General Municipal Litigation Update

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GENERAL MUNICIPAL LITIGATION UPDATE FOR THE LEAGUE OF CALIFORNIA CITIES CITY ATTORNEYS' CONFERENCE SPRING 2021

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A. *Ashford Hospitality v. City and County of San Francisco* (2021) 61 Cal.App.5th 498, petn. for review pending, petn. filed April 8, 2021

Holding: The City and County of San Francisco's real property transfer tax does not violate the Equal Protection Clause of the U.S. Constitution. The transfer tax is based on gross value of the subject property, but the City justified the tax rate classifications by practical considerations, including the City's interest in fairly allocating the costs of servicing higher valued properties.

Facts/Background: The City and County of San Francisco imposes an excise tax on the privilege of recording deeds for real property transfers. During the relevant period, the ordinance had five tiered rates, with the tax based on the value of the real property transferred. Deeds recorded for properties valued at the lowest tier were taxed $2.50 for each $500 in property value and those properties valued at the highest tier ($10 million and above) were taxed at $12.50 per $500 in property value. The ordinance was later amended to modify the fifth tier and add a sixth tier for properties valued at over $25 million, which were taxed at $15 per $500 in property value.

Plaintiffs challenged the property transfer tax ordinance after a change in their corporate ownership also triggered a change in ownership of associated real property. Plaintiffs paid the $3,348,025 transfer tax, but immediately sought a refund. The City did not act on the refund claim, which was deemed denied, and Plaintiffs sued. The trial court ruled in the City's favor, and Plaintiffs appealed.

Analysis: The Court of Appeal affirmed in the City's favor. It rejected Plaintiffs' claim that the transfer tax violated the Equal Protection Clause of the United States Constitution because it imposed different taxes for performing the identical act—recording a transfer deed for real property. Plaintiffs argued that basing the tax solely on the value of the property transferred was arbitrary. Plaintiffs relied on *Stewart Dry Goods Co. v. Lewis* (1935) 294 U.S. 550 in which the United States

Supreme Court ruled gross sales cannot be used to classify taxpayers and that a graduated tax cannot be justified based on the taxpayer's ability to pay because gross receipts does not account for the taxpayer's profit. Plaintiffs argued Stewart Dry Goods Co. applied and the City's transfer tax could legally only apply to one class of persons—those who record deed transfers.

The Court distinguished *Stewart Dry Goods Co*., noting that the City's record to support the taxation scheme demonstrated the classification was justified for reasons other than simply a proxy for profit or the taxpayer's ability to pay. Practical considerations included the extra work typically required to record transfers of higher value property and the "the city's interest in fairly allocating the costs of servicing higher valued properties." Plaintiffs conceded those considerations were rational, but countered that *Stewart Dry Goods Co.* stood for the proposition gross value could never be used to justify multiple taxpayer classifications. The Court of Appeal disagreed, holding that using gross value to classify taxpayers for reasons "beyond ability to pay" does not per se run afoul of the Equal Protection Clause.

Besides the substantive ruling in San Francisco's favor, the opinion contains helpful language restating the well-established deference owed to legislative bodies in the taxation context. If "there is any reasonably conceivable state of facts that could provide a rational basis for the classification," the inquiry ends. (*Id.* at *3, n. 4, quoting "*Federal Communications Com. v. Beach Communications* (1993) 508 U.S. 307, 315.) Thus, it is irrelevant if the legislative body's motivation to create the classification differs from the justification offered at trial. If the latter is rational, the tax should be upheld.

B. *Coachella Valley Water District v. Superior Court (Roberts)* (2021) 61 Cal.App.5th 755

Holding: A challenge to a county water district's ad valorem property tax must be brought within the 60-day statute of limitations set forth in Code of Civil Procedure section 860.

Facts/Background: The Coachella Valley Water District is a county water district under Water Code sections 33100 et seq. It has over 100,000 customers and has the power to set water rates and levy taxes on property within the District to satisfy its debts and expenses. It is also a water supply contract with the State Water Project ("SWP"). As a SWP contractor, the District must pay the state for participation in the system, which payments support the SWP's operating costs and bonds issued to build the system. If the District fails to raise sufficient funds to make such payments, it must levy a property "tax or assessment sufficient to provide for all payments" due on the SWP water supply contract.

To fund its contractual payment obligations to the state, the District annually levies an ad valorem property tax on all property within the District. The District's board of directors adopts a resolution to certify to the County Auditor the amounts to be levied, and the taxes are then placed on the county assessment roll. In 2013, the District adopted a resolution that increased the tax rate from $0.08 to $0.10 per $100 of assessed property value.

The rate remained unchanged, and about five years later, in 2018, Roberts, a District customer filed a class action in November 2018 to challenge the tax. He alleged the District improperly used the tax revenue to fund groundwater replenishment activities, that the amount levied exceeded the District's SWP costs and that the tax violated Proposition 13. The District demurred on the grounds petitioner, Roberts, failed to timely challenge the 2013 resolution to increase the tax rate by a validation action within 60 days of the resolution's adoption. Before the hearing on the demurrer, the District adopted a resolution setting the tax for FY19-20, and Roberts timely filed a reverse validation action to challenge it.

The trial court overruled the District's demurrer, disagreeing that the validation procedures applied and finding the District's annual resolution authorizing the taxes made the challenge timely. The District filed an appellate writ of mandate to challenge the trial court's denial of its demurrer.

Analysis: The Court of Appeal granted the District's writ and directed the trial court to sustain the demurrer and dismiss the complaint in its entirety. The case presented a question of first impression: Do the validation statutes apply to a

county water district's annual property tax? The Court concluded they do. Water Code section 30066 expressly provides that an action to determine the validity of a county water district's assessment may be brough under the validation statutes. Roberts countered it did not because section 30066 did not contain the word "tax." But in the County Water District law's overall scheme, setting a tax rate based on the value of property in the District is an assessment. Because Roberts' challenge attacked the validity of the tax itself, he could have pursued the claim in validation. He did not and was now time barred.

Roberts further argued that part of his challenge was to how the District spent tax revenue, not only that the District had no authority to impose it. The Court of Appeal disagreed. It found his claims that the District improperly spent the revenue were "inseparable" from his claim the tax was invalid. Because the statutory scheme requires the District to disclose the amount of money it needs to raise via property taxes and the source of the expense, when it adopted the tax resolution it also adopted a resolution "earmarking" the increased revenue to be used for groundwater recharge. On that record, Roberts' claim was barred.

Finally, the Court rejected Roberts' argument it should apply the continuous accrual theory established in *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809 to his challenge to the validity of a tax. The Court noted that the tax in *La Habra* was not subject to the validation statutes as was the District's tax here. Further, the District disclosed on the same day it increased the tax rate by two cents that it would use the additional revenue for groundwater recharge. Because the District "cannot hide how it intends to spend the revenue," a challenge to that stated intent must be brought within 60 days.

The Court of Appeal's ruling expressed no opinion on the merits of the reverse validation that Roberts had timely filed while the District's demurrer was pending.

C. *City of Fresno v. Fresno Building Healthy Communities (HJTA)* (2020) 59 Cal.App.5th 220, petn. denied March 30, 2021

Holding: Neither Proposition 13 nor Proposition 218 affects the voters' initiative

power, and therefore neither imposes a two-thirds voting requirement on the passage of voter initiatives that impose special taxes.

Facts/Background: In early 2018 an initiative petition circulated in Fresno to place a 3/8 percent transaction and use tax specifically to improve park safety and accessibility, update playgrounds and restrooms, improve after-school and recreation programs and other park-related activities. The initiative qualified for the ballot and at the November 2018 general election, Fresno voters approved Measure P with 52.17 percent voting "yes."

The City sued seeking a declaration regarding Measure P's validity, naming the proponent of Measure P, Fresno Building Healthy Communities ("FBHC") as defendant. FBHC filed a separate action seeking to declare Measure P valid, and HJTA was permitted to intervene in both actions. The City took no position on Measure P's validity and only sought direction on whether to implement the tax. HJTA argued Measure P was invalid because it was a special tax but lacked the two-thirds voter approval required by Propositions 13 and 218. The trial court agreed and sustained HJTA's motion for judgment on the pleadings in the City's action without leave to amend.

FBHC appealed. After FBHC filed its opening brief, the 1st DCA decided *City and County of San Francisco v. All Persons Interested in the Matter of Proposition C* (2020) 51 Cal.App.5th 703, which concluded Propositions 13 and 218 do not impose a two-thirds voter approval requirement for special taxes proposed by voter initiative.

Analysis: The 5th DCA reversed, finding that as a voter initiative, Measure P was valid even absent two-thirds voter approval. The Court analyzed Propositions 13 and 218 separately. Echoing the analysis in *All Persons*, the Court found no evidence that in approving Proposition 13 voters intended to limit their own power to impose special taxes by local initiative. It similarly found Proposition 218 imposed no such limit. HJTA argued that Proposition 218's limits on "local government['s]" ability to levy taxes extended to include the electorate exercising their initiative power. Citing the reasoning in *All Persons*, the Court held that "local government" refers to "constituted governmental entities, not to the

electorate exercising its initiative power." As a result, the special tax imposed by Measure P was valid based on 52.17 percent voter approval.

D. *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546

Holding: The trash receptacle installation requirement in the 2001 permit issued by the Regional Water Quality Control Board for the Los Angeles Region constitutes a reimbursable state mandate. But the permit's requirement that compelled local entities to conduct periodic inspections to ensure third party compliance with environmental regulatory requirements, although a mandate, was not reimbursable. Local governments have the authority to levy a fee to cover the inspection costs.

Facts/Background: The Regional Water Quality Control Board for the Los Angeles Region issued a permit to the County of Los Angeles and certain cities to operate the stormwater drainage system. That permit required the Operators to install and maintain trash receptacles at transit stops and to inspect specified sites to ensure compliance with environmental regulatory requirements.

Some Operators filed test claims with the Commission on State Mandates alleging the state must reimburse the costs associated with the trash receptacle and inspection requirements. The Commission determined the trash receptacle requirement is a reimbursable mandate, but the inspection requirement was not because local agencies had the authority to impose fees to pay for the inspections. The Department of Finance and the Regional Board filed a petition to challenge the Commission's decision regarding the trash receptacles. Seven Operators filed a cross-petition challenging the Commission's decision regarding the inspection obligation. The trial court granted Finance and the Regional Board's petition on the grounds that the challenged conditions were federal mandates and thus not reimbursable. It then dismissed the cross-petition as moot. The Operators appealed, and the Court of Appeal affirmed but the Supreme Court reversed in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749), ruling that the requirements were not federal mandates. It remanded the matter

back to the trial court to address other arguments raised by petitioners and the arguments by the Operators in their dismissed cross-petition.

On remand, the trial court granted the writ petition, holding that neither the trash receptacle nor inspection requirements qualified for reimbursement. The cross-petition was again dismissed as moot. The Operators appealed.

Analysis: The Court of Appeal reversed, agreeing that the Commission's decision was correct—the trash receptacles are a reimbursable mandate and the inspection requirements are not. Article XIII B, section 6 of the state constitution mandates the state pay for any new program or higher level of service the state imposes on local government. (Cal. Const., art. XIII B, § 6, subd. (a).) To evaluate whether a mandate is a "new" program or requires a "higher level of service" in an existing program, courts compare the legal requirements on the local agency before and after the change in law. (*Id.* at 629.)

Applying that standard, the Court of Appeal first observed the Operators' challenge implicated three governmental functions: 1) The operation of stormwater drainage and flood control systems; 2) installation and maintenance of trash receptacles; and 3) inspection of certain sites to ensure they comply with environmental laws and regulations. The Court concluded the first of these functions existed before the Regional Board issued the challenged permit, but the last two are new.

For the trash receptacles and inspection requirements, the Court of Appeal found each provides a higher level of service. Both are designed to reduce pollution entering the stormwater drainage system beyond the local agencies' pre-existing obligation to do so. The Court of Appeal also noted that the alternative analysis the Commission used, in which it concluded the two requirements each qualify as a "new program" providing services to the public, was equally valid. Even if receptacle installations failed to improve stormwater quality, they result in cleaner transit stops, sidewalks and streets, all to the public's benefit. Similarly, the inspections amount to a new program to ensure third party compliance with environmental regulations.

The Court of Appeal disagreed with the trial court's reasoning that the trash receptacle and inspection requirements are simply manifestations of existing policies and were not new programs carrying out a governmental service to the public. The Court of Appeal determined otherwise, holding that neither requirement banned or limited pollution levels; rather, they "are mandates to perform specific actions—installing and maintaining trash receptacles and inspecting business sites—that the local governments were not previously required to perform." Although the goal of the requirements was to reduce pollutants in the stormwater, "the state sought to achieve that goal by requiring local governments to undertake new affirmative steps resulting in costs that must be reimbursed under section 6."

The Court of Appeal then turned its analysis to whether the local governments had the "authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." (Gov. Code, § 17556, subd. (d).) If so, then no subvention is required. For the inspection requirement, the Court of Appeal agreed with the Commission that the local agencies had the ability to levy fees to pay for the activity. Citing the agencies' police power, which extends to imposing a regulatory fee "to further the purpose of a valid exercise of that power," the Court of Appeal held the local agencies have authority to impose a fee provided it does not exceed the reasonable cost of the inspections, is not levied for unrelated revenue purposes, and is fairly allocated among the fee payers. The Court of Appeal rejected the Operators' arguments that such fees would improperly duplicate existing state fees. On the record before it, which included no inspection fee ordinances, the Court declined to find that any inspection fee a local agency could impose would necessarily be preempted.

For trash receptacles at transit sites, on the other hand, the Court held the local agencies had no authority to levy a charge or fee to cover their costs. The state argued Government Code section 54999.7 authorized the local agencies to impose fees for the receptacles to the transit agencies. Section 54999.7 allows a public agency "providing public utility service" to another public agency to impose a fee for the service provided; the public agency receiving the service, in turn, must pay the associated fee. The Court of Appeal found section 54999.7 contemplates that the receiving public agency "solicited and uses the services for which it is

charged." It does not authorize one public agency to provide an unrequested service to the receiving agency and then charge that receiving agency for the unrequested service. The Court of Appeal next rejected the state's argument that the local agencies have authority to impose a fee or assessment under Proposition 218 to recover the costs. The state failed to demonstrate how the local governments could overcome the procedural and substantive limits Proposition 218 places on such fees and assessments.

E. *HJTA v. City and County of San Francisco* (2021) 60 Cal.App.5th 227, petn. for review pending, petn. filed March 8, 2021, time for grant or denial of review extended to June 4, 2021

Holding: Neither Proposition 13, Proposition 218, nor the San Francisco City Charter mandate a supermajority to approve a special tax proposed by voter local initiative. That elected officials promoted the voter initiative did not change the result; special taxes proposed by voter initiative require only majority approval.

Facts/Background: The City's June 2018 election had a voter initiative on the ballot that, if approved, would impose a tax on certain commercial rents to fund early childcare and education. About 51 percent of voters approved the measure.

HJTA sued to invalidate the measure because it did not obtain the two-thirds majority HJTA argued was required for a special tax. All parties agreed the measure was a special tax and had the City's supervisors placed it on the ballot, approval would require a two-thirds majority. The trial court granted summary judgment for the City. HJTA appealed.

Analysis: The Court of Appeal affirmed in the City's favor. As the Court in *All Persons* did, the Court first concluded that Proposition 13 "does not repeal or otherwise abridge by implication the people's power to raise taxes by initiative, and to do so my majority vote." (*Id*. at 437.) It similarly concluded that

Proposition 218's term "local government" did not extend to the electorate. To hold otherwise would burden the "people's constitutional right to direct democracy" with no unambiguous indication it was so intended. The Court rejected HJTA's argument distinguishing *California Cannabis's* rule that Proposition 218's "local government" definition does not extend to the electorate when construing election timing requirements. Thus, a special tax proposed by voter initiative needs only a simple majority to pass.

The Court was not persuaded a different result should follow simply because a member of the Board of Supervisors was the initiative proponent. HJTA argued that on those facts, the Court should interpret "local government" to include initiatives promoted by elected officials. It proposed some tests to consider for voter initiatives, including: 1) Did the elected official sponsor the initiative or "was their collusion" between officials and the citizen sponsor; and 2) Is there overlap between the citizens' initiative committee and the governing body? The Court was not persuaded "how the sponsorship and involvement of the single official here gives rise to the inference that the City intentionally circumvented Propositions 13 and 218 or effectively controlled the initiative." The Court instead ruled that it must narrowly construe provisions that would burden the initiative power, including when it is an elected official that exercises such power.

F. *Humphreville v. City of Los Angeles* (2020) 58 Cal.App.5th 115

Holding: A city-owned electric utility that charges rates that do not exceed the reasonable costs of service does not violate Propositions 13, 218 or 26 when, absent voter approval but pursuant to the power granted in the city's charter, it transfers the utility's annual electricity revenue surplus funds to the city's general fund.

Facts/Background: The Department of Water and Power ("DWP") of the City of Los Angeles provides electricity to about 1.4 million customers, with rates set by ordinance. The City's charter provides that any "surplus" in DWP's fund can be transferred to the City's General Fund. Since 1971, the City has transferred such surplus to its General Fund. The City provides nothing to DWP in return. DWP

does not pass through the transfer costs to customers as a separate line item on the bill.

In 2018 Plaintiff sued to challenge the City's practice of transferring DWP's annual surplus electricity revenues to the General Fund. Plaintiff argued that it was unconstitutional because it amounted to a tax that voters had never approved. The rate-setting ordinances applicable to Plaintiff's challenge were adopted in 2008 and 2016. The City demurred, arguing the 120-day statute of limitations to challenge electricity rates barred Plaintiff's claim and the transfer was not a "tax" because the electricity rates charged did not exceed the costs of service.

The trial court agreed with the City's arguments and granted the demurrer without leave to amend. Plaintiff appealed.

Analysis: The Court of Appeal affirmed the ruling in the City's favor to grant the demurrer without leave to amend. The decision stemmed from Plaintiff's decision to agree that the electricity rates did not exceed the costs of service. To avoid the statute of limitations bar, Plaintiff pled that his suit did not claim the rates exceeded the reasonable costs of service. Had he not made this concession, his claim would have been barred by the short 120-day statute of limitations to challenge the legality of electric rates in Public Resources Code section 10004.5. But the result of disclaiming this argument was that the annual transfer did not constitute a tax under Proposition 26.

Proposition 26 defines "tax" but also lays out seven exceptions. Applicable here is Article 13 C, section 1, subdivision (e)(2), which carves out from the definition "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Cal. Const., art. XIII C, § 1, subd. (e)(2).) But Plaintiff expressly conceded the transfer did not cause the electric rates to exceed the costs of service. The Court of Appeal found "This may place plaintiff's lawsuit outside the statute of limitation bar . . . but it simultaneously puts the DWP's monthly charge outside the definition of a 'tax'." (*Id.* at 124.)

The Court of Appeal cited *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1 in rejecting Plaintiff's argument that the transfer is a "tax" regardless of the absence of a demonstrated effect on the customers' electric rates because DWP receives nothing from the City in exchange for the transfer. The focus is on the "financial relationship between the ratepayer and the city-owned utility, and not—as plaintiff urges—between the city-owned utility and those to whom the city-owned utility transfers its revenue." What matters is the effect on the ratepayer, not any "behind-the-scenes transfers of funds. . .." Because Plaintiff's verified complaint admitted the rates did not exceed the costs of service, amendment was futile, and dismissal proper.

G. *Mahon v. City of San Diego* (2020) 57 Cal.App.5th 681

Holding: Where a city ordinance provided the funding for the undergrounding of electric lines through a surcharge on electric ratepayers, the surcharge was compensation validly given in exchange for franchise rights and thus, was not a tax subject to voter approval under Proposition 218.

Facts/Background: San Diego granted SDG&E a 50-year electric franchise in 1920. In 1969, the City began negotiations with the electricity provider in anticipation of the original agreement's expiration. The parties reached agreement in 1970 on another 50-year agreement that governed the first thirty years and obligated the parties to negotiate in good faith later to reach terms for the final twenty years. Part of the consideration for the 1970 agreement was a franchise fee equal to three percent of the utility's gross receipts. But a second component was SDG&E's obligation to increase the money it budgeted for undergrounding utilities within the City's boundaries to four and one-half percent (phased in a one-half percent per year) of total system gross receipts multiplied by an allocation factor specific to the City. The agreement stated that this undergrounding obligation was "intended only to be a measure of a portion of the consideration to be paid" for the rights and privileges granted by the franchise.

The parties negotiated terms for the final twenty years and reached agreed on an

amendment in 2002. The base three percent remained unchanged. The terms regarding undergrounding, however, were modified. SDG&E was required to fund the undergrounding efforts via a combination of payments of a specified percentage of the ratepayer's base rates plus a PUC-approved surcharge on customers' bills equal to 3.53%.

Plaintiff filed a class action challenged the 2002 undergrounding surcharge as an illegal tax imposed without voter approval in violation of Proposition 218. The trial court granted class certification. While the case was pending, the Supreme Court's decision in *Jacks v. Santa Barbara* (2017 3 Cal.5th 248) issued, which held that a surcharge paid by customers to fund the utility's franchise fee obligations was not subject to Proposition 218's requirements provided the "amount of the charge is reasonably related to the value of the franchise." (*Jacks, supra*. 3 Cal.5th at p. 257.)

The City moved for summary judgment on the grounds the franchise fee, including the undergrounding obligation, was compensation paid in exchange for the franchise rights and was reasonably related to its value. In the alternative, they argued the surcharge was a lawful regulatory fee. The trial court granted the motion on both grounds. Petitioner appealed.

Analysis: The Court of Appeal affirmed the trial court ruling in the City's favor on the first argument—that the surcharge was lawful compensation for the franchise rights. Plaintiff's primary argument in rebuttal was that the surcharge was not "compensation" as that terms was used in *Jacks.* He sought to distinguish "compensation" from "consideration." He agreed the surcharge was "consideration", but disputed it was "compensation," and argued the distinction was material. The three percent fee was the compensation in exchange for access and use of City streets, but the 3.83% surcharge was simply consideration made to induce the City to grant the franchise—not to use its streets. The Court of Appeal rejected Plaintiff's argument as putting form over substance. "[A]ll consideration that is a "charge" and is given in exchange for franchise rights, constitutes 'compensation for the use of government property' as that phrase is used in *Jacks*." (*Mahon, supra* at p. 708.)

The Court of Appeal further found the City met its burden to prove the surcharge was reasonably related to the value of the franchise. Plaintiff argued because the City did not introduce a valuation analysis, its proof failed. But he Court found *Jacks* does not compel a city to provide a valuation analysis. The value can be established by proof of "bona fide negotiations." Here, the City offered undisputed evidence of the negotiations for both the 1970 agreement and 2002 amendment. That evidence included proof of more than 30 negotiation sessions spanning multiple years, the City's retention of a consultant to advise them through the process and multiple exchanges of draft agreements and resolutions. Plaintiff, on the other hand, presented no evidence to establish the negotiations were not pursued in good faith. And he failed to provide evidence that the difference between San Diego's franchise fee and surrounding cities' fees was not due to acknowledged market differences between general law city franchises and charter city franchises.

H. *Malott v. Summerland Sanitary District* (2020) 55 Cal.App.5th 1102

Holding: Petitioner challenging utility rates need not exhaust administrative remedies by voting "no" at Proposition 218 hearing nor by specifying at the hearing the basis for the alleged illegality before filing suit to challenge the rates. The rule to exhaust administrative remedies in the Proposition 218 assessment context is pending before the Supreme Court in *Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2020) 51 Cal.App.5th 621 (review granted Sept. 16, 2020). A ruling in that case may provide guidance on the continuing viability of the holding in *Malott* in the rate context.

Facts/Background: Petitioner owns an apartment building whose wastewater collection, treatment and disposal services are provided by Summerland Sanitary District. At a duly noticed Proposition 218 protest hearing in 2018, the District increased its service rates 3.5 percent. Petitioner did not attend the public hearing or file a written protest. Instead, she filed an administrative mandate petition and alleged she was excused from exhausting administrative remedies because the

hearing provided an inadequate remedy.

Petitioner claimed the new rates overcharged apartment buildings in violation of Proposition 218. She alleged the rates did not account for the actual wastewater discharged from a parcel or the proportional costs of servicing a parcel. To support her motion for the writ she submitted expert testimony (via declaration) that opined the rates improperly placed all residential users into a single rate category even though multi-unit apartment buildings allegedly use 40 percent less water than single family homes. Petitioner argued the rates overcharged apartment buildings and undercharged single family residences.

The trial court granted the District's motion to strike the expert declaration because it was not presented at the hearing on the proposed rates. It also found the District's residential rates were valid and denied the petition. Petitioner appealed.

Analysis: The Court of Appeal reversed, first ruling that Petitioner need not have exhausted her administrative remedies because any such remedy was inadequate. The Court found *Plaintier v. Ramona Municipal Water District* (2019) 7 Cal.5th 372 controlled, and Petitioner need not have challenged the rate methodology before suing. The Court of Appeal agreed with Petitioner's argument that the protest hearing was an inadequate forum to resolve "the evidentiary issues involved in a challenge to the rate structure."

Second, the Court ruled the trial court improperly excluded the expert testimony Petitioner offered to support her motion. The trial court noted if Petitioner had submitted the declaration at the protest hearing "a reasonable argument could be made that the District would fail in its burden to show proportionality. . .." But because she had not, exclusion was appropriate. The Court of Appeal disagreed. "It was relevant evidence challenging the method the District used to calculate residential service rates. [Petitioner] had a right to make that challenge even though she did not attend the public hearing." The Court of Appeal remanded the matter to allow both Petitioner and the District to introduce expert testimony on the District's rates' compliance with Proposition 218.

This decision is problematic for many reasons. First, it is contrary to the long-standing rule that rate challenges are confined to the administrative record. To allow a petitioner to present expert testimony not before the rate-making body when it adopted rates is contrary to *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559. Second it misconstrues *Plaintier*. In *Plaintier*, the proposed rate increase left unchanged the allocation method for petitioner's specific property. And it was the allocation method, not the rates, the petitioner in *Plaintier* challenged. Had the rates been successfully protested, the allocation method would have remained unchanged. On these facts, the petitioner did not need to protest the rates before filing a challenge to the allocation method. *Malott* misses this important distinction.

I. *Silva v. Humboldt County* (2021) --- Cal.App.5th --- (2021 WL 1257170)

Holding: County amendments to marijuana cultivation tax approved by voters impermissibly expanded who and what was taxed beyond what voters approved; the amendments were thus invalid.

Facts/Background: Humboldt County's Board of Supervisors placed Measure S, a proposed tax on commercial growers of marijuana on the November 2016 ballot. It proposed to tax persons engaged in commercial marijuana cultivation. Voters approved it. Measure S allowed the Board to amend the law provided the amendment "does not result in an increase in the amount of the tax or broaden the scope of the tax." The Board amended Measure S to provide that each property owner whose property is subject to a commercial cultivation permit must pay the tax regardless of whether marijuana is actually grown on the property.

Silva, a property owner, sued arguing the change impermissibly broadened the scope of who and what is taxed. The trial court agreed and found the amendments invalid. The County appealed.

Analysis: The Court of Appeal affirmed the trial court ruling against the County. The Court applied standard rules of statutory construction to interpret the voter-

approved measure. The Court presumed the voters intended to approve a tax only on those persons commercially cultivating marijuana and did not intend the tax to extend to property owners whose property is subject to a commercial cultivation permit. Similarly, the Court found the amendment to clarify the taxable area of cultivated marijuana also invalid. The County argued the original definition was ambiguous and amended it to make plain the taxable area was the area stated on the permit. The Court disagreed, holing the original taxable area unambiguously was described as the area in which marijuana is actually cultivated. Despite perhaps rendering enforcement of the taxing scheme more efficient, the amendment impermissibly broadened the scope of the tax beyond what voters approved. Finally, the Court found the amendment to specify the tax accrues when the cultivation permit issues was also invalid; the original measure provided taxes accrue on the date a person engages in legally authorized marijuana cultivation.

J. *Valley Baptist Church v. City of San Rafael* (2021) 61Cal.App.5th 401, petn. for review pending, petn. filed on April 7, 2021

Holding: The California Constitution's religious exemption from taxation applies only to ad valorem property taxation and does not exempt a church from non-ad valorem special property taxes.

Facts/Background: In 2010, voters in San Rafael approved an annual special tax based on square footage of non-residential structures to support paramedic services. Residential units were also taxed but under a different formula. The City later discovered the County assessor had improperly designated some non-residential structures as exempt. The City sought to collect the past due taxes, and Valley Baptist objected. It argued as a religious institution it was exempt from such taxes under the California Constitution. (art. XIII, § 3(f).) It sued for declaratory relief and a refund.

The trial court denied the City's motion for judgment on the pleadings, and the matter proceeded to a bench trial. The City argued the tax was an excise tax

imposed on property owners "to fund a service they require and is therefore not subject to the constitutional exemption from property taxation" and that the church was not exempt from non-ad valorem special property taxes. Valley Baptist continued to urge its constitutional exemption argument. Following trial, the trial court determined the paramedic tax was a property tax not an excise tax because it was imposed upon the "mere ownership" of property. The trial court determined that a special tax assessed on any parcel of property fell within the plain meaning of "property taxation" for purposes of the constitutional exemption. Following the trial court's denial of a motion for new trial, the City appealed.

Analysis: The Court of Appeal reversed, holding the church was not exempt from the tax. The Court first noted that the constitutional exemption for religious institutions from ad valorem property taxes contains no reference to a "special property tax" because that taxation category did not exist before Proposition 13. The Court then examined Propositions 13 and 218 for evidence of a "clear intent by the electorate to extend the scope of article XIII exemptions to special property tax." The Court found no such evidence in the text or ballot materials for Proposition 13.

Neither did it find such evidence in the text or ballot materials for Proposition 218, despite the materials' express provisions changing the longstanding exemption for state and local governments from special assessments. "An intent to extend the benefits of a constitutional or statutory tax exemption must be clearly expressed or strongly implied by the text of the provision or its legislative materials, and any doubt must be resolved *against* the assertion of the tax exemption."

The Court further found support for its analysis in the text of Government Code section 53978, which authorizes submitting for voter approval a proposed special tax to support paramedic services. The statutory scheme expressly exempts state and federal agencies. The court concluded this express exemption indicated the Legislature's understanding that the exemptions from property tax in the Constitution are limited to ad valorem property taxes. The State Board of Equalization's interpretation of the constitutional exemption was consistent and while not conclusive, was persuasive support for the Court of Appeal's construction.

The Court of Appeal declined to reach the Plaintiff's free exercise argument, finding that the church had forfeited that claim at trial. Whether, or how, the paramedic tax impedes their ability to conduct worship services was undeveloped in the record below as a result.

K. *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373, petn. for review pending, petn. filed March 10, 2021, request for depublication filed March 30, 2021

Holding: Proposition 218 does not prevent voters from approving taxes on municipal utility enterprise funds to generate general fund revenue, even where those costs are recoverable as part of utility rates.

Facts/Background: Sacramento's Department of Utilities provides drainage and solid waste services to residential and commercial customers. Before 1998, the city imposed an "in-lieu franchise and property fee" on its utility enterprises and transferred 11 percent of the revenue from fees to the City's General Fund. After Proposition 218 passed, the City proposed, and voters approved, an ordinance to replace the in-lieu general fund transfer with a general tax on the utility enterprises at the same 11 percent rate. The utility fees were set at levels sufficient to pay the tax to the General Fund.

Petitioner sued, alleging the tax violates Proposition 218 because the utility rates exceeded the costs of service, and rate revenue was used for purposes other than providing the utility service, including for providing general governmental services. The trial court agreed with Petitioner and issued a writ of mandate directing the City to cease charging utility customers rates that included amounts to fund the transfer. The City appealed.

Analysis: The Court of Appeal reversed and on remand instructed the trial court to vacate the writ. The Court of Appeal found the tax was not imposed on property or customers. Rather, it was imposed on the utility enterprises' revenue. The Court

was unpersuaded that because the user fees generated sufficient revenue to fund the transfer, the General Fund transfer itself was a "fee or charge under article XIII D." The revenue tax was simply a cost of providing service and merely a component of the rate.

The Court rejected Petitioner's argument that voters could not approve the tax because the general fund transfer violates article XIII D, section 6. Because of voter approval for the tax, the Court concluded Sacramento's approach was consistent with *Redding's* holding that a local government cannot charge a utility fee that exceeds the costs of service unless it obtains "voter approval for rates that exceed costs." (*Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th at p. 18.) Voter approval in 1998 satisfied that requirement.

II. GOVERNMENT CLAIMS ACT

A. *City of Los Angeles v. Superior Court (Wong)* 62 Cal.App.5th 129

Holding: Government Code section 835 does not extend liability to members of the public whose alleged injuries do not arise from use of government property or adjacent property. Government Code section 855.4 bars claims based on the city's alleged failure to perform, or not perform, discretionary actions that affect public health.

Facts/Background: Plaintiff sued the city of Los Angeles for negligence and dangerous condition of public property, claiming that her husband, an LAPD officer, contracted typhus from unsanitary conditions in the police station where he worked and she, in turn, contracted typhus from her husband. The city demurred, arguing that plaintiff did not allege she had contact with the property and, thus, the city did not owe her a duty of care. The city also demurred citing immunity under Government code section 855.4 regarding decisions "to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community." The trial court overruled the demurrer. The city filed a petition for writ of mandate.

Analysis: The Court of Appeal granted the city's petition. The plaintiff admitted she had never visited the police station but argued this was irrelevant because she could prove her injuries were proximately caused by the "dangerous condition of the property." The trial court adopted plaintiff's theory that her typhus exposure amounted to "take-home exposure" from her husband's employment. Such "take-home exposure" had been recognized as a basis for liability in the asbestos context. But the Court of Appeal rejected this theory and held Government Code section 835 (dangerous condition of property) did not apply. She had no contact with the property, her only alleged contact was with her husband from whom she claims she contracted typhus months after he fell ill. And the "take-home exposure" theory does not apply to public entities.

As a second, independent basis for its ruling, the Court of Appeal agreed with the city that section 855.4 grants immunity from plaintiff's claims. Plaintiff claimed the typhus infection arose from infected fleas on vermin on City property, which spread via the City's failure to maintain the property. But the court concluded where the sole cause of Plaintiff's injury was the substandard maintenance of public property that exposed her to a deadly disease, section 855.4 bars her claim. The "decision" by the City to perform or not to perform any act regarding the alleged infected fleas fell squarely within the ambit of section 855.4. The Court of Appeal issued a peremptory writ of mandate directing the trial court to sustain the City's demurrer.

B. *Lowry v. Port San Luis Harbor District* (2020) 56 Cal.App.5th 211

Holding: A complaint filed against a public agency before the agency has rejected an otherwise timely claim does not satisfy the Government Claims Act. Such suits are premature and fail to strictly comply with the Government Claims Act.

Facts/Background: Plaintiff, a harbor patrol officer, fell from a ladder while boarding a rescue boat and suffered injuries. He missed the six-month deadline to

file a claim but applied for leave to present a late claim. That same day he sued alleging Jones Act negligence and related claims. The District denied Plaintiff's administrative claim.

In its answer, the District included an affirmative defense of failure to comply with the Government Claims Act. The District move for judgment on the pleadings for Plaintiff's failure to comply with the Act, and the trial court granted it. Plaintiff appealed.

Analysis: The Court of Appeal affirmed the judgment in the District's favor. Plaintiff's complaint was premature because he did not wait for the District to take action on his government claim, nor did he wait for the time to expire for the District to do so. The Court ruled that timely claim presentment was not simply a procedural requirement but a condition precedent to suing. And it declined to follow older case law that permitted premature suits to proceed because "the rationale of those cases is not consistent with more recent decisions of our Supreme Court." The Court relied in the Supreme Court ruling in *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, which held: "Only after the public entity's board has acted upon or is deemed to have rejected the claim may the injured person bring a lawsuit alleging a cause of action in tort against the public entity." (*Shirk, supra. at p.* 209, superseded by statute as stated in *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 914.) Because Plaintiff's noncompliance with the Act could not be cured by amending the complaint, denying leave to amend was appropriate.

III. ELECTIONS

A. *Denny v. Arntz* (2020) 55 Cal.App.5th 914

Holding: Statutory challenges to the sufficiency of ballot materials, including impartial analyses, cannot be made post-election. Elections Code section 16100 authorizes post-election challenges where a candidate has offered a bribe or similar offenses against the elective franchise, but does not authorize overturning an election after the fact based on alleged statutory deficiencies in ballot materials.

Facts/Background: Denny filed a post-election challenge to Proposition A, which proposed a 30-year bond issuance of $425,000,000 to protect San Francisco's waterfront, including the Embarcadero and associated seawall. Voters approved the bond issuance by 82.5 percent. Denny sought to overturn the results, claiming a myriad of faults with the ballot materials including, among others, that the voter's digest and ballot question were not impartial, and the ballot question did not conform to the format requirements of the Elections Code. Denny alleged these faults amounted to "offense[s] against the elective franchise" within the meaning of Elections Code section 16100, subdivision (c).

The San Francisco Director of Elections demurred on the grounds that Denny's claims fell outside the scope of Election Code section 16100. The trial court sustained the demurrer without leave to amend. Denny appealed.

Analysis: The Court of Appeal affirmed the trial court ruling in San Francisco's favor. It found statutory challenges to the sufficiency of ballot materials must be pursued pre-election and filed during the 10-day public inspection window for the material at issue. By contrast, section 16100 permits post-election challenges in limited situations, such as misconduct of a precinct board, illegal votes cast or bribery by a candidate, and only when such actions are demonstrated to have affected the election's outcome. Denny's claims, which all rested on the ballot materials and voter guide, fell outside section 16100's scope.

While dispensing with Denny's statutorily-based challenge, the Court recognized that *Owens v. County of Los Angeles* permits post-election challenges if ballot materials are so misleading or inaccurate as to implicate voters' due process rights. But the standard of proof in such a claim is much higher, and Denny alleged no such due process claim.

IV. OPEN GOVERNMENT (PRA, BROWN ACT, ETC.)

A. *Alfaro v. Superior Court* (2020) 58 Cal.App.5th 371

Holding: A court's master and qualified juror lists remain judicial records subject

to public inspection and copying at least as to the names and zip codes.

Facts/Background: Petitioner, a defendant in a capital murder case, sought records to support his claim that juries were not selected from a fair cross-section of the community. He asked for the County's master list of prospective jurors' names and zip codes, relying on *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, which held such list was a public record. The trial court denied the request, ruling that *Pantos* was no longer good law. Petitioner filed an appellate writ to challenge the denial.

Analysis: The Court of Appeal granted the writ, ruling that *Pantos* remains good law. The Public Records Act does not apply to judicial records. However, constitutional principles and common law render such records presumptively public. The presumption applies to jury selection records except on a showing of good cause. The Court of Appeal rejected the Jury Commissioner's argument that because Civil Code section 197, subdivision (c) prevents him from disclosing information furnished by the Department of Motor Vehicles, the master and qualified jury lists were nonpublic. The plain language of section 197 did not support such an argument. And the legislative history indicated the Legislature did not understand the statute to restrict public access to jury lists. The Court of Appeal further concluded that prospective jurors' rights to privacy did not overcome the presumption of public access to juror names and zip codes.

B. *Collondrez v. City of Rio Vista* (2021) 61 Cal.App.5th 1039

Holding: For purposes of SB 1421, a "sustained finding" of misconduct exists where the agency finds misconduct, but the parties settle before the officer's administrative appeal concludes. When an agency discloses records regarding a sustained finding of dishonesty, it may not redact findings regarding other forms of misconduct arising from the same incident except as otherwise permitted in Penal Code section 832.7, subdivision (b)(5).

Facts/Background: Plaintiff, a former Rio Vista police officer, sued the city over its disclosures of information from his personnel files in response to a PRA

request. The officer had been terminated for violating personnel rules and regulations, misconduct, dishonesty, and making a false statement in connection with an excessive force incident. Following a Skelly hearing, the city terminated the officer. The officer appealed, and while the administrative appeal was pending, the parties entered a settlement agreement. As part of the agreement, the city agreed it would only release information from the officer's personnel file "as required by law or upon legal process issued by a court of competent jurisdiction." After SB 1421 took effect in January 2019, the city received a PRA request related to the officer's disciplinary action. The city provided responsive records, and gave the officer prior notice of some disclosures, but not all. Media reports covered the excessive use of force incident, and the former Rio Vista officer's current employer fired him. The officer sued the city for breach of contract, invasion of privacy, interference with prospective economic advantage, and intentional infliction of emotional distress.

The City filed a demurrer and anti-SLAPP motion. It argued the PRA and Penal Code section 832.7 required it to disclose the officer's records. The trial court denied the motion and overruled the demurrer on the breach of contract and invasion of privacy claim based on its conclusion that the City's disclosures were not within the new statutory exceptions to disclosing police personnel records. But it granted the special motion to strike on the interference with prospective economic advantage and intentional infliction of emotional distress claims. Both parties appealed.

Analysis: The Court of Appeal found the trial court correctly ruled Plaintiff's claims arose from protected activity. Plaintiff claimed the gravamen of his complaint did not arise from protected activity, but was based on the City's failure to provide him advance notice of their intent to release the records. The Court disagreed; it found the complaint arose from protected speech "as each cause of action is fundamentally premised on the city's release of his personnel information to media outlets."

The Court of Appeal next ruled that Plaintiff failed to establish a likelihood of prevailing on any of his claims. The primary issue was whether there was a

"sustained a finding" as that term is defined in section 832.8, subdivision (b), which defines it as a "final determination by an investigating agency . . . Following an investigation and opportunity for an administrative appeal . . .." The trial court found there was no final determination because the settlement occurred before the officer's administrative appeal concluded. The Court of Appeal disagreed with this interpretation. It found a "final determination" did not require a "completed" administrative appeal, but only that the officer must be provided an "opportunity" to appeal. To rule otherwise would permit an officer to frustrate SB 1421's purpose by refusing to pursue an administrative appeal or by abandoning or settling an appeal before it concludes.

The Court of Appeal also rejected the officer's claim that the City should have redacted information in his personnel file related to the excessive use of force incident but that did not "directly pertain to the dishonesty finding." The court found the disclosed records "related to" the use of force incident, and none of the reasons in section 832.7, subdivision (b)(5) that permit redactions were present.

C. *New Livable California et al. v. Assn. of Bay Area Governments* (2020) 59 Cal.App.5th 709

Holding: A plaintiff does not have to allege prejudice to state causes of action pursuant to the Brown Act under Government Code sections 54960 and 54960.1 when seeking declaratory and injunctive relief. A court cannot convert a demurrer into an incomplete evidentiary hearing by considering judicially noticed material offered by the demurring party and restrict the evidence the opposing party may present in rebuttal.

Facts/Background: Petitioners, two not for profit entities, sued ABAG for violating the Brown Act's requirement to publicly report the Board's votes. For the meeting at issue, the Board 1) conducted one vote on a motion by "a show of hands" and reported it as a "voice vote" in the minutes, 2) conducted another vote "by a show of hands" and did not report it in the minutes, and 3) adopted a motion by a "roll call vote," which was reported in the minutes except the minutes did not reflect abstentions or absences. Petitioners alleged they suffered prejudice from

the failure to publicly report the votes because the failure undermined the ability to monitor how members were voting on issues of public importance.

The trial court sustained ABAG's demurrer without leave to amend on two grounds. First, it concluded Plaintiffs could not state "legally cognizable" prejudice, and second, it found there was no live controversy. Plaintiffs appealed.

Analysis: The Court of Appeal reversed. It found the Plaintiffs did not have to plead prejudice to state a cause of action for declaratory and injunctive relief under sections 54960 and 54960.1. It expressly noted, however, that because the ruling was at the demurrer stage, it expressed no opinion on whether "plaintiffs will be required to show prejudice before the trial court can declare any Board action null and void under section 54960.1."

The Court next ruled the trial court improperly considered judicially noticed material to determine no live controversy existed. That material included the minutes from a later Board meeting at which the Executive Board Vice-President made clear that in the absence of unanimous consent on any motion, a roll call vote would be conducted with abstentions and absences noted. The Court of Appeal found it could not be determined as a matter of law at the pleading stage that no live controversy existed.

D. *Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545

Holding: Requiring a Public Records Act plaintiff to post an undertaking before obtaining an injunction is not an unlawful prior restraint under the First Amendment. Nor is requiring an undertaking inconsistent with the Public Records Act.

Facts/Procedural Background: Sacramento's City Council adopted a resolution authorizing destruction of certain records and authorizing the city clerk to adopt a new records retention policy. The policy was finalized in 2010. In 2014, for the first time the City acquired technology that permitted the automatic deletion of

emails according to the 2010 policy. The City notified media and citizen groups in December, 2014 that it would begin to automatically delete email under the policy beginning July 1, 2015.

One week before the scheduled start of destruction, Petitioners submitted a PRA request for all emails scheduled to be deleted from 2008 to the present. The City replied the request was too broad, but it would delay the scheduled deletion by one week to allow the requestors to narrow their request. Meanwhile, Petitioners under the PRA and sought a TRO and preliminary injunction barring the City from destroying potentially responsive emails (15 million). The trial court granted the TRO to preserve the status quo and after more briefing granted a preliminary injunction. But it conditioned the injunction on Petitioners, over their objection, posting an $80,000 undertaking under Code of Civil Procedure section 529, which was the annual amount the City claimed it would cost to maintain the emails.

The trial court later reduced the undertaking to $2,349.50 once additional briefing revealed that to be the true cost to maintain the emails. Petitioners appealed the requirement to post the undertaking.

Analysis: The Court of Appeal affirmed the trial court's order requiring Petitioners post an undertaking. Appellants argued the undertaking requirement was inconsistent with the PRA and amounted to an unlawful prior restraint under the First Amendment. The Court of Appeal found neither argument persuasive.

First, it found section 529's general mandate to require an undertaking when issuing a preliminary injunction controlled; the PRA had no contrary, specific exception, unlike other statutory schemes that expressly provide no undertaking is required in specified instances. The Court also rejected Appellants' claim that because the PRA describes the limited and specific costs requestors must pay, the undertaking requirement was unlawful. It found that had the Legislature intended to exempt PRA cases from the general rule regarding undertakings it would have done so more clearly. And because the law allows trial courts to exempt indigent parties from any undertaking requirement, it did not violate public policy concerns.

Second, the Court determined the undertaking requirement was not a prior restraint in violation of the First Amendment. The trail court "did not forbid Appellants from engaging in any communications." The undertaking requirement was not concerned with speech.

E. *U.S. Fish and Wildlife Service v. Sierra Club* (2021) --- U.S. ---, 141 S.Ct. 777

Holding: The deliberative process privilege protects in-house draft biological opinions that are both predecisional and deliberative from disclosure under the Freedom of Information Act, even if the drafts reflect the agencies' last views about a proposal.

Facts/Background: The Sierra Club submitted a FOIA request to obtain documents regarding the United States Fish and Wildlife Service's (FWS) consultations with the EPA regarding the EPA's proposed regulations related to "cooling water intake structures." The EPA was required to consult with FWS before finalizing a rule so that FWS may issue a "biological opinion." If a "biological opinion" concludes the proposed regulation would jeopardize threatened or endangered species, the EPA must either terminate the action, seek an exemption or implement alternatives proposed by FWS. FWS completed a draft biological opinion on a revised version of EPA's proposed rule that concluded the rule was likely to jeopardize certain species. Staff circulated the draft opinions "to the relevant decisionmakers within each agency" but those decisionmakers did not approve the draft or send it to the EPA. Instead, it "shelved" the draft opinions and agreed to extend EPA's consultation period. The EPA circulated another revised proposed rule with significant changes from the earlier version that satisfied FWS that the rule posed no biological jeopardy to threatened or endangered species.

FWS withheld the draft biological opinions from its production of documents responsive to the Sierra Club's FOIA request. It claimed the drafts were subject to the deliberative process privilege. The Sierra Club sued. The trial court and the 9th circuit ruled for Sierra Club. The United States Supreme Court granted cert.

Analysis: The United States Supreme Court reversed, ruling the draft biological opinions were not final decisions. Recognizing that it is not always clear if a particular document represents an agency's final decision, the court observed "a document is not final solely because nothing else follows it. Sometimes a proposal dies on the fine." The key inquiry is whether the document "communicates a policy on which the agency has settled." Documents that are "merely tentative" do not reflect the agency's final decision.

Applying those general rules, the court concluded the draft biological opinions were covered by the deliberative process privilege. The FWS identified the opinions as "drafts." The court rejected Sierra Club's claim that because the draft opinions prompted the EPA to revise its proposed rule, "the draft opinions thus had an 'operative effect' on the EPA and must be treated as final. . .." The court described the test is whether FWS treated the biological opinions as final, not whether the effects of draft opinions was significant. FWS did not treat them as final because the decisionmakers had not approved them or sent them to the EPA.

Because the California PRA often looks to precedent interpreting FOIA, this decision may prove helpful in cases involving deliberative process privilege claims under the PRA.

F. *Ventura County Deputy Sheriffs' Association v. County of Ventura* (2021) 61 Cal.App.5th 585

Holding: SB 1421 applies retroactively to records of peace officer conduct that occurred before its effective date, January 1, 2019.

Facts/Background: The Ventura County Sheriff's Department sued Ventura County to enjoin their disclosure of documents regarding peace officer conduct that occurred before January 1, 2019, the effective date of SB 1421. The trial court agreed with the Association that SB 1421 was not retroactive and issued a preliminary injunction. While the case was pending, the decision in *Walnut Creek*

Police Officers' Assn. v. City of Walnut Creek (2019) 33 Cal.App.5th 940 issued, which held that SB 1421 applied to compel disclosure of records created before January 1, 2019. However, the trial court disagreed and declined to follow *Walnut Creek*. It issued a permanent injunction. The Ventura County Public Defender, who had intervened, appealed.

Analysis: The Court of Appeal reversed, holding consistent with prior caselaw that SB 1421 was retroactive. It rejected the Association's claim that *Walnut Creek* was distinguishable because it was a summary denial of petitions for writ of supersedeas. It held that *Walnut Creek* and *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897 both of which determined SB 1421 requires the disclosure of documents regarding specified instances that occurred before January 1, 2019, controlled. The court reversed and dissolved the permanent injunction.

V. MISCELLANEOUS

A. *Burgess v. Coronado Unified School District* (2021) 59 Cal.App.5th 1

Holding: To qualify for attorney fees under Code of Civil Procedure §1021.5, a litigant must show both that the action has resulted in the enforcement of an important right affecting the public interest and that it has conferred a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons. The significant benefit requirement of §1021.5 requires more than a mere statutory violation.

Facts/Background: A media outlet requested records from the Coronado Unified School District under the PRA regarding Burgess, an employee who had been the subject of "unsubstantiated molestation allegations." The employee filed suit to prevent the school district from disclosing the requested documents. The media outlet was permitted to intervene. The district submitted to the court in camera the documents it believed to be responsive to the PRA request. The trial court initially ordered the district to disclose "publicly available court filings and materials submitted to the district at a public hearing." The judge determined a few

documents did not relate to the subject matter of the request but found 22 pages"which consisted of publicly available filings in Burgess's separate lawsuit against the District seeking his reinstatement." The trial court later ordered additional documents disclosed that it determined contained allegations that were known to the public and which Burgess failed to demonstrate were in his personnel file. Burgess ultimately dismissed the case.

The trial court denied the media outlet's motion for attorney's fees under Code of Civil Procedure section 1021.5 because it found the ruling "did not confer a significant public benefit." The media outlet appealed.

Analysis: The Court of Appeal affirmed the trial court's denial of attorney's fees. The media outlets claimed it had conferred a significant public benefit by gaining access to records that Burgess sought to keep secret. The court concluded that the media had "vindicated an important public right in securing access to government records," but that alone did not answer whether "the records thereby produced resulted in a *significant* public benefit." The media outlet argued the court should find the significant benefit element of section 1021.5 met if a party secures the disclosure of public records. But the Court of Appeal held that "the significant benefit requirement of section 1021.5 requires more than a mere statutory violation." Applying the abuse of discretion standard to review the trial court's denial of the attorney's fee motion, the Court of Appeal found that the court – ordered production of publicly available documents conferred only "an insubstantial benefit."

B. *County of Sonoma v. U.S. Bank N.A., et al.* (2020) 56 Cal.App.5th 657

Holding: A trial court could subordinate a bank's lien so a receiver could remediate nuisance conditions on a property. But the trial court abused its discretion in giving the county's enforcement costs super-priority status without considering competing lienholder claims.

Facts/Procedural Background: The County of Sonoma spent years attempting to address multiple code violations and hazardous conditions in an unincorporated area of the county. The violations were extensive and included "a massive accumulation of junk and debris throughout the homes and exterior of the property." One of the major dwellings on the property had extensive fire damage, and other "dwelling like units" suffered from unsanitary conditions and other code violations. The county filed a code enforcement action, which was resolved with a stipulated judgment giving the property owner 90 days to abate the code violations. The property owner failed to comply with the judgment.

Approximately 2 years later, the county reinspected the property and discovered more trailers and recreational vehicles and more individuals living there. The county gave notice to the owner and all lienholders on the property of its intent to seek a court-appointed receiver. Having heard nothing from the noticed parties for 5 months, the County filed a petition to appoint a receiver. The petition included a request for a receiver's certificate of $30,000 with first priority to cover "the initial cost of securing the property in beginning the remediation process." The petition also asked that all receiver and County fees and expenses be granted super-priority status.

The trial court appointed a receiver. It also authorized the receiver to borrow money to finance the property's remediation and to fund a $30,000 receivership certificate to cover initial costs. The court also ordered the county could recover its enforcement costs, including attorney fees, which would be given the same priority as the receiver's costs. But the trial court refused the request to give the receiver's certificate super-priority over other liens. Eventually, the receiver filed his own motion seeking permission to obtain a receiver's certificate for $115,000 secured by a super priority lien. The occupants refused to vacate the property and the purchase money lien holder, U.S. Bank, refused to foreclose. The receiver could not obtain a loan for the approved $30,000 receiver's certificate, because that certificate did not have priority. U.S. Bank's lien was about $663,000. U.S. Bank opposed the receiver's motion arguing it would be unfair to give the receiver a super-priority lien. After giving the lienholder additional time to obtain an appraisal, the trial court ultimately found the continuing condition of the property unacceptable and granted the receiver's request, including approving super-priority

status of the lien. U.S. Bank appealed.

Analysis: The Court of Appeal affirmed in part and reversed in part. First, the court concluded the trial court could properly "issue a super-priority lien to fund the receiver's remediation efforts." It rejected the bank's argument that Health and Safety Code section 17980.7 does not authorize such super priority status for receivers. It held "trial courts enjoy broad discretion and matters subject to a receivership, including the power to issue receiver's certificates with priority over pre-existing liens." It further held that nothing in Health and Safety Code section 17980.7 limited the traditional receivership powers under Code of Civil Procedure section 568. Thus, the trial court had not abused its discretion in giving the receiver's certificate super-priority status.

Second, the Court of Appeal reversed the trial court's grant of super-priority status to the county's enforcement costs. Although the county was instrumental in getting the receiver appointed, the Court concluded the receivership statutes "do not address the fees and costs incurred by an enforcement agency." Rather, section 17980.6 permits the court to impose such costs against the owner.

C. *Spotlight on Coastal Corruption v. Steve Kinsey* (2021) 57 Cal.App.5th 874

Holding: The public interest standing exception did not apply in a non-mandamus action that sought only to recover civil penalties for which no private right of action was authorized. The civil penalty provision in the California Coastal Act that authorizes a private right of action does not apply to violations of the Act's duty to disclose ex parte communications.

Facts/Background: The California Coastal Act of 1976 requires commissioners to disclose to the executive director any ex parte communications they have with persons interested in a commission matter within 7 days of the communication or, if the communication occurs within 7 days of the next hearing, at that next hearing. The executive director then places the report of the ex parte communication in the

public record. The penalty for failing to disclose such communications is a civil fine of up to $7,500. The Act also provides that a commissioner may not participate in a matter about which they have knowingly had an unreported ex parte communication. Violating this provision also carries a potential civil fine of up to $7,500. Penalties paid under those two provisions are deposited into a "Violation Remediation" account. Finally, the Act imposes civil liability between $500 and $30,000 for any violation of the Act and allows "any person" to maintain an action to recover such penalties. The ex parte penalty provisions have no similar provision.

The plaintiff, Spotlight on Coastal Corruption, "is a lawyer–created entity" that has no employees and uses its lawyer's office as its own address. Spotlight sued five commissioners alleging 70 failures to report ex parte communications and the same number of failures to abstain from participating in matters in which the commissioners had the unreported ex parte communications. Spotlight sought $45,000 in civil penalties for each violation. At trial, some commissioners admitted submitting "tardy" disclosure forms and failing to sign some disclosures. And although the trial court imposed various fines on the defendants, it found the stray violations did not put "any person or property in jeopardy." But it awarded attorney's fees of $929,046.57. Defendants appealed.

Analysis: The Court of Appeal reversed. First, it found Spotlight lacked public interest standing to pursue violations of the ex parte communications disclosure requirements. The Court found the complaint pled no writ of mandate, which is the only context in which public interest standing exception has been recognized. The word "mandate" appeared only on the first page caption and in the prayer for relief, neither of which the Court found sufficient to make the complaint a mandamus action. Nor did the complaint seek to overturn or vacate any Commission decision. "This case has always been all about money – civil fines and attorneys' fees." The Court also disagreed that the trial court had discretion to confer public interest standing. "There is no general exception to the requirement of standing for cases that a court finds to be in the 'public interest'."

The Court of Appeal next determined that although Spotlight had statutory

standing to maintain an action to recover civil penalties of up to $30,000 for "any violation" of the Act, that penalty provision did not apply to the specific ex parte disclosure requirements. The Court found the term "any" ambiguous in the context of the entire statutory scheme because the ex parte disclosure requirements included their own penalty provisions. It analyzed the legislative history and determined the civil penalty provision for "any violation" of the Act was not intended to apply to the ex parte disclosure statutes. Because almost all fines were imposed under this general civil penalty provision, the Court of Appeal reversed. That reversal, in turn, led to the reversal of the prevailing party attorneys' fee award.