General Municipal Litigation Update

League of California Cities

City Attorney's Spring Conference

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Agenda

- Lawmaker Activities
- Public Meetings
- Public Records Act
- Elections
- Government Claims Act
- Municipal Finance
- Local Government

Lawmaker Activities

Lindke v. Freed

- Social-media user alleged that city manager violated his First Amendment rights by deleting his comments on city manager's Facebook page and blocking him from the page.
- U.S. Supreme Court held that user failed to establish state action. User had to establish that city manager (1) had actual authority to speak on behalf of city on particular matter, and (2) purported to exercise authority.
- On first prong, "actual authority" can stem from "statute, ordinance, regulation, custom, or usage" – *i.e.*, "written law," or "persistent practices of state officials" that are "permanent and well settled" and carry "the force of law." Inquiry "is whether making official announcements is *actually* part" of the official's job.
- On second prong, officer speaks for city while speaking "in official capacity" *or* to fulfill responsibilities.
- Relevant factors: (1) disclaimers on page or post, (2) manner in which page is used, (3) context of particular statement, and (4) nature of technology in question and breadth of its impact on the plaintiff/user.

Lawmaker Activities

Linthicum v. Wagner

- Oregon's Constitution disqualified from next election state senators who accrued ten unexcused absences from legislative sessions. In 2023, two senators engaged in a legislative "walkout" for weeks, and were disqualified.
- Ninth Circuit held that this was not a violation of the First Amendment. Relying on *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), the court held that "not attending legislative sessions . . . is 'an exercise of the power of the legislator's office' and therefore is not activity protected under the First Amendment."
- In *Carrigan*, a Nevada state law prohibited legislators from voting on matters in which they were privately interested, and Court held that "a legislator has no right to use official powers for expressive purposes." Ninth Circuit held that the Supreme Court "thus explicitly 'rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message.'"
- Inconsistent with California law holding that the *votes* of councilmembers are protected speech. (*Mary's Kitchen*.)

Public Meetings

Mary's Kitchen v. City of Orange

- City manger cancelled agreement with homeless-service provider. City council then held closed session under "anticipated litigation," but did not identify the provider or the agreement in the agenda. After closed session, city attorney announced that the council had "unanimously confirmed" the termination of the agreement.
- Provider challenged decision under Brown Act, and City responded with anti-SLAPP motion. Court held that anti-SLAPP statute was inapplicable because complaint targeted unprotected conduct, not protected speech.
- Court cited *Schwarzburd v. Kensington Police Protection & Community Services Dist. Bd.* (2014) 225 Cal.App.4th 1345 as instructive. There, lawsuit challenging increase to police chief's pay named both the district itself *and* its board members. The anti-SLAPP statute did not apply to the action against district but did apply to action against individual board members, as it was necessarily premised on how they *voted*, which is speech.

Public Records Act

State of California v. Superior Court (Energy and Policy Institute)

- EPI made request for policy advisor's calendar entries for meetings with 10 utility organizations. Governor's Office argued that *Times Mirror* and the deliberative process privilege make the entries exempt.

- Court performed balancing test required by the catchall exemption. Found that Governor's interest in nondisclosure of limited meeting information (invitees, attendees, date, time, and location) did not *clearly* outweigh the public's interest in disclosure. The Office is not required to disclose substantive information about a meeting such as the agenda.

Public Records Act

City of Gilroy v. Superior Court

- Gilroy produced some body-worn camera footage of police homeless camp cleanup but claimed other footage was exempt under CPRA. Gilroy then destroyed the footage deemed exempt.
- Requestor sued seeking declaration that Gilroy violated CPRA.
- Court of Appeal: No CPRA requirement for records retention.
- Supreme Court granted review: Is it a CPRA violation to destroy records deemed exempt from disclosure before a court has an opportunity to conduct a review?

Public Records Act

First Amendment Coalition v. Superior Court

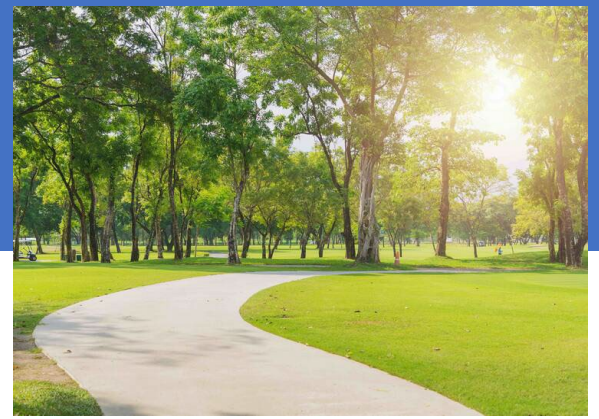
- TV station sought AG records from pattern-and-practice investigation regarding officers' discharges of firearms, use of force, or sexual assault.
- Penal Code section 832.7(b) says records relating to officer misconduct are nonconfidential and must be produced upon PRA request. It applies notwithstanding "any other law."
- Held: Section 832.7 also overrides all statutory exemptions because Legislature intended officer misconduct records to be made available for public inspection.

Elections

San Bernardino Cnty. Fire Protection Dist. v. Page

- Fire protection district annexed properties into service area, causing the new properties to be subject to a previously approved special tax.
- Challengers submitted an initiative measure against the tax, which stated that the tax was illegal on the ground that it was required to be put to a vote of the public under Prop. 218.
- The trial court found these statements to be false and misleading and, although the initiative was ultimately approved by the voters, the court ordered that it not be enforced.
- The appellate court affirmed, holding that the law was clear that the voter-approval requirements of Prop. 218 do not apply to taxes imposed due to annexations, and that the statements to the contrary in the initiative were therefore false.

Elections



Move Eden Housing v. City of Livermore

- City adopted amended DDA requiring developer to construct public park. Objectors sought to process referendum against DDA, but city clerk refused to process it because the adoption of the DDA was purportedly an administrative act. The Court of Appeal held:

- City clerk may <u>not</u> refuse to submit a referendum measure to electorate because it deals with a matter not subject to referendum. The clerk's sole duty is to determine whether procedural requirements are met. Substantive challenges must be brought as writ of mandate.

- Although administrative actions are not subject to referendum, City's adoption of DDA was legislative act because it constituted the <u>definitive policy decision</u> to construct the park. Prior versions of the DDA merely gave the City the <u>option</u> to have it constructed.

- City was not acting as administrative agent of State in approving DDA, even though property was on City's LRPMP. Scope of State's approval was limited, while City maintained significant discretion.

Elections

Schlesinger v. Sachs

- Under stipulated judgment, election was held for three councilmember positions in November 2018. Election-related documents stated that the councilmembers would be elected for two-year terms.
- Under original judgment, City was to implement a "cumulative voting" system in November 2020, but judgment was amended in 2020 to delay this for two years. The three councilmembers were thus not put on ballot in 2020 as planned.
- In a *quo warranto* action in 2022, the three councilmembers were removed from office for exceeding the two years. The court affirmed on the ground that the will of the voters was for a two-year term.
- "Holdover provisions" in Gov. Code section 57377 and City's municipal code did not change result. Such provisions were only intended to prevent brief vacancies following an election. Also, Government Code section 36512(b) requires a city council to fill vacancies within 60 days.

Government Claims Act

A.S. v. Palmdale School District

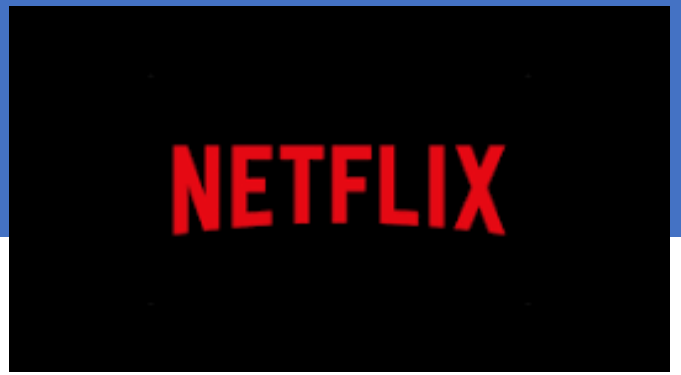
- Mother alleging teacher harmed child submitted a complaint form to the assistant superintendent.
- Sued school for damages and alleged the complaint form complied with the Act.
- The complaint form did not comply with the Act because it did not state child was making a claim, made no estimate of damages, and did not threaten litigation.
- School not required to inform of deficiencies in the form because the form was not a claim.

Municipal Finance

Mojave Pistachios, LLC v. Superior Court

- Company sued to challenge $8M SGMA groundwater replenishment fee but did not pay the fee under protest first. Company claimed it could not afford high fee.
- Court enforced SGMA requirement that company pay under protest before suing.
- Court relied on case law interpreting H&S section 5470 pay-under-protest requirement for wastewater charges to interpret the SGMA pay-under-protest requirement to mean what it says without an exception for very high fees or when the challenge alleges the fee violates the law.

Municipal Finance



City of Lancaster v. Netflix

- DIVCA requires "video service providers" to obtain a franchise from the PUC and pay franchise fees to local governments in exchange for use of public rights-of-way to operate video service networks.
- City class action seeking unpaid franchise fees from streaming services.
- DIVCA does not create private right of action for city to sue non-franchise-holders for franchise fees. Instead, PUC enforces DIVCA.
- Court leaves open question whether law requires streaming services to pay franchise fees like cable TV providers.

Local Government

Temple of 1001 Buddhas v. City of Fremont

- Property owner challenged nuisance decision of city's administrative appeal officer on multiple grounds.
- Following *Lippman v. City of Oakland* (2017) 19 Cal.App.5th 750, court held that city's appeal process was invalid because it was heard by a single hearing officer rather than a body, per Building Code section 1.8.8.
- This invalidity only applied to nuisance determinations based on violations of city's Building Standards Code, *not* to nuisance determinations based solely on zoning violations. However, City could not avoid rule by characterizing building-standard violations as "nuisances."
- With respect to claims of unfairness at hearing, court recognized that attorney cannot act as both advocate for agency and then as adviser to the decisionmaker who reviews the result the advocate achieved.
- However, property owner failed to object to deputy city attorney's alleged dual role, waiving it. Also, plaintiffs only showed that deputy city attorney attended hearing, not that she advised the hearing officer.

Questions