General Municipal Litigation Update

Friday, September 24, 2021

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GENERAL MUNICIPAL
LITIGATION UPDATE
FOR
THE LEAGUE OF CALIFORNIA CITIES
CONFERENCE
FALL 2021

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I. PUBLIC FINANCE

A. *City and County of San Francisco v. All Persons Interested in the Matter of Proposition G* (2021) 66 Cal.App.5th 1058 (as modified on denial of rehearing Aug. 17, 2021)

Holding: Special parcel taxes proposed by voter initiative require only majority voter approval and not two-thirds. A school district and teacher's union support for a voter initiative does not convert a voter initiative into one proposed by the local agency which requires two-thirds voter approval.

Facts/Background: A voter initiative, Proposition G, proposed to impose an annual parcel tax, the revenues from which would be transferred to the San Francisco Unified School District for certain restricted uses and, thus, constitutes a special tax. Proposition G passed with about 60 percent voter approval, and the City filed a validation action. Wayne Nowak answered, arguing the measure was invalid because it failed to garner the two-thirds voter approval required for a special tax under Propositions 13 and 218. He also argued that because the measure was "conceived and promoted by local Government officials" is not a valid citizens' initiative.

The trial court granted summary judgment in the City's favor, finding Proposition G was valid. It rejected Nowak's argument that the proponent's were not "true" proponents and determined that under *California Cannabis*, the two-thirds approval requirement for special taxes did not apply to voter initiatives. Nowak appealed.

Analysis: The Court of Appeal affirmed, finding the case indistinguishable from *In the Matter of Proposition C* decided just one month after the trial court ruled in this case. It reiterated the principle that Proposition 218 was not designed to circumscribe the people's power to impose special taxes on themselves by a simple majority. That the initiative power must be liberally construed compels such a

result lest such power be unconstitutionally hobbled.

The Court also reaffirmed that "local government" as used in article XIII C 2(b) and 2(d) does not include voters acting via their own initiative. It rejected Nowak's claim that "agency" as used in article XIII D includes the electorate acting via initiative. Now we have rulings that article XIII A, article XIII C and article XIII D do not require two-thirds voter approval for special taxes imposed via voter initiative.

The Court also rejected Nowak's argument that the special parcel tax, a flat annual tax, violated article XIII, section 1, which mandates that all property is taxable and "shall be assessed at the same percentage of fair market value." It noted the long line of cases that hold the ad valorem property tax requirement does not extend to special taxes and apples only to general ad valorem taxes. Because it does not prevent a local government from adopting a special parcel tax with voter approval, so too may voters exercise their initiative power to adopt such a tax.

Finally, the Court of Appeal rejected Nowak's argument that the Proposition G was not a voter initiative process because, he alleged, the District "undermined and improperly appropriated" it. The Court found "nothing inherently sinister about the fact that the District and the Union supported this proposition."

B. *Lil' Man in the Boat v. City and County of San Francisco* (9th Cir. 2021) 5 F.4th 952

Holding: The federal Rivers and Harbors Act ("RHA"), 33 U.S.C. § 5, which limits non-federal entities' ability to charge fees to vessels in federal navigable water ways, dis not create a private right of action.

Facts/Background: Plaintiff, a commercial charter business based in San Francisco Bay, sued to challenge landing fees charged to commercial vessels for using the South Beach Harbor. Until 2016, the fee charged was $80 per docking to load and unload passengers. In 2016, the Port of San Francisco and South Beach

Harbor increased the fee to $110 and required commercial vessels to enter into a Landing Agreement that further required payment of 7% of the user's gross revenue during the months the vessel docked at the port.

Plaintiff alleged the fees violated the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 5(b)(2), which allows imposition of "reasonable fees charged on a fair and equitable basis." Non-federal entities may not charge fees on any vessel in navigable waters subject to United States authority that do not meet those criteria. Plaintiff also claimed the fees violated the dormant Commerce Clause and the Tonnage Clause. The trial court granted defendants' motion for summary judgment. It ruled the port was exempt from the dormant Commerce Clause because it operated as a market participant subject to market pressures. It also ruled the fees did not violate the Tonnage Clause because they were charged for services provided to the vessels and not for general revenue-raising purposes. It finally ruled the RHA did not apply to the Landing Agreement. Plaintiff appealed only the ruling on the RHA claim.

Analysis: The Ninth Circuit affirmed in the defendant agencies' favor. It first examined whether the RHA authorizes a private right of action. Such rights must be created by Congress, and the parties agreed the RHA does not expressly provide such a right. The Court analyzed whether such a right was implied, focusing primarily on determining legislative intent. It first found nothing in the "text or structure" of the RHA that relects "a clear and unambiguous intent to create a private right of action." Nor did it find anything in the legislative history that suggested otherwise. It was not persuaded that if no private right of action were authorized, Plaintiff would be left with no mechanism to challenge the fees. The Court noted that a challenge under the Tonnage Clause provided just such a mechanism. But the RHA, it ruled, was not enacted to confer a benefit on private vessels. Instead, it was "for the benefit of the public at large" and no private right of action could survive.

C. *San Diegans for Open Government v. Fonseca* (2021) 64 Cal.App.5th 426 (as modified on denial of rehearing June 9, 2021), petn. for review denied Aug. 25, 2021

Holding: An association seeking taxpayer standing under §526a must establish either it, or one of its members who was a resident within the meaning of the statute, paid a tax that funded the defendant agency within one year of suing.

Facts/Background: Petitioner San Diegans for Open Government ("SDOG"), a nonprofit organization, sued a former school superintendent, Fonseca, claiming he illegally disbursed the school district's ("District") funds to settle a dispute between the District and a former employee. Petitioner alleged taxpayer standing under Code of Civil Procedure section 526a. Petitioner alleged Fonseca authorized a settlement payment of just over $113,000 to an employee who claimed he was terminated after he disclosed that Fonseca was having a personal relationship with another District employee.

Fonseca moved to bifurcate the trial to determine first if SDOG had standing. SDOG was not within the District's boundaries and not a party to the challenged settlement agreement. SDOG opposed, arguing it had associational standing if any of its members had standing to sue individually and if they paid taxes to the state, as opposed to the District. The trial court granted the motion to bifurcate and ultimately determined that SDOG lacked standing. SDOG appealed.

Analysis: The Court of Appeal affirmed. It construed section 526a to require a plaintiff to show "either it, or one of its members who was a 'resident' within the meaning of the statute, paid a tax that funded District within one year of the commencement of the action." SDOG's claim it paid taxes on food and drink at a "boot camp" at some unnamed restaurant in 2016 that was "possibly" within the District's territory did not satisfy this threshold. Similarly lacking was evidence of three members who purportedly lived within the District, but for whom no evidence was submitted that they paid any taxes within one year of the lawsuit's initiation. Finally, the Court of Appeal found equally inadequate the testimony from SDOG's PMK that he paid income, property and sales tax to the state because

he did not live, work, own property or attend school within the District.

II. GOVERNMENT CLAIMS ACT

A. *LAUSD v. Superior Court (Doe)* (2021) 64 Cal.App.5th 549, petn. for review pending, petn. filed June 30, 2021

Holding: Government Code section 818 immunizes public entities from treble damages under Code of Civil Procedure section 340.1 because such damages are exemplary and punitive.

Facts/Background: Plaintiff, a former student, alleged a Los Angeles Unified School District ("LAUSD") employee, Garcia, sexually abused her after the employee had targeted her and groomed her for such abuse. Based on Garcia's threats, the student did not immediately report the abuse, but after about sixteen months she told her parents, who immediately reported it to LAUSD. Plaintiff alleged that LAUSD had known of prior abuse of other students by Garcia and had covered it up by transferring Garcia to a new school, instead of terminating him.

Plaintiff sued LAUSD for negligent hiring, supervision and retention of an unfit employee, among other things, and sought treble damages under Code of Civil Procedure section 340.1, which authorizes such damages in certain cases involving childhood sexual abuse. LAUSD moved to strike the treble damages claim under Government Code section 818 and the trial court denied the motion. LAUSD filed a writ.

Analysis: The Court of Appeal granted the writ in LAUSD's favor. It found Government Code section 818, which immunizes a public agency from punitive damages and other damages "imposed primarily for the sake of example and by way of punishing the defendant." The Court found that treble damages are not compensatory in nature. Rather, they are primarily punitive because they allow an award of "up to" three times a plaintiff's actual damages. The "actual damages," therefore, are compensatory, but the treble damages are not. They serve to punish

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a defendant and to deter future conduct. Thus, section 818 applied to immunize LAUSD.

The Court of Appeal rejected plaintiff's argument that the treble damages authorized in CCP section 340.1 were not within section 818's ambit because they served a non-punitive, public policy purpose to encourage those who have suffered childhood sexual abuse to come forward so perpetrators may be stopped from engaging in future abuse. The Court recognized that while such a policy may be laudable, the state had not waived sovereign immunity for damages imposed primarily to punish a defendant for a tort. It directed the trial court to strike the treble damages claim.

III. ELECTIONS

A. *Exline v. Gillmor* (2021) 67 Cal.App.5th 129

Holding: The political work exception to the anti-SLAPP exemption for lawsuits filed in the public interest applies to the completion of the Statement of Economic Interests California Form 700 by a public official.

Facts/Background: Plaintiff Exline sued Gillmor claiming that during Gillmor's terms as a city council member and mayor of Santa Clara, she failed to disclose on her Form 700 her business interest in an entity known as Public Property Advisors. Gillmor filed an anti-SLAPP motion. Exline argued his suit fell within the public interest exemption under Code of Civil Procedure section 425.17, subdivision (b) and was thus not subject to such a motion. Gillmor countered that the political work exception to the public interest exemption applied and, as a result, she was entitled to pursue her anti-SLAPP motion. The trial court agreed, found Exline failed to establish a probability of success and granted Gillmor's motion. Exline appealed.

Analysis: The Court of Appeal affirmed in Gillmor's favor, finding that an action based on a Form 700 filing is an action based on a political work within the

meaning of section 425.17, subdivision (d)(2)'s exception to the public interest exemption. "There is no question Form 700 is political in nature." Further, Form 700 filings are political "work" because Gillmor "filled out these complex, comprehensive, and public forms through her effort as required by law." Accordingly, they fell within the definition of "work" as construed in *Major v. Siena* (2005) 134 Cal.App.4th 1485, which includes material produced by "effort, exertion, or exercise of skill." Construing the public interest exemption narrowly in accordance with the legislative intent, the political work exception defeated the exemption and Exline's claim was subject to a special motion to strike. Notably, Exline did not appeal the trial court's ruling that Exline failed to establish a probability of prevailing, the Court of Appeal did not review that portion of the trial court's ruling.

B. *Howard Jarvis Taxpayers Association et al v. Weber* (2021) 67 Cal.App.5th 488

Holding: The constitution does not guarantee the right to a speedy and immediate recall election. Amendments to state regulations regarding verification of state recall petitions that increased the time for processing of such petitions by up to 90 days were reasonable and did not impinge on a voter's ability to participate in a recall election. The Legislature may amend a budget bill by majority vote.

Facts/Background: After state senator Josh Newman voted to approve SB 1 in 2017, which increased gas and auto taxes, petitioners began a recall campaign against him. On May 8, 2017, the state approved the recall petition, which allowed the proponents to circulate it for signature. On June 15, 2017, the Legislature enacted SB 96, which created a 30-day period after the initial determination that a recall petition had sufficient signatures during which a signer could request withdrawal of their signature. SB 96 also required a full count of the signatures, eliminating the option of using a random sample. It also required the Department of Finance to determine the cost of the election and to include such cost in the official ballot materials. Finally, it appropriated funds to offset the local costs of state recalls and made it procedures applicable to recalls then pending.

Petitioners filed an original appellate writ petition claiming that SB 96 violated their right to a speedy election and violated the single subject rule. The Legislature then adopted SB 113 and SB 117. SB 117 appropriated funds to offset the recall costs was also intended to remedy any alleged single-subjection violations in SB 96. SB 117 repealed SB 96 but enacted similar provisions and reiterated its intent that the bill apply to any recalls pending at any stage of the act's enactment.

Petitioners filed a second original appellate writ petition to challenge SB 117 both facially and as applied. They claimed that the constitutional right to a recall necessarily included the right to a speedy and immediate recall election where the proponents have otherwise complied with all requirements. SB 117, they claimed, interfered with such vested right.

Petitioners also challenged whether the Legislature could amend a budget bill by a simple majority voter. They contended that only the budget bill itself could be approved by majority vote and all other general fund appropriations require a two-thirds vote of both houses.

Analysis: The Court of Appeal denied both petitions. First, the Court determined that the constitution did not guarantee a right to a "speedy and immediate recall election." Rather, it sets forth the timeline by which sufficient signatures must be gathered and gives two options for recall election dates depending on when the next regularly scheduled election is set. Second, it found that any burden on the right to recall imposed by SB 117 was "minor and justified by the state's regulatory interests." Rules regarding signature gathering and verification and withdrawal of signatures are "reasonable, nondiscriminatory restrictions." The total additional time SB 117 added to the recall process amounted to 90 business days, and the Court found the state's interest in the integrity of the election process justified the "modest restrictions." And the restrictions did not fall on recall proponents but instead fall on local officials, who had to verify all signatures, allow time for withdrawing signatures and who had to assist in preparing the estimated costs of the election. The measures briefly delay an election but deprive no one of their ability to participate in such election.

The Court also rejected Petitioners claim that the Legislature could not amend the budget bill by a majority vote. The Court construed Proposition 25, adopted in 2010 to allow the Legislature to approve the budget bill and "other bills providing for appropriations related to the budget bill" by a simple majority. The Court followed *City of Cerritos v. State of California* (2015) 239 Cal.App.4th 1020 to hold Proposition 25 applies to budget trailer bills that appropriate funds. Because SB 117 appropriated funds to offset the recall election costs, it was such a trailer bill and approved by a simple majority and immediately effective.

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

A. *Austin v. City of Burbank* (2021) 67 Cal.App.5th 654

Holding: Review of a trial court order directing agency disclosure or supporting the agency's refusal to disclose under the Public Records Act is via an extraordinary writ and not by a regular appeal under Code of Civil Procedure section 904.1. When a petitioner waives notice of the trial court order on the PRA petition, the 20-day deadline to file the appellate writ petition runs from the date of the order.

Facts/Background: Ronald Austin, a serial PRA petitioner, sued the City seeking to compel production of documents the City had declined to disclose in response to Austin's PRA request. The trial court issued a tentative ruling to deny the petition and later entered a minute order adopting the tentative ruling as its final ruling. Austin waived notice of the July 14, 2020 ruling. The trial court signed a judgment on July 24, 2020 and notice of entry was provided the same day. Austin filed a notice of appeal on August 4, 2020. The City moved to dismiss the appeal.

Analysis: The Court of Appeal dismissed the appeal. It first ruled that Austin failed to file an extraordinary writ to challenge the trial court ruling, which is the procedurally proper method. The Court noted that Austin presented no extraordinary circumstances to justify the court treating his appeal as an

extraordinary writ. In particular, the Court took judicial notice of the thirty similar PRA suits Austin had filed within eleven months, which the Court found demonstrated Austin's familiarity with PRA litigation and its requirements.

Next, the Court agreed with the City that even if the notice of appeal was treated as an extraordinary writ, it was nevertheless untimely. Because Austin waived notice of the ruling, the 20-day period to file the writ began to run on July 14, 2020 and the last day to file was August 3, 2020. Austin's appeal was one day late.

B. *Voice of San Diego v. Superior Court (County of San Diego)* (2021) 66 Cal.App.5th 669 (as modified July 27, 2021)

Holding: The PRA catchall exemption applied to county records regarding the exact address of COVID-19 outbreaks given the County's uncontradicted evidence that disclosure of the precise address of outbreaks would chill the public's willingness to report infections and cooperate in contact tracing investigations. The County's interest in conducting contact tracing in the midst of a deadly pandemic outweighed the public interest in disclosure of the addresses.

Facts/Background: The County of San Diego maintains records showing the location of COVID-19 breakouts in the County, including the dates of the outbreak, the city, number of people and the community setting (e.g., skilled nursing facility, etc.) When the data is released to the public, the County redacts the street address where the outbreak occurred, but will disclose the type of location, such as a restaurant, gym, residence, skilled nursing facility, etc. Media outlets submitted PRA requests to obtain such data, including the precise addresses where outbreaks occurred.

The County declined to provide the addresses of outbreaks. Among other justifications, it noted that disclosure of such addresses would discourage businesses from coming forward to report outbreaks, which in turn would hamper the County's ability to trace infections and combat further spread. It further noted that data regarding communicable disease investigations must be "de-identified to prevent it from being linked to a particular individual." Given the significant

government interest in the "candid exchange of information between those linked to these outbreak locations and the Public Health Officer's disease investigators" it redacted the address information from the publicly disclosed data set.

Three media outlets sued to compel the County to disclose the exact location of each outbreak. The trial court determined the County was justified in redacting the addresses of outbreaks for two reasons. First, section 6254, subdivision (k) of the PRA permitted redaction because the information was confidential under California Code of Regulations, title 17, section 2502, subdivision (f). Second, the catchall exemption also applied as the public interest in nondisclosure outweighed the public interest in disclosure. The media appealed.

Analysis: The Court of Appeal affirmed in favor of the County. It held the County met its burden to show the catchall exemption in section 6255, subdivision (a) applied. To support its position, the County submitted a declaration from Dr. Wilma Wooten, the County's longtime Public Health Officer. The declaration set forth her opinion that disclosing the addresses would impede the County's contact tracing and outbreak investigation efforts. Businesses who feared such information would be made public would be less likely to be forthcoming with "the very vital details that identify and mitigate outbreaks." The media did not submit evidence to contradict Dr. Wooten's expert opinion, but instead argued the court could disregard it as merely conjecture. The trial court did not find it too speculative, and the Court of Appeal agreed. The dangers to the public from the spread of COVID-19 are "real and concrete." That the County of Los Angeles released addresses of outbreaks did not compel a different conclusion. The Court of Appeal agreed that the public interest in nondisclosure of the addresses was significant.

The Court of Appeal next determined the public interest in disclosure could not overcome the public interest in nondisclosure. The Court concluded the record did not demonstrate that the public could protect itself from COVID-19 by knowing, and avoiding, addresses where outbreaks occurred. Given that the virus is "everywhere" knowing the address of outbreaks does not meaningfully enhance the public's ability to avoid infection. Similarly, the Court found that disclosure of addresses would not assist the public to evaluate the government's response to the

pandemic. The public can assess such response without knowing the precise addresses of outbreaks, especially so given the County's disclosure of the community sector in which an outbreak occurred (restaurant/bar, gym, residence, etc.). Having balanced the competing interests, the Court concluded the catchall exemption applied and redaction of addresses was justified.

V. MISCELLANEOUS

A. *Alameda County Waste Management Authority v. Waste Connections US, Inc.* (August 18, 2021, A158323)

Holding: Local governments need not make a factual showing or determination to establish necessity before inspecting landfill records "as necessary to enforce the collection of local fees" under the Integrated Waste Management Act.

Facts/Background: The Alameda County Waste Management Authority ("Authority") manages solid waste services regionally in Alameda County. Under the Integrated Waste Management Act, the Authority sought records from three landfills located outside the County that receive waste originating in Alameda County to enforce the collection of its local fees. The Authority imposed tonnage-based fees on waste generated in Alameda County regardless of where that waste was disposed. The landfills refused to permit the Authority to examine the records, claiming the Authority had not demonstrated the record inspection was "necessary" to enforce its fee ordinance. The Authority sued to enforce the Act's provision entitling it to inspect the records.

The trial court agreed with the Authority that it did not have to prove "necessity" before the landfill had to comply with the inspection demand and granted the Authority's motion for judgment on the pleadings. The landfill operator appealed.

Analysis: The Court of Appeal affirmed in the Authority's favor. It found that Public Resources Code section 41821.5, subdivision (g)(2) did not impose a "burden of proof on local government entities who seek to enforce their inspection rights to prove inspection is 'necessary' to enforce collection of local fees." It found no legislative intent that the phrase "as necessary" imposed a precondition

for the local agency to satisfy before its right to inspect the records matured. It disagreed with the landfill operator's arguments that "as necessary" meant "essential" or that "as necessary" invites a factual defense to an inspection demand. Such an interpretation, the Court held, undermines the Act's purpose, which is to maximize diverting waste from landfills. "The Legislature, aware of waste handlers' ability to defraud local governments of fees, determined the specified records would be useful" to enforce their fee ordinances.

B. *City of Calexico v. Bergeson* (2021) 64 Cal.App.5th 180

Holding: Order granting or denying petition for writ of mandate that disposes of all claims is an immediately appealable judgment. Any later judgment issued by the trial court is irrelevant for calculating the deadline to appeal if the order on the writ was itself a final judgment.

Facts/Background: A terminated police officer filed a writ of mandate to challenge a hearing officer's decision to uphold the officer's termination. The City filed a separate writ to challenge the hearing officer's award of back pay because the city allegedly failed to provide the required predisciplinary notice. The trial court consolidated the petitions and denied both by a "Ruling and Order on Writ of Mandate." The clerk mailed a filed endorsed copy of the ruling that same day, September 24, 2019, to both parties. The officer filed his notice of appeal on November 4, 2019, within 60 days of the clerk's service of the ruling. On November 21, 2019, the trial court entered a judgment consistent with the earlier ruling, and on November 22, 2019 the City served the officer with notice of entry of the November 21, 2019 judgment. The clerk served the City with notice of the officer's appeal on December 3, 2019 and the City cross-appealed on January 21, 2020.

Analysis: The Court of Appeal ruled that the City's cross-appeal was untimely and dismissed it. It reiterated the long-standing rule that an order granting or denying a petition for writ of mandate that disposes of all claims is an immediately appealable final judgment. "The mere fact that the trial court interred a subsequent judgment after issuing the September 24 ruling is irrelevant, because the

September 24 ruling was itself a final judgment." The City's January 21, 2020 appeal was neither a timely appeal of the September 24, 2019 order, nor was it a timely cross-appeal. The deadline to cross-appeal is twenty days after the clerk serves notice of the first appeal. That deadline passed on December 23, 2019.

C. *Daly v. San Bernardino County Board of Supervisors* (2021) 11 Cal.5th 1030

Holding: An injunction ordering a local legislative body to rescind an appointment and to seat a replacement is a mandatory injunction which is stayed until the appellate court has determined whether the trial court was correct.

Facts/Background: The County of San Bernardino's charter establishes a five-member board of supervisors elected by district. If a vacancy occurs, the Board has thirty days to appoint a replacement. If the Board does not do so, the charter provides that the Governor is to appoint the replacement. A supervisor vacated his seat when he was elected to the state Assembly. From a pool of 48 applicants, the supervisors each emailed their nominees to the Board's clerk. Those who received at least two nominations would be further considered. Thirteen received at least two nominations and were interviewed at a public meeting. Following that interview, the Board narrowed the field to five to interview a second time. Before that second interview, a member of the public claimed the Board's e-mail nomination process violated the Brown Act.

In response to the Brown Act claim, the Board rescinded its actions to select a replacement supervisor. It created an alternate process whereby each supervisor would publicly submit three names and each candidate who received at least one vote would be interviewed. Using that process, six candidates were selected to be interviewed, after which the Board appointed one, Dawn Rowe.

Petitioner sued arguing that the alleged Brown Act violation had not been cured and the appointment of Rowe was void. He sought a writ commanding the Board to rescind the appointment and, because no valid appointment had been made within thirty days, the Governor should appoint the replacement. The trial court

granted the writ, finding the Board's cure of the alleged Brown Act claims was "pro forma at best." It ruled Rowe's appointment had to be rescinded and the Governor was to appoint replacement.

Rowe and the Board appealed. The superior court granted a temporary stay and Rowe and the Board filed a petition for a writ of supersedeas, which after briefing the Court of Appeal denied. The Court of Appeal also declined to issue a stay pending the appeal, ruling instead that the writ was prohibitory. The Board and Rowe petitioned the Supreme Court for review.

Analysis: The Supreme Court granted review and reversed. It found the writ was mandatory, not prohibitory, and the rule for an automatic stay pending resolution of the appeal was triggered. It reaffirmed the rationale behind the rule—a mandatory injunction commands a change in the parties' positions and the defendant must "detrimentally alter its position." The defendant is entitled to know whether the mandatory order is correct before it does so.

Here, the Court concluded the order to the Board to rescind the appointment of Rowe "requires the Board to perform affirmative acts that, once performed, will change the relative position of the parties by ousting Rowe from her position so that a replacement can be seated." It is thus mandatory and automatically stayed on appeal. The Court noted that had Petitioner challenged Rowe's appointment via a quo warranto proceeding and prevailed with an order excluding Rowe from office, that judgment would be immediately enforceable and not subject to stay on appeal. (Code of Civ. Proc. § 917.8, subd. (a).)

In Section III of its opinion, the Supreme Court suggested the automatic stay rule "may be ripe for reexamination." It noted that the mandatory/prohibitory distinction can by difficult to apply as it is not always readily apparent into which category a particular order falls. Also, the Court noted that the strict rule does not consider the equitable considerations related to a stay pending appeal. The opinion contrasts the federal approach (a four-part analysis) with California's, and also surveys other states' approaches that permit equitable consideration to guide whether a stay is appropriate. Recognizing that the question was beyond the scope

of the case the opinion closes by noting "the Legislature may always, if it chooses, reexamine California's statutory law governing stays pending appeal and decide whether the law would be better served by an approach that permits courts to take account of a wider array of equitable considerations than does present law."

D. *Newsom v. Superior Court (Gallagher)* (2021) 63 Cal.App.5th 1099, review denied Aug. 11, 2021

Holding: The Emergency Services Act is not an unconstitutional delegation of power.

Facts/Background: Governor Newsom issued Executive Order No. N-67-20 in June 2020, which affirmed an earlier executive order that required all counties to provide all voters vote-by-mail ballots for the November 2020 election and provided for the use of the Secretary of State's vote-by-mail ballot tracking system. Petitioner sought a writ of mandate declaring the executive order null and void as "an unconstitutional exercise of legislative powers reserved only the Legislature."

Also in June 2020, the Governor signed AB 860, an urgency statute, that mandated actions similar to those ordered in Executive Order no. N-67-20. In August 2020, the Legislature passed and the Governor signed SB 423, another urgency statute, which took effect immediately and mandated certain modifications for in-person voting for the November 2020 election. Though these bills superseded the executive order at issue and though the November 2020 election was completed by the time of trial, the trial court ruled the dispute was not moot because the Governor maintained his authority under the Emergency Services Act to amend existing law. Because of the pandemic, judicial resolution was necessary. The trial court ultimately held that the Act did not authorize the Governor to amend statutory law. The Governor appealed.

Analysis: The Court of Appeal reversed and rejected Petitioner's argument that the Emergency Services Act did not permit the Governor to issue orders that amended or made new statutory law. It agreed with the trial court that Government Code sections 8567 and 8571 do not provide for such power. But it found such

power existed in Government Code section 8627.

The Court of Appeal further determined that the grant of such power to the Governor did not violate the constitutional separation of powers. It determined the Emergency Services Act gave sufficient guidelines to coordinate an emergency response that it did not run afoul of the separation of powers doctrine. Of note is the requirement that the Governor terminate the state of emergency "at the earliest possible date that conditions warrant" and also enables the Legislature to terminate the emergency at any time. Thus, it is not a statute of indefinite duration and is not unconstitutional.

E. *Perry v. City of San Diego* (2021) 65 Cal.App.5th 172, petn. for review denied Aug. 18, 2021

Holding: The City acted within its authority to set standards for residences to obtain the free residential solid waste services the city provided based on a voter approved ordinance that authorized the city to issue regulations regarding disposal of solid waste. The regulations at issue were rational and not arbitrary or capricious.

Facts/Background: Voters in the City of San Diego approved an ordinance in 1919 that requires the City to collect residential solid waste refuse within the City limits weekly at no charge. Voters amended the original ordinance once in 1981 and again in 1986. The 1986 amendment provided that the City shall regulate the collection, transportation and disposal of refuse provided certain criteria were met. It also provided that the City Manager may "duly promulgate such rules and regulations as are appropriate to provide for the collection, transportation and disposal of refuse." The City adopted a Waste Management Regulation ("WMR") that established standards for providing the service and eligibility requirements. Among the requirements was that the residence have reasonable access for collection vehicles on a public street or alley, and that the residence have enough space for placement and separation of the refuse containers.

Petitioners, a group of twelve condominium owners, applied for the free City

refuse service. The City denied the request because the property did not have the required setout space as required by the WMR. Per the WMR, the property needed 120 feet of setout space, but had only 72.5 feet. Also, the site did not have reasonable access as required by the WMR because the owners would have to move their containers across a private driveway or walkway to the public alley. The owners sued and challenged the WMR as unlawfully exceeding the City's authority. They claimed the WMR improperly made private property ineligible for the free refuse collection service. The trial court disagreed and granted the City's motion for summary judgment, finding the WMR was valid. Petitioners appealed.

Analysis: The Court of Appeal affirmed in the City's favor. The Court evaluated whether the WMR was within the scope of the authority conferred by the voters in the 1986 amendment and, if so, whether the regulation was "reasonably necessary to effectuate the purpose of the statute." It agreed with the trial court on both counts. First, the Court held the 1986 amendment expressly delegated authority to the City to promulgate rules and regulations "as are appropriate to provide for the collection, transportation and disposal of refuse." The WMR did precisely that consistent with the 1986 amendment and was not arbitrary, capricious or without a rational basis.

The Court of Appeal also agreed with the trial court that Petitioners' equal protection claim failed. Petitioners alleged the WMR treats multifamily homes different than single family residences regarding the setout space requirements with no reasonable justification for the disparity. The setout space requirements attached as an exhibit to the WMR apply, by their own terms, only to multi-family residences. But, critically, the conditions of service in a different section of the WMR apply to single family residences and require them to have three feet of space between the refuse containers and other objects. Thus, the setout requirements, though expressed slightly differently between the multi-family and single-family residences and in different parts of the WMR, are functionally the same. No equal protection violation could stand on these facts.