counties, and thus should have been enrolled.

In 2008, CalPERS designated as precedential the decision entitled *In the Matter of Galt Services Authority*, Precedential Decision 08-01, Case No. 8287, OAH No. N-2007080553 (effective Oct. 22, 2008) ("*Galt Services*"). *Galt Services* involved the City of Galt, which was *not* a contracting agency with CalPERS. The City attempted to create a new joint powers authority, the Galt Services Authority ("GSA"), and transfer many of the City employees to the new GSA entity. The GSA entity would then contract with CalPERS so that the employees could receive CalPERS benefits. CalPERS refused to contract with the new GSA entity, arguing that the newly-transferred employees were, in fact, still employees of the City. The OAH agreed. The City approved all of the GSA's actions, reimbursed the GSA for the employees' salaries, set up bank accounts and auditing for the GSA, prepared payroll checks for GSA employees, and was the GSA's only client. Applying *Cargill* and *Tieberg*, the OAH found that the employees remained under the City's control, and thus were not common law employees of the GSA.

C. The Decision in *Tracy C. Fuller / Cambria Community Services District*

This case involves Regional Government Services ("RGS"), a Joint Powers Authority ("JPA") formed to provide worker and interim support to various public agencies. In this case, RGS contracted with the Cambria Community Services District ("CCSD") to provide an Interim Finance Manager, Tracy Fuller ("Fuller"). The contract specifically provided that Fuller was an independent contractor, and that all persons working for RGS are RGS employees, and not employees of CCSD.

RGS entered into a contractual relationship with Fuller. Fuller was assigned an RGS business card, office, a phone extension and an email address. Fuller was assigned to CCSD where she performed Interim Finance Manager tasks. Fuller was provided a CCSD office, telephone, an email address and access to certain CCSD computer systems. She received assignments from CCSD, and there were other indicia of employment with CCSD.

The Administrative Law Judge concluded, among other things:

- CCSD should have known that the enrollment requirement would apply to Fuller because the position at issue was a position that is filled by a regular employee. In fact, Fuller's predecessor and successor were regular CCSD employees.

- Fuller was, in fact, acting as a finance manager, and the work she was doing was clearly an integral part of the regular business of CCSD.

- CCSD had the right to control the manner and means of the work performed by CCSD.

The CalPERS Board adopted the *Fuller* decision in October 2018. Subsequently, CalPERS agendized whether to adopt *Fuller* as a precedential decision. *Fuller* was subsequently removed from the agenda, and it is currently uncertain whether CalPERS will move forward to designate it as precedential.

Fuller is particularly troublesome for public agencies because it interferes with a model that has been in play for some time – a model beneficial to both the public agency and the worker.

VIII. The Process to Appeal a CalPERS Determination

The process to appeal and adjudicate an adverse CalPERS determination is governed by statute and regulations, with strict timelines. Local agencies should be careful to observe the statutory timelines, and to create a complete record.

A. The Audit and Appeal

CalPERS has the right to audit payroll and personnel information to ensure compliance with PERL. In the context of evaluating independent contractor status, CalPERS will issue an "initial determination" whether CalPERS views the relationship as a bona fide independent contractor relationship. The local agency will then be given an opportunity to respond. At some point thereafter, CalPERS will issue a "final determination."

The final determination triggers a thirty day timeline. This timeline may be extended by CalPERS for thirty (30) days. Local agencies should be very mindful of this deadline, as it will be strictly enforced.

RPLG Practice Pointer: When communicating with CalPERS, always confirm receipt of the applicable communication. Consider sending confirmations in different ways – i.e., by email, regular mail and/or certified mail. Document all contact with CalPERS.

B. The Statement of Issues

After filing an appeal, CalPERS will issue a Statement of Issues. As provided by California Government Code section 11504:

The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing and, in addition, any particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought.

C. Statement of Defenses:

The Statement of Issues triggers a fifteen (15) day timeline to file a Notice of Defense. (Cal. Gov. Code § 11506(a).) Failure to file a Notice of Defense constitutes a waiver of the right to a hearing. (*Id.* § 11506(c).)

Local agencies should be careful to include all affirmative defenses in this Notice, or they may face a later motion to exclude evidence or argument.

CalPERS is responsible for making arrangements with the Office of Administrative Hearings ("OAH") for a hearing date. The local agency will be asked to set convenient dates and times for a hearing.

> ***RPLG Practice Pointer***: When setting dates, make sure there is sufficient time for discovery, and for resolution of discovery disputes. As with any litigation, it is very possible that disputes will arise over whether CalPERS has sufficiently complied with its discovery obligations (*see infra*.) At the state of setting a hearing, local agencies should have considerable latitude in setting a mutually agreeable and reasonable date(s) for hearing.

D. Discovery:

1. California Public Records Act

As set forth *infra*, there is a limited right to discovery under the APA. However, practitioners may also avail themselves of the Public Records Act ("PRA") to obtain documents. The PRA is a powerful tool to obtain documents related to how the OAH and CalPERS have ruled in other cases.

2. The APA Discovery Statute

Section 11507.6 is the APA discovery statute. While the traditional discovery is not permitted (e.g. depositions and interrogatories), the statute provides for various categories of permitted discovery. Practically, the two key categories are:

a. Witnesses: Under the statute, each party may obtain "the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing" (Cal. Gov. Code § 11507.6.)

b. Documents: The statute provides for various categories of documents, including documents that will be introduced at the hearing, investigative reports, statement and others categories of documents.

RPLG Practice Pointer: Local agencies should pay careful attention to the discovery process. If an agency fails to identify a witness, or a document, it could be excluded during the hearing. In addition, if CalPERS fails to provide requested documents, agencies should consider filing a motion to compel.

E. The Hearing Process: An Administrative Law Judge will preside over the hearing. Pre-briefing is permitted, but not required. Opening statements may be made. Witnesses will be sworn and are subject to direct and cross examination. Exhibits are proffered and subject to authentication and objection. Hearsay is admissible, subject to the rule that a material finding may not be premised solely on hearsay.

At the conclusion of the hearing, the parties may request the opportunity for post hearing briefing. The parties may agree on a briefing schedule.

F. The Proposed Decision and Appeal Opportunity: The ALJ will issue a Proposed Decision, which becomes final, unless one party appeals to the CalPERS Board. If appealed to the CalPERS Board, the case will be docked for final decision.

G. Penalties

Under California Government Code section 20283, if an employer fails to enroll a member within 90 days (which will always apply in these situations), the employer may be required to pay all employer and employee contributions associated with enrolling the contractor into the system retroactively to the time of initial hire. In addition, CalPERS may impose an additional $500 administrative fee per member.

IX. Observations and Preventive Measures

There are a variety of preventive measures that an agency should consider in connection with independent contractor relationships.

Agencies should consider an internal audit, to catalog their independent contractor relationships and to gauge risk. Consider making the audit subject to the attorney client privilege, to ensure that it is not subject to later disclosure.

When being audited by CalPERS, ensure that accurate information is provided. CalPERS may send out "employment relationship questionnaires" to employees without the agency's knowledge. Consider adopting a rule requiring that employees coordinate with the city attorney before unilaterally responding to outside agency. This can help ensure that CalPERS receives balanced and accurate information.

With respect to independent contractor relationships:

- When utilizing retired CalPERS annuitants, carefully observe the requirements of California Government Code section 21221, including the 960 hour per fiscal year limitation.

- Confirm the third-party relationship, and have the worker sign and acknowledge that they are working as an independent contractor, and not as an employee.

- Ensure all identification of the worker is as a contractor. Avoid providing the same email address or other identification that would suggest the worker is an employee.

- Confirm in writing that the local agency has no right to control the manner and means of performing the work at issue.

- Avoid requiring the worker to attend meetings.

- Do not supply dedicated office space. If space is provided, consider using "hotel" office space that is not dedicated to the worker.

- Do not supply the specific "tools" needed to perform the work.

- Consider requiring the contractor to indemnify the local agency for adverse determinations by CalPERS.

- Consider obtaining an advance opinion from CalPERS as to whether the relationship qualifies a bonafide independent contractor relationship.

X. Conclusion

Local agencies should be aware of the risks associated with independent contractor relationships, and consider taking preventive measures in connection with the relationships.

Notes:_____

Rent Control: Tenant Protection and Anti-Displacement Policies, Technically Speaking

Friday, October 18, 2019 General Session; 10:15 a.m. – 12:15 p.m.

Karen Tiedemann, Partner, Goldfarb & Lipman LLP
Thomas Webber, Partner, Goldfarb & Lipman LLP

RENT CONTROL
Tenant Protection and Anti-Displacement Policies, Technically Speaking

League of California Cities
Annual Conference, City Attorney Track
Long Beach California
October 18, 2019

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TABLE OF CONTENTS

I. Introduction

California Rental Market: Predictably Challenging

California has long suffered high housing costs and the problem has worsened since approximately 1970 in comparison to other states.[1] The housing market can be particularly challenging for renters, who lack stable housing costs created by long-term financing such as a thirty-year fixed-rate mortgage. Although the housing market varies throughout the state, average monthly rents in numerous California markets are notably above the U.S. average.[2] The predictably challenging rental markets in California are highly volatile, as reflected in high rents, excessive and frequent rent increases, and unexplained evictions.[3]

Local officials in some California cities and counties have responded to the challenging rental market by enacting **rent control**. To proponents, rent control can promote stability and increase rental market predictability for tenants. To opponents, rent control shifts the burdens and costs of what ought to be a public goal (providing safe and stable housing for residents), and places it principally on private property owners. Mere mention of rent control is likely to stir emotions and raise blood pressure.

But what is rent control, technically speaking? Colloquially, rent control often means any of a suite of regulations governing the landlord-tenant relationship. This paper reviews the historical roots and current legal precedents that both support and shape local rent stabilization policies in California and focuses on two main aspects of the landlord-tenant relationship: setting and increasing monthly rents, and evictions. Other regulations, such as ensuring unit habitability or data collection via public registry, may also be included in the rent control policy suite.

Historical Context

Notably, rent control was enacted as a policy response to regulate rental housing markets

[1] Taylor, Mac. "California's High Housing Costs: Causes and Consequences," Legislative Analyst Report. March 17, 2015. Available at https://www.lao.ca.gov.

[2] The U.S. Census Bureau estimates that median gross rents for the state of California ($1,358) were the third highest in the United States ($982), behind Hawaii ($1,507) and the District of Colombia ($1,424). Estimated median gross rents in urban California counites emphasize that high rents are not isolated to one region: Los Angeles ($1,322), Sacramento ($1,122), San Diego ($1,467), San Francisco ($1,709), and Santa Clara ($1,955). U.S. Census Bureau, *2013-2017 American Community Survey 5-Year Estimates*, Table B25064.

[3] Evictions often refer to the unlawful detainer process by which a landlord may seek a judicial order to remove a household and their property from a dwelling. The unlawful detainer process is separate from the termination of a tenancy by a landlord, which is a prerequisite to the unlawful detainer process. This paper uses the term eviction to refer to both a landlord's termination of tenancy and an unlawful detainer action in court.

during the first and second World Wars. Washington, D.C. enacted an ordinance allowing a commission to fix fair and reasonable rents and regulate evictions in 1919 that was subsequently challenged and upheld by the United States Supreme Court in 1921.[4]

In a 5-4 decision, the Court upheld the District's rent control program against challenges based on the Takings Clause and Due Process Clause because it was a temporary measure to address a declared emergency "growing out of the war, [and] resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business."[5] Three years later the Supreme Court rejected D.C.'s slightly revised rent control law because it appeared the emergency had passed.[6] Rent control was again upheld by the U.S. Supreme Court when enacted in response to World War II.[7]

Although crises of the World Wars subsided, emergency conditions in local housing markets persisted in places like New York City, and later in California cities. In response to local conditions, multiple jurisdictions in the United States have maintained and enhanced long-standing rent control policies while others have enacted new policies. Today, cities in California and New York, Washington, D.C., and the state of Oregon maintain modern rent control programs. At the time this is written, there is no statewide rent control policy or program in California.[8] Instead, thirty California cities and one county have local policies that generally limit the frequency of rent increases to no more than once every twelve months, limit the amount of rent increases, and limit the reasons for which a tenant household can be evicted. These thirty cities and county account for over one-fifth of California's population.[9] In addition to the thirty, many cities offer other tenant protections that could be considered less strict anti-displacement policies, such as voluntary mediation programs and anti-harassment policies.

Section II of this paper describes the outer parameters of rent stabilization programs in California, highlighting the legal issues, court cases, and state laws that authorize and constrain

[4] Block v. Hirsch (1921) 256 U.S. 135.
[5] *Id.* at 154.
[6] Chastleton Corp. v. Sinclair (1924) 264 U.S. 543,
[7] *See e.g. Bowles v. Willingham* (1944) 321 U.S. 503; *Woods v. Miller Co.* (1948) 333 U.S. 138.
[8] AB 1482 (Chiu, 2019) was approved by the Assembly and Senate, and awaits the Governor's signature. Although the law would regulate evictions and limit rent increases for existing tenancies, it is unclear whether and to what extent the state will create an administrative apparatus to safeguard the "fair return" concept discussed below.
[9] Based on 2017 Census data.

the thirty local programs in California cities and counties. Section III of this paper provides brief case studies of three variations of rent control programs in California.

II. Modern Rent Stabilization in California

Numerous federal and state court decisions, in addition to the enactment of state laws, have modernized rent control policies in California since the U.S. Supreme Court approved of wartime rent control. The principal case is *Birkenfeld v. City of Berkeley*, in which the California Supreme Court ultimately struck down Berkeley's 1972 voter-initiative charter amendment, which would have created a rent control program.[10] In its ruling, the Court provided the fundamental analyses resulting in the foundational features of local rent control programs.

A. Jurisdiction: Police Power

The *Birkenfeld* decision concludes that regulation of residential rents is a valid exercise of the police power.[11] The Court stated, "[a] City's police power under this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself."[12] The court then found that Berkeley's rent control initiative was "distinct from the purpose of any state legislation, and the imposition of rent ceilings does not materially interfere with any other state legislative purpose."[13] The court concluded, "It is of the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good."[14]

Accordingly, only those jurisdictions granted police powers may enact some form of rent control. California Constitution Article XI, Section 7 grants cities and counties the legal authority to enact "local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Notably, counties maintain broad police powers only in the geographic areas that are unincorporated (i.e. areas within the county that are not incorporated as and governed by a city). In other words, a county could only apply rent regulations to the unincorporated areas of the county and not to cities within the county.

[10] (1976) 17 Cal. 3d 129.
[11] 17 Cal. 3d at 140-143.
[12] *Id.* at 140 (citation omitted).
[13] *Id.* at 142 (citation omitted).
[14] *Id.* at 146 (citation omitted).

B. Due Process: The end of the "Emergency" Doctrine and a Duty to Offer Speedy Rent Adjustments

While discussing the breadth and depth of police power authority, the *Birkenfeld* court rejected the argument that rent controls may only be imposed in response to an "emergency." Berkeley's voter-initiative had declared that an emergency existed, consisting of "a growing shortage of housing units resulting in a critically low vacancy rate, rapidly rising and exorbitant rents exploiting this shortage, and the continuing deterioration of the existing housing stock."[15]

However, the Court discussed the evolution of usury laws and price controls to protect consumers and minimum wage laws to protect workers, noting that each were previously rejected under *Lochner* era substantive due process.[16] The California Supreme Court concluded that "the 'emergency' doctrine invoked to uphold rent control measures of more than half a century ago [in response to the World Wars] is no longer operative as it was formulated as a special exception to limitations on the police power that have long since ceased to exist."[17]

The California Supreme Court quoted the U.S. Supreme Court decision in *Nebbia v. New York* (upholding the state's authority to regulate the price of milk for dairy farmers, dealers, and retailers), noting that, "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . [so long as] the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory . . ."[18]

Applying this economic legislation rule, the California Supreme Court held that "the constitutionality of residential rent controls under the police power depends upon the actual existence of a housing shortage and its concomitant ill effects of sufficient seriousness to make rent control a rational curative measure."[19] The Court summarized the role of the courts: because no emergency was constitutionally required, courts should "sustain the propriety of rent controls under the police power unless the findings establish a complete absence of even a debatable rational basis for the legislative determination by the [enacting body] that rent control is a

[15] *Id.* at 137 (citation omitted).
[16] *Id.* at 153-160.
[17] *Id*. at 154.
[18] *Id.* at 155, quoting *Nebbia* (1934) 291 U.S. 502, 537.
[19] *Id*. at 160.

reasonable means of counteracting the harms and dangers to the public health and welfare emanating from a housing shortage."[20]

Still, Berkeley's 1972 rent control charter amendment was fatally flawed. The California Supreme Court stated that it is "constitutionally necessary" for indefinite rent control ordinances to include mechanisms to provide "adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary."[21] The 1972 charter amendment required each landlord submit individual petitions for each unit prior to increasing rent. The Court characterized the petition process as an "inexcusably cumbersome rent adjustment procedure [ ] not reasonably related to the amendment's stated purpose of preventing excessive rents and so would deprive the plaintiff landlords of due process of law."[22]

Berkeley voters again enacted a rent control charter amendment in 1980, which guaranteed each landlord a fair return on their investment.[23] The fair return guarantee was fulfilled via two methods to adjust rents: annual general adjustments granted increases based on a formula to be determined by a rent stabilization board of commissioners, and if landlords were dissatisfied with the general increase they could file property-specific petitions to increase rent.[24]

Berkeley landlords again sought legal review of the charter amendment, which challenge was largely rejected by the California Supreme Court in *Fisher v. City of Berkeley*.[25] The California Supreme Court concluded that the fair return guarantee to each landlord appeared to redress the problems identified in the *Birkenfeld* case because the annual general adjustment could account for the effect of inflation that might otherwise cause confiscatory results if rents were permanently frozen.[26] Thus, the annual general adjustment and a streamlined petition process in which hearing officers would adjudicate petitions with the potential to appeal to the rent board for additional relief addressed "every major procedural failing" identified in the *Birkenfeld* decision.[27] In addition to constitutional challenges, the California Supreme Court rejected a novel theory that

[20] *Id.* at 161. This premise was later confirmed by the U.S. Supreme Court in *Pennell v. San Jose* (1988) 485 U.S. 1, 13, where that Court stated, "we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare."
[21] *Id*. at 169.
[22] *Id*. at 173.
[23] *Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 651-52.
[24] *Fisher*, 37 Cal. 3d at 653; 688-690.
[25] Notably, the Court rejected a presumption in the charter amendment that affected the burden of proof in retaliatory eviction cases, which was severed from the measure. *Fisher*, 37 Cal. 3d at 693-699.
[26] *Id.* at 682-83. Because the Court heard a facial challenge to the charter amendment, it was bound to rule based only on its text and not its application to a particular landlord.
[27] *Id.* at 690.

Berkeley's mandatory price controls were preempted by the federal Sherman Antitrust Act.[28] The U.S. Supreme Court granted certiorari on the limited question of preemption under the Sherman Act, and affirmed the California Supreme Court's conclusion that local residential rent controls do not violate the Sherman Act, albeit on a slightly different theory than the California Court.[29]

C. The Takings Clause

Two California Supreme Court decisions verify that local rent controls do not take private property in violation of the Takings Clause in the U.S. and California Constitutions.[30] In *Kavanau v. Santa Monica Rent Control Board*, the Court analyzed whether Santa Monica's rent control ordinance effected a regulatory taking for which a landlord was due compensation. The Court concluded that rent control is not a *per se* taking of property because the policy "does not generally constitute a physical invasion of property . . . and [the landlord] did not lose 'all economically beneficial or productive use of' his property."[31]

Because there was no *per se* taking, the Court then reviewed local rent controls using an *ad hoc* balancing test, including various factors identified in numerous U.S. Supreme Court cases, to conclude that rent control programs do not constitute a taking of property so long as the "future rent ceiling [ ] will maintain financial integrity, attract necessary capital, and fairly compensate [a landlord] for the risks he has assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable."[32] In other words, adjustment of future rents via a petition process provides an adequate remedy for purportedly unconstitutional rent limitations that restricted a particular landlord's earnings.

Moreover, the Court stated that "[r]egulated prices must fall within a broad zone of reasonableness to be constitutional[,]" citing rate-setting cases applicable to gas and electric utilities.[33] The Court then concluded that "[s]etting rent ceilings is essentially a legislative task, and agencies, not courts, choose which administrative formula to apply." Emphasizing this point, the Court strongly resisted "the impossible task of finding somewhere in the penumbra of the

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[28] 37 Cal. 3d at 655-678.
[29] *Fisher v. Berkeley* (1986) 475 U.S. 260. Most recent, the U.S. Supreme Court denied a petition for certiorari regarding a challenge of New York's rent control laws based on the Takings Clause in 2012. *Harmon v. Kimmel* (Apr. 23, 2012) 11-496.
[30] U.S. Const. Amend. V; Cal. Const. art. I, § 19.
[31] *Kavanau*, (1997) 16 Cal. 4th 761, 780 (internal citations omitted).
[32] *Id.* at 785.
[33] *Id.* at 779 (internal quotations and citation omitted).

Constitution a stipulation that a particular apartment in a particular building should rent for $746 per month rather than $745."[34]

Two years later, the Court addressed a more novel regulatory takings claim, which argued that Santa Monica's rent control program did not substantially advance a legitimate governmental purpose. In *Santa Monica Beach v. Superior Court*, the California Supreme Court concluded that the city's rent control program substantially advanced some legitimate state purpose, and that the law is constitutional even if it did not precisely fulfill all of the goals specified in its preamble.[35] Specifically, the challengers relied on Census data to conclude that the rent control law had failed to protect low income, minority, and elderly tenants, which groups were identified as in need of protection in the rent control law.

The *Santa Monica Beach* decision upheld the city's generally applicable rent control law, finding that it was not an arbitrary regulation of property rights, and noting that rent control even withstands heightened scrutiny even though the rational basis test controls (*i.e.* the Court noted that local rent control substantially advances a legitimate governmental purpose).[36] The Court cited the U.S. Supreme Court's *Pennell* decision, noting that even the dissent by Justice Scalia "like the majority, took for granted the basic constitutionality of ordinary rent control laws."[37]

D. Other Constitutional Challenges

California rent control programs have been subjected to judicial challenges based on other constitutional provisions, including the Equal Protection Clause and the Contracts Clause. In *Pennell*, the U.S. Supreme Court rejected an equal protection challenge to San Jose's rent control program, which allowed for hearing officers to consider individual tenant hardships when factoring potential rent increases requested via a landlord petition. The Court stated that it:

> "will not overturn a statute that does not burden a suspect class or a fundamental interest unless the varying treatment of differed groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational."[38]

[34] *Id*. at 784.
[35] *Santa Monica Beach*, (1999) 19 Cal. 4th 952, 970-71.
[36] *Id.* at 967.
[37] *Id.* at 968.
[38] *Pennell*, (1988) 485 U.S. at 14.

Like the California Supreme Court, the U.S. Supreme Court concluded that protecting tenants facing hardships served a legitimate purpose, and so the resulting different treatment of certain landlords on the basis of whether or not they house hardship tenants is rational.[39]

Likewise, the California Court of Appeal concluded in *Interstate Marina Development Company v.* County *of Los Angeles* that generally applicable rent controls do not deprive landlords of equal protection of the laws.[40] The *Interstate Marina* case also presented a novel challenge to rent control by a long-term ground lessor of public property, upon which the landlord developed and operated residential rental housing subject to rent control.[41] The Court of Appeal thoroughly analyzed the claim that rent control unconstitutionally impairs contractual relationships, noting that greater scrutiny is necessary when the government is a party to the contract as a long-term ground lessor to the landlord.[42] The Court of Appeal concluded that L.A. County's rent control ordinance caused minimal alteration of contractual obligations and provided similar treatment for similarly situated landlords, and so did not result in an unconstitutional impairment of contracts.[43] The court noted that "[r]ent control, like the imposition of a new tax, is simply one of the usual hazards of the business enterprise [for anyone engaged in the property rental field]."[44]

E. State Law Constraints

While the constitutionality of rent control programs is well established, state laws prohibit specific aspects of local rent control.

1. Rent Stabilization and the Costa-Hawkins Rental Housing Act

The Costa-Hawkins Act mandates vacancy decontrol of rent-regulated units, which means that a landlord can freely set the rent for a vacant unit subject to regulation when a new tenancy begins. The act states:

> "If the original occupant or occupants who took possession of the dwelling or unit pursuant to the rental agreement with the owner no longer permanently reside there, an owner may increase the rent by any amount allowed by this section to a lawful

[39] *Id.*
[40] (1984) 155 Cal. App. 3d 435; *see also Berman v. Downing* (1986) 184 Cal. App. 3d Supp. 1.
[41] *Interstate Marina*, 155 Cal App. 3d at 441.
[42] *Id*. at 445-46.
[43] *Id.* at 449
[44] *Id*. at 448; 453.

> sublessee or assignee who did not reside at the dwelling or unit prior to January 1, 1996."[45]

This means, that generally landlords may reset the rent for a regulated unit if all the initial occupants of that unit move out, even if a new occupant moved in while one initial occupant lived in the unit. For instance, if one person moves into an apartment and later allows a roommate or significant other to live with them, the landlord may reset the rent for the apartment if the roommate or significant other remains in the apartment and the initial person moves out, regardless of local rent regulation. Because Costa-Hawkins prohibits cities and counties from setting the initial rent in multifamily housing, local programs are essentially limited to regulating the amount and frequency of rent increases for existing tenancies. Thus, regulation of rents in California is often referred to as rent "stabilization" instead of rent control.[46]

The Costa-Hawkins Rental Housing Act also limits local government's ability to regulate different types of residential rental housing.[47] The act limits the housing units to which local rent regulations apply, effectively deregulating detached single-family homes.[48] Among other restrictions, rent for tenancies that began after 1996 generally cannot be regulated, unless the housing unit was built prior to February 1, 1995. The Costa-Hawkins Act also freezes in time local exemptions for newly constructed units, which precludes most regulation of rents in West Hollywood and San Francisco buildings constructed after 1979, but allows for rent regulation of Oakland buildings constructed prior to 1983, and prior to 1995 in Mountain View.[49]

Notably, a voter-initiative to repeal Costa-Hawkins was rejected by popular vote in November 2018, but the issue appears poised for a return to the ballot in 2020.

2. Exiting the Rental Market and the Ellis Act

The Ellis Act was adopted in 1985 in response to a 1984 California Supreme Court decision that effectively allowed a city to require rental property continue to be used as such until a demolition or removal permit was issued by the city.[50] The Ellis Act expressly supersedes the

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[45] Civil Code § 1954.53(d)(2).
[46] Notably, the Costa-Hawkins Act does not apply to mobile home parks; some jurisdictions have mobile home rent control programs that regulate the initial rent and subsequent increases for mobile homes and mobile home spaces.
[47] Civil Code §§ 1954.50 – 1954.535.
[48] Civil Code § 1954.52(a).
[49] Civil Code § 1954.52(a)(2); *see also* W.H. Mun. Code §17.24.010.A.4; S.F. Admin. Code. § 37.2; Oak. Mun. Code 8.22.030.A.5; & M.V. Charter § 1703(b)(1).
[50] Gov. Code §§ 7060 – 7060.7; *see e.g.* Gov. Code § 7060.7 & *Nash v. City of Santa Monica* (1984) 37 Cal. 3d 97.

Court ruling and allows landlords to terminate tenancies in order to exit the residential rental market.

While granting this right to landlords, the Ellis Act provides specific authority for cities and counties to regulate aspects of a landlord's exit from the rental market. However, cities and counties must affirmatively enact ordinances providing the following protections. First, the Ellis Act allows local jurisdictions to require that landlords provide tenants with additional notice of a termination of tenancy that relies on the Ellis Act.[51] Generally, state law requires landlords provide at least 30 days' notice to terminate a tenancy of less than one year, and 60 days to terminate a longer tenancy.[52] Moreover, the noticing requirements in state law have been construed to preempt local governments from requiring longer notice periods.[53] The Ellis Act allows a local jurisdiction to require a 120-day notice to terminate a tenancy based on the landlord's withdrawal of the property from the rental market. The 120-day notice can be extended to one year for seniors over the age of sixty-two and persons with disabilities.

Second, the law authorizes local jurisdictions to require that landlords mitigate the impacts of the withdrawal on tenants, for instance by paying relocation assistance to tenants.[54] Myriad published decisions explore the outer limits of relocation assistance landlords can legally be required to pay departing tenants. For instance, the Court of Appeal rejected a facial challenge in *Pieri v. City and County of San Francisco*, affirming the city's ordinance requiring relocation payments of $4,500 per tenant (up to $13,500 per unit), with additional payments of $3,000 if the household included a senior or disabled person, all of which were to be adjusted annually for inflation.[55] In contrast, a 2014 San Francisco ordinance requiring landlords to pay twenty-four times the difference between the tenant's current rent and the fair market value of a comparable unit in the city was summarily rejected.[56]

Third, the Ellis Act authorizes local jurisdictions to strictly regulate re-entry to the rental market of previously withdrawn units.[57] Cities and counties can impose penalties if the property is returned to the rental market within two years of withdrawal; can require re-control of the rents

[51] Gov. Code § 7060.4.
[52] Civ. Code §§ 1946-1946.1.
[53] *Tri County Apartment Association v. City of Mt. View* (1987) 196 Cal. App. 3d 1283 (holding that the city's minimum 60-day notice for all rent increases was preempted Civil Code § 827).
[54] Gov. Code § 7060.1(c).
[55] (2006) 137 Cal. App. 4th 886.
[56] *Levin v. City and County of San Francisco* (2014) 71 F. Supp. 3d 1072.
[57] Gov. Code § 7060.2.

for units returned to the rental market within five years of withdrawal at the last monthly rental amount plus annual general adjustments; and can require landlords provide former-tenants with a first option to re-rent units returned to the rental market up to ten years from withdrawal.[58]

III. Case Studies

This Section III provides a brief overview of three models of rent stabilization policies in place in California, beginning with a legacy rent control city in southern California using an information-driven enforcement system, followed by a Bay Area city that recently enacted a complaint-driven rent stabilization program, and concluding with a Bay Area county that has initiated an alternative program to mediate landlord-tenant relations.

A. Information-Driven Enforcement of Rent Stabilization in Santa Monica[59]

City of Santa Monica voters adopted a rent stabilization charter amendment in 1979. Since that time, Santa Monica's rent control program continues to limit rent increases and regulate the reasons for which a tenant can be evicted. The program governs 27,445 residential rental units as of December 2018.[60]

Annual rent increases are limited to the lesser of: six percent of the current rent, seventy-five percent (75%) of the annual percentage change in the consumer price index (CPI-U all items) for the Los Angeles area; or a specific dollar figure published by the rent board based on application of 75% of the CPI-U annual change applied to an average 85th percentile maximum allowable rent (MAR), which equaled two percent (2%) or $44 for MARs of $2,175 per month or greater in 2019.[61] Larger rent increases may be authorized through a petition process initiated by a landlord. The Santa Monica program charged an annual registration fee to landlords of $198 per-controlled unit to administer the program in 2019; fifty-percent of the annual fee can be passed through to tenants over a twelve-month period.

Santa Monica's rent stabilization should be considered information-driven because the city proactively calculates and publishes the maximum-allowable rent (MAR) for each regulated

[58] *Id.*
[59] The following discussion summarizes information included in the 2018 Annual Report of the Santa Monica Rent Control Board, and other information published on the City website, available at: https://www.smgov.net/rentboard.
[60] The number of controlled units varies from year to year due in part to the withdrawal and return of units to and from the marketplace under the Ellis Act, as well as temporary exemptions (such as Santa Monica's owner-occupancy exemption on properties of three-or-fewer units).
[61] S.M. Charter § 1805.

tenancy. The city requires mandatory registration of regulated units and publishes MARs for specific units on its website, allowing for easy public access to information about regulated rents and lawful rent increases. The city recently automated tenancy registration, eliminating paper-based registrations and allowing for easier computations of MARs and verifications of fees, waivers and exemptions, and other issues. Notably, MAR calculations are based on information reported by landlords, but the information is sent to tenants in a customized letter so the tenants can validate the accuracy of the tenancy registration.

B. Complaint-Driven Enforcement of Rent Stabilization in Mountain View[62]

Voters in the City of Mountain View adopted a rent stabilization charter amendment in 2016. Mountain View's charter amendment limits rent increases and regulates the reasons for which a tenant can be evicted. The program regulates rents in 13,466 residential rental units as of July 2018.

Annual rent increases are limited to one hundred percent (100%) of the annual percentage change in the consumer price index (CPI-U all items) for the San Francisco area, which equaled three and one-half percent (3.5%) in 2019.[63] Larger rent increases may be authorized through a petition process initiated by a landlord. The Mountain View program charged an annual registration fee to landlords of $101 per-controlled unit to administer the program in 2019, which cannot be passed through to tenants.

In contrast with Santa Monica's information-driven rent stabilization program, Mountain View's program is primarily enforced via tenant complaints and petitions. The city does not require registration of tenancies and so cannot calculate maximum allowable rents for each regulated unit. However, the program actively educates the public about protections under the city's charter amendment, and provides binding arbitration of disputes related to rent and housing services, as well as voluntary mediation services for other disputes.

C. Mandatory, Non-binding Mediation in Marin County[64]

[62] The following discussion summarizes information published on the city website, available at: https://www.mountainview.gov/rentstabilization.
[63] M.V. Charter § 1707.
[64] The following discussion summarizes information published on the county website, available at: https://www.marincounty.org.

In 2017, the board of supervisors in Marin County adopted the Rental Housing Dispute Resolution Ordinance, which mediates disputes related to certain rent increases. The program requires mandatory participation in mediation for rent increases in excess of five percent (5%) of the current rent in any twelve-month period, if requested by either the landlord or tenant. Although participation is mandatory if mediation is requested by any party, it may result in either a voluntary mediation agreement or a nonbinding mediation statement from a neutral third party.[65] There are no direct costs to participating landlords or tenants for the mediation services.

In 2018, the county board of supervisors enacted an ordinance regulating the reasons for which a tenant may be evicted and requiring landlords to register each rental unit with the county on an annual basis, including disclosure of the occupancy status and monthly rent for each unit.[66] The county board of supervisors must review this most recent ordinance by January 2021.

IV. Conclusion

This paper reviews the historical roots and current legal precedents that both support and shape local rent stabilization policies in California. Cases at the state and federal levels confirm that rent stabilization programs in California can withstand constitutional challenges based on the Due Process Clause, Takings Clause, and other constitutional provisions. The decisions from the U.S. and California Supreme Courts identify necessary elements for any rent stabilization program governing rent increases in multifamily residential units, including broadly applicable annual general adjustments that will diminish the effects of inflation on a landlords' income overtime, as well as individualized petition processes that ensure a landlord may earn a fair return from a rental property.

Two state laws significantly constrain local rent stabilization programs. The Ellis Act supersedes local regulations and the reasons for which a tenant can be evicted; allowing landlords to evict all tenants and permanently exit the rental housing market. And the Costa-Hawkins Rental Housing Act mandates vacancy decontrol, which allows a landlord to set the initial rental price for a new tenancy. Vacancy decontrol is also the reason why most local programs reference rent stabilization, and not rent control. Likewise, the Costa-Hawkins Act limits the rental units that may be subject to rent stabilization policies based on the year the unit was constructed and whether

[65] Marin County Code § 5.95.050.
[66] Marin County Code Chapter 5.100.

any other rental units are located on the same parcel (*e.g.* providing a statewide exemption for most single-family homes).

Within the constitutional and statutory constraints, three jurisdictions provide roadmaps for implementing rent stabilization and tenant protection policies that address rent increases and unexplained evictions. Santa Monica's long-standing policy has evolved into an information-driven program that provides detailed, tenancy specific information to landlords, tenants, and the general public to facilitate enforcement of the law. Mountain View's recently enacted program is cheaper to administer and relies on landlord and tenant complaints to enforce the law. While Marin County's mandatory-mediation program offers a softer approach to regulating rent increases when compared to the binding arbitration offered in Santa Monica and Mountain View. Among these three models, local jurisdictions may find an appropriate approach to address California's predictably challenging rental markets by implementing anti-displacement policies that provide tenants with greater certainty and stability in their housing.

Postscript

It appears California will soon be subject to statewide rent stabilization assuming AB 1482 (Chiu, 2019) is signed by the Governor as anticipated (*see* footnote 8, *supra*). With a statewide policy, is there a reason for continued local regulation, let alone the creation of new programs? Undoubtedly each local jurisdiction will grapple with this question.

Cursory review of AB 1482 indicates ample opportunities for some California jurisdictions to assert local control. AB 1482 expressly preserves the ability for local jurisdictions to provide more-strict regulation of evictions and rent increases. For instance, some local jurisdictions provide eviction protections to tenants after renting a unit for more than a month, while AB 1482 eviction limits generally apply after a tenant has continuously occupied a property for 12 months. Likewise, AB 1482 would limit annual rent increases to inflation plus five percent (*e.g.* allowing increases of 7-8% of existing rent). Most local jurisdictions with rent stabilization have only authorized smaller increases (*e.g.* Berkeley limits rent increases to 65% of the annual change in an inflation index, resulting in maximum rent increases of 2.5% in 2019). Finally, AB 1482 extends protections to some unit-types that are exempt from local regulation under the Costa-Hawkins Act: detached single-family homes owned by real estate investment trusts or corporations. Still, with such a large proportion of the population renting their home and the continued upward pressure on

rents, California jurisdictions will mostly likely continue to grapple with the means to provide housing stability for renters in their communities.

Redevelopment 2.0: Existing Laws, Pending Legislation and Legal Theory

Friday, October 18, 2019 General Session; 10:15 a.m. – 12:15 p.m.

Christopher Lynch, Attorney, Jones Hall, A Professional Law Corporation
Jim Morales, Deputy Director/General Counsel, Office of Community Investment and Infrastructure, acting as the Successor Agency to the San Francisco Redevelopment Agency

Notes:_____

Redevelopment 2.0:
Existing laws, pending legislation and legal theory

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League of California Cities
Annual Conference
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The dissolution of redevelopment agencies in California eliminated an important source of funding for economic development projects and affordable housing.

This paper describes alternative funding sources for public infrastructure and affordable housing, efforts by the California Legislature to introduce new redevelopment tools ("Redevelopment 2.0"), and the legal basis for those alternatives.

As will be explained, Redevelopment 2.0 is notable mostly for its potential.

I. Introduction to Property Taxation in California

Property Tax in General

The California Constitution and other state laws define how real property is taxed in California. The most well-known of such laws is Proposition 13, which in 1978 added Article XIII A to the California Constitution. Among other things, Proposition 13 states that the maximum amount of any ad valorem tax (i.e., a tax based on value, as opposed to another metric such as square footage) on real property cannot exceed 1% of the assessed value of such property. Thus, in the absence of any additional voter-approved ad valorem taxes or other taxes, a parcel of real property that has an assessed value of $500,000 would generate $5,000 in tax revenues ($500,000 * 1%). However, under Article XIII A, additional ad valorem taxes can be levied on real property to pay debt service on bonded indebtedness, causing the total ad valorem tax rate to exceed 1% of assessed value, if approved by the requisite percentage of voters.

A property's assessed value often varies, sometimes significantly, from its market value. This variance is due largely to Proposition 13's other notable provision, a 2% cap on annual inflationary increases in assessed value. Generally, a property's assessed value is set at its market value when it is sold and can increase to reflect new construction. Annually thereafter, the assessed value may increase by an inflationary rate that may not exceed 2%. In times and places of high growth in the market value of real property, this 2% maximum annual inflationary increase in assessed value does not keep pace with market value, leading to differences between market and assessed values.

The California Supreme Court has described the impact of Proposition 13 on California property taxation and public finance:

> First, by capping local property tax revenue, it greatly enhanced the responsibility the state would bear in funding government services, especially education. [citation omitted] Second, by failing to specify a method of allocation, Proposition 13 largely transferred control over local government finances from the state's many political subdivisions to the state, converting the property tax from a nominally local tax to a de facto state-administered tax subject to a complex system of intergovernmental grants. [citations omitted] Third, by imposing a unified, shared property tax, Proposition 13 created a zero-sum game in which political subdivisions (cities, counties, special districts, and school districts) would have to compete against each other for their slices of a greatly shrunken pie. California Redevelopment Assn. v. Matosantos (2011) 53 Cal. 4th 231, 244-245.

Tax Allocation

The 1% property tax for an individual parcel of real property typically supports multiple taxing entities, such as the city and county the parcel is located in, the school and community college districts that serve the parcel and other special districts. Article XIII A empowers the State Legislature to allocate property taxes to public agencies: "The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties."[1]

Allocation of the revenues from the 1% rate is determined according to a statutory formula that is commonly referred to as "AB 8". Since adoption of Proposition 13, California courts have consistently recognized the Legislature's power to allocate property tax revenues.

It is unnecessary for this discussion to understand how the allocations are calculated under AB 8. The important point is that the allocation is determined by statutory formula and a given taxing entity's AB 8 share usually remains relatively consistent from year to year, although changes in assessed value can affect allocations. Relative allocations among types of taxing entities differ from area to area.[2]

II. Introduction to Tax Increment Financing

The idea behind tax increment financing is that local government can provide financial support for specific activities, often new property development, and pay for it with increased tax revenues generated by the financed activity.

The following table shows an example of the tax increment generated when there are no changes in the subject property. It incorporates the following assumptions:

- The assessed value of parcels in the geographic area in the initial year (the "base year") is $100,000,000.
- No development or property sales (which could result in increases in assessed value) take place.
- The growth in assessed values is capped at 2% even though market values may have increased at a faster rate.

In this example, $20,000 of tax increment is generated in the second year.

Example 1 – No Development or Property Sales

Base Year Assessed Value	$100,000,000
Tax Revenue Generated by 1% General Levy	$1,000,000
Inflationary Increase in Assessed Value	2%
Second Year Assessed Value	$102,000,000
Tax Revenue Generated by 1% General Levy	$1,020,000
Tax Increment (Difference between Second Year and Base Year Tax Revenues)	$20,000

[1] California Constitution, Article XIII A, Section 1(a).

[2] See California Legislative Analyst's Office, August 20, 1996, "Property Taxes: Why Some Local Governments Get More Than Others".

Development in a given geographic area can lead to increases in assessed values as new improvements are built and as property is sold at now-higher prices as the area becomes more desirable. Example 2 below shows how this works. It incorporates the following assumptions:

- The assessed value of the parcels in the geographic area in the base year again is $100,000,000.
- In this example, however, investment in roads and parks makes the area more desirable for residents and businesses. This causes additional development on parcels in the area and sales of parcels at market prices higher than previously-assessed values.
- This example ignores inflationary increases for purposes of illustration.

Example 2 – Increased Development and Property Sales

Base Year Assessed Value	$100,000,000
Tax Revenue Generated by 1% General Levy	$1,000,000
Increase in Assessed Value due to Sales and other Development	$10,000,000
Second Year Assessed Value	$110,000,000
Tax Revenue Generated by 1% General Levy	$1,100,000
Tax Increment (Difference between Second Year and Base Year Tax Revenues)	$100,000

As a result of the development, assessed values in Example 2 increase by $10,000,000, which results in tax increment of $100,000, or $80,000 more than in Example 1, where there was no development.

The idea behind tax increment financing is that development can pay for itself by generating higher assessed values. The increased tax increment is then pledged to repay money borrowed to fund the initial development.

III. The End of Redevelopment 1.0

The Community Redevelopment Law (Health and Safety Code Division 24, §§ 33000 - 37964; "CRL") was for decades the primary vehicle for tax increment financing in California. The CRL depended upon authority in California Constitution Article XVI, Section 16. See Appendix A.

Redevelopment proved to be very popular with California cities and counties, in large part because the tax increment allocated to redevelopment agencies included the tax increment generated by other taxing agencies' AB 8 portion. Because 20% of the tax increment was committed to affordable housing, redevelopment was also a major source of affordable housing in the State.

However, the resulting popularity of the CRL with California cities and counties created stress in California's public finance system, which the California Supreme Court has described as follows:

> Tax increment financing remains a source of contention because of the financial advantage it provides redevelopment agencies and their community sponsors, primarily cities, over school districts and other local taxing agencies. Additionally,

> because of the state's obligations to equalize public school funding across districts [citation omitted] and to fund all public schools at minimum levels set by Proposition 98 (Cal. Const., art. XVI, § 8), the loss of property tax revenue by school and community college districts creates obligations for the state's General Fund. (See Los Angeles Unified School Dist. v. County of Los Angeles, supra, 181 Cal.App.4th at pp. 419–422; Lefcoe, Finding the Blight That's Right for Cal. Redevelopment Law (2001) 52 Hastings L.J. 991, 999 ["[W]here cities and counties shift property taxes from schools to redevelopment projects, the state must make up the difference … ."].) The effect of tax increment financing on school districts' property tax revenues has thus become a point of fiscal conflict between California's community redevelopment agencies and the state itself…. California Redevelopment Association v. Matosantos (2011) 53 Cal. 4th 231, 248.

This conflict manifested in a series of Legislative efforts to reduce the flow of property tax revenues to redevelopment agencies, most notably legislation funding a countywide Educational Revenue Augmentation Fund ("ERAF"):

> In response to these rising educational demands on the state treasury, the Legislature in 1992 created county educational revenue augmentation funds (ERAF's). (Stats. 1992, chs. 699, 700, pp. 3081–3125; Rev. & Tax. Code, §§ 97.2, 97.3; see Los Angeles Unified School Dist. v. County of Los Angeles, supra, 181 Cal.App.4th at pp. 420–421; City of El Monte v. Commission on State Mandates (2000) 83 Cal.App.4th 266, 272–274 [99 Cal. Rptr. 2d 333]; County of Los Angeles v. Sasaki, supra, 23 Cal.App.4th at p. 1447.) It reduced the portion of property taxes allocated to local governments, deposited the difference in the ERAF's, deemed the balances part of the state's General Fund for purposes of satisfying Proposition 98 obligations, and distributed these amounts to school districts. [citation omitted] Periodically thereafter, the Legislature through supplemental legislation required local government entities to further contribute to the ERAF's in order to defray the state's Proposition 98 school funding obligations. [citation omitted] Local governments had no vested right to property taxes [citation omitted]; accordingly, the Legislature could require ERAF payments as "an exercise of [its] authority to apportion property tax revenues" [citation omitted]. Matosantos, 53 Cal. 4th at p. 245.

Finally, the Legislature passed two bills – ABx1 26 and ABx1 27 – as part of the 2011 budget. ABx1 26 prohibited redevelopment agencies from engaging in new business and provided for their windup and dissolution. ABx1 27 offered an alternative whereby redevelopment agencies could continue to operate if the cities and counties that created them agreed to make payments to the state for the benefit of schools and special districts. In Matosantos, the California Supreme Court largely upheld ABx1 26's dissolution of redevelopment agencies but invalidated ABx1 27's alternative that would have allowed redevelopment agencies to continue operating.

As a result of ABx1 26, successor agencies to former redevelopment agencies may not undertake further redevelopment projects (unless they are obligated to do so under an "enforceable obligation") and have either wound down or are in the process of doing so.

The dissolution of redevelopment agencies also eliminated a reliable source of funding for affordable housing at a time when housing shortages are acute. It is estimated that when they were dissolved, redevelopment agencies were obligated to annually set aside at least $1 billion of tax increment for affordable housing.

IV. Is Redevelopment 2.0 Necessary?

Following the dissolution of redevelopment agencies, it is important to ask whether a new tax increment-based redevelopment system is necessary to advance local agencies' economic development projects, reduce blight or increase affordable housing.

Limited General Funds

One option for California cities is to leverage their general funds. Any such efforts must work within the limits imposed by the "Constitutional Debt Limit" in Article XVI, Section 18 of the California Constitution, which provides in relevant part:

> (a) No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose…[3]

The California Supreme Court has described the purpose of the Constitutional Debt Limit:

> To safeguard the general funds and property of a municipality from a situation whereby the holders of an issue of bonds could, at some time after the issuance thereof, force an unconsented-to increase in the taxes of, or foreclosure on the general assets and property of the issuing public corporation to obtain payment of the principal or interest thereon. To this end each general obligation bond issue is required to contain provision for a tax capable of insuring its repayment and that tax, together with the purpose for which the bonds were being issued, must secure the approval of two-thirds of the voter electors**.** Redondo Beach v. Taxpayers, Property Owners, Citizens & Electors (1960) 54 Cal. 2d 126, 131.

The California Supreme Court has broadly interpreted the Constitutional Debt Limit:

> When section 18 refers to "indebtedness," it includes within that term all the obligations of the local government during the relevant fiscal year. [citation omitted] Therefore, a city can violate the constitutional requirement by incurring even a very small debt if the city's other obligations during that year have already exhausted the city's total revenues for the year. (Ibid.) For this reason, section 18 is more accurately understood as mandating balanced budgets than merely as regulating the debt financing of public capital improvements. Rider v. City of San Diego (1998) 18 Cal.4th 1037, 1045.

However, the California Supreme Court has also recognized a number of exceptions to or limitations on the Constitutional Debt Limit.[4] The most common vehicle for general fund-based

[3] Article XVI, Section 18 authorizes school districts to incur bonded indebtedness for specific financing purposes with a 55% voter approval.

[4] "Certain exceptions or limitations to the balanced budget requirement of section 18 are almost as old as the requirement itself. One commentator has suggested that the willingness of the courts to recognize and perpetuate these exceptions reflects 'a concern for economic development and a perception that the debt limit [i]s too rigid and restrictive for the needs of a modern, urbanized population.' (Kosel, Municipal

financings by cities – lease financing – relies on a "contingent" or "lease" exception to the Constitutional Debt Limit often referred to as the Offner-Dean rule.[5] With this vehicle, cities lease real property to a third party (often a joint powers authority whose governing body consists of members of the city council) that subleases it back to the city. The stream of lease payments to the third party can be securitized and sold to investors through certificates of participation or lease revenue bonds, and the financing proceeds can be used by the city for any municipal purpose, in reliance on Government Code Sections 37350 and 37351:

> 37350. A city may purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit.
>
> 37351. The legislative body may purchase, lease, exchange, or receive such personal property and real estate situated inside or outside the city limits as is necessary or proper for municipal purposes. It may control, dispose of, and convey such property for the benefit of the city….

Because each yearly lease payment obligation is dependent upon the local agency's access to the leased property, these lease transactions do not constitute debt within the meaning of the Constitutional Debt Limit.

General Obligation Bonds

General obligation bonds are another source of potential financing for municipal improvements. With two-thirds voter approval, California cities can issue general obligation bonds to finance acquisition or improvement of real property under Article XIIIA of the Constitution and Government Code Section 43600 et seq. General obligation bonds issued by California cities are payable only from ad valorem property taxes, which must be levied in an amount sufficient to pay interest and principal on the bonds.

Following the loss of the CRL, some California cities have employed general obligation bonds to finance public infrastructure projects that previously might have been financed with tax increment. In addition, some cities and counties have employed general obligation bonds to finance affordable housing.

Comparative Benefits of Tax Increment Financing

The utility of lease financing and general obligation bonds as alternatives to redevelopment is limited in a number of important ways:

(i) The ability to pursue lease financings relies on identifying and encumbering a city asset with a value that is approximately equal to the principal amount of the lease financing. Many cities have limited assets that can be leased in a financing, and may wish to preserve them for financings that achieve core municipal purposes. A

Debt Limitation in California (1977) 7 Golden Gate L.Rev. 641, 645.) That observation may be valid, or perhaps our decisions have simply recognized that section 18's restrictions were not so much designed to discourage public investment in capital improvements as to mandate fiscal responsibility. Regardless of what principles might have motivated our decisions, certain exceptions to section 18 are firmly rooted in our jurisprudence." Rider, 18 Cal.4th at p. 1046.

[5] City of Los Angeles v. Offner (1942) 19 Cal. 2d 483; Dean v. Kuchel (1950) 35 Cal. 2d 444.

shortage of available assets may be exacerbated if the principal amount to be financed is large.

(ii) The two-thirds vote required for issuance of general obligation bonds can be a prohibitive hurdle. In addition, under the Government Code, general obligation bonds issued by general law cities can only be issued to finance "municipal improvements," which is a narrower subset of improvements than those that could be financed under the CRL. Charter cities may finance a broader set of improvements. Assembly Constitutional Amendment 1, introduced by Assembly Member Aguiar-Curry in December 2018, would reduce the vote requirement to 55% for general obligation bonds issued to finance public infrastructure, affordable housing and permanent supportive housing. The future of ACA 1 is uncertain as of the date of this paper.

(iii) Lease financings do not easily incorporate the funds of other public agencies that wish to contribute to a project, particularly if the other public agencies have to comply with the Constitutional Debt Limit or a statutory equivalent.

V. Existing Tax Increment Financing Laws

Perhaps because public agencies doubt their ability to accomplish economic development and other "redevelopment purposes" using general fund lease financings or general obligation bonds, the Legislature has passed a number of "post-dissolution" laws that provide tax increment financing options to California cities. However, all of these vehicles share at least two features that reduce their economic value relative to the CRL:

Voluntary Participation. The biggest challenge, which is common to all existing post-dissolution tax increment financing laws, is that participation by taxing entities other than the sponsoring agency is completely voluntary. If a city wishes to engage in tax increment financing and cannot convince any other taxing entity to participate, it has not really unlocked any new source of revenues to pay for public improvements than already would be available from its general fund, and the resulting tax increment revenue is significantly less than it would have been under the CRL.

Relatedly, even if a local school district or successor agency wanted to participate in one of the new districts or agencies authorized to do tax increment financing, current law prohibits their participation. Given that schools' AB 8 share typically represents 45-50% of the ad valorem tax, a significant portion of potentially available tax revenues are precluded from participation in the new tax increment financing programs. This further limits the amount of revenues that can be raised for tax increment-financed redevelopment.

Subordination to Redevelopment Obligations. In communities that previously had redevelopment agencies, new tax increment financing must be subordinated to any remaining residual Redevelopment Property Tax Trust Fund obligations of the former redevelopment agencies. In those communities, this makes new tax increment financing more expensive and thus more difficult.

Infrastructure Financing Districts

Statute. Authority for Infrastructure Financing Districts ("IFDs") was added to the California Government Code in 1990 (Government Code Title 5, Division 2, Part 1, Chapter 2.8 (§§ 53395 - 53397.11) (the "IFD Law")) but it has been used infrequently. As will be detailed below, the failure of IFDs to catch on as a means to spur development is likely due to various challenges with the statute.

Requirements for financing improvements under the IFD Law include:

(i) Revenues of the district must be used for the purchase, construction, expansion, improvement, seismic retrofit, or rehabilitation of any real or other tangible property with an estimated useful life of 15 years or longer.

(ii) The improvements must meet a "communitywide significance" test and provide significant benefits to an area larger than the area of the district.

(iii) Eligible public capital facilities include highways, interchanges, ramps and bridges, arterial streets, parking facilities, sewage treatment and water reclamation plants, flood control levees and dams, libraries, parks and recreational facilities, and facilities for the transfer and disposal of solid waste.

(iv) IFDs are limited to a 30-year life, which runs from the date of the ordinance forming the IFD, rather than being tied to the beginning of the flow of tax increment. This shortened window to collect and leverage tax increment may be the biggest problem with the IFD Law.

San Francisco Port IFD Law. The City and County of San Francisco ("San Francisco") is one of the few public agencies that has used the IFD Law, primarily for two reasons.

First, beginning in 2013, Assembly Bill 2259 added provisions to the IFD Law that are specific to property in the jurisdiction of the Port of San Francisco (Section 53395.8). Most importantly, AB 2259:

(i) extended the term of an IFD from 30 years from adoption of the formation ordinance to 45 years from the date the IFD has actually received $100,000 in incremental tax revenues;
(ii) authorized the creation of project areas within an IFD, which allows multiple 45-year time limits to be tied to project phasing; and
(iii) for IFDs in the 65-acre Pier 70 district, the IFD is entitled to receive up to 100% of the incremental ERAF tax revenues.

Second, as a city and county, San Francisco's AB 8 share is equal to approximately $0.65 of every property tax dollar, which means that the power of a San Francisco Port IFD is greater than an IFD established by any other California city unless the IFD also involves the voluntary allocation of tax increment by the county or other special districts.

Since the Legislature's adoption of AB 2259, the Board of Supervisors has established:

(i) an IFD that covers all of the property in the San Francisco Port's jurisdiction; and

(ii) one or more project areas in the Port-wide IFD for three projects: (A) the San Francisco Giants' Mission Rock Project, (B) the rehabilitation of 6 historical buildings in the historic core of Pier 70 and (C) the redevelopment of the waterfront parcels in Pier 70. The IFD is expected to receive 100% of the incremental ERAF tax revenues from the Pier 70 waterfront redevelopment project.

A summary of these projects and the involvement of the San Francisco Port IFD can be found at https://sfport.com/planning-development-projects.

San Francisco's Board of Supervisors adopted a set of policies that limit use of the San Francisco Port IFD to projects with the following characteristics:

(i) Rezoning is projected to result in a net fiscal benefit to the City's general fund.

(ii) The project will address infrastructure deficiencies in the general area of the IFD.

(iii) The financed infrastructure projects will be accompanied by a long-term maintenance commitment (typically in the form of ongoing services special taxes levied in a community facilities district established under the Mello-Roos Community Facilities Act of 1982).

Enhanced Infrastructure Financing Districts

Statute. Enhanced Infrastructure Financing Districts ("EIFDs") are another alternative to redevelopment financing, with enabling legislation added in 2014. In so doing, the Legislature noted that "with the dissolution of redevelopment agencies, public benefits will accrue if local agencies, excluding schools, are provided a means to finance the reuse and revitalization of former military bases, fund the creation of transit priority projects and the implementation of sustainable communities plans, construct and rehabilitate affordable housing units, and construct facilities to house providers of consumer goods and services in the communities served by these efforts."[6] The statutory scheme for EIFDs is found in Government Code Title 5, Division 2, Part 1, Chapter 2.8 (§§ 53398.50 - 53398.88) (the "EIFD Law").

Subsequent amendments to the EIFD Law have, among other things, focused on making the EIFD Law a tool for addressing the state's affordable housing challenges.[7] For instance, the Neighborhood Infill Finance and Transit Improvements Act (AB 1568 (2017)) amended the EIFD Law to allow cities and counties to allocate sales and use tax revenues to an EIFD if certain requirements were met, including that the area to be financed is an infill site and that at least 20% of the sales and use tax funds received by the district be used for the acquisition construction, or rehabilitation of low-income housing. Similarly, the Second Neighborhood Infill Finance and Transit Improvements Act (SB 1498 (2018)) allows cities and counties to allocate sales and use tax revenues to an EIFD to fund affordable housing within one-half mile of a major transit stop.

In addition to authorizing the allocation of cities' AB 8 property tax increment, the EIFD Law also authorizes the allocation of that portion of any ad valorem property tax revenue annually

[6] Government Code Section 53398.50.

[7] Amendments to the EIFD law since its initial adoption include AB 313 (2015), SB 63 (2015), AB 733 (2017), AB 1568 (2017) (the "Neighborhood Infill Finance and Transit Improvements Act"), AB 1999 (2018), SB 961 (2018) (the "Second Neighborhood Infill Finance and Transit Improvements Act"), and SB 1498 (2018).

allocated to a city or county pursuant to Section 97.70 of the Revenue and Taxation Code that corresponds to the increase in the assessed valuation of taxable property ("Section 97.70 tax increment"). Revenue allocated to cities pursuant to Revenue & Taxation Code Section 97.70 is the motor vehicle fee in-lieu property tax allocation to cities and counties, which was created when the Legislature reduced the motor vehicle in-lieu fee ("MVLF") from 2% to 0.65%; the Legislature took property tax revenue from ERAF and allocated it to cities and counties based on their lost MVLF fees and annual increases in city-wide/county-wide assessed values.

West Sacramento EIFD. The City of West Sacramento has formed an EIFD that includes much of the area (4,125 acres) that comprised the former West Sacramento Redevelopment Project Area (5,416 acres). According to West Sacramento, the portions of the former RDA that were included in the EIFD are those that have a potential for new development and/or private investment that would lead to an increase assessed in valuation and therefore tax increment growth. One of the reasons that West Sacramento has used the EIFD Law is that its AB 8 allocation of property tax revenues is unusually high for California cities, approximately 50% according to the Legislative Analyst's Office.[8]

More information about West Sacramento's EIFD can be found at https://blob.cityofwestsacramento.org/city/depts/admin_services/finance/eifd_formation.asp.

EIFDs in Los Angeles County. On August 1, 2017, the Los Angeles County Board of Supervisors adopted a Board Policy for Evaluating Enhanced Infrastructure Financing District and Community Revitalization and Investment Authority Projects.

The policy establishes minimum requirements for County allocation of property tax increment to an EIFD proposed by a city within Los Angeles County, including the following:

(i) The city's share of property tax increment must at least equal 15 cents ($0.15) for every dollar captured in the EIFD project area.

(ii) The city's contribution of property tax increment must at least equal that contributed by the County general fund and its special districts.

(iii) The County must not be required to contribute 100% of its property tax increment.

(iv) A fiscal analysis conducted by the Chief Executive Officer of the County must demonstrate a positive net impact to the County general fund as a result of the tax revenue generated from the project area.

(v) In addition to supporting economic development, the proposed EIFD project must align with established Board priorities in one or more of the following areas: (a) affordable housing, (b) homeless prevention, (c) workforce development or (4) sustainability.

(vi) Any rental housing proposed for the EIFD must allocate a minimum of 20% of all units for affordable housing. In certain circumstances, this requirement may be satisfied through payment of an in-lieu fee, or through provision of an equivalent number of affordable housing units at a separate location in proximity to the economic development site.

[8] https://lao.ca.gov/2000/020300_ab8/020300_ab8.html.

More information about Los Angeles County's policy can be found at http://media.metro.net/projects_studies/tod/images/eifd_policy.pdf.

As of the date of this paper, we are not aware of the County participating in an EIFD.

Infrastructure and Revitalization Financing Districts

Statute. Infrastructure and Revitalization Financing Districts ("IRFDs") were added to the Government Code in 2014. The statutory scheme is found in Government Code Title 5, Division 2, Part 1, Chapter 2.6 (§§ 53369 - 53369.49) (the "IRFD Law"). Like IFDs, IRFDs can finance the purchase, construction, expansion, improvement, seismic retrofit, or rehabilitation of any real or other tangible property with an estimated useful life of 15 years or longer and which meets a "communitywide significance" requirement.

The IRFD Law made a number of improvements to the IFD Law:

(i) the communitywide significance test for IRFDs does not require that the benefits extent to an area larger than the area of the district;

(ii) IRFDs normally must dissolve within 40 years of their formation but, if elected in the ordinance of formation, may exist for up to 40 years from the date on which the allocation of tax increment begins or a later date specified in the IRFD formation proceedings;

(iii) IRFDs may contain project areas, which facilitates multiple 40-year time limits within an IRFD;

(iv) Property may be annexed into the IRFD after its original formation (this flexibility is important for the IRFD established on Treasure Island described below, where property is gradually transferred from the Navy to the City and then to a project developer as part of the military base closure process).

(v) Unlike EIFDs, which are governed by a new public agency established as part of the EIFD formation process, IRFDs are governed by the legislative body of the city or county that established it. This is particularly useful where the IRFD is part of a financing plan that involves formation of a community facilities district for which the city council or board of supervisors will also act as governing body.

San Francisco IRFDs. San Francisco has established two IRFDs:

(i) In connection with the redevelopment of Treasure Island and Yerba Buena Island, the City formed an IRFD to provide financing for public infrastructure and affordable housing. The project will include 8,000 new residential units, 2,000 of which will be affordable, and the development agreement between the City and the developer commits 17.5% of IRFD revenues to affordable housing.

When the Board of Supervisors established the IRFD, it declared that amending the IRFD Law to permit the allocation of Section 97.70 tax increment to the IRFD was a legislative priority, and committed to use any Section 97.70 tax increment allocated to the IRFD for affordable housing.

(ii) In connection with the redevelopment of the waterfront parcels in Pier 70, San Francisco established an IRFD exclusively to fund the costs of building affordable housing on those parcels.

Community Revitalization and Investment Authority

Statute. Community revitalization and investment authorities ("CRIAs") were added to the Government Code in 2017. The statutory scheme for CRIAs is found in Government Code Title 6, Division 4, §§ 62000 - 62208. The CRIA law borrows heavily from the old Community Redevelopment Law but has additional restrictions and requirements designed to combat the perceived lack of accountability associated with redevelopment agencies. Formation of a CRIA does not normally require a vote, but if there is sufficient protest to its formation, a vote of the registered voters (or landowners if there are fewer than 12 registered voters) must be held. Additionally, once the CRIA has been allocated $1 million of tax increment, and every five years thereafter, it must cause an independent audit of its compliance with its affordable housing requirements. Annual reports and financial audits are also required. Additionally, every 10 years a CRIA is required to conduct a protest proceeding to determine if the plan should continue.

Use of CRIA. As of the date of this paper, we are not aware of a CRIA established by a California city.

Annexation Development Plans

Statute. Annexation development plans were added in 2014 by Senate Bill 614 and incorporated in most relevant part in Revenue and Taxation Code Section 99.3. This law makes tax increment financing available in the specific situation where a local agency proposes to annex a disadvantaged, unincorporated community and proposes to improve structures that serve that community.

Use of Annexation Development Plans. As of the date of this paper, we are not aware of an Annexation Development Plan being implemented by a California city.

Affordable Housing Authority

Statute. Assembly Bill 1598, which went into effect on January 1, 2018, authorizes tax increment financing for the specific purpose of financing low-and moderate-income housing within the boundaries of the cities and counties that create a housing authority (an "Affordable Housing Authority") under this law. Each Affordable Housing Authority must adopt an affordable housing investment plan that states the principal goals of the plan, estimates of the number of new, rehabilitated, or price-restricted residential units to be assisted during the next five years, estimates of the number of units, if any, to be developed by the Affordable Housing Authority for very low, low-, and moderate-income households in the next five years, and a five-year fiscal analysis, among other items. See Government Code Title 6, Division 5, §§ 62250 - 62262.

Use of Affordable Housing Authority. As of the date of this paper, we are not aware of a California city implementing an Affordable Housing Authority.

Seaport Infrastructure Financing Districts

Statute. Seaport infrastructure financing districts ("SIFDs") were added to the Harbors and Navigation Code in 2015 (Harbors and Navigation Code §§ 1710 - 1719) and largely piggy-back on the provisions of the EIFD Law. The main differences between an EIFD and an SIFD are that (1) in an SIFD, the financed improvements to the harbor agency's property to be financed must be solely for the support of port or harbor infrastructure and (2) whereas an EIFD has a 55% vote requirement for the issuance of bonds, an SIFD has a two-thirds vote requirement.

Use of SIFD. As of the date of this paper, we are not aware of a California city establishing an SIFD.

VI. The Legal Foundation for Redevelopment 2.0

Any city that wishes to commit general fund property tax revenues for an economic development or blight reduction project using a Redevelopment 2.0 vehicle must grapple with the limitations imposed by the Constitutional Debt Limit. Absent Constitutional authority, a 40-year allocation by a city of its general fund property tax revenues may violate the Constitutional Debt Limit.

Bond attorneys are required to give unqualified validity opinions when tax increment financing districts issue bonds, so legal certainty is important.

There are two primary legal foundations for Redevelopment 2.0, one relies on the Legislature's power under Article XIIIA and the other relies on Article XVI, Section 16.

Article XIIIA

As described above, Article XIIIA empowers the Legislature to allocate ad valorem property tax revenues among the districts in the county:

> §1. (a) The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

Each of the IFD Law, IRFD Law and EIFD Law define the new tax increment district as a district within the meaning of Section 1 of Article XIIIA, e.g.:

> Government Code Section 53369.1(e)(2): An infrastructure and revitalization financing district is a "district" within the meaning of Section 1 of Article XIII A of the California Constitution.

Therefore, the legal theory under Article XIIIA is that the IFD/IRFD/EIFD laws represent the exercise by the Legislature of its authority to allocate property tax revenues and the delegation to cities or counties that form IFDs/IRFDs/EIFDs of the decision as to the amount, duration and use of the tax increment, subject to the limitations within the IFD/IRFD/EIFD law.

Any reliance on Article XIIIA as the legal foundation for Redevelopment 2.0 must take into account recent Constitutional initiatives that limited the Legislative power to allocate property tax

revenues, most notably Proposition 1A (2004) and Proposition 22 (2010), which added and amended Article XIII, Section 25.5:

> SEC. 25.5. (a) On or after November 3, 2004, the Legislature shall not enact a statute to do any of the following:
>
> (1) (A) Except as otherwise provided in subparagraph (B), modify the manner in which ad valorem property tax revenues are allocated in accordance with subdivision (a) of Section 1 of Article XIII A so as to reduce for any fiscal year the percentage of the total amount of ad valorem property tax revenues in a county that is allocated among all of the local agencies in that county below the percentage of the total amount of those revenues that would be allocated among those agencies for the same fiscal year under the statutes in effect on November 3, 2004. For purposes of this subparagraph, "percentage" does not include any property tax revenues referenced in paragraph (2).
>
> ...
>
> (3) Except as otherwise provided in subparagraph (C) of paragraph (2), change for any fiscal year the pro rata shares in which ad valorem property tax revenues are allocated among local agencies in a county other than pursuant to a bill passed in each house of the Legislature by roll call vote entered in the journal, two-thirds of the membership concurring. The Legislature shall not change the pro rata shares of ad valorem property tax pursuant to this paragraph, nor change the allocation of the revenues described in Section 15 of Article XI, to reimburse a local government when the Legislature or any state agency mandates a new program or higher level of service on that local government.

Under Section 25.5, any Legislative shift of property tax revenues among non-school districts, which is what the IFD Law, IRFD Law and EIFD Law do, generally must be accomplished by “a bill passed in each house of the Legislature by rollcall vote entered in the journal, two-thirds of the membership concurring.” Cal. Const. Article XIIIA, §25.5(a)(3). Each of the IFD Law, the IRFD Law and recent amendments to the EIFD Law were adopted in compliance with Section 25.5.

Article XVI, Section 16

The CRIA Law, the Affordable Housing Authority Law and some recent bills have relied on Constitutional authority in Article XVI, Section 16, which expressly grants the Legislature the power to enact enabling legislation. For example, Assembly Bill 11 proposed adding the “Community Redevelopment Law of 2019” to the California Government Code, including the following:

> 100602. (a) The Legislature declares that this title constitutes the Community Redevelopment Law within the meaning of Article XVI of Section 16 of the California Constitution, and that an affordable housing and infrastructure agency formed pursuant to this title shall have all powers granted to a redevelopment agency pursuant to that section.

It will be important for cities wishing to use a Redevelopment 2.0 law that relies on Article XVI, Section 16 to confirm compliance with its specific requirements.

Judicial Validation

San Francisco has utilized the judicial validation power granted by Code of Civil Procedure Section 860 et seq. in connection with its IFDs and IRFDs, asking the California Superior Court to rule that the allocation of property tax revenues to IFDs and IRFDs is legal, valid and binding and does not violate the Constitutional Debt Limit.

VII. Pending and Proposed Legislation

Bills have been introduced in both the Assembly and the Senate that would further expand tax increment financing options for redevelopment. Summaries of the most important provisions of these bills are presented below.

Many of the Legislature's Redevelopment 2.0 efforts focus on affordable housing and basic infrastructure projects.

The key question is whether Redevelopment 2.0 proposals can achieve the economic power of the CRL, which may depend upon their ability to leverage tax increment that would otherwise be allocated to other taxing entities or ERAF.

Assembly Bill 11 – Community Redevelopment Law of 2019

Assembly Bill 11 ("AB 11") would allow cities and counties to designate a redevelopment plan area within which, with state approval, tax increment could be redirected to the development of affordable housing and infrastructure. In May 2019, AB 11's main sponsor announced that he would hold the bill until the next session of the Assembly due to opposition of Governor Newsom and certain political groups. As with any proposed legislation, the exact terms of AB 11 remain in flux. As currently drafted, AB 11 would allow cities and counties to form an affordable housing and infrastructure agency ("AHIA") which would be allowed to finance the purchase, construction, expansion, improvement, seismic retrofit, or rehabilitation of any real or tangible property with an estimated useful life of at least 15 years that constitutes affordable housing or specified infrastructure projects. Only certain enumerated infrastructure projects are allowed to be financed, and include highways, ramps and bridges, sewage treatment plants, flood control levees and dams, child care facilities, libraries, parks, low-income housing, and transit priority projects. AHIAs would be required to dissolve within 45 years from the date they issue bonds or enter into a loan.

Senate Bill 5 – Affordable Housing and Community Development Investment Program

As discussed above, one of the main problems facing the existing tax increment financing laws is that participation by other local taxing entities is voluntary. Absent agreement by additional taxing entities, a city or county forming a tax increment district does not generate any revenue for the district that it would not already have access to through its general fund. Senate Bill 5 ("SB 5"), which as of the date of writing has passed the Assembly and Senate and is awaiting the Governor's signature, would change that. Specifically, SB 5 would allow EIFDs, AHAs, transit village development districts, and CRIAs access to ERAF money provided that the projects meet the bill's requirements, including that the projects support affordable housing. Such districts and agencies would have to apply to a newly established Affordable Housing and Community Development Investment Committee (the "AHCDIC"), which would be empowered to distribute a specified aggregate dollar amount of ERAF money for all projects across the state. The AHCDIC could allocate up to $200 million per year in ERAF money for fiscal years ending June 30, 2022

through June 30, 2026 and $250 million per year in ERAF money for fiscal years ending June 30, 2027 through June 30, 2030.

VIII. Conclusion

The loss of the CRL eliminated an important source of funding for economic development projects and affordable housing. Cities' general funds and voter-approved general obligation bonds have not been able to fill the void.

Legislative efforts to establish a vital alternative to the CRL have largely failed because they rely on voluntary allocation of tax increment from non-school taxing entities, and, with limited exceptions, the ERAF share of tax increment is unavailable. However, there is a strong legal basis for Redevelopment 2.0 if the political will to establish an effective replacement for the CRL can be found.

APPENDIX A

Relevant Statutory and Constitutional Provisions

For reference, this section includes relevant Constitutional and statutory references and text where feasible.

Constitutional Debt Limit

California Constitution, Article XVI, Section 18(a):

> "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose..."

Ad Valorem Tax Limitation

California Constitution, Article XIII A, Section 1:

> "(a) The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.
>
> (b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any of the following:
>
> (1) Indebtedness approved by the voters prior to July 1, 1978.
> (2) Bonded indebtedness for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition.
> (3) Bonded indebtedness incurred by a school district, community college district, or county office of education for the construction, reconstruction, rehabilitation, or replacement of school facilities, including the furnishing and equipping of school facilities, or the acquisition or lease of real property for school facilities, approved by 55 percent of the voters of the district or county, as appropriate, voting on the proposition on or after the effective date of the measure adding this paragraph…"

Authorization of Allocation of Property Tax Revenue to Redevelopment Agencies

California Constitution, Article XVI, Section 16.

… The Legislature may provide that any redevelopment plan may contain a provision that the taxes, if any, so levied upon the taxable property in a redevelopment project each year by or for the benefit of the State of California, any city, county, city and county, district, or other public corporation (hereinafter sometimes called "taxing agencies") after the effective date of the ordinance approving the redevelopment plan, shall be divided as follows:

(a) That portion of the taxes which would be produced by the rate upon which the tax is levied each year by or for each of those taxing agencies upon the total sum of the assessed value of the taxable property in the redevelopment project as shown upon the assessment roll used in connection with the taxation of that property by the taxing agency, last equalized prior to the effective date of the ordinance, shall be allocated to, and when collected shall be paid into, the funds of the respective taxing agencies as taxes by or for those taxing agencies on all other property are paid (for the purpose of allocating taxes levied by or for any taxing agency or agencies which did not include the territory in a redevelopment project on the effective date of the ordinance but to which that territory has been annexed or otherwise included after the ordinance's effective date, the assessment roll of the county last equalized on the effective date of that ordinance shall be used in determining the assessed valuation of the taxable property in the project on that effective date); and

(b) Except as provided in subdivision (c), that portion of the levied taxes each year in excess of that amount shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency to pay the principal of and interest on loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed or otherwise) incurred by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project. Unless and until the total assessed valuation of the taxable property in a redevelopment project exceeds the total assessed value of the taxable property in the project as shown by the last equalized assessment roll referred to in subdivision (a), all of the taxes levied and collected upon the taxable property in the redevelopment project shall be paid into the funds of the respective taxing agencies. When the loans, advances, and indebtedness, if any, and interest thereon, have been paid, then all moneys thereafter received from taxes upon the taxable property in the redevelopment project shall be paid into the funds of the respective taxing agencies as taxes on all other property are paid.

(c) That portion of the taxes identified in subdivision (b) which are attributable to a tax rate levied by a taxing agency for the purpose of producing revenues in an amount sufficient to make annual repayments of the principal of, and the interest on, any bonded indebtedness for the acquisition or improvement of real property shall be allocated to, and when collected shall be paid into, the fund of that taxing agency. This paragraph shall only apply to taxes levied to repay bonded indebtedness approved by the voters of the taxing agency on or after January 1, 1989.

The Legislature may also provide that in any redevelopment plan or in the proceedings for the advance of moneys, or making of loans, or the incurring of any indebtedness (whether funded, refunded, assumed, or otherwise) by the redevelopment agency to finance or refinance, in whole or in part, the

redevelopment project, the portion of taxes identified in subdivision (b), exclusive of that portion identified in subdivision (c), may be irrevocably pledged for the payment of the principal of and interest on those loans, advances, or indebtedness.

It is intended by this section to empower any redevelopment agency, city, county, or city and county under any law authorized by this section to exercise the provisions hereof separately or in combination with powers granted by the same or any other law relative to redevelopment agencies. This section shall not affect any other law or laws relating to the same or a similar subject but is intended to authorize an alternative method of procedure governing the subject to which it refers.

The Legislature shall enact those laws as may be necessary to enforce the provisions of this section.

Community Redevelopment Law

Health and Safety Code, Division 24, Part 1, §§ 33000 - 33855.

Community Revitalization and Investment Authorities

Government Code, Title 6, Division 4, §§ 62000-62008.

Infrastructure Financing Districts

Government Code, Title 5, Division 2, Part 1, Chapter 2.8, §§ 53395 - 53395.9.

Infrastructure and Revitalization Financing Districts

Government Code, Title 5, Division 2, Part 1, Chapter 2.6, §§ 53369 - 53369.49.

Enhanced Infrastructure Financing Districts

Government Code, Title 5, Division 2, Part 1, Chapter 2.99, §§ 53398.50 - 53398.88.

Seaport Infrastructure Financing Districts

Harbors and Navigation Code, Division 6, Part 1, Chapter 3, §§ 1710 - 1719. See also Government Code, Title 5, Division 2, Part 1, Chapter 2.99, §§ 53398.50 - 53398.88.

Affordable Housing Authorities

Government Code, Title 6, Division 5, §§ 62250 - 62262.

Annexation Development Plans

Government Code, Title 5, Division 3, Part 3, Chapter 1, § 56653.

Notes:_____

Walking the Tightrope: Addressing Mental Illnesses & Disabilities

(MCLE Specialty Credit for Competence Issues)

Friday, October 18, 2019 General Session; 10:15 a.m. – 12:15 p.m.

Jennifer Rosner, Partner, Liebert Cassidy Whitmore

LCW LIEBERT CASSIDY WHITMORE

Walking the Tightrope: Recognizing, Addressing and Accommodating Mental Illness in the Legal Profession

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I. INTRODUCTION

Mental illness in the legal profession is a topic of growing significance in recent years. Mental illness encompasses a variety of mental impairments that may affect an individual's thought, mood, or behavior and his/her ability to function psychologically, socially, occupationally, or interpersonally. Mental illness ranges from attention deficit hyperactivity disorder ("ADHD") to depression and schizophrenia. A lawyer's role is to advocate for his/her clients. And lawyers have the duty to act competently, maintain client confidentiality, avoid adverse interests, and communicate with clients to keep them reasonably informed, among other duties. Mental illness can affect a lawyer's ability to abide by these duties and provide professional and competent representation. Thus, mental illness can lead to decreased work performance, questions and interventions by colleagues, burning out, the inability to maintain ethical responsibilities, legal exposure, and discipline by the State Bar.

On the other hand, California recognizes the chance to seek and hold employment, free from discrimination, as a civil right.[1] Accordingly, employers must give applicants and employees with mental disabilities due consideration and fair treatment. This is also true for the legal profession. Attorneys suffer from mental illness at alarmingly higher rates than the general population. Attorneys also experience substance abuse at higher rates than other professionals. Given the prevalence of mental illness in the legal profession, public employers and law firms need to be knowledgeable about their legal obligations to prevent disability discrimination claims. Indeed, providing reasonable accommodations may have important ethical implications.

This paper will examine the rights and obligations that employers have under California law with respect to attorneys suffering from mental illness. It will discuss the prevalence of lawyers with mental health issues, the reasons why lawyers suffer from mental illness, and inherent obstacles in the legal profession. It will also review the legal definition for a mental disability, what information an employer may gather from applicants and employees, what testing or examination is permitted, what constitutes reasonable accommodation, how to engage in the interactive process, and what responsibilities the employer holds for disability retirement.

II. MENTAL ILLNESS AND SUBSTANCE ABUSE IN THE LEGAL PROFESSION

A. The Prevalence of Mental Illness in the Legal Profession

Mental illness in the legal profession is an important and relevant topic that has garnered an increasing amount of attention in recent years. In the only survey by the California State Bar on the subject, 14% of disabled attorneys reported having psychological disabilities, and 50% of disabled attorneys reported having non-visible disabilities. [2] Attorneys also report high levels of resistance to requests for reasonable accommodations.[3] The survey also found that attorneys with disabilities reported high levels of perceived discrimination during the hiring process.[4]

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[1] Gov. Code, § 12921, subd. (a).
[2] State Bar of California, *Challenges to Employment and the Practice of Law Continue to Face Attorneys with Disabilities*, (Dec. 4, 2004), available at: http://www.calbar.ca.gov/portals/0/documents/caf/2004_Attorneys-with-Disabilities-Report.pdf.
[3] *Id*. at p. 43.
[4] *Id*. at p. 42.

A 2016 study funded by the American Bar Association and the Betty Ford Foundation found that 28% of attorneys surveyed experienced mild or high levels of depression; 19% reported experiencing anxiety; and 23% reported experiencing significant stress.[5] The same study also found that 20.6% percent of attorneys surveyed had scores consistent with problematic drinking, while 36.4% of attorneys had scores consistent with hazardous drinking or alcohol abuse.[6] The study concluded that attorneys experienced problematic drinking at rates much higher than the general population, and that depression, anxiety, and stress were significant problems for this occupation.[7] Despite these high rates, a 2018 report from the National Association for Legal Career Professionals ("NALP") states that only about one-half of one percent of partners report being disabled compared to 0.46% of associates.[8] This is much less than the 12.9% of all Americans who are disabled,[9] suggesting law firms have been slow to recognize the problem of mental illness. Lawyers experience major depressive disorder at higher rates than other occupation groups,[10]

Similarly, the California Bar Association's Lawyer Assistance Program (LAP), which provides support to attorneys who are struggling with substance abuse and/or mental health issues, found that 73% of participants had a substance use disorder at intake, and 24% had a combined mental health and substance abuse diagnosis.[11] Attorneys involved in the standard discipline process through the State Bar Court (SBC) made up 14% of intakes, highlighting the role that mental health impairments plays in the state's disciplinary process. Indeed, in one case study 60% of lawyers who entered Oregon's substance abuse assistance program had malpractice suits filed against them while they were suffering from substance abuse.[12]

B. Reasons for the Prevalence of Mental Illness in the Legal Profession

There are many reasons for why individuals in the legal profession may be prone to mental illness. Being a lawyer is a high stress profession. Lawyers are expected to take on heavy workloads and be problem solvers. By its nature, the legal profession is littered with conflict and adversity is part of the profession. Lawyers have to deal with conflict and uncertainty from clients, witnesses, opposing counsels, co-workers, insurance companies, judges, and jurors. Many lawyers also have to deal with the stress of billable hours while trying to balance professional goals with

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[5] Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. of Addiction Medicine, pp. 46-52 (Feb. 2016).
[6] *Id*. at p. 48.
[7] *Id*. at p. 52.
[8] NALP, *2018 Report on Diversity in U.S. Law Firms* (Jan. 2019) at p. 6, available at: https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf.
[9] U.S. Census Bureau, *Disability Characteristics: 2015 American Community Survey 1-Year Estimates*, available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S1810&prodType=table
[10] William Eaton, *Occupations and the Prevalence of Major Depressive Disorder*, *Journal of Occupational Medicine*, Vol. 32, No. 11, 1079-1087 (1990).
[11] Annual Report, Lawyer Assistance Program (March 2019), available at: http://www.calbar.ca.gov/Portals/0/documents/2018-Annual-LAP-Report.pdf
[12] Andrew Benjamin and Elaine Darling, *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, Int'l Journal of Law and Psychiatry, Vol. 13, 233-246 (1990).

personal and/or family goals. Lawyers are also trained to be analytical problem solvers and may view seeking help as a sign of weakness. The workforce is also aging: The State Bar of California reports that the average "active" attorney is now 49 years old.[13]

Further, Americans generally appear to avoid treatment for mental illness and substance abuse. The 2017 National Survey on Drug Use and Health indicated that nearly 46.6 million adults had some type of behavioral or emotional disorder.[14] Less than half, however, received any form of treatment in the prior year.[15] The survey also found 19.7 million persons 12 and older had a substance use disorder, and only about 20% received any substance abuse treatment.[16] Similarly, 8.5 million Americans had a mental health disorder and a substance abuse disorder, and only about one-half of this group received any type of service in the preceding year.

This general aversion to treatment may be stronger for lawyers – despite being more prone to mental illness than the general population – because of the stigma attached to mental illness. Lawyers may choose to avoid treatment out of concern that they will be diagnosed with a mental illness and the fear of what it could mean to their ability to practice law. Lawyers who reveal their mental illness may risk being viewed as incompetent, disorganized, unreliable, and subject them to heightened scrutiny. Lawyers may also fear that being diagnosed with a mental health condition will cost professional relationships and prestige. Attorneys also have aggressive and competitive personality traits that may make them less likely to seek treatment.

III. ATTORNEY MENTAL ILLNESS AND THE WORKPLACE

A. THE FAIR EMPLOYMENT & HOUSING ACT

California's Fair Employment & Housing Act ("FEHA") provides protection from disability discrimination. The FEHA makes it unlawful for an employer to discriminate against a qualified individual with a physical or mental disability because of that disability. This statute generally applies to all California employees, including those in the legal profession. As such, much of the discussion below will apply to a wide range of jobs and professions.

The FEHA's definition of "disability" is broad, encompassing a wide range of physical and mental conditions. Generally, a physical or mental condition[17] that *limits* a major life activity will be considered a disability.[18] The term "major life activity" is broadly interpreted to include

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[13] State Bar of California, Attorney Demographics, available at: https://members.calbar.ca.gov/search/demographics.aspx (accessed on September 11, 2019.)

[14] Nat. Inst. Of Mental Health, *Key Substance Use and Mental Health indicators in the United States: Results from the 2017 National Survey on Drug Use and Health*, p. 2 (Sept. 2018), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHFFR2017/NSDUHFFR2017.pdf

[15] *Id*. at p. 52.

[16] *Id*. at p. 2, 46 (noting 4 million people 12 and older received substance abuse treatment).

[17] Though not the subject of this presentation, it is important to note the following for *physical* disabilities: To qualify, the physical disability must limit the performance of a major life activity *and* manifest itself physically, affecting the body's "neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, [or] endocrine" systems. (Gov. Code, § 12926, subd. (m)(1).) Mental disabilities need only limit the performance of a major life activity to be covered by the FEHA.

[18] Gov. Code, § 12926.1, subd. (c).

"physical, mental, and social activities and working."[19] This covers activities like "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, [and] communicating."[20] It can also include a properly functioning bodily functions, like normal cell growth. A physical or mental condition limits a major life activity if it simply makes the achievement of that activity difficult to perform compared to the general population.[21] The limitations imposed by a mental or physical disability are weighed without consideration to any mitigating measures, like medication or assistive devices, unless the mitigation itself limits a major life activity.[22]

The FEHA offers broad and encompassing protection – even if the attorney does not have a disability. An attorney is generally entitled to FEHA protection if s/he:

- Has a physical or mental impairment that limits a major life activity;
- Is regarded to have had a past impairment, to be currently impaired, or having a condition that may become a limiting impairment in the future ;[23]
- Has a record of such an impairment;[24] or
- Is associated with someone who has such an impairment.[25]

Further, the FEHA expressly incorporates the definition of "disability" from the Americans with Disabilities Act (ADA)[26] into its own definition.[27] The ADA is the federal counterpart of the FEHA to the extent FEHA addresses disability discrimination. California courts will often look to federal courts analyzing the ADA for interpretive guidance on applying the FEHA. Any condition which otherwise would not have qualified as a disability under the FEHA, but which meets the ADA definition, will be recognized as a disability under both. Generally, the FEHA offers broader protection than the ADA. For example, the FEHA only requires that a condition *limit* a major life activity, whereas the ADA requires a condition to *substantially limit* a major life activity to be a disability.[28] The FEHA also finds limitations on working if the condition affects one job or a whole class of jobs.[29] Accordingly, a qualifying condition under the ADA will likely qualify under FEHA, though a disability under FEHA is not necessarily a disability under the ADA.

Under the FEHA, a "mental disability" is broadly defined to include "any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities that limit a major life activity."[30] The FEHA definition also includes any other disorder or condition that requires special education or

[19] Gov. Code, § 12926, subds. (j)(1)(C) & (m)(1)(B)(iii).
[20] 42 U.S.C. § 12102(2)(A).
[21] Gov. Code, § 12926, subds. (j)(1)(B) & (m)(1)(B)(ii).
[22] Gov. Code, § 12926, subds. (j)(1)(A) & (m)(1)(B)(i).
[23] Gov. Code, § 12926, subd. (m)(4).
[24] Gov. Code, § 12926, subd. (m)(3).
[25] *Rope v. Auto-Chlor System of Wash., Inc*. (2013) 22 Cal.App.4th 635, 657-658.
[26] Americans with Disabilities Act of 1990 (42 U.S.C. § 12101, *et seq.*).
[27] Gov. Code, § 12926, subd. (n).
[28] Gov. Code, § 12926.1, subd. (c).
[29] *Ibid*.
[30] Gov. Code, § 12926, subd. (j)(1).

similar services.[31] Conditions that will generally qualify as a "mental disability" under the FEHA include schizophrenia, clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.[32] The FEHA expressly excludes the following conditions: "sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from [unlawful drug use]" as mental disabilities.[33]

B. EXAMINATIONS, TESTING, AND ACQUIRING INFORMATION

The FEHA limits what actions an employer may take concerning attorneys with qualifying disabilities, including what information the employer may gather regarding disabilities and what examinations or testing the employer may require. The limitations differ based on whether the employer seeks information about an applicant or an employee.

1. FOR ATTORNEY APPLICANTS

a. Examinations and Inquiries

Generally, employers cannot require job *applicants* to undergo medical or psychological examinations, ask any medical or psychological-related questions, ask whether an applicant has a mental disability, or ask about the nature or severity of an applicant's mental disability.[34] An employer may ask about the applicant's ability to perform job-related functions. The employer may also respond to an applicant's request for reasonable accommodations.[35]

In narrow circumstances, employers are permitted to require medical or psychological examinations for applicants, or may ask the applicant medical or psychological-related questions. The exam or inquiry must be job-related, consistent with business necessity,[36] and the employer must apply the same standard for all applicants to that job classification. Additionally, the exam or inquiry must take place *after* the applicant has received an offer for employment but *before* the applicant begins performing employment duties.[37] If these requirements are met, the employer may require an examination or ask the applicant about physical fitness, medical conditions, or medical history. An employment offer may be withdrawn based on the results of such testing where it is determined that the applicant is unable to perform the essential job duties or would endanger his/her health or the health or safety of others with or without a reasonable accommodation.[38]

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[31] Gov. Code, § 12926, subd. (j)(2).
[32] Cal. Code Regs., tit. 2, § 11065, subd. (d)(1).
[33] Gov. Code, § 12926, subd. (j)(5).
[34] Gov. Code, § 12940, subd. (e)(1).
[35] Gov. Code, § 12940, subd. (e)(2).
[36] Cal. Code Regs., title 2, § 11010(b) defines "business necessity" as a "legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." Cripe v. City of San Jose (9th Cir. 2001) 261 F.3d 877, 890, expands on the definition: "The 'business necessity' standard is quite high, and is not to be confused with mere expediency. Such a necessity must substantially promote the business' needs. Furthermore, the employer must demonstrate that the qualification standard is necessary and related to the specific skills and physical requirements of the sought-after position." (Internal quotation marks and citations omitted.)
[37] Gov. Code, § 12940, subd. (e)(3).
[38] Cal. Code Regs., title 2, § 11072, subd. (b)(1), (4).

The term "job-relatedness" is not defined by statute. However, California appellate courts have treated "job-relatedness" and "business necessity" as interchangeable.[39] In *City and County of San Francisco v. Fair Employment & Hous. Com.*, after an administrative hearing, the Fair Housing and Employment Commission (FEHC) found that San Francisco had discriminated against firefighter applicants with a written test in violation of the FEHA. San Francisco applied for a writ of mandamus and vacated the administrative decision. The FEHC appealed. The appellate court disagreed with the trial court's determination that San Francisco had demonstrated its written test was sufficiently job-related. The appellate court used the statutory definition for "business necessity" in its examination of job-relatedness.[40]

b. Physical Fitness or Agility Testing

Generally, employers cannot test attorney applicants for physical fitness or agility unless the test is job-related.[41] Since most attorneys perform intellectual functions as opposed to physical tasks, this type of testing would generally not be job related. If the testing is job-related, it is good practice for employers to inform applicants of the test's criteria. Since employers cannot ask about the applicant's medical background before making an offer for employment, informing the applicant about the test's criteria may avoid liability or misunderstanding later. An applicant with a disability who performs poorly or injures himself or herself in a fitness test will have weaker grounds to challenge the test if he or she knew the criteria beforehand.

2. FOR EMPLOYEES

a. Examinations and Inquires Generally

Limitations regarding current employees are largely similar to that of applicants. Generally, employers cannot require medical or psychological examinations, make any medical or psychological inquiries, ask whether an attorney has a mental disability, or ask about the nature or severity of the mental disability.[42] However, if the employer can show the examination or inquiry is job-related and consistent with business necessity, it may proceed.

b. Fitness for Duty Examinations

Despite the general prohibition above, employers may require fitness for duty examinations that it can show to be job related and consistent with business necessity.[43] Fitness for duty exams typically become an option in two situations: when a current employee's performance has already declined, or when there are signs that an employee's performance *will* decline. Within the context of fitness for duty examinations, "job-related and consistent with business necessity" take on a specific meaning. In either instance, the standard is high, but attainable. A work environment where people can work safely, for instance, may be a sufficient basis.[44]

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[39] *City and County of San Francisco v. Fair Employment & Hous. Com.* (1987) 191 Cal.App.3d 976.
[40] *Id*. at 989–990.
[41] Cal. Code Regs., tit. 2, § 11072 subd. (b)(4).
[42] Gov. Code, § 12940, subd. (f)(1).
[43] Gov. Code, § 12940, subd. (f)(2); Cal. Code Regs., tit. 2, § 11071, subd. (d)(1) ["An employer or other covered entity may make disability-related inquiries, including fitness for duty exams, and require medical examinations of employees so long as the inquiries are both job-related and consistent with business necessity"].)
[44] *Kao v. Univ. of San Francisco* (2014) 229 Cal.App.4th 437, 452.

When an employee's performance has already declined, the employer must show that "health problems have had a substantial and injurious impact on an employee's job performance."[45] In *Yin v. California*, state tax auditor Cecelia Yin displayed excessive absenteeism over a period of five years, missing almost four months' work at one point.[46] As a result, she had one of the lowest productivity levels in her district. After several years of the same pattern, the state requested her medical records. It then requested that she submit to a fitness for duty examination. Yin refused both requests and was eventually terminated. She filed in district court, alleging violations of the ADA and her Fourth Amendment rights. The district court granted summary judgment for the state, so Yin appealed. The Ninth Circuit affirmed the lower court's decision, reasoning, "[T]he proposed medical examination was job-related.[] Yin's supervisors had good cause for trying to determine whether she was able to perform her job. Yin had missed an inordinate number of days at work.[] Yin's excessive absenteeism had taken a serious and deleterious toll on her productivity and overall job performance."[47]

Alternatively, a fitness for duty exam may be appropriate *before* an employee's job performance declines. In *Brownfield v. City of Yakima*, the Ninth Circuit affirmed the lower court's summary judgment for the City against Brownfield's claims of ADA violations.[48] There, Oscar Brownfield served as a Yakima police officer. Within a one-year period, Brownfield had multiple negative outbursts at work. He made inappropriate criticisms against another officer, he committed several acts of insubordination, he had a public argument with another officer, his estranged wife complained to the City about an alleged domestic violence incident, and he once reported he felt himself "losing control" during a routine traffic stop.[49] The City ordered a fitness for duty exam, and Brownfield was diagnosed with a psychological condition that would preclude him from serving as an officer. Brownfield got a second opinion that said he was treatable. When the City ordered a follow-up examination, Brownfield refused and was terminated.

Brownfield filed in district court, lost on summary judgment, and appealed. The Ninth Circuit affirmed the summary judgment. The court stated that the "business necessity" standard may be met "even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job."[50] Here, multiple, highly emotional outbursts within one year was enough to support a fitness for duty exam before the employee's performance had actually declined. Notably, the court took Brownfield's position as a police officer into consideration, reasoning that police departments have good reason to act if they have evidence that calls an officer's capability into question. The court also differentiated the "significant evidence" required to meet the standard from an employee who is "merely annoying or inefficient;"[51] a fitness for duty examination would not be appropriate for the latter.

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[45] *Yin v. California* (9th Cir. 1996) 95 F.3d 864, 868.
[46] *Id. at* 867.
[47] *Id.* at 868.
[48] *Brownfield v. City of Yakima* (9th Cir. 2010) 612 F.3d 1140.
[49] *Id.* at 1143.
[50] *Id.* at 1146.
[51] *Ibid.*

C. REASONABLE ACCOMMODATIONS FOR MENTAL DISABILITIES

1. Requirements

Once an employer knows an attorney has a disability under the FEHA, the employer has an affirmative duty to make reasonable accommodations.[52] This occurs through the interactive process (discussed below). In short, the FEHA requires employers to make reasonable accommodations for the known disabilities of applicants and employees to enable them to perform the essential functions of the job. The employer is required to consider the attorney's preferred accommodation, and if possible must implement an effective accommodation. An accommodation is effective if it allows the attorney to perform the essential functions of the job. An employer should generally respond quickly to a request for a reasonable accommodation.

A reasonable accommodation may require the employer to make existing facilities readily accessible and usable by the disabled employee. It may also require "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters," or similar adaptations for disabled attorneys.[53]

The purpose of a reasonable accommodation is to achieve one or more of the following: (1) to give a disabled applicant an equal consideration for a desired position; (2) to enable a disabled employee to perform the job's essential functions; or (3) to allow a disabled employee to enjoy the same privileges or benefits as similarly situated, able employees.[54]

2. Limitations

Generally, it is unlawful for an employer to fail to make a reasonable accommodation.[55] Employers also cannot retaliate or discriminate against an attorney who makes a request for accommodation. An employer may avoid the requirement for reasonable accommodations if it can demonstrate that the accommodation would cause undue hardship.[56] Actions, which "require significant difficulty or expense", qualify as undue hardships.[57] This type of assessment takes into consideration the employer's overall resources and distribution among all employees, as well as the specific facility's resources and distribution among its employees, and the impact of the accommodation, among other factors. This fact-specific defense is often a source of litigation.

An employer is not obligated to hire or retain an applicant or attorney who cannot perform the position's essential functions due to a disability, even with accommodations.[58] "Essential functions" refers to the position's fundamental duties.[59] A duty is fundamental if the job exists for the performance of that duty. A duty may also be fundamental if there is a limited number of

[52] Cal. Code Regs., tit. 2, § 11068(a).
[53] Gov. Code, § 12926, subd. (p).
[54] Cal. Code Regs., tit. 2, § 11065(p).
[55] Gov. Code, § 12940, subd. (m).
[56] Cal. Code Regs., tit. 2, § 11068(a).
[57] Gov. Code, § 12926, subd. (u).
[58] Gov. Code, § 12940, subd. (a)(1).
[59] Gov. Code, § 12926, subd. (f).

employees who can perform that duty. If the duty is highly specialized, to the point that the employee is hired to perform that specific function, then it is likely fundamental.[60] Some essential functions in the legal profession may include "legal research, writing motions and briefs, counseling clients, teaching a law course, drafting regulations and opinion letters, presenting an argument before an appellate court, drafting testimony for a legislative body, and conducting depositions and trials […]."[61] This list is non-exhaustive and will vary by position.

In one case, for instance, a bank employee suffered from posttraumatic stress disorder after she experienced an attempted bank robbery.[62] She asked the bank to accommodate her mental disability and applied for numerous transfers within the company. The bank informed her that no jobs were available within her work restrictions or qualifications and sought to establish that it did everything required to reasonably accommodate her. In denying the bank's motion for summary judgment, the court held that the bank overlooked that a disabled employee is entitled to preferential consideration to reassignment of vacant positions for existing employees. Even though the employee kept adding to her list of restrictions, the court did not agree that the bank met its burden of establishing the absence of a triable issue of material fact with respect to Plaintiff's reasonable accommodation cause of action.

In another case, a medical transcriptionist with OCD sued her employer for disability discrimination under the ADA and FEHA.[63] She struggled to arrive to work on time, or at all, because her OCD caused her to engage in a series of obsessive rituals, such as washing her hair for an hour. Her employer agreed to allow her to work a flexible start-time schedule where she could begin work at any time within a 24-hour period. However, when the accommodation did not work, she suggested she work from home. The employer denied her request in a letter and provided no alternative accommodation. The employee was absent twice more and the employer terminated her employment. The Ninth Circuit held that the employer had an affirmative duty under the ADA and FEHA to explore further methods of accommodation before terminating employment.[64] The flexible start-time accommodation was ineffective and the employer had a continuing duty to accommodate, which was not exhausted by one effort.[65] By rejecting the employee's request to work at home and offering no alternative accommodations, the Court held the employer failed to engage in the interactive process.[66]

The reasonable accommodation process should reflect a diligent and serious effort aimed at identifying effective accommodations. Because the employer will have more access to information about possible accommodations than the employee, the employer should not disengage simply because it concludes the employee's request is not feasible.

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[60] Gov. Code, § 12926, subd. (f)(1).
[61] *Reasonable Accommodations for Attorneys with Disabilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 2, 2011), https://www.eeoc.gov/facts/accommodations-attorneys.html.
[62] *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245.
[63] *Id* at 1128.
[64] *Id* at 1137.
[65] *Humphrey v. Memorial Hospitals Assn.* (9th Cir. 2001) 239 F.3d 1128, 1138.
[66] *Id* at 1139.

There are many ways for an employer to reasonably accommodate a disabled attorney. In the context of accommodating mental illness, some accommodations may include:[67]

- Reducing workplace pressure;
- Making adjustments to the type of work the attorney performs (e.g., performing legal research or drafting transactional documents as opposed to jury trials);
- Part-time or modified work schedules;
- Changing methods of supervision or tailoring supervision to the individual (e.g., providing written critiques rather than face to face); and
- Telecommuting in some situations.

According to one study, the most common examples of reasonable accommodations that were offered to lawyers with mental illness included offering short term leave, reduced work schedules, and being assigned less stressful work.[68] In contrast, law firms were more likely to offer a temporary leave of absence in the context of attorney substance abuse.[69]

D. THE INTERACTIVE PROCESS

1. The Interactive Process Generally

The interactive process is a dialogue between the employer and a disabled attorney, with the goal of finding a reasonable accommodation for the attorney. It is meant to bridge the gap between what the employer needs done and what the employee can do. Once an employee requests an accommodation or an employer becomes aware of a need for one,[70] the FEHA requires the employer to begin a "timely, good faith, interactive process" to examine reasonable accommodation.[71] The interactive process represents a continuing legal obligation; employers should not assume they have satisfied their obligations in this regard by offering a single accommodation for an ongoing disability.[72] An accommodation that may be effective in the beginning may become ineffective in the future. There is California authority suggesting a single failure to accommodate a disabled employee could give rise to a legal claim.[73]

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[67] *Reasonable Accommodations for Attorneys with Disabilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 2, 2011), https://www.eeoc.gov/facts/accommodations-attorneys.html; ABA, *Obligations with Respect to Mentally Impaired Lawyer in the Law Firm* (June 11, 2003), Formal Opinion No. 03-429, available at http://www.abajournal.com/files/03-429.pdf.

[68] Donald Stone, *The Disabled Lawyers Have Arrived; Have They Been Welcomed with Open Arms into the Profession – An Empirical Study of the Disabled Lawyers*, 27 LAW & INEQ. 93 (2009) at p. 122.

[69] *Id*. at p. 126.

[70] Awareness can occur through normal observation and includes situations where the employee exhausts available leave but still requires more time to recuperate from a disability. (Cal. Code Regs., tit. 2, § 11069(b)(3).) In such an instance, the employer would need to begin the interactive process.

[71] Gov. Code, § 12940, subd. (n).

[72] *Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971.

[73] *A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464.

Generally, the attorney has the responsibility to notify the employer of a disability[74] or to request an accommodation.[75] However, the attorney need not initiate the process if his/her disability or limitation is obvious.[76] Likewise, the employer is required to initiate the interactive process if it becomes aware of the need for a reasonable accommodation through a third party or by observation.[77] Both employer and the attorney have obligations to deal in good faith, to communicate openly, and to refrain from obstructing the interactive process.[78]

a. Employer Rights and Obligations

In addition to the above, an employer must give an attorney's request for a reasonable accommodation due consideration.[79] If the employer denies the initial request, it must discuss alternative accommodations with the attorney as part of the interactive process.

An employer can require reasonable medical documentation from an attorney requesting accommodation if the disability is not obvious and the documentation has not already been provided. Additionally, the employer can request clarification from the attorney on documentation that was provided.[80] An employer cannot, however, inquire about underlying medical causes of the disability, but it may seek a second opinion.[81]

An employer may consult experts if necessary to the accommodation or the advancement of the process.[82] The employer must consider an applicant's or employee's accommodation preference, but it has discretion to implement any accommodation that is "effective" in that it allows the individual to perform essential job functions.[83] If the accommodation is reassignment to an alternative position, the employer may request the employee's educational background and work history to help the employer make a suitable assignment.[84]

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[74] Note that, while the responsibility to notify an employer of a disability often rests with the employee, the responsibility to start the interactive process always rests with the employer. Once the employer becomes aware of a disability, it must begin the dialogue with the employee.
[75] *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 598.
[76] *Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971.
[77] Cal. Code Regs., tit. 2, § 11069(b)(1)-(3).
[78] *Swanson, supra*, 232 Cal.App.4th at 971–972.
[79] Cal. Code Regs., tit. 2, § 11069(c)(1).
[80] Cal. Code Regs., tit. 2, § 11069(c)(4).
[81] Cal. Code Regs., tit. 2, § 11069(c)(3).
[82] Cal. Code Regs., tit. 2, § 11069(c)(6).
[83] Cal. Code Regs., tit. 2, § 11069(c)(8).
[84] Cal. Code Regs., tit. 2, § 11069(c)(9).

b. Employer Rights and Obligations

If an attorney requests reasonable accommodation for a disability that is not obvious, but has not given the employer medical documentation showing the existence of the disability, the attorney must then provide reasonable medical documentation at the employer's request.[85] However, the attorney need not reveal the nature of the disability itself.[86] The attorney is still entitled to reasonable accommodation to the extent that existing documentation supports accommodation, even when the amount of documentation provided is insufficient.[87]

An attorney's mental or physical inability to engage in the interactive process does not constitute a breach for either side.[88] An attorney may also communicate directly with the employer or use an intermediary.[89] If an employer requires an attorney to use a specified health care provider, the employer must pay the costs and give the employee time off to visit the provider.[90]

2. Documentation And Follow-Up

It is good practice for employers to document every meeting and significant development during the interactive process. Appropriate documentation may include a letter to the employee or a memorandum for the employer's records, depending on the content. Documentation should keep an accurate record of the proceedings, including the employer's efforts to engage in good faith dialogue. There should be a clear record of the requested and proposed accommodations, as well as their consideration during the process. Records of meetings should include who attended the meeting, what was discussed, and whether the employee had a representative present. Finally, documentation should record any agreements or understandings reached.

3. Meeting The Employer's Good Faith Requirement

To meet the good faith requirement for the interactive process, an employer must be able to show: "(1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith."[91] The employer's documentation efforts become very important here. An assertion of good faith must be supported by more than the employer's word to succeed.

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[85] Cal. Code Regs., tit. 2, § 11069(c)(2), (d)(5).
[86] Cal. Code Regs., tit. 2, § 11069(d)(1).
[87] Cal. Code Regs., tit. 2, § 11069(d)(6).
[88] Cal. Code Regs., tit. 2, § 11069(d)(3).
[89] Cal. Code Regs., tit. 2, § 11069(d)(4).
[90] Cal. Code Regs., tit. 2, § 11069(d)(8).
[91] *Jenson v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263.

For example, in one case an attorney was diagnosed with major depressive disorder and missed work.[92] The law firm partners were informed of his status, told the employee to take the time off he needed to get well, but would not discuss the status of his employment.[93] The attorney was fired a few days later. Applying the ADA, the court concluded the law firm was not entitled to summary judgment on the attorney's interactive process cause of action, and there were genuine issues of fact on whether the law firm made a good faith effort to accommodate.[94]

E. THE ROLE OF LAW FIRMS AND SUPERVISING ATTORNEYS

Lawyers have professional obligations, including the duty to act competently and communicate with their clients. Rule 5.1 of the revised California Rules of Professional Conduct now impose obligations on law firms and supervisor attorneys to prevent ethical violations. This includes having policies and procedures in place to ensure compliance with ethical rules, which arguably includes appropriate and lawful policies and practices in place on reasonable accommodations. This is because a disabled attorney may need a reasonable accommodation to act competently and comply with their professional obligations.

Formal Opinion 03-429 of the American Bar Association Ethics Committee states that a lawyer owes the same professional duties to his or her clients regardless of whether s/he is impaired. "Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation." According to this opinion, "When the impaired lawyer is unable or unwilling to deal with the consequences of his impairment, the firm's partners and the impaired lawyer's supervisors have an obligation to take steps to assure the impaired lawyer's compliance with the Model Rules." To this end, cities and law firms should work towards promoting a climate in which lawyers will not fear requesting accommodations. Indeed, some scholars have argued the duty to make reasonable accommodations is also an ethical duty, because it is designed to allow the attorney to provide competent representation.[95]

IV. DISABILITY RETIREMENT

There are multiple retirement systems and policy options in California. Many public agencies and employers contract with the Public Employees' Retirement System[96] (PERS) or maintain their own retirement plans under the County Employees Retirement Law of 1937[97] (CERL). Both systems have options covering disability retirement.

A. WHO IS ELIGIBLE

Employees must meet certain requirements to qualify for disability retirement under PERS. A public employee who has performed 5 years of service and is incapacitated will qualify.[98] A safety employee (e.g., a police officer or firefighter) qualifies if incapacitated in the performance

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[92] *Shaver v. Wolske & Blue (2000) 138 Ohio App.3d 653.*
[93] *Id*. at 661.
[94] *Id*. at 672.
[95] Alex Long, *Reasonable Accommodation and Professional Responsibility, Reasonable Accommodation as Professionalism*, 47 UC Davis L. Rev. 1753 (2014).
[96] Covered by Government Code § 20000, *et seq.*, the Public Employees' Retirement Law (PERL).
[97] Government Code § 31450, *et seq*.
[98] Gov. Code, §§ 21150, subd. (a).

of duty, regardless of the amount of service.[99] Here, "incapacitated" refers to a substantial inability of the employee to perform the normal duties of the position.[100] Within the context of mental disabilities, if an employer could not accommodate an employee with a mental disability after engaging in the interactive process, and the employee still could not perform the job's usual duties, the employee may then be eligible for disability retirement.

Employees have similar eligibility requirements under CERL. There, a member who is "permanently incapacitated" becomes eligible for disability retirement if she has performed 5 years of service;[101] or if she received an injury or disease causing incapacity during her employment, and the job substantially contributes to the incapacity.[102] Under both PERS and CERL, employees who waive their rights to disability retirement are not eligible to receive it.[103]

B. APPLYING FOR DISABILITY RETIREMENT

Employers must apply for disability retirement on behalf of eligible employees under both the PERS[104] and CERL.[105] For PERS, the responsible "employer" includes the head of the employee's specific office or department, a university for university employees, the agency's governing body or designated official.[106] CERL includes the head of the employee's office or department, the agency's board or designated agents.[107] Additionally, the employee herself may apply for disability retirement, or anyone else on the employee's behalf, under both systems.[108]

C. AFTER A DECISION IS RENDERED

An employer cannot immediately terminate an employee with a disability under either system.[109] The employer must engage in the interactive process in good faith. If the employer cannot accommodate the disabled employee, the employer must apply for disability retirement (if the employee is qualified, per above). The governing body[110] must then render a decision on the application. If the application is denied, the FEHA protections still apply: terminating an employee because of a disability will likely be considered discrimination. Accordingly, the employer must meet the requirements discussed above, especially a good faith engagement in the interactive process, before considering termination.

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[99] Gov. Code, §§ 21151, subd. (a).
[100] *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876.
[101] Gov. Code, § 31720, subd. (a).
[102] Gov. Code, § 31720, subd. (b).
[103] Gov. Code, §§ 21153, 31720, subd. (c).
[104] Gov. Code, § 21153.
[105] Gov. Code, § 31721, subd. (a).
[106] Gov. Code, § 21152, subds. (a)–(c).
[107] Gov. Code, § 31721, subd. (a).
[108] Gov. Code, §§ 21152, subd. (d); 31721, subd. (a).
[109] Gov. Code, §§ 21153, 31721, subd. (a).
[110] The PERS board decides the disability retirement applications of non-safety members; the member agency's own governing body makes the decision for safety employees, excluding school safety employees. (Gov. Code, § 21156, subd. (a)(1).) The CERL board makes the decisions for all disability retirement applicants under its system. (Gov. Code, § 31725.)

V. CONCLUSION

Lawyers suffer from mental illnesses at higher rates than the general public due to a combination of factors. As such, law firms and public entities need to be aware of how mental illness affects lawyers. They also need to be knowledgeable of the ADA, Rehabilitation Act, and FEHA to prevent discrimination claims. Supervisors also need to understand how to provide reasonable accommodations specifically for lawyers with mental illnesses as well as their professional and ethical duties under the Rules of Professional Responsibility. As the legal profession continues to grow, supervisors play an important role in educating lawyers about mental illness and supporting those with mental illness by finding ways to continue their success at work while abiding by ethical and legal responsibilities.

Notes:_____

Speakers Biographies

Celia Brewer, City Attorney, Carlsbad

Celia A. Brewer's more than two-decade long career in public service has included work on some of the San Diego region's most complex and high profile land use and environmental projects. Brewer is currently city attorney for the City of Carlsbad, where she was a key member of the team that negotiated a historic agreement with NRG Energy and SDG&E to remove the aging power plant from the city's coast. Brewer also led a team in creatively combining a lawsuit settlement, an interested developer, and several environmental groups to provide an extra city park, additional open space, and accelerated road improvements. Prior to joining the City of Carlsbad in 2003, Brewer served as the interim Port attorney and assistant Port attorney for the San Diego Unified Port District. Here she was a key adviser on the Port's efforts to remove the South Bay Power Plant from the San Diego Bay waterfront. As assistant general counsel to the San Diego County Water Authority, she worked on a number of innovative water supply and diversification strategies, including finalizing issues concerning the lining of the All American Canal. Brewer began her public service career in Solana Beach, first as deputy city attorney and eventually as city attorney, where she helped resolve issues related to moving the railroad tracks below street level, a project which improved safety and helped revitalize this small coastal city. In addition to working for public agencies, Brewer was in private practice representing municipalities, special districts and nonprofit organizations.

Brewer currently serves as First Vice President of the League of California Cities City Attorneys Department and has twice been president of the City Attorneys Association of San Diego County. A passionate advocate for people with spinal cord injuries, Brewer serves on the advisory board of the Southern California Chapter of United Spinal Association, is a Christopher Reeve Foundation certified peer mentor and a member of the UCSD satellite fundraising team for the "Swim With Mike" scholarship fund for physically challenged athletes. Brewer currently lives in Cardiff with her teen age daughter and is writing her first book, an inspirational account of her son's triumph over a life changing injury.

Damien Brower, City Attorney, Brentwood
Damien Brower is the City Attorney of Brentwood, a community of 60,000 people located in Northern California (about 50 miles east of Oakland). A graduate of Johns Hopkins University in Baltimore, Damien received his law degree from U.C. Berkeley. In addition, he holds a master's degree in Political Science (U.C. Davis) that he uses to pontificate all things politics to his two teenage sons at the dinner table (and has, sadly, grown used to their rolling eyes and mocking tones when he does).

Before coming to Brentwood in 2005, Damien worked in Redwood City as the Assistant City Attorney, and as a Deputy City Attorney for the City of Carlsbad. In addition to Redwood City and Carlsbad, he worked in Riverside, both as a Deputy City Attorney and as the City Prosecutor, where he made the local papers for, among other things, prosecuting the owner of Frank the Peacock (luckily this was before the Internet and copies of the articles are hard to find).

Damien has long-standing connections to the League's City Attorneys' Department, as well as the larger League itself, where he worked as an intern in the late 1980s while attending U.C. Davis. After law school he was fortunate enough to work for two City Attorneys (Stan Yamamoto and Ron Ball) who allowed him to volunteer his time at Department Conferences, helping JoAnne Speers and League staff with Conference logistics (which is a fancy way of saying that he made sure there were MCLE forms at everyone's seats and that the individual session sign-in sheets were up to date – yes, things were done differently in those days…).

Since being appointed City Attorney, Damien has served on several Department and League Committees (Legal Advocacy, Nominating, Brown Act, Community Services, and the Practicing Ethics Handbook Revision Committee). In 2016, he was selected as the Department's Second Vice President, and currently serves as the Department President. In October 2019, when his term is up, he will rest, and perhaps further expand his aloha shirt collection.

Christina Cameron, Partner, Devaney Pate Morris & Cameron, LLP
Christina Cameron has more than 30 years of local government experience in both the legislative and legal fields. She has focused much of her practice around governmental ethics (including conflicts of interest under the Political Reform Act and Government Code section 1090), campaign and economic disclosure laws, Brown Act and Public Records Act compliance. She serves as general counsel to the San Diego Ethics Commission providing advisory, administrative enforcement and litigation services and regularly trains local agencies and officials in governmental ethics laws. Ms. Cameron is also Assistant City Attorney to the cities of Del Mar and Murrieta. Ms. Cameron serves as legal counsel to the Third Avenue Association in Chula Vista, the San Diego Workforce Partnership as well as several private non-profit and for-profit entities, and assists officials in their compliance with state and federal economic disclosure laws. Christina's litigation practice is focused on the defense of public entities including writs of mandate and defense of challenges related to administrative enforcement actions. She also defends public entities in contract matters, CEQA challenges, and public works litigation.

Timothy T. Coates, Managing Partner, Greines, Martin, Stein & Richland
Tim Coates is Managing Partner at the appellate firm of Greines, Martin, Stein & Richland LLP in Los Angeles, and over the past 35 years he has briefed and argued more than 250 matters in the state and federal appellate courts, including successfully arguing five cases in the United States Supreme Court, and obtaining a per curiam reversal in a sixth case. He has been named a Southern California Super Lawyer in the area of appellate practice from 2007-2019, and has also been named in The Best Lawyers In America (Appellate Law) (2014-2019). The Los Angeles Daily Journal has repeatedly recognized Tim as one of the Top 100 Attorneys in California, describing him as a "go to" lawyer for "a major federal appeal." Tim has received a California Lawyer Attorney of the Year award for his United States Supreme Court work, and Reuters News Service named him one of the "Top Petitioners" in the United States Supreme Court. Tim lectures widely on issues related to appellate practice, as well as federal civil right liability under 42 U.S.C. section 1983, Title VII and related statutes. He is also co-author of the chapter on federal civil rights liability in the CEB publication California Government Tort Liability.

Christine Crowl, Partner, Jarvis, Fay & Gibson, LLP
Christie Crowl is a partner at Jarvis, Fay & Gibson, LLP. Christie is the Assistant City Attorney for the City of Hercules, and she regularly provides city attorney and general counsel services for cities and special districts. Her general municipal work involves advising administrative and legislative bodies -- including city councils, planning commissions, and design review boards -- on a wide variety of legal issues, including public contracts, development agreements, the Brown Act, and the Political Reform Act. She is also an expert in state land use and planning law and CEQA.

Burke Dunphy, Sloan Sakai Yeung & Wong LLP
Ms. Dunphy is a partner with Sloan Sakai Yeung & Wong. She joined the firm in 2013, bringing her experience in labor/management relations, financial restructuring, and bankruptcy to the firm's Labor and Employment law practice. Ms. Dunphy currently negotiates on behalf of numerous public entities with a range of bargaining units, including Police, Fire, Police Management, and Mid-Management unions. She also handles personnel advice and labor relations matters for several Bay Area nonprofits. Prior to joining Sloan Sakai, Ms. Dunphy was an associate in the business reorganization and financial restructuring practices of two New York law firms, where she represented both private and public sector clients in in-court and out-of-court restructurings.

Clare Gibson, Senior Partner, Jarvis, Fay & Gibson, LLP
Clare Gibson is a senior partner at Jarvis, Fay & Gibson, LLP in Oakland, which specializes in local government law and represents cities throughout the state. Clare advises and represents California cities on public contract, procurement, and construction law, and is a leading practitioner in this area. She frequently works with the League on pending legislation relating to public contracts, and has submitted amicus briefs on behalf of the League to the California Supreme Court and State Courts of Appeal. Clare frequently presents and writes on public contract issues, and is a past Chapter Chair for Chapter 7 (Public Contracting) of the Municipal Law Handbook.

Stephanie Gutierrez, Associate Attorney, Burke, Williams & Sorensen, LLP
Stephanie Gutierrez is an associate attorney at the Riverside office of Burke, Williams & Sorensen, LLP and is a member of the Public Law Practice Group. Stephanie advises cities and other public agencies on a variety of public law issues related to the Brown Act, the Public Records Act, the Political Reform Act, and code enforcement. Stephanie regularly drafts contracts, ordinances, and resolutions as well as other development related agreements. She also routinely represents city planning commissions at their meetings and provides training to local government officials. In addition, Stephanie contributes to the League of California Cities' Municipal Law Handbook. Stephanie earned her Juris Doctor degree from University of La Verne College of Law. During law school, she served as a judicial extern for Associate Justice Carol D. Codrington of the Fourth District Court of Appeal, and was Editor in Chief of the Journal of Law Business and Ethics. She also received a Master of Public Administration degree from University of La Verne College of Business and Public Management.

Arthur Hartinger, Partner, Renne Public Law Group

With a practice focused on labor and employment law for over 33 years, Arthur (Art) Hartinger is one of California's leading labor and employment attorneys. He is a founding partner of Renne Public Law Group, and was previously a partner at Renne Sloan Holtzman Sakai LLP. Since 2004, he has been recognized each year as a "Northern California Super Lawyer" and was one of the Daily Journal's "Top 75 Labor & Employment Attorneys" in 2013. He was also selected by the Daily Journal as one of the "Top 20 Municipal Lawyers in California" for 2011, 2012, and 2013, and in 2012 he was named one of the "Top 100 Lawyers in California." Prior to working at Renne Sloan Holtzman Sakai, Mr. Hartinger was a partner at Meyers Nave, where he chaired the Labor and Employment Group for sixteen years. He also worked as a partner at Liebert, Cassidy & Frierson, a Deputy City Attorney at the San Francisco City Attorney's Office, and an associate at Brobeck, Phleger & Harrison. Mr. Hartinger represents public and private clients in complex state and federal litigation pertaining to all types of labor and employment issues, including California and U.S. constitutional law, the Fair Labor Standards Act (FLSA), Title VII, Title IX, the Fair Employment and Housing Act (FEHA), and the Americans with Disabilities Act (ADA). Mr Hartinger has represented clients in a variety of litigation matters, including class actions, writs, and jury trials. His litigation practice also includes administrative and binding arbitration hearings before personnel boards, arbitrators, and administrative law judges. He also frequently advises public agencies, personnel boards, and civil service commissions.

Jolie Houston, Assistant City Attorney, Gilroy, Partner, Berliner Cohen

Ms. Houston is a partner at Berliner Cohen and practices in the areas of land use and public law with an emphasis on municipal law. She joined Berliner Cohen in 1998. Ms. Houston also represents private land use clients in a wide variety of land use and regulatory approvals. Ms. Houston has been the Assistant City Attorney for Gilroy for 21 years. From August 2016 until October 2018, Ms. Houston served as the Interim City Attorney for the City of Merced. She also served as the City Attorney for Los Altos for over 13 years, served as District Counsel for the Sanitary District No. 1 of Marin County for four years, and was formerly the Deputy City Attorney for the City of Santa Clara. Ms. Houston is involved in various seminars and trainings regarding the Public Records Act. She has served on the League of California Cities Public Records Act Committee for several years. She currently is the Chair of the Public Records Act Committee and has served as Chair since 2016. She frequently conducts PRA training for the various City Clerk Associations throughout Northern California. Ms. Houston participated in the League of California Cities, City Attorney Webinar, "Public Records Act Practices after the San Jose Decision," July 20, 2017. • League of California Cities, Public Records Act Committee, Chair, 2016-2018, 2018-2020 • League of California Cities, Public Records Act Committee, 2006-2008, 2013-2015

Bill Ihrke, City Attorney, La Quinta, Partner, Rutan & Tucker LLP

Bill Ihrke's practice emphasis includes city attorney and municipal finance issues, land use and entitlement, developing and financing affordable and market rate housing and mixed-use projects, and matters relating to economic development, infrastructure investment, and post-redevelopment/public-private partnerships. He has been interviewed and quoted in several national and state-wide publications concerning the recent litigation and municipal financing issues in connection with the unwinding of redevelopment. In addition, Bill has litigation and transactional experience in several areas affecting both public and private clients, and as part of his practice, he regularly advises both public and private clients on federal and state planning, zoning and housing laws, relocation requirements for businesses and residences, and land use and entitlement obligations. He also regularly drafts and reviews federal and state legislation, and is very familiar with the legislative process in Sacramento. He currently serves as the City Attorney for La Quinta and served as the Assistant City Attorney for the Cities of Yorba Linda and Duarte; and as counsel to the successor agencies to the former redevelopment agencies of Adelanto, Twentynine Palms, Yorba Linda and Duarte. In representing all of these entities, Bill regularly attends public meetings and advises governing bodies and staff on all aspects of public agency law, including the Planning and Zoning Law, Subdivision Map Act, California Environmental Quality Act (CEQA), Ralph M. Brown Act (open meeting law), Public Records Act, Political Reform Act and Fair Political Practices Commission ("FPPC") regulations, Tort Claims Act, Affordable Housing and RHNA compliance, Federal and State labor and employment law (including prevailing wage requirements), real estate law, contract law (including bid-construction, design-build and DBOM models of contracting), parliamentary procedure, code enforcement and implementation of post-redevelopment legislation and case decisions. Additionally, Bill has experience negotiating and advising clients on commercial and industrial projects, federal and state environmental and toxic tort claims, eminent domain cases, state water law including pre-1914 appropriative water rights claims, and general municipal zoning and regulatory matters. He has expertise in state, regional and local land use and planning mandates and regulations, as well as environmental compliance under federal, state and local laws. Specifically, he has both litigation and advisory experience under CEQA, the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Davis-Sterling Common Interest Development Act, and Redevelopment Dissolution laws. Bill is currently a member of the firm's Executive Committee. Along with working at Rutan & Tucker, LLP, he served as a Staff Attorney for the United States Court of Appeals for the District of Columbia Circuit, where he advised appellate judges on cases involving Constitutional and federal regulatory requirements, among other matters. In December 2012, Bill was named to the Daily Journal's Top 25 Municipal Lawyers list.

Howard Jordan, Consultant, Management Strategies Group
Howard Jordan is a licensed private investigator at Jordan Consulting and Investigations, a self-established company that offers an array of services, including law enforcement consultations, legal services, investigations, and background investigations. He has a professional background in law enforcement and rose through the ranks to serve as Chief of Police for the City of Oakland. Mr. Jordan is a Police Practice and Procedures Expert. He is a graduate of the 219th FBI National Academy and the Police Executive Research Forum's Senior Management Institute in Policing. He shares his wealth of knowledge and experience in the law enforcement profession with others, serving as a mentor for executive leadership and as an adjunct professor at Diablo Valley College and Merritt College.

Christopher Lynch, Attorney, Jones Hall, A Professional Law Corporation
Chris Lynch represents California public agencies as bond counsel and disclosure counsel and represents regional and national investment banks as underwriter's counsel in tax increment, utility revenue, lease, Mello-Roos special tax, property assessed clean energy (PACE), assessment and 501(c)(3) financings. Chris represented the City and County of San Francisco in connection with formation of two infrastructure financing districts (IFDs) and two infrastructure revitalization financing districts (IRFDs) and contributed to State legislation governing those districts. Prior to joining Jones Hall in 1994, Chris practiced real estate and land use law as well as municipal bond law, and served as a law clerk to Justice Stanley Mosk on the California Supreme Court (1989-1990). Beginning in 2000 and continuing until mid-2003, Chris served as general counsel for two private companies. Chris graduated from Stanford University and Stanford Law School.

Michelle Marchetta-Kenyon, City Attorney, Rohnert Park, Pacifica, Piedmont, Moraga and Calistoga
Michelle Kenyon provides legal representation for cities and other public agencies as city attorney and special counsel. Michelle currently serves as City Attorney for the cities of Rohnert Park, Calistoga, Piedmont and Pacifica, Town Attorney for the Town of Moraga, and Special Counsel to several cities in the Bay Area. She previously has served as Acting/Interim City Attorney for many cities including the City of Redwood City, Daly City, Pleasant Hill, and the Town of Danville. Her practice includes advising city councils and staff in all areas of municipal law issues such as annexation procedures, bidding and claims procedures, CEQA, code enforcement, conflicts of interest laws, contract review, elections, Government Tort Claims Act, initiatives, referenda, land use and planning, municipal finance, open meeting laws, personnel, Proposition 218, and water supply assessments.

Michelle's other areas of specialty include land use litigation and appellate advocacy. She is experienced in both state and federal trial and appellate courts, including written appearances in the U.S. Supreme Court. She has successfully served as lead attorney in litigation involving CEQA, inverse condemnation, election law, civil rights, Proposition 218 and rent control, with several outcomes garnering published decisions.

Madeline Miller, Senior Counsel, Sloan Sakai Yeung & Wong LLP
Madeline E. Miller is Senior Counsel with Sloan Sakai Yeung & Wong LLP. Ms. Miller's practice includes representation of public agency clients in litigation regarding employment law and labor relations. Ms. Miller also represents public agency clients in administrative hearings before the Public Employment Relations Board.

Jim Morales, Deputy Director/General Counsel, Office of Community Investment and Infrastructure, acting as the Successor Agency to the San Francisco Redevelopment Agency

I have been the General Counsel of the San Francisco Redevelopment Agency and its Successor Agency since 2003. Previously, I was the Executive Director of the S.F. Redevelopment Agency and a public interest lawyer at the National Center for Youth Law. I have also served on various boards and commissions, including the S.F. Planning Commission, Redevelopment Agency Commission, and Rent Board. I am a graduate of the University of Michigan Law School.

Lynn Tracy Nerland, City Attorney, San Pablo

Lynn Tracy Nerland is the City Attorney for the City of San Pablo. From 2006-2015, she was the City Attorney for the City of Antioch, and before that, the Assistant City Attorney for the cities of Pleasanton and Emeryville. Lynn started her legal career with the law firm of Hanson Bridgett representing public agencies. She graduated from UC Hastings College of the Law and Dartmouth College. A native of Upstate New York, Lynn first came to California with the Jesuit Volunteer Corps working for a job training community services organization in Visalia. Lynn is currently the Second Vice President for the City Attorneys Department of the League of California Cities and was Chair of the Attorney Development and Succession Committee. She has served on the Department's FPPC Committee, Municipal Law Institute Committee, Nominating Committee and Ad-hoc Public Law Specialization Certification Committee, as well as President of the Contra Costa County City Attorneys Association. Every Wednesday, Lynn spends the lunch hour at the elementary school near City Hall as the playground lunch lady for the kindergartners. As "Miss Lynn" she ties shoelaces, leads games, and encourages the students to eat their sandwiches before their cookies.

Traci Park, Partner, Burke, Williams & Sorensen, LLP

Traci Park exclusively advises and assists employers and management in labor and employment law and civil rights litigation. Her wide-ranging practice includes representing clients in FEHA, Title VII, wrongful termination, employee compensation and civil rights matters. Ms. Park has extensive trial and appellate experience, and she regularly handles grievance arbitrations, disciplinary appeals, administrative hearings, and agency investigations. Ms. Park also has a significant counseling practice, which includes drafting employment policies, performing employment law compliance audits and advising on employee discipline, First Amendment issues, performance management, and due process issues. Ms. Park is a member of the Association of Workplace Investigators and frequently serves as a personnel investigator and neutral fact-finder. Ms. Park regularly advises employers about issues and policies related to ADA website compliance, cyber-security, social media, and on-line conduct of employees and elected officials, and she regularly writes for the California Lawyer Magazine Social Media Column. She recently authored articles on use of social media by police, social media policies for public entities, defining on-line threats, free speech and public forums, and social media and the First Amendment. Ms. Park also frequently assists public entities with the development and enforcement of social media policies. Ms. Park likes surfing, Twitter, and the Los Angeles Chargers.

Charles Parkin, City Attorney, Long Beach

Long Beach City Attorney Charlie Parkin has over 34 years of experience working for the City of Long Beach and has held the position of City Attorney since 2013. Mr. Parkin was elected Long Beach City Attorney in 2014 and again in 2018. Mr. Parkin graduated cum laude from Pacific Coast University, School of Law and received his Bachelor of Science degree in Business Administration from California State University, Long Beach. Charlie is a lifelong Long Beach resident. Charlie and his wife Terese have been married for 42 years and have three adult children and three grandchildren.

Robert “Perl” Perlmutter, Partner, Shute Mihaly & Weinberger, LLP
Robert "Perl" Perlmutter is a partner at Shute, Mihaly and Weinberger LLP in San Francisco. He focuses his practice on local initiatives and referendums, land use, general planning and zoning laws, CEQA, NEPA, California Endangered Species Act, conservation easements, the Political Reform Act, and open meeting laws. He advises and represents environmental organizations, public agencies, and community groups in administrative proceedings in state and federal courts.

Javan N. Rad, Chief Assistant City Attorney, Pasadena

Javan Rad is the Chief Assistant City Attorney for the City of Pasadena, and has been with Pasadena since 2005. Javan oversees the Civil Division of the City Attorney's office, and also handles a variety of litigation and advisory matters in the areas of constitutional, tort, and telecommunications law. Javan has been active in a variety of capacities for the League of California Cities' City Attorneys' Department. Javan has previously served as President of the City Attorney's Association of Los Angeles County, and is currently on the Board of Directors of SCAN NATOA (the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors). Javan graduated from Purdue University with a bachelor's degree in Quantitative Agricultural Economics, and from Pepperdine University School of Law.

Richard Romero, Partner, Devaney Pate Morris & Cameron, LLP
Richard Romero's practice has focused primarily on the representation of public entities in both a transactional and litigation capacity. Over his career, Richard has advised public agencies on the full spectrum of issues facing public entities, including employment and labor, water law, elections, public works, contracting, Brown Act compliance and Public Records Act responses. Richard has worked with or for public entities since before even graduating from law school, interning at the City Attorney offices for San Diego and Chula Vista as well as interning at the Imperial County District Attorney's Office prior to law school. He currently serves as Deputy City Attorney and Special Counsel for several different types of public entities; served as Assistant General Counsel to a water district for over 5 years; and also serves as General Counsel for a private water company primarily owned by public agencies. Richard has also defended cities, schools, colleges, and special districts in litigation over his entire career, including in both state and federal court, courts of appeal, local and state commissions, etc. In addition to his public entity representation, Richard has represented private individuals and entities over his career in both litigation and transactional work and on both the plaintiff and defense side, including advising on employment and personnel issues, drafting and negotiating contracts, and civil defense.

Jennifer Rosner, Partner, Liebert Cassidy Whitmore

Jennifer is a prolific litigator with an extensive background in lawsuits involving discrimination, harassment and retaliation, as well as disciplinary and due process issues. As a litigator, Jennifer has considerable experience with law enforcement issues, including the Public Safety Officers Procedural Bill of Rights Act, and in defending law enforcement agencies in officer discipline, Section 1983 claims and Pitchess Motion hearings. She has tried law enforcement lawsuits to verdict and/or judgment in state and federal court in cases involving claims for retaliation for exercising freedom of speech rights and union activities under 42 U.S.C. Section 1983 and false imprisonment. In one of her recent trials, Jennifer obtained a non-suit after nine-day jury trial involving a police officer who alleged numerous tort causes of action. Jennifer has been successful in obtaining summary judgment on behalf of clients in many of her litigation matters in both state and federal court and also has extensive appellate experience. In addition to her work as a litigator, Jennifer represents clients in numerous administrative appeal hearings and has a strong record of success on behalf of the firm's clients in upholding their disciplinary decisions. Jennifer also frequently responds to requests from clients for advice and guidance in the areas of leave rights, disability interactive process, disability retirement, discipline, termination, Family Medical Leave Act, Fair Labor Standards Act, investigations, retaliation and discrimination. She also works extensively with local agencies on every facet of the disability accommodation process, including identifying disabilities, requesting medical documentation and evaluation, evaluating leave rights of disabled employees, engaging in the interactive process, identifying possible reasonable accommodations, complying with applicable disability laws, and, when necessary, disability retirements. Jennifer is a prolific trainer on numerous employment law issues, including disability and the interactive process, industrial disability retirement, investigations, discipline, managing the marginal employment, the Fair Labor Standards Act, Ethics, harassment, discrimination and retaliation. She was named a Southern California Rising Star in Employment Litigation in 2013.

Steven Shaw, Partner, Sloan Sakai Yeung & Wong LLP

Steve Shaw is a Partner in the Sacramento office of Sloan Sakai Yeung & Wong LLP, where he represents public agencies in a variety of labor and employment matters, with an emphasis on litigation and employment advice. He handles all types of litigation in state and federal court, including discrimination, harassment, and retaliation lawsuits, whistleblower claims, alleged violations of federal due process (Section 1983), wage and hour disputes, and claims brought under the Public Safety Officers Procedural Bill of Rights Act (POBR) and Firefighters Procedural Bill of Rights Act (FOBR). Steve also advises and represents public employers in arbitrations and administrative proceedings concerning employee discipline, labor relations, and collective bargaining issues. Steve graduated from Georgetown University Law Center in 2003, and holds a Bachelor's Degree from the University of Virginia. Steve has regularly been named to the "Rising Stars" list by Northern California Super Lawyers every year since 2011.

Kathy Shin, Associate, Best Best Krieger

Kathy Shin is an associate in Best Best & Krieger LLP's Manhattan Beach office. As part of the firm's Municipal Law practice group, Ms. Shin serves as Deputy City Attorney for the City of Hermosa Beach, the City of West Hollywood, and the City of Palos Verdes Estates, and generally advises cities on a range of public law and land use matters, particularly as they relate to the local implementation of state laws. Prior to joining the firm, Ms. Shin was a post-graduate law fellow at the Land Use Division of the Los Angeles City Attorney's office where she worked on matters relating to the California Environmental Quality Act and digital sign regulation. Ms. Shin also worked as a judicial intern at the California Second District Court of Appeal, where she reviewed both appeals and extraordinary writ petitions. Ms. Shin received her law degree from Georgetown Law in Washington, D.C., where she was awarded the CALI Excellence for the Future Award in Environmental Law.

Suzanne Solomon, Partner, Liebert Cassidy Whitmore

Suzanne Solomon is an experienced trial lawyer who has represented public entities, private companies and individuals in a wide range of employment disputes for over 20 years. At Liebert Cassidy Whitmore, Suzanne's litigation practice focuses on defense of single- and multi-plaintiff employment claims for discrimination, retaliation, harassment, violation of wage and hour laws, due process, First Amendment retaliation, and numerous other tort and statutory employment law claims. Suzanne has tried cases before judges and juries in both state and federal courts. She also has extensive experience representing law enforcement agencies, including winning summary judgment of discrimination claims made against Police Departments and command staff. Suzanne has also handled appellate matters in state and federal courts, including a case of first impression in the Ninth Circuit Court of Appeals regarding the criteria courts may use in deciding whether to grant interlocutory review of class certification decisions. Suzanne regularly advises governmental agencies on all aspects of employment law, including employee discipline, leave laws, Americans with Disabilities Act compliance, and investigating and responding to discrimination complaints. Her practice has included developing and presenting management training on such subjects as due process, reasonable accommodation, privacy, and prevention of discrimination.

Matthew Summers, City Attorney, Ojai, Colantuono, Highsmith & Whatley, PC
Matthew Summers is a Senior Counsel in Colantuono, Highsmith & Whatley PC's Pasadena office with over seven years of experience representing cities and other public agencies in every aspect of municipal law, including four years' service as City Attorney for the City of Ojai. Mr. Summers has specialized in representing public agencies his entire career and has been with the Firm since July 2012. Mr. Summers serves as City Attorney for the City of Ojai, including serving as counsel to its Planning Commission and Historic Preservation Commission. He is also Assistant City Attorney and Planning Commission and Communications and Technology Commission Counsel for the City of Calabasas, and has served in this role for the past seven years. He additionally serves as Assistant City Attorney for the City of Barstow, advising the city on its labor and employment and other general municipal matters. In these roles, his practice covers the full range of public law issues, including: Brown Act, Public Records Act, conflicts of interest, land use, elections, labor and employment, post-redevelopment disputes, litigation, telecommunications and cell tower regulations, First Amendment and speech regulations, CEQA, and Americans with Disabilities Act ("ADA") compliance.

Walter Tibbet, Consultant, Management Strategies Group
Mr. Tibbet has more than forty years of experience in law enforcement, having served in operational, administrative, and management functions while a member of the Alameda, San Jose, and Fairfield Police Departments. He served for more than nine years as Chief of Police in the cities of Alameda and Fairfield. With a rich history of working in communities of different sizes and demographics, Walt is well-versed in the challenges and issues faced by the organizations serving them. His work as a consultant spans from mentoring new Police Chiefs, advising chief executives on dealing with their police departments, promoting organizational development and best practices, and community engagement.

Karen Tiedemann, Partner, Goldfarb & Lipman LLP

Karen Tiedemann practices in the areas of real estate transactions, affordable housing, nonprofit organization, and environmental law. Ms. Tiedemann advises public agencies and nonprofit housing developers on affordable housing matters. She represents numerous agencies and nonprofit corporations on the development, financing and management of low- and moderate-income projects and programs. Her affordable housing work includes advising clients on compliance with fair housing laws. Ms. Tiedemann is a frequent speaker on relocation and fair housing issues. She is also a co-author of Between the Lines, a Question and Answer Guide on Fair Housing in Supportive Housing, which was updated in 2010. Ms. Tiedemann represents numerous housing cooperatives, providing advice on compliance with Davis-Stirling, the limited equity cooperative law, HUD financing, Department of Real Estate regulations, and other laws and regulations impacting cooperatives. She has also formed numerous limited equity cooperatives. Ms. Tiedemann is a frequent speaker on the formation and management of cooperatives. Ms. Tiedemann has negotiated and drafted transaction documents for complex developments involving multiple uses, including transactions that involved the acquisition of numerous properties and the relocation of business and residential tenants. She also advises clients on compliance with environmental laws, including shepherding developments through CEQA. Additionally, as general or special counsel to several public agencies, Ms. Tiedemann provides advice on compliance with the Brown Act, the Fair Political Practices Act and Public Records Act, as well as general law questions. Education A.B., University of California, Berkeley. Masters in City Planning, University of California, Berkeley. J.D., Boalt Hall School of Law, University of California, Berkeley, Order of the Coif honors. Associate Editor, Ecology Law Quarterly. Professional and Volunteer Affiliations State Bar of California. California Center for Cooperative Development, Board Member.

Stephen Velyvis, Partner, Burke Williams & Sorensen, LLP
Steve Velyvis is a well-respected land use and environmental law attorney with over 18 years of expertise advising and representing public agency and private clients in administrative proceedings and before state and federal trial and appellate courts. Steve has extensive advisory and litigation experience with and works daily on projects addressing complex legal issues spanning the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA), the Federal Power Act, and the California Coastal Act, as well as the state and federal legal and regulatory frameworks governing clean water, clean air, endangered species and electricity generation and transmission. He also routinely represents clients in land use-related matters including local and state planning and zoning laws, the Subdivision Map Act, timber harvests/timberland conversions, and vineyard expansions. While Steve has extensive advisory and litigation experience with a multitude of environmental laws, he is most experienced with CEQA, having represented parties on all three "sides" of the CEQA equation. In other words, in addition to successfully representing Burke's many municipal and public agency clients, Steve has also successfully represented numerous private clients (e.g., project applicants and project opponents.) In this regard, Steve distinguishes himself as a leading CEQA practitioner. Steve's deep and varied experience gives him invaluable insight into what all three sides on a given CEQA project are thinking at every step along the way. This unique perspective also enables him to develop cutting-edge legal strategies aimed at resolving conflicts and prevailing in litigation, as opposed to simply posturing or falling back on routine "cookie cutter" advice and litigation tools. In sum, Steve draws on his collective experience to help Burke's clients think outside the box and routinely provides successful, cost-effective results.

Thomas Webber, Partner, Goldfarb & Lipman LLP
Mr. Webber is a partner in the firm with an emphasis of practice in affordable housing, community economic development, real estate, nonprofit and municipal law. He represents numerous public agencies and nonprofit organizations on the development, financing and management of affordable housing and mixed use projects and programs which utilize state assistance, including MHP and MHSA financing, and federal assistance, including, tax credits and CDBG, NSP and HOME financing.

Mr. Webber also represents public agencies and nonprofit developers on mixed-use and commercial projects. He has negotiated and drafted disposition and development agreements, loan documents, and ground leases for complex mixed-use developments, including finance documents for new markets tax credit transactions. Mr. Webber's work in this area involves structuring complex development transactions involving public and private partnerships, advising clients on public and private financing structures and all aspects of development issues, including CEQA related and real property security issues.

Mr. Webber represented the Community Redevelopment Agency of the City of Los Angeles on various aspects in the development of Staples Center, the Marriott Convention Center Hotel, and the new Broad Museum. He represents the City of Santa Clara in the development of the new stadium to be the home of the San Francisco 49ers, providing advice on financing, construction and operation issues related to the stadium.

Mr. Webber also works with a wide variety of nonprofit entities, including school districts, affordable housing developers, and other charitable organizations providing legal guidance regarding nonprofit operations and administration, tax issues, as well as matters related to property and real estate, and other corporate and organizational matters.

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