GENERAL MUNICPAL LAW UPDATE

This is not so much a general update of all municipal law, as an effort to be an update of California's reported public entity cases and AG Opinions for the last six months or so. You will not find, for example, anything about municipal law in Kansas here; nor will you find anything about California statutes *per se*, or even cases that opine on employment law, land use, or the things Gene Gordon does so much better.

What you will find is a lot of material that our Clerk, Christy Hunsberger, assisted me in presenting for your consideration, if not edification. For the record, the dateline of that information runs from approximately October 1, 2008, through April 1, 2009.

I. FOUNDATIONS OF MUNICIPAL GOVERNMENT

- *Widders v. Furchtenicht*, 167 Cal.App.4th 769 (Oct. 20, 2008).

An Ojai resident, who happened to be an attorney, submitted two initiatives directing the City Council to exercise its informed judgment to draft and adopt ordinances regulating chain stores and providing affordable housing. Ojai City Attorney Monte Widders, faced with 15 days to prepare a ballot title and summary under Election Code §9203, contacted the resident to suggest he withdraw the measures and resubmit them in proper substantive form. Widders was concerned the measures were an invalid attempt to enact indirect legislation under *Marblehead* (226 Cal.App.3d 1504).

After the 15 days came and went without result, Widders filed an action for declaratory relief seeking an order to be relieved of any duty to comply with Section 9203, as well as a declaration that the initiative measures would be facially unconstitutional.

The appellate court reversed the trial court's ruling that the 15 days under Section 9203 acted as a statute of limitations for the City Attorney to seek judicial relief from his duty to prepare a ballot title and summary. Since the obligation to prepare the title and summary was ongoing, even after the 15-day period, the court held that the ability to ask for judicial relief from that obligation also continued.

Additionally, the court held that judicial review of an initiative at the pre-petition stage does not violate the right to free speech. Free speech may be precious and come into play in a situation like this, but it is limited in a special forum like the initiative process, especially when that initiative is invalid.

- *Community Youth Athletic Center v. City of National City,* 170 Cal.App.4th 416 (Jan. 22, 2009).

Community Youth filed a reverse validation action under CCP §863 challenging an ordinance amending a redevelopment plan that would: 1) extend the plan's time period 2) find blight, and 3) allow eminent domain takings. Community Youth obtained a court

order to publish the summons, but encountered difficulties outside its control. Namely, one of the newspapers unexpectedly changed its publication schedule, so the summons's publication was delayed; and, due to that delay, the summons described an incorrect date for responses.

The trial court granted the City's motion for judgment on the pleadings based on its conclusion that the publication was inadequate without good cause.

The court of appeal reversed. The court sidestepped arguments about substantial or strict compliance standards since Community Youth's compliance was not even substantial enough for consideration of that issue. Instead, the court found good cause existed under CCP §863 to excuse the non-compliance and directed the trial court to allow leave to republish.

II. OPEN GOVERNMENT AND ETHICS

- *Berkeley Police Association v. City of Berkeley* 167 Cal.App.4th 385 (Oct. 7, 2008).

Berkeley's Police Officers' Association challenged the Police Review Commission's (PRC's) practice of investigating citizen complaints and conducting open and public evidentiary hearings on those complaints. It asked for a court order directing the City and its PRC to close the evidentiary hearings to the public.

The City argued that Penal Code §832.7, which protects the confidentiality of investigatory records, only applied when the investigation in the records could lead directly to discipline. Meanwhile, it argued, the PRC furthered policies of transparency and accountability, as evidenced by the fact that no PRC activities ever led directly to disciplining City police officers. PRC investigations might only lead indirectly to discipline: the PRC regularly referred its investigations and conclusions to the city manager and police chief, who, admittedly, could use PRC information when considering discipline.

The court of appeal held that PRC hearings investigating citizen complaints against police officers should be closed to the public. Penal Code §832.7 applies to all aspects of disciplinary matters and citizen complaints. This being the case, the PRC's process of transmitting its findings to the chief of police and city manager must comply with §§832.5 and 832.7's confidentiality requirements. Even an officer's identity regarding such records must remain confidential.

The court reasoned that the state legislature, in passing §832.7, already balanced the policy of furthering public confidence in law enforcement by making investigations open to the public against confidentiality, and—surprise!—gave privacy more weight. Therefore, Berkeley could not rebalance State policy locally and make its own independent decision.

- *D'Amato v. Superior Court of Orange County* Cal.App.4th 861 (Oct. 21, 2008).

The (former) City of Placentia city administrator, D'Amato, supervised the City's director of public works, Becker. The City Council formed a JPA to facilitate lowering railroad crossings. D'Amato served on the board of the JPA. He encouraged Becker to apply for the JPA's executive director position and then voted with the other two JPA board members to contract with Becker's consulting firm, "Becker and Associates," thereby securing Becker's services as the JPA executive director. The JPA agreed to pay Becker and Associates a retainer fee of $200.00 per hour for its time and to award 1.5% of the estimated $300 million cost ($4.5 million, less the retainer fee) upon completion of the project. To avoid the appearance of impropriety, Becker's firm agreed to repay to the City Becker's public works director salary and benefits while he was acting as the JPA's executive director.

The grand jury indicted Becker for a violation of Government Code §1090. It also indicted D'Amato for aiding and abetting that violation.

The trial court denied D'Amato's motion to set aside the indictment; but the court of appeal issued a writ of prohibition directing the dismissal of the indictment and that the superior court not take any further action against D'Amato, Placentia's now-former City Manager. Reasoning that separation of powers principles prohibited inquiring into legislators' minds, the court held that the allegation of aiding and abetting could not stand because D'Amato's motive could not be proved. Additionally, the court said that §1090 is not meant to defeat legislative immunity if the legislator has no personal financial interest in the contract at issue—and that immunity applies to criminal prosecutions as well as civil suits.

- *Galbiso v. Orosi Public Utility District,* 167 Cal.App.4th 1063 (Oct. 23, 2008).

The appellate court reversed a trial court decision denying attorney fees after the plaintiff and Orosi Public Utility District (Orosi) settled a Brown Act and Public Records Act case "in open court." The plaintiff claimed Orosi committed several Brown Act violations arising from a case involving the foreclosure on her property for failure to pay assessments. The Brown Act violations included:

1) A secret vote, as shown by a draft resolution in the agenda that already noted the motion makers and the vote count;
2) Denying plaintiff the opportunity to make a public comment at an open meeting where the resolution to foreclose her property was adopted, after telling her she could not speak about the closed session item where the sale of her property was going to be discussed;
3) Failure to appropriately disclose the subject of closed session meeting items.

The Public Records Act violations involved telling the plaintiff she could not visit the Orosi offices to get documents. A letter to the plaintiff's attorney stated that if there was any documentation she sought ". . . concerning the cases [she] may use the discovery method to obtain that information. . . please advise [Galbiso] that she is not to come to the office and disrupt the office as she has done in the past."

The appellate court held that while some Brown Act claims failed, such as the "scrivener's error" on the draft resolution, others succeeded; the Public Records Act claims also succeeded. (Incidentally, Orosi backed off the tax sale during this matter.) The trial court held wrongly that no Brown Act or Public Records Act violations had occurred: among other mistakes was the conclusion no PRA violation happened because no specific records were withheld—*all* access to records was withheld. The court of appeal sent the matter back to the trial court to determine reasonable attorney's fees.

- *Dixon v. Superior Court of El Dorado County,* 170 Cal.App.4th 1271 (Feb. 4, 2009).

In this Public Records Act case, the court of appeal ruled that a journalist was not entitled to autopsy records concerning a murder victim—not even 31 years after the crime—because the murder trial was on going at the time she sought the records.

A journalist covering a murder trial sought the County's autopsy records to help her write a book about the homicide that occurred 31 years earlier. The autopsy records provided DNA samples that helped link the criminal defendant to the victim. Dixon, the journalist, claimed that the coroner's autopsies were not covered by the Government Code §6254(f) exemption for law enforcement investigatory files.

The court ruled that coroner's reports fell under subsection (f) because they were records compiled by another local agency for law enforcement purposes. The court limited the exemption to situations in which a concrete and definite prospect of criminal enforcement proceedings existed. Additionally, the court said that the appellant's status as a journalist did not offer her greater access to the records.

- *County of Santa Clara v. Superior Court*, 170 Cal.App.4th 1301 (Feb. 5, Feb. 27, 2009).

The court of appeal ruled that GIS maps are public records that generally must be disclosed on request, despite concerns over whether their disclosure might compromise national (or local) security or finances.

The County of Santa Clara claimed that GIS maps fell under federal statutory protection as protected critical infrastructure information (PCII) under the Critical Infrastructure Information Act of 2002 ("CII Act"). The County claimed that the CII Act trumped the Public Records Act (PRA). It also claimed that the GIS maps were protected under the PRA catch-all exemption and that access to the maps could be limited under

Government Code §6254.9 (and more could be charged for producing them than the PRA allowed) because they were copyrighted.

In response, the First Amendment Coalition (CFAC) pointed out that the County actually sold the GIS maps to anyone who wanted to buy them and agreed not to share them with others. The County-wide maps, for example, cost $250,000.

After some discussion, the court found that the CII Act protections the County relied on did not apply. These protections covered only public entities *receiving* PCII from the Department of Homeland Security (DHS); but if the public entity *submitted* the documents to DHS, it did not enjoy federal protections.

Next, the court held that the PRA catch-all exemption did not apply. The County claimed that the public interest served by nondisclosure clearly outweighed the public interest served by disclosure. It argued that the public's interest in the GIS maps was "minimal and hypothetical" and that there were alternate methods to obtain some of same information. In contrast, the public sector's interest in the documents' cost and their security was great, and clearly outweighed the interest in disclosure.

The appellate court disagreed with how the County applied the cost balance. It found the public interest in disclosure was not minimal; disclosure was likely to contribute "significantly to public understanding of government activities." Although there might be alternative methods to obtain at least some of the information provided by the GIS maps, this does not negate the public interest in disclosure. Likewise, the court found that the public interest in nondisclosure was actually small. The CFAC showed that 37 counties provided GIS information either for free or only for the costs of reproduction. And the County's security concerns were belied by the fact it sold the information to those willing to pay—as well as the fact that not all of the GIS information could be claimed to be critical to protect against terrorism.

Regarding copyright protection, Government Code §6254.9's references to copyright only extended to that section's protection for computer software. The section's exception did not cover the whole PRA. Further, the protection did not authorize access to copyright as a means to withhold information—it only recognized the availability of copyright protection.

Finally, the PRA reference to copyrights did not allow the County to insist on restrictive end user agreements limiting the use of GIS information.

- *Kolter v. Commission on Professional Competence LAUSD,* 170 Cal.App.4th 1346 (Jan. 8, 2009).

Plaintiff claimed a Brown Act violation because the public body under whom she worked met in closed session without notice to her to consider whether to initiate disciplinary proceedings. The court of appeal ruled the meeting was not a Brown Act violation; Section 54957 requires notice about evidentiary hearings on possible discipline, so as

to allow the affected employee the choice of an open hearing. This section does not cover deliberations on whether the charges at issue might justify discipline before deciding whether to initiate discipline is different from an evidentiary hearing, even if possible evidence is discussed.

Likewise, the court ruled that it was not a due process violation to go into closed session since the employee would have an opportunity later to refute the charges in open session before the discipline became effective.

- *92 Ops. Cal. Atty. Gen. 19*, (Jan. 14, 2009) Opinion 07-807.

A city redevelopment agency may enter into a loan agreement with the agency member's adult son's corporation. It makes no difference that the son lives with the agency member.

Government Code §1090 forbids a board of a public agency from entering into a contract when one of its members has a personal financial interest in that contract. A redevelopment agency is a public body and a contract to loan money is a contract under 1090. A parent-child relationship, though, between an agency member and her son does not mean the member has a 1090 "financial interest" in the loan. A child might have no legal duty to support a parent, and here, there was no indication the board member would profit from the transaction. Although the son lived with the board member, he did not have the same remote interest that landlords and tenant share in each others' official contracts.

However, the member should abstain from any official action with regard to the proposed loan and not attempt to influence negotiations regarding the agreement.

- *Morongo Band of Mission Indians v. State Water Resources Control Board* 45 Cal.4th 731 (Feb. 9, 2009).

An agency attorney prosecuting a matter before the agency's decision-making body also can advise that body in unrelated matters. This case disapproved *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810.

This case is the subject of another presentation at this conference, so, in the interest of resource conservation, the author declines to elaborate on it.

- *County of Santa Clara v. Superior Court (Naymark)* 171 Cal.App.4th 119 (Feb. 17, 2009).

This case answers whether the Public Records Act contains the exclusive remedies under which a party potentially seeking records can obtain relief. In short, the answer is no—at the very least, Code of Civil Procedure section 526(a) allows a taxpayer's action to enjoin public expenditures on policies and practices that violate the PRA.

The *Naymark* court distinguished the Supreme Court's *Filarsky* decision. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419.) In that case, the state supreme court simply ruled that public entities could not bring declaratory relief actions to establish lack of any requirement to disclose particular documents. The CPRA only allows actions by parties seeking disclosure, not the opposite; it does not say it is the only way to challenge CPRA decisions.

- *City of Tulare v. Superior Court,* 169 Cal.App.4th 373 (Dec. 17, 2008)

The rules governing discovery of peace officer personnel records mandate that efforts to access second-level evidence from an agency require the same notice and hearing protections as initial discovery. That is, short-cuts outside the Evidence Code section 1043 procedures violate due process, the statutes, and privacy rights.

In this case the defendant successfully and appropriately moved for *Pitchess* discovery prior to his criminal trial for assault on a police officer. The week before his trial, his attorney e-mailed the city's attorney to let him know that the complainants identified in the original motion were proving hard to find. For example, one was dead—supposedly. Thus, the defendant would move to see the complaints themselves in nine days—the trial date. If one wants to see what probably was a knock-down, drag-out *Pitchess* discovery motion described by the appellate court, you can review pages 378-379; the court questioned the city's attorney repeatedly on such matters as what the police department might be able to find witnesses that counsel for the defendant already hadn't done. (The defendant's attorney filed papers a few days earlier stating that his office tried to find witnesses identified in the earlier *Pitchess* motion, to no avail.)

In ruling in favor of the defendant, the court explained that the trial-date hearing actually was a continuation of the earlier *Pitchess* motion hearing. Thus, the notice Evidence Code section 1043 might require did not apply. The court, however, granted the city's attorney's request for a stay, during which time he filed a petition for writ of mandate.

The court of appeal took the trial court to task, focusing on the careful balance between the officer's privacy interests and the defendant's right to a fair trial.

> "Police records are confidential for a reason, and their disclosure must be appropriately guarded. . . a properly noticed motion does not restrict disclosure of the information; it merely allows a sufficient time for the law enforcement agency and its officers to challenge and scrutinize the adequacy of the motion in question. Thus the balance between a fair trial and the officer's interest in privacy is maintained. [¶] It could also be said that the court's actions deprived [the officers] of due process." (383.)

As the court of appeal noted, the trial court repeatedly questioned the city's attorney's challenge that the defendant could have tried harder to gather the information. Unfortunately, the city's attorney was unable to answer to the trial court's questions because it had little notice of the hearing in time to conduct an investigation.

Finally, the court of appeal said that an e-mail notice a few days before the actual hearing was no excuse.

III. PUBLIC PROPERTY

- *Villegas v. Gilroy Garlic Festival Association* 541 F.3d 950 (9th Cir.; September 3, 2008.)

In this case, the 9th Circuit ruled that the City of Gilroy was not liable under 42 U.S.C §1983 after one of its officers escorted festival attendees from the Garlic Festival premises for wearing jackets displaying motorcycle gang information. The organizers of the festival asked the police to help them enforce their unwritten dress code; one of the festival's functionaries was a sergeant in the Gilroy Police Department—and the supervisor of the officer who escorted the patrons.

Nevertheless, the 9th Circuit held that the Association was not a state actor—running festivals is not a traditional municipal function. Likewise, it was not a violation of First Amendment rights to enforce a dress code, since it is not a constitutional violation for an officer to enforce a private party's rights.

- *Dietrich v. John Ascuaga's Nugget/City of Sparks* 548 F.3d 892 (9th Cir., December 1, 2008.)

By contrast to the *Villegas* case, here the 9th Circuit held that removal of a festival's patrons because of their political speech at a non-political event violated First Amendment rights.

In this case, the plaintiffs wanted to collect voters' signatures inside the premises of the closed city streets where the "Best in the West Nugget Cookoff" was taking place. The sponsors asked the Sparks police officers to have the petition gatherers removed to another location. After this took place, the signature gatherers found they were unable to collect any signatures, gave up and went home.

The *Dietrich* case distinguished this situation from the seminal *Hurley v. Irish-American Gay, Lesbian and Bisexual Group Case.* (515 U.S. 557 [1995].) Unlike the *Hurley* case, in which participants in a parade wanted to express a message the sponsors did not want expressed, *Dietrich* was engaging in political activities no one supposedly would have attributed to the *Nugget.* There was "… little chance that the public would have viewed Plaintiff's petitioning activities as endorsed by the Cook-Off." Further, even if such a concern existed, the sponsor could have disclaimed the Plaintiff's activities with a sign or through some other simple mechanism. Supposedly, nothing like that would have worked in *Hurley*.

Given the unlikelihood the political message from the plaintiffs in this case could have been attributed to the event's sponsor, as well as the ability to use means to distinguish

from that message, removing the patron from the premises was a violation of First Amendment rights.

IV. ELECTIONS

- *Santa Barbara County Coalition v. SBCAG* 167 Cal.App.4th 1229 (Oct. 27, 2008.)

A special agency/public entity may study, formulate, sponsor and draft a ballot measure that is consistent with its functions. A governmental entity has First Amendment rights, as well as a duty to "endeavor to secure the assent of voters to fund what is required to discharge its responsibilities." (1241) When the activities further express statutory duties, courts will recognize and authorize activities that are consistent with those rights and duties. Here, the court extended anti-SLAPP protection.

Until a measure is drafted, courts will not typically consider activities in furtherance of such a measure to be campaigning instead of simply governing. (Id.) In this case, SBCAG used a polling firm to craft favorable language; had prepared a new county transportation plan, including a recommendation to extend a tax to support the new plan; and its staff attended public meetings with civic groups to describe the expenditure plan and the importance of a sales tax extension to that plan. However, the county had not yet approved the plan or the sales tax extension ordinance. These activities did not cross the line into the type of express advocacy that Government Code section 54964 prohibits.

V. CODE ENFORCEMENT

- *People v. Mentch* 45 Cal.4th 274 (Nov. 24, 2008.)

The Compassionate Use Act is a defense to marijuana cultivation and possession for sale only if the defendant is a primary care giver. That is, the defendant must

- consistently provide primary care
- at or before assuming primary caregiver status under MMJ statutes, and
- do so independent of supplying MMJ. (283)

By consistency, the court meant an on-going relationship with regular and repeated actions over time. (Id.) That is, the activities must take place with "persistent uniformity" in a "persistent or even manner," as opposed to sporadically.

The activities must be contemporaneous with assuming primary caregiver status, not after the fact. MMJ assistance itself is irrelevant to the nature of the relationship. (284) The care must be directed at housing, health, or safety, not simply supplying MMJ. The court looked askance at a "dog-chasing-its-tail absurdity" in saying that one becomes a primary caregiver if and when one starts supplying MMJ. (285.)

"[O]ne must be a 'primary'—principal lead, central—'caregiver'—one responsible for rendering assistance in the provision of daily life necessities—for a qualifying or seriously terminally ill patient." (286.) The *Mentch* court pointed to the fact that Prop. 215 proponents deliberately made it a "narrow measure with narrow ends" because they recognized they had to walk a "delicate tightrope … designed to induce voter approval." (286, fn. 6.) Before the supreme court explained what a primary caregiver was, the court of appeal decided that assisting with MMJ, as well as sporadic accompaniment by the defendant to medical appointments was enough to support a conclusion that the defendant was a primary caregiver. The supreme court decided not to be so generous.

VI. REGULATING BUSINESSES AND PERSONAL CONDUCT

- *Metro Lights v. City of Los Angeles* 551 F.3d 898 (9th Circuit, Jan. 6, 2009.)

The city may prohibit most off-site commercial signs, while selling and allowing bus-stop commercial signs. Exceptions for bus stops do not swallow an otherwise valid rule against commercial signs because those exceptions do not impermissibly detract from an ordinance's goals of aesthetics and traffic safety. Likewise, the exceptions do not go so far as to diminish from the rationale for the prohibition against commercial signs in the first place.

Here, the ordinance's exception for bus stops did not ensure that the general prohibition would fail to achieve its end of traffic safety and aesthetics. Additionally, the bus stop exceptions related to public policies, perhaps not perfectly, but reasonably-enough to advance their goals. This does not mean the least restrictive means must be used to further ends. (906.) Likewise, under the earlier *MetroMedia v. San Diego* case, a city can value one kind of commercial speech over another.

- *Manufactured Home Communities v. County of San Luis Obispo* 167 Cal.App.4th 705 (Oct. 15, 2008.)

Mobilehome park landlords challenged a rent review board's decision invalidating a rent increase. The court of appeal ruled that this challenge was successful, since the board did not allow them to cross-examine witnesses at San Luis Obispo County's hearing.

At that hearing, several tenants testified about the unscrupulous practices of the landlord (MHS). MHS supposedly lied about whether they could increase rent, engaged in mob-like bullying tactics, and failed to give proper notice of rent increases.

When MHC's attorney asked to cross-examine the witnesses, the Board said no, as, in the words of one Board member "[The Board] always allows the people to speak without cross-examination, because it is a fearful thing."

The court of appeal had to explain its earlier decision, *Stardust v. San Buenaventura* 147 Cal.App.4th 1176 (2002), in which cross-examination was unnecessary. The court said that cross-examination is necessary when cases turn on questions of fact

(especially) when findings are based on live witness testimony. (372.) Here, the tenants had an unfair advantage.

This was not a quasi-legislative or informal public hearing, where cross-examination might actually inhibit testimony. Thus, since the decision rested on live testimony, the hearing was unfair without cross-examination. (373.)

VII. MUNICIPAL SERVICES AND UTILITIES

- *Ford Greene v. Marin County Flood Control and Water Conservation District* _Cal.Rptr. 31 ___ (March 11, 2009.)

Under Proposition 218, ballot secrecy must be maintained for elections on new or increased property-related fees. Despite the measure's allowance for election procedures similar to assessments, the language in that provision is ambiguous, for example, "similar to" may refer only to vote weighting and secret voting.

The intent behind Proposition 218 is to crush the state's power to fund its operations and to make government beg for any revenue it receives. Allowing voters to pretend they support good government but vote against it is consistent with secret voting, which further Proposition 218's goals. (In reality, the court did rely heavily on the skepticism of government's role that Proposition 218 reflects.) Even though District procedures barred voter identity absent a court order, that was not enough for the court of appeals.

Further, the failure to extend the equanimity of a secret ballot to voters meant that the election was invalid. Although typically courts validate elections "if possible," here the lack of confidentiality was such a severe injury to the voters that unfairness was presumed. (18). Thus, the appellate court set aside the election approving the fee.

Note, as of this writing, the District expected to petition for rehearing, review, or, presumably, at least depublication.