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GENERAL MUNICIPAL LAW UPDATE

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TABLE OF AUTHORITIES

Cases

Attorney General Opinions

I. Legal Foundations of Municipal Government

American Financial Services Assoc. v. City of Oakland
(Cal. January 31, 2005)
34 Cal. 4th 1239

Oakland ordinance regulating predatory lending practices in the home mortgage market preempted by state law

In 2001 the state enacted Division 1.6 of the Financial Code (sections 4970-4979.8), which was legislation to combat predatory lending practices that typically occur in the subprime home mortgage market. Eight days before Division 1.6 was signed into law, Oakland adopted its own ordinance regulating predatory lending practices in its home mortgage market.

Oakland prevailed in both the trial court and the court of appeal. The supreme court reversed, finding that even though there was no express preemption language in the bill, the legislature intended to fully occupy the field of regulation of predatory lending practices. The state has a strong interest in uniformity of mortgage lending controls.

MHC Financing Limited Partnership Two v. City of Santee
(Cal. App. 4th Dist. February 16, 2005)
125 Cal. App. 4th 1372

City council may cure administrative error in adoption of proposed initiative ordinance and apply it retroactively

The Santee city council was presented with a notice of intent to circulate an initiative petition that proposed to amend the city's existing mobile home rent control law. The circulators later submitted a modified version of the initiative, which was circulated and signed by the citizens of Santee.

The city council erroneously enacted the text of the original initiative, not the form contained in the initiative petition that was circulated and signed by the requisite number of voters. When the error was discovered, the council passed a corrective ordinance incorporating the correct version of the initiative-proposed ordinance and making it retroactive to the effective date of the original ordinance.

The trial court held that the city council could not cure the defects in the first ordinance by enacting the second ordinance. The court of appeal reversed, concluding that the only reason the council's original ordinance was invalid was because of the inadvertent adoption of the wrong initiative text. This could be cured, the court said, simply by replacing the ordinance with the correct, unaltered version of the petition initiative that was properly put before the council and which the council was required to adopt under Elections Code section 9215.

Penrod v. County of San Bernardino
(Cal. App. 4th Dist. January 31, 2005)
126 Cal. App. 4th 185

County ordinance allowing board of supervisors to remove sheriff by four-fifths vote is facially constitutional

The San Bernardino County board of supervisors adopted an ordinance involving reprimand and removal of county officers, including the elected sheriff. Removal for cause may be accomplished by a four-fifths vote of the board. The sheriff challenged the validity of the ordinance, arguing that recall and grand jury indictment followed by conviction were the only permissible removal provisions.

Both the trial court and the court of appeal concluded the ordinance was constitutional. The California Constitution requires the county to provide for the compensation, terms and removal of the sheriff.

Opinion of Lockyer
(No. 04-207)
87 Ops. Cal. Atty. Gen. 164 (November 18, 2004)

City Council may reimburse a council member for expenses incurred in attending Governor's inauguration

The attorney general concluded that the city council may reimburse one of its members for actual and necessary expenses incurred in attending the Governor's inauguration. Government Code section 36514.5 authorizes reimbursement for actual and necessary expenses incurred in the performance of official duties. The attorney general reasoned that the council member might have the opportunity to present information to aid the passage of legislation beneficial to the city. The attorney general cautioned that a direct connection must be established between the attendance at the inauguration and the performance of official duties such as lobbying for legislation. The attorney general noted that if the council has approved the member's attendance prior to the event, verification will be fairly limited in scope. If, however, prior council approval has not been obtained, a more detailed inquiry must occur. Did the member attend in his official capacity as a council member? What official duties were performed? What benefit did the city receive?

Opinion of Lockyer
(No. 04-907)
87 Ops. Cal. Atty. Gen. 176 (December 20, 2004)

City charter requiring two-term council members to wait two years before seeking reelection does not bar term-limited council members from running for reelection prior to expiration of the two-year "cooling-off period," so long as they do not assume office prior to the expiration of two years following expiration of their previous terms

The voters of the City of Cerritos adopted a term limit measure in 1986. It provides that "any council member who has served two consecutive four-year terms shall not be eligible, for a period of two years, to seek reelection or be appointed to the Cerritos City Council." Relator alleges that council members Bowlen and Crawley have violated that city charter provision by *seeking* reelection without waiting the requisite two years after leaving office after serving two consecutive terms on the city council.

The attorney general rejected this contention after parsing the meaning of "seeking" reelection and a review of the city attorney's impartial analysis of the proposed charter revision. Moreover, the proposed action would be moot as to one council member whose allegedly offending council term has already expired and is about to become moot as to the other council member who has only a few months remaining on his challenged term. Quo warranto exists only to right existing wrongs and not to try moot questions.

Held:

Leave to sue in quo warranto denied.

II. Open Government and Ethics

Taxpayers for Livable Communities v. City of Malibu
(Cal. App. 2d Dist. February 15, 2005)
126 Cal. App. 4th 1123

Advisory committee composed of less than a quorum of council members not subject to Brown Act

The Coastal Commission ordered the City of Malibu to adopt a local coastal program. Following Malibu's failure to do so, the legislature amended the California Coastal Act of 1976 to permit the Coastal Commission to write and implement a local coastal program for Malibu. The Commission subsequently released for public comment a draft of one component of Malibu's eventual local coastal plan, a land use plan, or LUP. In the following months, two of the five members of Malibu's city council held a number of private meetings with various individuals, constituents, and city staff to "go over the city's response" to the draft LUP. The general public was not invited to these meetings.

At a regular meeting of the city council, the two council members submitted to the council as a whole their recommendations on how Malibu should respond. The council did not adopt the recommendations and instead directed that the two council members and city staff should continue to "negotiate" the LUP with the Coastal Commission. A few weeks later a writ petition was filed alleging that the public's exclusion from the two members' meetings constituted a Brown Act violation.

Held:

Although the two members were also the sole members of the city council land use and planning committee, their meetings did not violate the Brown Act because the subject under discussion was outside the jurisdiction of the committee.

Nor were the meetings violative of the Brown Act as meetings of an "other body of a local agency," since the body consisted of less than a quorum of the full council and was only advisory. (Gov't Code section 54952, subd. (b))

Harron v. Bonilla
(Cal. App. 4th Dist. January 7, 2005)
125 Cal. App. 4th 738

Comments made by water board members following meeting in which agency counsel's employment was terminated not protected by anti-SLAPP statute

In 1991 the Otay Water District hired Harron as its general counsel. In November 2000 the District's voters elected three new members to the district's board, for the term beginning January 2001. At its December 2000 meeting, the outgoing board approved an employment agreement for Harron that included a 15-month severance period.

In a January 10, 2001 special meeting of the board the newly-elected members assumed office and the board elected Bonilla, one of the new members, as president. The board adjourned to closed session to discuss personnel matters. On its return, Bonilla moved to terminate Harron's employment. Inocentes, a long time member of the board, seconded the motion, and he Bonilla and Cardenas, a majority of the board, voted to fire Harron. The board held no public discussion in open session regarding Harron's job performance or its reasons for firing him.

Following the meeting Bonilla and Inocentes spoke with a newspaper reporter. The next day the paper reported Bonilla as saying: "It's not necessarily for cause. . . . It's a matter of trust. The board just didn't trust [Harron]." Inocentes was quoted as saying "I felt [Harron] had a conflict of interest."

Harron filed a slander action. Bonilla and Inocentes brought special motions to strike under Code of Civil Procedure section 425.16, the anti-SLAPP statute. Section 425.16 provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the

plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Bonilla admitted in deposition that in his comments to the reporter he revealed matters discussed in closed session. Inocentes submitted a declaration that his comments to the reporter were based on opinions he formed on his own before entering closed session.

The trial court found that because the board considered Harron's employment in closed session, and personnel matters discussed in closed session are confidential, Bonilla's comments did not satisfy the "public issue" requirements of section 425.16. With respect to Inocentes' comments, the trial court found he had met his threshold burden

The court of appeal found that Bonilla's comments were not protected as a matter of law. Disclosure of information gained in closed session without the legislative body's authorization constitutes a violation of the Brown Act and thus not a legitimate exercise of free speech rights. The court of appeal also concluded that Inocentes' comments to the reporter were unconnected to any ongoing debate, since the employment action was a fait accompli. Thus, they were not protected speech. By opting to hold a closed session and then airing grievances against Harron after the board meeting was adjourned, the defendants denied Harron a public forum in which to defend against their claims of conflict of interest and untrustworthiness.

Kern County Employees' Retirement Assoc. v. Bellino
(Cal. App. 5th Dist. February 9, 2005)
126 Cal.App.4th 781

Staff member of county retirement association automatically forfeited his job upon election as member of the board of retirement

Bellino was a county employee whose job included calculating retirement benefits. A dispute arose as to whether he could continue his job following his election to the retirement board. A 1997 attorney general opinion had concluded there was no conflict. Because of an intervening change in the statutory definition of local agency, the board notified Bellino that he would not be permitted to assume his elected position unless a court ruled that Government Code section 53227(a), which requires an employee of a local agency to resign from employment upon election or be terminated from his job upon being sworn into office, did not apply to his situation. Bellino obtained declaratory relief from the trial court, which relied upon the attorney general opinion. The court of appeal held that Government Code section 53227(a) did in fact apply.

Moreno v. City of King
(Cal. App. 6th Dist. January 28, 2005)
127 Cal. App. 4th 17 (2005)

City's termination of finance director violated Brown Act and is therefore null and void

The City of King held a closed special meeting at which the agenda item was "Per Government Code Section 54957: Public Employee (employment contract)." During the closed meeting the city manager gave the city council a document containing details of alleged misconduct by the city's financial director, Robert Moreno. Moreno was not told his employment would be discussed and was not provided an opportunity to respond to the accusations. Nor was he permitted to have the matter discussed in open session. Moreno served at the pleasure of the city council. He was subsequently terminated by the city manager. Moreno sued for wrongful termination, alleging in part a Brown Act violation. The city council subsequently considered and rejected Moreno's claim at another meeting.

Held:

The Brown Act requires special meeting agendas to list the items to be discussed. The agenda for the council's first meeting regarding Moreno was deficient because it gave no hint that dismissal of a public employee would be discussed. The subsequent agenda item for rejection of Moreno's claim did not achieve a cure of the city's prior Brown Act violation.

Nasha LLC v. City of Los Angeles
(Cal. App. 2d Dist. December 29, 2004)
125 Cal.App.4th 470

Unacceptable probability of actual bias found where planning commissioner wrote an article opposing project and had ex parte contacts with opponent of application while matter was pending before planning commission

Developer Nasha L.L.C. proposed to build five three-story single-family homes of between five thousand and 6650 square feet on five undeveloped lots located within the area subject to the Mulholland Scenic Parkway Specific Plan. An advisory body recommended disapproval of the application on environmental grounds, among others. The city planning director then accepted a mitigated negative declaration and conditionally approved the project. The project was appealed to the planning commission.

While the matter was pending before the planning commission, commissioner Lucente authored an unsigned article in the local Studio City Residents Association newsletter, stating that the site "is an absolutely crucial habitat corridor." Lucente subsequently

introduced Mr. Hennessy, an opposing neighbor to speak against the project at a residents' association's monthly meeting.

The appeal was heard by the planning commission on June 28, 2001. At the hearing commissioner Lucente mentioned the newsletter article but did not disclose his authorship. Commissioner Lucente also stated that he had had no direct contact with the appellants, although Mr. Hennessy was one of them. Following the hearing, commissioner Lucente made a motion to grant the appeal, which was carried on a three-to-one vote (pursuant to the Los Angeles city charter, three affirmative votes were required to grant the appeal).

One week after the hearing the developer filed a request for reconsideration based upon new facts relating to commissioner Lucente's bias (the ex parte contact in introducing Hennessy at the residents' association meeting and failure to disclose his role in authoring the newsletter article). One week later Nasha reiterated its request for reconsideration. The planning commission did not reconsider its decision.
Four months later, the commission issued findings setting forth its decision to overturn the planning director's approval of the project.

Nasha brought a writ of mandate to overturn the planning commission decision. During the pendency of the mandamus proceedings, Nasha took commissioner Lucente's deposition. Lucente admitted that he authored the newspaper article, he had spoken to Hennessy before the residents' association meeting and he had introduced Hennessy at the meeting. Lucente added that he had left the room and did not listen to Hennessy's remarks.

The trial court rejected Nasha's claim of bias on the ground that Nasha either knew or had reason to know of Lucente's pre-decision activities and that Nasha had not demonstrated due diligence in discovering those actions at the administrative level and was therefore barred from introducing that information at trial.

Held:

Nasha demonstrated an unacceptable probability of actual bias on the part of Lucente. The bias issue was raised at the administrative level, when Nasha twice asked for reconsideration.

Reversed with directions to issue a writ vacating the planning commission's decision and directing the planning commission to conduct a new hearing before an impartial panel.

Opinion of Lockyer
(No. 04-502)
___ Ops. Cal. Atty. Gen. ___ (March 28, 2005)

City council member who serves on the board of directors of a nonprofit trust may participate in a city council decision to lease a parcel of land to a business owner from whom the council member has solicited contributions on behalf of the nonprofit trust

In the early 1990's the city began developing "The Rosie the Riveter Memorial" in honor of the women who worked in the city's industrial shipyards during World War II. The National Park Service became interested in the project and asked that a local nonprofit trust be organized to support and assist the NPS in developing and operating a national park within the city. The city did so. Congress then established the Rosie the Riveter/World War II Home Front National Historical Park within the city. Most of the land and buildings within the park are owned and maintained by the city.

Currently, the trust has a five-member board of directors. The directors serve without compensation. The duties of each director include participating in the annual fund-raising campaign. One council member is a director of the trust.

The California Political Reform Act prohibits government officials from participating in financial decisions in which they have a financial interest. The attorney general had no difficulty in determining that the council member had no disqualifying conflict of interest, since he was not compensated for his activities with the trust.

Nor would the proposed council action violate Government Code section 1090, which prohibits council members from "self-dealing" with respect to city contracts. Although the lease of city property would constitute a "contract" within the meaning of section 1090, here again the council member would have no financial interest in that lease.

Opinion of Lockyer
(No. 04-904)
87 Ops. Cal. Atty. Gen. 153 (November 8, 2004)

Leave to sue in quo warranto granted to test whether a person may simultaneously hold the office of water district director and school district trustee

The relator alleges that Blanca Estella Rubio is unlawfully holding the office of water district director and school district trustee, in violation of the common law rule against the simultaneous holding of two incompatible offices. The test for incompatible offices is whether the performance of the duties of either office could have a significant adverse effect on the other. Whether an actual conflict presently exists or has existed in the past is not determinative. The attorney general had previously opined that the two offices were incompatible. Defendant Rubio asserted

that granting leave to sue would not serve the overall public interest because she is entering the last year of her term on the water district board and does not intend to seek reelection. Leave to sue in quo warranto granted.

III. Elections

McKinney v. Superior Court (City of San Diego)
(Cal.App. 4th Dist., December 7, 2004)
124 Cal. App. 4th 951

Post-election challenge to invalidate San Diego mayoral runoff for impermissibly including a write-in candidate was neither a proper election challenge nor a violation of voters' constitutional rights. Any charter violation argument should have been raised prior to the election.

San Diego held a mayor runoff for the top two vote getters in the primary. About five weeks before the election the city clerk qualified a third person as a write-in candidate. The apparent winner and the write-in candidate each received about 34 percent of the votes, separated by a few votes. Following the November 2 runoff election, the petitioner sought a temporary restraining order to halt the vote count and subsequent certification of the election results. The trial court denied the TRO and dismissed the petition. The subsequent writ proceeding was filed in San Diego's Division 1 of the 4th District on November 30, 2004, and was immediately transferred to Division 3 in Santa Ana. Division 3 stayed the certification of the election results to maintain the status quo.

Held:

Petitioner had a pre-election remedy that he failed to exercise -- a writ brought pursuant to Elections Code section 13314. Post-election challenges are limited to specified grounds for election challenges pursuant to Elections Code section 16100. Any claim that including a write-in candidate on the ballot violated the city charter was untimely post-election. Any ballot defect did not rise to the level of a constitutional violation.

Save Our Sunol Inc. v. Mission Rock Co.
(Cal. App. 1st Dist. November 19, 2004)
124 Cal.App.4th 276

Initiative measures do not operate retrospectively to apply to previously-approved projects unless there is a specific intent to have them do so

Alameda County voters adopted Measure D, a land-use initiative that amended the county's general plan and added a requirement that approval of new quarries outside an urban zone be sanctioned by the voters. For years, Mission Valley Rock had been

operating a quarry in the Sunol Valley. Both the trial court and the court of appeal found that although Measure D was certainly hostile in its attitude toward quarries in general and the Sunol Valley quarry in particular, Measure D applied only prospectively. The initiative contained a specific provision limiting application of Measure D to the future approval of quarries.

IV. Personnel (Pitchess motions only)

No reported cases

V. Finance and Economic Development

City of Carson v. City of La Mirada
(Cal. March 23, 2005)
125 Cal. App. 4th 532

Corporate Express operated a facility in Carson at which it sold computer consumables. Customers who placed orders before arriving could pick those items up at the "will call" window, but the facility did not serve the general public. In response to an offer of a sales tax rebate, Corporate Express moved its facility to neighboring La Mirada. Carson sued La Mirada, seeking revenue sharing, as provided in Health and Safety Code section 33426.7 and Government Code section 53084 (collectively AB 178). The trial court held the facility was not a "big box retailer" subject to the revenue sharing provisions of AB 178.

Held:

Reversed. Although Corporate Express was not a "user friendly" operator, it did offer goods for retail sale. And since its store was far larger than the AB 178 minimum requirement of 75,000 square feet of gross buildable area and it generated approximately $1.73 million in annual sales tax, it was a big box retailer to which AB 178 applied.

City of Vacaville v. Pitamber
(Cal. App. 1st Dist., November 8, 2004)
124 Cal. App. 4th 739

Hotel ordered to comply with council subpoena to produce records for transient occupancy tax audit.

Over the years, the City of Vacaville had conducted regular TOT compliance reviews of the Best Western Heritage Inn. In 2003, in response to the city's notice of its intent to conduct another periodic audit, the hotel asserted that it was not obligated to disclose its books and records to the city. The city council subsequently authorized the mayor to

issue a subpoena pursuant to the requirements of Government Code section 37104 *et seq.* Best Western failed to comply with the subpoena and the city commenced enforcement proceedings with the superior court.

Held:

The ordinance is not unconstitutionally vague on its face, even though it lacks a scienter requirement. "[I]n the collection of taxes, the importance to the public of their collection leads the [L]egislature to impose on the taxpayer the burden of finding out the facts upon which is liability to pay depends, and meeting it at the peril of punishment. . . . [citations omitted]. Where an affirmative act is involved, imposition of liability without proof of guilty intent or knowledge is constitutionally proper." Vacaville, 124 Cal.App.4th at 744.

The court also held that holding the hotel responsible for collecting the TOT was constitutionally permissible. Due process was not offended.

The legislative subpoena was authorized by Government Code section 37104, even though it related to an administrative investigation rather than a matter pending before the city council.

Howard Jarvis Taxpayers Assoc. v. City of Fresno
(Cal. App. 5th Dist. March 23, 2005)
2005 Cal. App. LEXIS 395

Ordinary water, sewer and trash service fees are subject to the requirements of Proposition 218, whether or not they have been extended, imposed or increased since the adoption of Proposition 218

In 1957 Fresno voters adopted a charter provision governing municipally-owned utilities, to make those utilities self-sustaining. Beginning in 1967, Fresno required each municipal utility to pay a fee "in lieu" of property and other taxes normally placed upon private business. The fee paid by each utility is passed through to its customers.

In 1996, California voters adopted Proposition 218. In January 2003, Plaintiff Howard Jarvis Taxpayers Association filed a complaint for declaratory relief, seeking to enjoin Fresno's collection of its in lieu fee as preempted by Proposition 218.

Fresno argued that Proposition 218 is not applicable to fees that were not newly imposed, increased or formally extended following the adoption of Proposition 218, that the in lieu fee is not imposed as an incident of property ownership, and that the in lieu fee, as it impacts ratepayers, is not a fee at all but is instead a general tax.

Both the trial court and the court of appeal rejected all of the city's arguments. Looking to the face of Proposition 218, the courts agreed that the plain language of Proposition

218 controlled: “Beginning July 1, 1997, all fees or charges shall comply with this section.”

VI. Municipal Services and Utilities

MetroPCS Inc. v. City and County of San Francisco
(U.S.C.A. 9th March 7, 2005)
400 F.3d 715 (9th Cir. 2005)

MetroPCS is a provider of wireless telecommunications services. It applied to the City of San Francisco’s planning department for permission to install antennas on a light pole atop a commercial parking garage. After a public hearing the city’s planning commission approved the application, which was appealed to the city’s board of supervisors. The board unanimously voted to overturn the decision of the planning commission.

MetroPCS sued in federal district court on the theory that the board’s decision violated several provisions of the federal Telecommunications Act of 1996. The issues of interest here concern whether the board’s decision constituted unreasonable discrimination among providers of functionally equivalent wireless services and whether the board’s action prohibited or had the effect of prohibiting the provision of wireless services. The parties filed cross-motions for summary judgment.

The court of appeals could not resolve MetroPCS’s discrimination claim. The 9th Circuit applied the “similarly situated” standard used by most other federal courts. Under this standard the applicant alleging unreasonable discrimination must demonstrate that it has been treated differently from other providers whose facilities are similarly situated in terms of the structure, placement or cumulative impact as the facilities in question. Feeling that the factual record on the discrimination issue was equivocal, the court of appeal reversed the district court’s grant of summary judgment on this issue and remanded it for further proceedings.

The court next considered the prohibition claim. In doing so it adopted the First Circuit rule that a significant gap in service (and thus an effective prohibition of service) exist whenever a provider is prevented from filling a significant gap in its own service coverage. The district court had denied both parties’ motions for summary adjudication on this issue; the court of appeal affirmed.

VII. Public Contracting

Arnold v. California Exposition and State Fair
(Cal. App. 3d District December 29, 2004)
125 Cal. App. 4th 498

Cal Expo harness racing contract not a public services contract subject to competitive bidding

Following issuance of a request for proposals, Cal Expo, an independent entity in state government, awarded a multi-year contract to conduct harness racing at the state fairgrounds. An unsuccessful applicant sued to invalidate the agreement on the grounds that it was a public services contract and that Cal Expo had failed to conduct competitive bidding, as required by Pub. Contract Code section 10335.

The court of appeal affirmed the trial court judgment upholding the agreement. In doing so, the court noted that the agreement before it did not fit the typical profile of a contract for goods or services that a third party is obligated to provide the state and for which goods or services the state pays. Here, the contractor was using Cal Expo's facilities and *paying* Cal Expo for that use.

City of Long Beach v. Department of Industrial Relations
(Cal. December 20, 2004)
34 Cal. 4th 942

City's contribution to pre-construction costs was not a "public work" subjecting project to prevailing wage requirements.

In 1998 the City of Long Beach agreed to contribute $1.5 million to assist in the development phases of an animal shelter to be built and operated by the SPCA-LA. The city's funds, which were specifically designated for project development and preconstruction expenses, were spent on architectural design, project management, surveying fees, legal fees and insurance coverage.

Under the law in effect in 1998, "public works" was defined as "construction, alteration, demolition or repair work done under contract and paid for in whole or in part out of public funds." Labor Code section 1720, subd. (a). The term "construction" was undefined. The court found that preconstruction expenses were not included in the term "construction." Therefore the animal shelter project was not a public work and was not subject to the prevailing wage requirement of Labor Code section 1771.

City of Merced v. American Motorists Insurance Co.
(Cal. App. 5th Dist. February 17, 2005)
126 Cal. App. 4th 1316

City can enforce payment bond of failed contractor for construction of streets and other subdivision improvements after third party purchased remaining undeveloped land and completed the improvements

After the original subdivider failed in his development efforts, a third party purchased the remaining undeveloped land and proceeded to complete the project. The third party stepped in following the city's unconditional assurance that it would attempt to recover on the original developer's payment bond and that it would repay the third party regardless.

Held:

This was not an illegal assignment of the original developer's payment bond. The city continued to have the right to look to the original developer and his surety for completion of the required improvements.

Electrical Electronic Control Inc. v. Los Angeles Unified School District
(Cal. App. 2d Dist. February 4, 2005)
126 Cal. App. 4th 601

Replacement contractor's payment bond could not be applied to default of original prime contractor

Los Angeles Unified School District had a public works contract with Wareforce Inc. Wareforce failed to obtain the required payment bond for the payment of its subcontractors. LAUSD failed to act, allowed work to begin, and paid Wareforce. Wareforce was subsequently terminated and the contract was assigned to SBC DataComm. An unpaid subcontractor of Wareforce sued LAUSD for negligently allowing Wareforce to commence work without a payment bond.

LAUSD turned to SBC, asserting that SBC's bond was retroactive and covered the entire project. Both the trial court and the court of appeal rejected this argument. There was nothing in the SBC payment bond that suggested it was to have retroactive application.

Michaelis, Montanari & Johnson v. Superior Court
(Cal. App. 2d Dist. March 29, 2005)
2005 Cal.App. LEXIS 491

City must disclose proposals for lease of hanger facility before it completes negotiations with successful bidder

The City of Los Angeles Department of Airports issued a request for proposals for the lease of a hanger at Van Nuys Airport. The request stated the proposals would be public records. After the deadline for proposals passed, but before the city selected a bidder, petitioner submitted a request for a copy of the proposals. The city responded that it would send out copies of the proposals only after it had selected a bidder and concluded negotiations. Michaelis sued. The trial court denied the petition.

Held:

The proposals must be disclosed as public records. Since the proposals could not be changed after the submittal deadline had passed, the city's negotiating position could not be prejudiced.

N.V. Heathorn Inc. v. County of San Mateo
(Cal. App. 1st Dist. February 23, 2005)
126 Cal. App. 4th 1526

County's failure to obtain payment bond from defaulting contractor constituted a breach of mandatory duty sufficient that failure of payment gives subcontractor cause of action under Tort Claims Act

The prime contractor had a public works construction contract with the County of San Mateo. N.V. Heathorn contracted to provide labor for the project. The prime contractor failed to pay for the labor. Heathorn sued. The prime contractor then declared bankruptcy. Heathorn added the county as a defendant under the theory that the county's negligent failure to procure a payment bond caused it injury. The court of appeal reversed the trial court's sustaining of the county's demurrer, on the theory that the Tort Claims Act holds public entities liable for any injury to the kinds of interest protected by the courts in actions between private persons. Here the court analogized to private project mechanic's lien laws.

Reclamation District No. 684 v. State Dept. of Industrial Relations (Foundation for Fair Contracting)
(Cal. App. 3d District January 13, 2005)
125 Cal. App. 4th 1000

Levee maintenance work was a public work subject to prevailing wage laws

The reclamation district contracted to perform maintenance work on one of its levees. The purpose of the work was to maintain the levee in condition to withstand flooding. The court of appeal affirmed the trial court's judgment that the work was a public work subject to the prevailing wage requirement because it did not fall within the exception for operation of an irrigation or drainage system.

VIII. Public Property

No reported cases

IX. Regulation of Businesses and Personal Conduct

Cook v. City of Buena Park
(Cal. App. 4th Dist. January 28, 2005)
126 Cal. App. 4th 1

Ordinance requiring landlord to evict all occupants of rental unit when tenant has engaged in drug activity violates procedural due process

Landlord Cook rented an apartment to Bicksler. Bicksler's roommate, Dixon, was cited for possession of drug paraphernalia and sent to drug treatment diversion, under which his plea of guilty could not constitute a conviction for any purpose. Thereafter, the Buena Park police ordered Cook to evict Bicksler and Dixon, pursuant to a city ordinance that landlords not cause or knowingly permit illegal drug activity, gang-related crime or drug-related nuisances, nor allow any tenant to occupy the premises if the tenant is involved in any of the foregoing. Upon notice from the chief of police, the landlord is required to diligently serve a notice to quit and to prosecute eviction proceedings until the tenants have completely vacated the unit.

Cook appealed the chief of police's notice to the city manager. When that appeal was denied, Cook challenged the constitutionality of the ordinance in the superior court. The court found the ordinance violated procedural due process.

The terms of the notice required under the ordinance fail to require sufficient specificity to aid the landlord in the unlawful detainer action. Second, the landlord is required to commence the unlawful detainer within just 10 days of receiving notice

from the chief of police. The court found that was insufficient time for the landlord to proceed, especially given the inadequate notice. Finally, the ordinance was defective because it required the landlord to prevail in the unlawful detainer action.

Dream Palace v. County of Maricopa
(U.S.C.A. 9th September 27, 2004)
384 F.3d 990

Maricopa County zoning ordinance essentially prohibiting nude dancing through restrictive definition of "specific sexual activity" declared unconstitutional restraint on speech; licensing and operating requirements of adult businesses upheld in part; manager and dancer contact information submitted pursuant to application requirements enjoined from public disclosure.

Maricopa County, Arizona, adopted an ordinance requiring licensing of adult business establishments, together with their managers and employees. Dream Palace, a live adult nude dancing business, sued to invalidate the ordinance. The court invalidated those portions of the ordinance that prohibited "adult service providers," which included nude or semi-nude dancers, from performing "specific sexual activities." The court concluded that the county's prohibition of specific sexual activities, including a bar on simulated sex acts, proscribed the particular movements and gestures a dancer may make during the course of a performance and amounted to a total ban on nude and semi-nude dancing. As such, that portion of the ordinance violated the First Amendment.

The Maricopa ordinance included numerous operating and licensing requirements, including hours of operation, rules to separate performing dancers from patrons, and submission of personal contact information by managers and dancers. The court generally approved of the operating and licensing requirements and severed the valid portions of the ordinance from the invalid. The case was remanded to issue an injunction prohibiting disclosure of submitted personal contact information.

X. Land Use (covered in another paper)

XI. Protecting the Environment (covered in another paper)

XII. Code Enforcement

No reported cases