General Municipal Litigation Update

Thursday, May 5, 2011 General Session; 10:30 – 11:45 a.m.

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Notes . . .

City Attorney's Department Annual Conference
League of California Cities
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GENERAL MUNICIPAL

LITIGATION

UPDATE

For Cases Reported Between
October 1, 2010 and April 1, 2011

League of California Cities Municipal Litigation Update

List of Cases:

Attorneys General's Opinions:

General Municipal Law Litigation Update

(excluding land use, eminent domain,
personnel, civil rights and tort cases)

CHAPTER 1. NATURE OF MUNICIPAL CORPORATIONS

I. D. Constitutional Limitations on Municipal Authority
§1.59 California Constitution

Best Friends Animal Society v. Macerich Westside Pavilion Property LLC
March 2, 2011
193 Cal.App.4th 168

Privately owned shopping mall may not give preference to labor speech over other forms of protected speech.

Article I, section 2 of the California Constitution protects free speech rights in shopping malls, even though the First Amendment does not. Westside Pavilion (Westside) limits "noncommercial expressive activity" such as signature gathering for petitions and leafleting to certain areas; it is forbidden altogether on "blackout days" and by stores that are closed for the day. "Labor speech" can take place in the free-speech zones, or next to targeted businesses, and blackout days do not apply to it. Plaintiffs wished to protest in front of Barkworks Pup & Stuff; they were only allowed to do so in the designated areas far from the alleged puppy mill. They sued. The trial court rules for Westside, on the grounds that (1) *Union of Needle Trades v. Superior Court* (1997) 56 Cal.App.4th 996 permits a shopping mall to limit expressive activity to designated areas and days and (2) the National Labor Relations Act and state law compel Westside to allow preferential treatment to labor groups. The appellate court reversed, declining to follow *Union.*

Held:

1. A mall may not impose blanket bans on time or place of free speech unless there is proof that these bans are the only way to prevent substantial disruption of normal business operations.
2. Westside's rules are content-based because they distinguish between labor speech and other non-commercial expressive activity; they do not pass strict scrutiny.
3. An injunction will not be a taking of private property.

§ 1.60 Establishment Clause

Local residents and civil rights group had standing to sue for violation of the Establishment Clause, but adoption of resolution condemning church decision not to place children for adoption in same-sex households does not violate the Clause.

Catholic League for Religious and Civil Rights v. City and County of San Francisco
(October 22, 2010)
624 F.3d 1043

The head of the Roman Catholic Congregation for the Doctrine of the Faith, headquartered in the Vatican, directed that Catholic agencies in California not place children for adoption in same-sex households. The Board of Supervisors passed a non-binding resolution deploring "hateful," "insulting", and "callous" meddling by a foreign country and asking the cardinal in charge to change the policy and the local archbishop to defy it. Individual Roman Catholics and a Catholic civil rights group sued the City claiming a violation of the Establishment Clause. A badly divided panel concluded that the case should be dismissed, because some of them believed the plaintiffs did not have standing, and some believed that there was no violation of the Establishment Clause, and some believed both.

Held:

1. Catholics in San Francisco, as opposed to Protestants in Pasadena, have standing to bring the law suit: they have sufficient personal stake in the outcome. (Those dissenting on standing argued that mere existence of a resolution on the books or the City's website is not enough to create standing for anyone: "Had Defendants reproduced the resolution…in giant letters above the entrance to city hall,…or chiseled the resolution in to a block of stone eight feet tall and three feet wide in a public park…[that] would constitute [an Establishment Clause violation.]")
2. Marriage and adoption are secular issues and the resolution had a predominantly secular purpose; elected officials have a right to speak out even if this offends the religious sensibilities of some.

§ 1.62 Religious Displays

Trunk v. City of San Diego
(January 4, 2011)
629 F. 3d 1099

Latin cross visually dominating a war memorial violated the Establishment Clause as well as the California Constitution.

In 1993, the Mt. Soledad cross in La Jolla was found to be a publicly owned sectarian war memorial carrying an inherently religious message in violation of the California Constitution. The land and the cross were transferred to the federal government in 2006. Individuals and a veterans group again filed suit, asking that the cross be removed. In what it describes as the "fact-intensive evaluation" required by the Supreme Court, the court concluded that this was not a veterans memorial that happens to include a cross. Instead, this was a free-standing cross dating back decades that did not function significantly as a memorial until litigation began in the in the 1990s.

The trial court ruled for the government on summary judgment; the appellate court reversed and ruled for plaintiffs on summary judgment.

Held:

1. Congress's acquisition of the Memorial was primarily secular and therefore lawful: it sought to preserve a historically significant war memorial and a much loved landmark.
2. The history of this particular Latin cross, including its setting in historically anti-Semitic La Jolla, and expert testimony on American war memorials, establish that it projects a government endorsement of Christianity.
3. The cross's visual and physical domination of the site are such that recent additions cannot convert it into one element in a permissible secular display.

Stay tuned for further appeals.

§1.64 Free Exercise Clause

Short-term detention facility is an "institution" subject to RLUIPA restrictions on state action.

Khatib v. County of Orange
(March 15, 2011)
(9th Cir. 2011) 2011 U.S. App. Lexis 5022

The Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits states from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution." 42 USCA 1997 defines "institution" to include jails, prisons, other correctional facilities, and pretrial detention facilities. Khatib was taken into custody when she came to court to ask for an extension on her probation. She was ordered to remove her headscarf, despite her objections that this violated her religion beliefs. She sued under RLUIPA. The trial court and three-judge panel held that a courthouse detention facility was not an institution covered by RLUIPA; the appellate court *en banc* reversed on that point. The case was remanded to the trail court to determine if a detainee at the courthouse may still be required to remove her headscarf. An individual's right to a religious practice will not be allowed if it imposes unjustified burdens on other inmates or jeopardizes the effective functioning of the institution.

I. F. Intergovernmental Relations
§ 1.85 Supremacy Clause

United States v. City of Arcata
(December 17, 2010)
629 F.3d 986

Ordinance barring U.S. military from recruiting minors is void under the Supremacy Clause.

In 2008 voters in Arcata and Eureka passed Youth Protection Acts imposing civil penalties on federal employees and agents who seek to recruit minors into the armed services. The federal government brought an action for declaratory relief; the cities counterclaimed and asked for an injunction prohibiting the government from recruiting any Eureka or Arcata residents under the age of 17. The trial court ruled for the federal government, on the grounds of intergovernmental immunity, and so did the appellate court.

Held:

1. Federal government had sufficient "injury in fact" to have standing because the ordinances proscribe activity encouraged by federal law, such as the recruitment of minors and enlistment of 17 year-olds.
2. Federal request for invalidation of local ordinances under federal law was a federal question providing subject matter jurisdiction.
3. The ordinances violate the Supremacy Clause by directly regulating the federal government and by discriminating against it.
4. The Tenth Amendment does not reserve to the states the power to regulate military recruitment. Even if the ordinances simply set out the standards of treaties against the use of child soldiers to which the US is a party, they are invalid.

II. B. Incorporation

See ***Guggenheim v. City of Goleta***, below.

III. I. Officials: Powers and Duties

§1.256 City Attorney

1. ***Delia v. City of Rialto***
(November 8, 1010)
(9th Cir.2010) 621 F. 3d 1069

Private attorney retained by city for internal affairs investigation has no qualified immunity and may be subject to section 1983 liability.

Filarski was hired by City of Rialto to assist in an internal affairs investigation of a firefighter who was suspected of being off work under false pretenses. Court held that his home was searched by city officials, without a warrant, in violation of the Fourth Amendment. (Delia was ordered to go into his home and bring out rolls of insulation.) Because the violation was not clear at the time, the trial court granted summary judgment in favor of the defendants on

the basis of qualified immunity. The appellate court reversed as to Filarski. (Filarski was not present during the search; he had interviewed Delia, argued with his lawyer, and consulted with the Fire Chief. The Fire Chief ordered the search.) Following 9th Circuit precedent, the appellate court found that Filarski, as a private attorney, had no qualified immunity.

2. ***Banning Ranch Conservancy v. Superior Court of Orange County***
(March 22, 2011)
2011 Cal.App. Lexis 316

"Framework" retainer agreement between city and law firm does not create current client relationship barring firm from suing city.

In 2010 Shute, Mihaly and Weinberg filed a CEQA lawsuit against the City of Newport Beach on behalf of the Banning Ranch Conservancy. Newport moved to disqualify the firm under the Rules of Professional Conduct on the grounds that (1) the City was a former client and there was a substantial relationship between work done and the current litigation, and (2) the City was a current client under a 2005 retainer agreement. Shute had not worked for, or communicated with, the City since 2006. It had represented the City on a number of CEQA matters unrelated to Banning Ranch. The trial court found that the City was a current client and disqualified the firm. Noting that the City had hired 9 other firms for CEQA matters since 2005, the court of appeals reversed.

Held:

1. Merely knowing the City's general business (or CEQA) practices or litigation philosophy is not a basis for disqualification.
2. A "classic" retainer, where the firm is paid currently whether it does work or not, (the old Southern Pacific Railroad ploy) creates a continuing representation and disqualifies the firm from taking an adverse position. However, a "framework" retainer agreement, which sets out basic terms such as hourly rates but requires that the client ask that work be done, and that the firm confirm that it can do so, does not.
3. A peremptory writ should issue, because of the urgent need for relief. The Conservancy argued that it could almost certainly never find experienced environmental counsel at such favorable rates.

3. ***People v. White***
(January 20, 2011)
191 Cal.App.4th 1333

Failure to administer oath to record custodian at Pitchess hearing is not harmless error.

While reviewing the Defendant's appeal, the Court reviewed, at his request, the sealed transcripts of two *Pitchess* motions. It discovered that the custodians of records had never been sworn; as a result, there was no admissible evidence as to the completeness of the records production. This was not harmless error. The case was remanded for a new *Pitchess*

hearing; if that hearing establishes that there are no discoverable records, the conviction is reinstated.

Chapter 2. OPEN GOVERNMENT AND ETHICS

II. B. Rules of Procedure and Decorum
§2.15 Rules of Decorum and Their Enforcement

1. ***Norse v. City of Santa Cruz***
(December 15, 2010)
629 F.3d 966

Court must give adequate notice before *sua sponte* summary judgment; videotape evidence inadequate to establish qualified immunity on part of elected officials who ejected member of the public after silent Nazi salute.

Norse sued the city and various officials for violation of his First Amendment rights after he was ejected from a city council meeting for giving a silent Nazi salute, and again for whispering during a meeting. Evidence submitted before the trial included videotapes of the meetings. On its own motion, the trial court dismissed the case on the eve of trial, finding the defendants had qualified immunity. A three-judge panel affirmed the dismissal of a facial challenge to the city's rules proscribing disruptive conduct but reversed the as-applied challenge.

Held:

1. Because qualified immunity depends in part on the subjective intent of the public officials, summary judgment cannot be granted in their favor on videotape evidence alone.
2. All of city council meeting, not just the public comment portion, is a limited public forum in which the public has First Amendment rights.
3. Rules of decorum may only authorize ejection of a member of the public for actually disrupting or impeding a meeting.

Judges Kozinski and Reinhardt would have ruled, based on the videos (available on YouTube), that there was no disruption and therefore no immunity for council members.

§2.24 May Limit Disruptive Speech

2. ***City of San Jose v. Garbett***
(November 24, 2010)
190 Cal.App.4th 526

Injunction under Workplace Violence Safety Act forbidding violence and threats of violence against city officials and workers does not violate First Amendment.

Following a series of increasingly agitated conversations with plaintiff, which included his references to a recent assassination of city officials in Missouri and apparently quite delusional accounts of recent events, City petitioned for an injunction under the Workplace Violence Safety Act ordering plaintiff to refrain from actual violence and threats of violence against city officials. The injunction significantly limited but did not eliminate Garbett's access to City Hall. The Act (CCP section 527.8) requires a knowing and willful statement by the defendant that would place a reasonable person in fear and that serves no legitimate purpose. Plaintiff argued that his conduct did not constitute violence or a credible threat of violence and that his First Amendment rights were violated.

Held:

1. A credible threat of violence towards an employee meeting the standards of CCP section 527.8 is not protected by the First Amendment.
2. Proof of subjective intent to threaten is not necessary.
3. Expert testimony on risk assessment was admissible.

IV. D. Incompatible Activities and Offices.

1. ***Michael P. Murphy, County Counsel of San Mateo***
No. 09-43 (December 17, 2010)
___ Ops. Cal. Atty. Gen. ___
2010 WL 5175808

Offices of city clerk and school district trustee are not incompatible.

The offices of (elected) city clerk and elementary school district trustee are not incompatible. Although the city clerk is the filing officer for disclosure statements of district trustees under the Political Reform Act, the duties are essentially ministerial. The clerk has no power to audit, overrule, supervise or remove a trustee. Furthermore, while policy issues make the offices of city manager and school trustee incompatible, the clerk does not have such policy duties.

2. ***Rental Housing Owners' Association of Southern Alameda County***
No. 10-26 (December 31, 2010)
___ Ops. Cal. Atty.Gen ___
2010 WL 5557447

Quo warranto issues to determine if offices of director of sanitary district and director of recreational and park district are incompatible.

Dennis Waespi was elected in the same general election to two boards: a sanitary district and a recreational and park district. Because a significant number of recreational and park district facilities receive services from the sanitary district, the Attorney General concludes that it is likely that there will be a significant clash of duties or loyalties between the two offices. The fact that Mr. Waespi has had to recuse himself is evidence of that. Therefore, relators are granted a writ of *quo warranto* so that they can sue in superior court and find out if the offices really are incompatible under Government Code section1099.

3. ***Hon. Allen Lowenthal***
No. 10-903 (November 30, 2010)
___ Ops. Cal. Atty. Gen.___

The office of member of the High-Speed Rail Authority is incompatible with the following offices: mayor of Anaheim, director of Orange County Transit Authority, member of Los Angeles Metropolitan Transportation Authority member, and member of the Southern California Regional Rail Authority.

Government Code section 1099, prohibiting an individual from holding incompatible public offices, applies to the High-Speed Rail Authority. In each case, there is a potential clash of duties, arising from non-trivial conflicts. Examples cited include competition for scare state and federal funding, negotiations over route planning and rights of ways, and the terms for sharing facilities. The ability to avoid conflict by stepping down from a decision does not solve the problem.

V. J. Nondisclosure
§2.251(l) Criminal Investigation Records Exempted

Office of the Inspector General v. Superior Court (The Sacramento Bee)
(October 26, 2010)
189 Cal.App4th 695

OIG investigation of flawed parole supervision carried concrete and definite prospect of enforcement proceedings; documents exempt from disclosure.

Government Code section 6254 (f) exempts from disclosure under the California Public Records Act:

> Records of complaints to, or investigation conducted by, or records of intelligence information or security procedures of … any state or local police agency, or any investigatory or security files compiled by any other state or local government agency for correctional, law enforcement, or licensing purposes.

Under *Williams v. Superior Court* (1993) 5 Cal.4th 337, the exemption only applies if there is a "concrete and definite prospect of enforcement proceedings." Following the discovery that a supervised parolee had concealed the kidnapping of a young girl for ten years, the Office of the Inspector General issued a public report highly critical of the California Department of Correction and Rehabilitation. The press sought copies of the supporting documents and the trial court ordered the OIG and the CDCR to prepare a privilege list of any documents they proposed to withhold for *in camera* examination. The appellate court issued a peremptory writ of mandate ordering the court to set aside the order on the grounds that the documents were exempt under *Williams.* Disclosure statutes peculiar to the OIG did not limit the section 6254(f) exemption.

CHAPTER 3. ELECTIONS

VI. C. Limitations on Initiatives and Referenda
2. Judicial Limitations on Initiatives and Referenda
§3.106 Only Apply to Legislative Acts

Sacks v. City of Oakland
(January 5, 2011)
190 Cal. App. 4th 1090

Revenue initiative for police services limited to legislative acts; City could make administrative decisions on implementation

Oakland voters passed Measure Y to fund police services. One of the goals was to "hire and maintain" at least 65 officers assigned to community policing. The tax was not to be collected if the appropriation for the police department was less than that needed to maintain the 2003-2004 staffing level of 739 officers. The department assigned veteran officers to community policing, not rookies. Therefore, Measure Y funds were used to recruit and train new officers to backfill the positions of the senior officers assigned to community policing. Despite hiring efforts, the staffing level fell initially. Plaintiff sued to enjoin further collection of the Measure Y taxes and for refund of previously collected taxes. She argued that Measure Y money could only be spent on "Measure Y" officers. The City had not met the Measure Y staffing standards when the lawsuit was filed in 2008, but by 2009, there were 65 officers assigned to community beats, and 768 sworn officers, but not 804.) The Plaintiff prevailed in part at trial, but not on appeal. The appellate court found that Measure Y did not impose a ministerial duty to use its funds in a particular fashion to accomplish its objectives. Measure Y was necessarily limited to legislative acts, not administrative ones.

Held:

1. City could properly use Measure Y fund to recruit and train "backfill" officers.
2. Relevant date for determining compliance with Measure Y was date of trial.
3. Failure to reach staffing levels is not a violation of appropriation requirement.

CHAPTER 4. PERSONNEL - See Labor Law Update.

CHAPTER 5. FINANCE AND ECONOMIC DEVELOPMENT

II.B. Taxes
§515 Taxes

Chiatello v. City and County of San Francisco
(October 21, 2010)
189 Cal.App.4th 472

Person not liable for tax has no standing to challenge it under a "taxpayer's" suit

Proposition Q applied the San Francisco Payroll Tax to the income paid in non-W2 form by pass-through entities such as partnerships, trusts, and S corporations. Plaintiff brought a "taxpaye'rs" suit to prevent governmental waste under Code of Civil Procedure section 526a; he argued that the tax was invalid. Plaintiff was not liable for the tax; he had no pass-through income. The trial court dismissed the action citing *Daar v. Alvord* (1980) 101 Cal.App.3d 480, which held that the Constitutional prohibition of any legal action to enjoin the collection of a state tax could not be avoided by filing a 526a action. A person wishing to challenge a tax must pay it and then ask for a refund.

The appellate court agreed, but on different grounds. *Daar* rests in part on a state statute expressly prohibiting interference with the collection of real property taxes. There is no such prohibition for local taxes and the Court treated the issue as a case of first impression. A common law prohibition on actions to enjoin tax collection was already in place when 526a was enacted. The legislature could be assumed to expect it to remain in place.

Held: Pay first, litigate second is still the rule and cannot be avoided with an action to prevent waste.

The Court did not consider the City's argument that Chiatello was seeking to avoid the statute of limitations on challenges to ballot measures.

2. ***ZC Real Estate Tax Solutions Ltd. V. Ford***
(December 29, 2010
191 Cal.App.4th 378

County tax collector properly assessed 10% fine when service bureau accidentally sent Stanislaus County property taxes to San Francisco.

ZC Real Estate contracted with real estate lenders to forward escrowed property tax impounds to counties throughout California. On December 4, 2008 it sent Stanislaus County taxes to the City and County of San Francisco, which promptly deposited the checks. It notified ZC of the error on December 12th. Stanislaus County refused to accept late payment without a 10% late penalty of $500,000. Plaintiff sued under Revenue and Taxation Code Section 4985.2 for cancellation of the penalty and lost.

Held:

1. Mailing the taxes to the wrong county is not ordinary or reasonable care when the entity transmitting the taxes is a professional office providing tax payment services.
2. San Francisco's delay in identifying the problem, while beyond Plaintiff's control, was not the cause of the late payment. *ZC* should have had a verification system of its own in place.

II. E. Charges, Rates, and Fees
§5.158 Charges, Rates, and Fees

California Taxpayer's Association v. Franchise Tax Board
(December 13, 2010)
190 Cal.App.4th 1139

Statute imposing penalty for understating corporate tax liability is not subject to 2/3 requirement for adoption of new tax ; it is not a fee that exceeds the cost of providing a service.

Revenue and Taxation Code section 19138 imposes a 20% penalty for corporations that understate their tax liability by more than $1,000,000 in any tax year. It was adopted in 2008. It is retroactive to 2003, but taxpayers may avoid the penalty for earlier years by voluntarily correcting their returns and paying the taxes due. Plaintiff CTA sued on the grounds that the penalty was in fact a new tax. CTA reasoned that under the various Article XIIIs of the California Constitution, local governments cannot adopt special taxes themselves; there is an exception for fees that do not exceed the reasonable cost of providing a service, but the burden of proof is on the local government. Furthermore, generally an imposition is a "tax" if its purpose is to raise revenue and not to regulate. The court declined to follow this analysis, using instead what it described as a traditional analysis: a statute is presumed constitutional and the burden is on the challenger to show otherwise. While a penalty raises revenues when it is collected, its purpose is to prevent violations of law from

occurring in the first place. A penalty is only imposed on those who break the law; taxes are paid by those who act lawfully. Further, Article XIII A requirement of a 2/3 vote in the legislature for new taxes applies to changes resulting from increased rates or changes in the method of computation, not the imposition of penalty. And finally, as to the objection that there is no "good faith" defense to imposition of the penalty, "perhaps this is explained by the substantial tax understatement threshold specified in section 19128: $1,000,000."

CHAPTER 6. MUNICIPAL SERVICES AND UTILITIES

CHAPTER 7. PUBLIC CONTRACTING

I. G. Prevailing Wages

§7.89 Requirement to Pay Prevailing Wages

1. ***Monterey/Santa Cruz County Building and Construction Trades Council v. Cypress Marina Heights LP***
(January 10, 2010)
191 Cal.App.4th 1500

Redevelopment agency covenant to pay prevailing wages on former military base land was binding on developer; attorneys' fees awarded to labor council that enforced when public agencies would not.

Cypress Marina Heights LP (CMH) bought land from the City of Marina's redevelopment agency. The agency had previously acquired the land from the city, which had in turn acquired it from the Ford Ord Reuse Authority (FORA.) Deed covenants between FORA and the City required compliance with a Master Resolution, which in turn required prevailing wages for all development on the land. CMH, purchased the land at market value for construction of 1,050 housing units. It received no public subsidies. The year after the transfer, FORA "clarified" that the prevailing wage requirement only applied to "first generation construction." CMH, however, claimed that it was not bound by the covenants at all. The labor council sued the redevelopment agency and its transferees for violation of the labor code, unfair business practices, and an injunction to enforce the prevailing wage covenants. The trial court's summary judgment was upheld on appeal.

Held:

1. The plain meaning of the deed covenants was that successor purchasers are bound by the prevailing wage requirements, independent of whether the work would be subject to Labor Code requirements for prevailing wage on public projects.
2. Obligation of the redevelopment agency to pay "or cause to be paid" prevailing wages for projects on the property meant that it must require its transferees to pay prevailing wages.
3. No "downstream" agreement can modify the Master Resolution that required prevailing wages, and the redevelopment agency cannot bargain away the prevailing wage requirement.

4. Extrinsic evidence that the redevelopment agency's lawyer thought the prevailing wage requirement could not be imposed on transferees was irrelevant.
5. A prevailing wage deed covenant qualifies under Civil Code Section 1468 as a covenant benefiting the grantor's land and can run with the land when properly documented.
6. Providing well-paying jobs for local contractors, "instead of cheaper labor imported from elsewhere," advanced FORA's purpose of revitalizing the local economy. When the public agencies would not enforce the covenant, the unions did, and they are entitled to legal fees for advancing the public interest.

Tip: This case dismissed a number of fairly compelling arguments by plaintiffs to arrive at its conclusion that the covenants are binding. It may be useful in arguing in support of other covenants commonly required by cities and their redevelopment agencies and resisted by property owners. Importantly, CMH had actual notice of the prevailing wage requirement because it was in the RFQ even though the Master Resolution was not recorded.

2. ***Azusa Land Partners v. Dept. of Industrial Relations***
(December 21, 2010; review denied March 2, 2011)
191 Cal.App.4th 1

City and developer cannot exempt required public improvements from Prevailing Wage Law by allocation of partial public funding to some and not others.

The City of Azusa approved a development agreement for a 500+ acre project on the former site of Monrovia Nursery. The required public improvements would cost about $146 million; the City agreed to form a community facilities district (CFD) and issued $71 million in bonds to cover some of the costs. California's Prevailing Wage Law generally requires that public improvements required as a condition of project approval, and paid for in whole or in part with public funds, be built by workers paid prevailing wages. Labor unions brought a proceeding before the Department of Industrial Relations, which ruled that all the required public improvements, not just the portion funded with bonds, were subject to the prevailing wage requirements of Labor Code section 1720. The appellate court affirmed the trial court's judgment for the plaintiffs.

After commenting at length of the unfortunate drafting of section 1720, and the declared public policy of the Prevailing Wage Law "enacted in response to economic conditions resulting from the Depression, when the oversupply of labor …was exploited by unscrupulous contractors to win government contracts," the court engaged in close reading of the statute and held:

1. The Mello-Roos Act does not set up a separate prevailing wage scheme for CFDs; CFDs are governed by section 1720.
2. The proceeds of CFD bonds are public funds within the meaning of section1720, not mere conduit financing.

3. Contracts between the public agency and the developer cannot be used to limit the application of section 1720 by defining some required public improvements as funded with public money and others as not.
4. Section 1720 (c)(2), which exempts certain work from prevailing wage requirements, exempts otherwise includible private improvements, not public improvements.

(See also ***Johnson v. Rancho Santiago Community College District*** (9th Cir. 2010) 623 F. 3d 1011, cert. filed Jan. 5, 2011) upholding a project labor agreement requiring that all contractors on the district's building projects make use of unions' apprenticeship programs and maximize opportunities for local residents and MOBE and WOBE. Non-union contractors challenged the agreement as pre-empted by ERISA and NLRA.

Held:Agreement is valid; district was acting as a market participant, not a regulator.)

CHAPTER 8. PUBLIC PROPERTY

I. PROPERTY ACQUISITION
§8.1 Legal Authority

Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California v. City of Los Angeles
(March 14, 2011)
(9th Cir.) U.S. App. Lexis 4983

Tribe's action against city to set aside transfer of land by the United States must be dismissed because United States cannot be joined in the action.

In 1941 the United States transferred land in the Owens Valley it held in trust for a group of Paiute-Shoshone to the City of Los Angeles. It was authorized to do so under the terms of a 1937 statute authorizing a land exchange. In 2006, the tribe brought an action to eject the City and restore the land to the tribe because of violations of the authorizing statute. The City moved to dismiss on the grounds that the United States was a required party and was not joined. The trial and appellate courts concurred: the case must be dismissed because the remedy sought can only be obtained through the government. A voiding of the transfer to the City would restore the land to the United States, not the tribe. The United States has sovereign immunity; it waived it for a limited period of time in the 1946 Indian Claims Commission Act, but the statute of limitations ran in 1951. Finally, the case cannot proceed in equity and good conscience without the United States, because it is the conduct of the federal government that is at issue.

II. PROPERTY DISPOSITION
A. Real Property
§8.95 Parkland

Citizens Planning Association v. City of Santa Barbara
(January 25, 2011)
191 Cal.App.4th 1541

Use of less than 1% of public park parcel for construction of bridge and roadway to provide access to new subdivision and better public access to beach was not "accessory" to park purposes; public vote required under city charter.

The charter of the City of Santa Barbara requires voter approval before any dedicated parks are sold, leased, transferred, "encumbered or otherwise disposed of." However, no vote is required for concessions, permits or leases "compatible with and accessory to" park purposes. The City approved a subdivision with access through a park via an elevated bridge over a creek. The City Council adopted a resolution finding that no election would be required, since the land would remain public, and the new bridge would provide safer access for existing residents and the public to the area, including a nearby beach. Advocacy groups sued; the developer defended. Both the trial and appellate courts ruled against the City.

Held:

1. No finds of fact and no evidentiary hearing supported the Council's finding that the bridge was compatible with park purposes because of better, safer, public access. Therefore, the resolution is just an interpretation of the Charter, "a task which is within the sole province of the courts."
2. The road is not an accessory use to the park/open space; it is only being proposed to provide access to a private subdivision.
3. Prior litigation between parties over EIR, which resulted in a revised EIR, did not preclude this lawsuit under doctrine of *res judicata.* The charter issue arose after the CEQA dispute.

Tip: Consider the court's implied suggestion that if the city has "called witnesses" and held an "evidentiary hearing" on the issue of improved park access, the council resolution might have had more effect. The City may have laid out the case for improved public access to recreational facilities, but the form in which it did so failed to impress the court.

V. STREETS AND EASEMENTS

Coronado Cays Homeowners Association v. City of Coronado
(March 16, 2011)
193 Cal.App.4th 602

City, not homeowners' association, was required to maintain berm supporting bulkheads that were to be maintained by HOA.

The City of Coronado sold property to a private developer for a planned community development of a "marina type." Under a special use permit, the developer installed concrete bulkheads along a new waterway to be dredged adjacent to Lot C. Lot C, in turn, was dedicated to the City for recreational purposes. The developer was to maintain the bulkheads and ancillary structures; the City was to own and maintain, the waterway. A bulkhead elsewhere in the area failed. The HOA sued for declaratory relief that the City had the duty to maintain the berm. The appellate court affirmed the trial court summary judgment in favor of the HOA.

Held:

1. Even though the berms do not need maintenance now, there is an actual controversy justifying a declaratory relief action.
2. The usual rule that the owner of an easement maintains it is superseded by specific terms of the special use permit.
3. The berm, native soil that was graded before the bulkheads were constructed, is not an ancillary structure; it isn't even a structure.

9. REGULATING BUSINESSES AND PERSONAL CONDUCT

II. REGULATING BUSINESSES AND OCCUPATIONS
B. 1. Adult Businesses
§ 9.7 Location Restrictions

Alameda Books, Inc. v. City of Los Angeles
(January 25, 2011)
(9th Cir.) 631 F.3d. 1031

Improper to grant summary judgment when question exists on success of plaintiff's effort to cast doubt on rationale for ordinance requiring dispersal of adult businesses.

In this very long running battle between the trial court (which rules for the plaintiff,) and appellate courts all the way up to the Supreme Court (which ruled for the City), this round goes to the City. The City adopted an ordinance requiring dispersal of "adult businesses," such as bookstores and "adult arcades." It was amended to forbid the operation of both an adult bookstore and an arcade in one facility. When the City moved to enforce the ordinance against plaintiffs in 1995, litigation ensued. Plaintiffs argued that splitting the arcade business would not survive on its own. The trial court accepted the testimony of two

witnesses working for plaintiffs and rejected the testimony of the city's economic expert in granting summary judgment for plaintiffs.

The appellate court reversed, finding that the trial court has misunderstood the various burden shifting standards set forth in *City of Los Angeles v. Alameda Books, Inc*. (2002) 535 U.S. 425. Plaintiffs' declarations showed "obvious bias" and cited no data; they were not a proper basis for concluding that the plaintiff had successfully cast significant doubt on the city's rationale (crime reduction and blight) in adopting the ordinance.

C. Rent Control
§ 9.48 Permissible Rent Control Regulation
§ 9.51 Impermissible Rent Control Regulation

1. ***Guggenheim v. City of Goleta***
(December 22, 2010
(9th Cir.) U.S. App. Lexis 25981

Re-adoption of mobile home park rent control ordinance made necessary by incorporation of new city provides opportunity for new facial challenge.

Ranch Mobile Estates has been subject to a county rent control ordinance since 1979. In 1997, plaintiffs purchased it. When the City of Goleta incorporated in 2002, the rent control ordinance lapsed for less than a day until the City passed the statutorily required extending county ordinances for 120 days, or until amended. The Guggenheims brought a facial challenge to the ordinance, claiming it illegally transferred property from themselves to the mobile home owners. They did not bring an "as applied" challenge. While a previous case of the appeal was pending, the U.S. Supreme Court decided *Lingle v. Chevron U.S.A., Inc (2005)* 544 U.S. 528, undermining the district court judgment in favor of plaintiffs. The parties agreed to start over in district court, where the City won summary judgment. A three-judge panel reversed, but the Court *en banc* ruled for the City.

Held:

1. Plaintiffs have standing; they owned the park when the ordinances were adopted by the City of Goleta.
2. Facial challenges to the county ordinances are time barred, but not to their re-adoption by the City.
3. The primary factor to be considered under *Lingle* is interference with investment-backed expectations, and there was none. Plaintiffs bought the park subject to rent control and any belief that incorporation would end it was speculation, not expectation. If the city had discontinued the rent control program, the people experiencing interference with their expectations would be mobile home owners.
4. The rent control ordinance furthered a legitimate government purpose, the protection of mobile home owners from the leverage of mobile home park owners.

2. ***Larson v. City and County of San Francisco***
(February 23, 2011)
192 Cal.App.4th 1263

Rent board cannot order rent reductions based on tenant harassment by landlord; landlords have no right to coerce tenants into moving.

The voters of San Francisco enacted Proposition M in 2008 "to ensure property owners do not abuse their statutory rights under the Costa-Hawkins Rental Housing Act." Prop M: added "quiet enjoyment of the premises without harassment by the landlord" to the definition of housing services, and then adopted an extensive definition of "harassment." A tenant claiming harassment could petition the Rent Board for a reduction in rent or file a civil suit. Prop M also called for an award of attorney's fees to tenants who prevailed in unlawful detainer cases. Landlords filed a petition for writ of ordinary mandate and declaratory relief, the City defended.

Held:

1. The rent board cannot order rent reductions when it determines a landlord has harassed a tenant; this violates the judicial powers clause. A decrease in housing services can be the basis of an administrative reduction in rent when the award is a quantifiable, restitutive form of damages. Rent reductions based on harassment (even when defined as housing services) are non-quantifiable, non-restitutive general damages which can only be awarded by courts.
2. Provision (to be enforced by civil courts) that no landlord may try to persuade a tenant to vacate a rental unit "through fraud, intimidation or coercion" is lawful. This is commercial speech. The regulation is content neutral, narrowly tailored to serve a significant government interest, and not impermissibly vague.
3. Provision that no landlord may try to remove a tenant with offers of cash accompanied by threats or intimidation is also lawful.
4. Provision that landlords cannot offer cash inducements to leave after the tenant has asked them to stop is unconstitutional, even if it is commercial speech. It isn't misleading, it isn't unlawful, and the ban is more extensive than necessary. (The court was particularly troubled that one request for no more offers would be in effect until the end of the tenancy.)
5. The voters of San Francisco cannot alter the attorney's fees provisions for unlawful detainer actions.

III. REGULATING PERSONAL CONDUCT
L. Speech
2. g. Charitable Street Vending or Solicitations (§ 9.152)

Hunt v. City of Los Angeles
(March 22, 2011)
(9th Cir.) U.S. app. Lexis 5721

County's restriction on selling items that have more than nominal value aside from the "inherently communicative" is not void for vagueness.

The City of Los Angeles owns Venice Beach Boardwalk, "world-famous for its free performances and public expression activities." The City adopted, and repealed, several ordinances restricting vending on the boardwalk while seeking to allow protected First Amendment speech. Vendors of shea butter and incense challenged some of the ordinances.

The 2004 ordinance incorporated the standard approved by the court in *Gaudiya Vaishnava Society v. City and County of San Francisco* (9th Cir. 1990) 952 F.2d 1059, but this was insufficient to avoid invalidation for vagueness:

> By incorporating the standard in *Gaudiya*, the City attempted to exempt fully protected speech…but simply reciting this standard fails to provide guidance regarding when a message is "inextricably intertwined" with the merchandise and what types of messages qualify as religious, philosophical, political, or ideological. That [the law] was to be enforced by a police officer having to make a split-second decision…and not a court carefully weighing all of the facts and legal precedent highlight the lack of clarity….*copying and pasting Gaudiya's legal standard and pasting into §42.15(2004) does not offer the city a per se safe harbor from a vagueness challenge.* [Emphasis added.]

The 2006 version instead allowed the sale of items (1) "created, written or composed by the vendor," (2) inherently communicative, and with (3) nominal utility apart from its communication. It cited examples of permitted items (books, paintings, photographs, sculptures and various forms of electronic media) and forbidden items with "dominant non-expressive purpose" (housewares, appliances, clothing, auto parts, oil, incense, lotions, candles, jewelry, stuffed animals.) This, said the court, is something the vendor and the police officer can understand; it is not void for vagueness. Furthermore, because the court found that plaintiffs were engaged in commercial speech, a "time, place and manner" challenge failed. Nothing about their products required their sales to be combined with noncommercial messages:

> To accept that Plaintiff's incorporation of spiritual elements into their sales pitch and products transforms their proposal of a commercial transaction into fully protected speech would recast a broad range of vendors' sales pitches as protected speech.

The City's system of requiring permits for vending was a permissible means "narrowly tailored to achieve the desired objective" as required by *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (1*980) 447 U.S. 557.*

Tip: Court's preference for the simple words and "laundry list" approach to bans, as opposed to incorporating judicial language with lots of abstract nouns may be useful. In any event, if you take that approach you can cite this case.

10. LAND USE – See Land Use and CEQA Update

11. PROTECTING THE ENVIRONMENT

California Environmental Quality Act – See Land Use and CEQA Update

IV. WATER QUALITY
C. Basic Regulatory Scheme
2. b. Requirements for Basin Plans (§ 11.129)

City of Arcadia v. State Water Resources Control Board
(December 4, 2010)
191 Cal.App.4th 156
(review denied Mar. 16, 2011)

The Los Angeles Regional Water Quality Control Board adopted a water quality control plan under the federal Clean Water Act and the state Porter-Cologne Act. Cities, as sources of storm water and urban runoff, are subject to permits issued in accordance with the plan. When the 2005 version of the plan was issued, cities challenged the permit on procedural and substantive grounds. The Attorney General and environmental advocacy groups intervened, as did the League of California Cities. The cities prevailed at trial, but not on appeal.

Held:

1. Causes of action challenging adoption of new TMDL (total maximum daily load) standards for pollutants were timely since they were brought within three years of adoption.
2. Question of whether Board complied with requirement of Water Code section13241 to consider economic factors in regulation of storm sewers was barred by collateral estoppel.
3. Water Code section 13000 is a statement of general intent and not a basis for a writ of mandate.
4. Regional Board was not require to reconsider section13241 economic factors when conducting triennial review of the plan because they only apply to establishing water quality objectives, not implementation measures.

3. b. (4) NPDES Permits
§11.140 Storm Water

Natural Resources Defense Council, Inc. v. County of Los Angeles
March 10, 2011
2011 U.S. App. Lexis 4647

Public stormwater system operators are subject to private enforcement actions for violating permit discharge standards; evidence showed district had violated standards with respect to channelized rivers.

Plaintiffs alleged that the County and its Flood Control District were discharging pollutants from storm sewers in violation of the National Pollution Discharge Elimination System (NPDES) permit. The district admitted that it conveyed pollutants but argued that it neither generated nor discharged them. Instead, it conveys "up sewer" waters from various municipalities which in turn have thousands of permitted dischargers. The trial court refused to issue a summary judgment for the plaintiffs because they had not shown that the district was responsible, under the Clean Water Act, for the discharge. After discussing the devolution of regulatory authority to local agencies, and the need to take a source-reduction approach rather than end-of-the-pipe treatments for stormwater pollution, the appellate court considered whether the evidence showed evidence of polluted water at the District's outflows.

Held:

1. Plaintiffs did not need to indentify a particular feeder storm drain in order to show District had violated permit.
2. Plaintiffs did need to show that an outflow from the District's system was so polluted that it violated the NPDES permit.
3. Measurements in the portions of the Los Angeles and San Gabriel Rivers that had been encased in concrete as part of the stormwater system establish the violation.

12. LIABILITY AND LITIGATION

Fabbrini v. City of Dunsmuir
(February 11, 2011)
(9th Cir.) 631 F.3d 1299

Attorneys' fees award for successful anti-SLAPP motion cannot include "inextricably intertwined" time spent on §1983 defense for which no fees were awardable.

City loaned money to Fabbrini with a requirement for 110% collateralization. It then sued Fabbrini for declaratory relief (that he had not posted sufficient collateral) and fraud. After the City filed a voluntary dismissal, Fabbrini filed a §1983 claim for malicious prosecution, and a state law defamation claim. The City filed a successful motion to strike the defamation claim under the anti-SLAPP statute (CCP section425.16) and was granted summary judgment on the malicious prosecution issue.

Held:

1. Summary judgment in favor of City on malicious prosecution claim was proper; Fabbrini admitted inadequate collateral so City had probably cause to bring its declaratory relief action. (The test is: would any reasonable attorney think the City's claim tenable?)
2. The fraud claim was dropped, and a dropped claim cannot form the basis of a §1983 malicious prosecution action in California, so motion to strike properly granted. (Court mentions but does not consider the un-briefed issue of whether common law should be considered as well as state law in light of *Hartman v. Moore* (2006) 547 U.S. 250.)
3. Error to award attorneys' fees for time spent on the §1983 defense even if "inextricably intertwined" with the anti-SLAPP motion. The court did not find the §1983 claim was frivolous.

Note: See the court's discussion of the sort of billing entries that will, and will not, pass muster as the basis for a fee award.

13. LIABILITY AND LITIGATION

VI. A. Municipality as Plaintiff §13.173

City of Santa Rosa v. Patel
December 21, 2010
(2010) 191 Cal.App.4th 65

City attorneys are definitely worth it: lodestar is proper method for fee awarded after successful red-light abatement action.

Trial court awarded fees under Civil Code Section 3496, but refused to use a "lodestar" hourly rate of $325. (A lodestar rate is an estimate of reasonable hours at reasonable; generally prevailing market, rate.) Instead, it limited the fee award to actual government cost for hours worked, which it determined to be $177.34 per hour. In *City of Oakland v. McCullough* (1996) 46 Cal. App.4th 1, Oakland had requested an hourly rate that included both its lawyers' salaries and an overhead factor for a drug-house abatement. The court had allowed the request, stating that there wasn't any prevailing rate for government prosecutors since they don't provide their services in a free market. The trial court in *Santa Rosa* relied on that case in denying a lodestar request. The appellate court reversed.

Held:

1. When the legislature does not want lodestar calculations used for attorneys' fees awards, it says so.
2. Lodestar fees are more efficient; they provide predictability and avoid protracted litigation about cost-plus calculations.
3. Red-light abatement attorneys' fees can be calculated on a lodestar basis, even when the work is done by in-house public lawyers.