General Municipal Litigation Update

Friday, May 6, 2022

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GENERAL MUNICIPAL LITIGATION UPDATE FOR LEAGUE OF CALIFORNIA CITIES CITY ATTORNEYS CONFERENCE SPRING 2022

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A. *Lejins v. City of Long Beach* (2021) 72 Cal.App.5th 303, review denied March 23, 2022

Holding: Voter approval of a general fund transfer from water and sewer utilities was not sufficient to protect it from Proposition 218 challenge.

Facts/Background: Long Beach Water Department is a department of the City, governed by its City charter, providing water and sewer services to residents and businesses throughout Long Beach and to some areas outside the City. Monies collected from customers for water services are accounted for and initially maintained in the City's Water Revenue fund; likewise for revenues from sewer services in the City's Sewer Revenue fund. The City has historically transferred revenues from its utilities to the City's general fund to support general City services, such as fire, police, library, and parks. The City attempted to protect its general fund transfer post-Proposition 218 by obtaining voter approval of it as a tax. City voters approved the measure. Customers outside the City, of course, did not participate in that election.

Plaintiffs filed a writ action challenging the measure (Measure M) which authorizes use of the proceeds of rates the Long Beach Water Department charges its customers for service to fund the general fund transfer. The City imposed the surcharge on its water and sewer customers by embedding it in the service rates of the Water Department. The surcharge was intended to cover transfers of funds from the Water Department to the City's general fund, to be used for unrestricted general revenue purposes — revenues from the Water and Sewer funds that the Board determined unnecessary to meet other obligations of the Water Department, not to exceed 12% of Department annual gross revenues. The surcharge was developed in 2016 to account for a reduction in general fund revenues after Lejins sued the City over a pipeline permit fee collected from the Water Department. The Board raised rates for potable and recycled water by over 7% to account for the Measure M transfer, which plaintiffs characterized as a "surcharge."

Characterizing Measure M as a voter-approved general tax to support the City's general fund, the City argued it was properly approved by a majority of the City's voters under article XIII C, section 2(b) for the use of a property-related service (sewer and water). Plaintiffs argued the surcharge must meet the constitutional requirements in article XIII D for a fee or charge imposed as an incident of property ownership — a theory, which if

taken to its logical extent, would threaten all utility taxes even though ballot arguments on Proposition 218 assured voters they could continue to approve such taxes.

The trial court concluded the surcharge violates article XIII D, section 6 because it is a general tax imposed as an incident of property ownership, and not a charge based on actual water usage. It also found it to violate article XIII D, section 3's closed list of allowable impositions on property and property ownership because it is a charge as an incident of property ownership that does not fall under any of the enumerated exceptions. The trial court concluded compliance with article XIII C did not excuse compliance with independent constitutional requirements in article XIII D.

Analysis: Affirmed. The Court focused on the key issue of whether the Measure M surcharge is imposed upon a parcel or person as an incident of property ownership. The City argued the surcharge is akin to a valid utility user's tax or excise tax levied on the use of utility services; it is not imposed as an incident of property ownership since one may own real property without obtaining water or sewer service. Looking to precedent in *Apartment Association of Los Angeles County Inc. v. City of Los Angeles*, *Richmond v. Shasta Community Services District*, and *Bighorn-Desert View Water Agency v. Verjil*, the Court rejected this argument, finding charges for utility services such as water and sewer are property-related fees. Quoting *Richmond*, the Court concluded: "A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership; because it requires nothing more than normal ownership and use of property." Based on this finding, the Court next concluded that the surcharge must comply with article XIII D, section 6's requirements regardless of voter approval.

The case purports to distinguish the contrary ruling of *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373, which affirmed Sacramento's voter-approved measure to protect its general fund transfer from its water, sewer, and trash utilities. The Supreme Court has denied review in both *Wyatt* and *Lejins*, so it is necessary to reconcile the two. It is notable that Sacramento characterized its tax as on the utility itself and, therefore, a lawful use of rate proceeds just as are sales taxes the utilities incur in purchasing materials for system maintenance. Ballot materials, too, informed Sacramento voters the measure was a tax, unlike Long Beach.

B. *Plata v. City of San Jose* (2022) 74 Cal.App.5th 736, review filed Mar. 14, 2022

Holding: Late penalty charges are not subject to Proposition 218 since they do not burden landowners as "landowners," but rather as delinquent bill payors. These charges are not fees imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to a parcel of property, as contemplated by article XIII D, section 6. Claimants may not pursue litigation on a new theory of liability based on an entirely different state of facts from that included in their government claim, particularly where they have not litigated the case based on that theory.

Facts/Background: The City of San Jose owns and operates San Jose Municipal Water System ("Muni Water"). The water department's annual budget is reflected in a source and use of funds statement, which is part of the City's annual operating budget. The Platas, customers of Muni Water and suing on behalf of a class of water customers, filed suit claiming the water department violated Proposition 218 by collecting money from customers and transferring it to the City's general fund, urging the City used Muni Water revenues for general purposes rather than operational costs associated with water service. The Platas argued this practice depleted the funds, causing Muni Water to charge higher rates for service. The lawsuit focused on five categories of transfers: (1) late payment penalty charges imposed by Muni Water; (2) transfers to service City debt incurred in financing City Hall and other City structures; (3) "enterprise in lieu" transfers encompassing fees the City would otherwise charge a private utility to provide a similar service; (4) "rate of return" transfers the City made from Muni Water to compensate the City for investing in the Muni Water system; and (5) transfers to the City to cover overhead. Just weeks before trial, the Platas included in a pretrial statement that they also intended to challenge the underlying tiered rates under article XIII D, section 6 (citing *San Juan Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493) — an issue not in their pleading. The City argued decertification of the class, which no longer had community of interest on this new theory because tiered rates necessarily divide the class into those who pay upper-tier rates and those who do not.

The trial court found the late fees charged by Muni Water were neither a fee nor charge under Proposition 218, and any claims pre-November 2012 were time barred under Government Code section 911.2. The court also found the City was on notice of challenge to the rate structure, and the tiered rate structure did not comply with

Proposition 218. It did not, however, award any relief to ratepayers, instead granting the City's motion to decertify the class.

Analysis: Affirmed in part and reversed in part. The Court affirmed for the City on the transfers to the City's general fund. First, the late penalty charges need not comply with Proposition 218. The Court analyzed prior decisions in *Apartment Association of Los Angeles County Inc. v. City of Los Angeles*, *Richmond v. Shasta Community Services District*, and *Bighorn-Desert View Water Agency v. Verjil* on the limitations of Proposition 218 and whether a fee or charge is imposed by an agency as an incident of property ownership. A fee or charge must comply with article XIII D "if it is imposed on a property owner, in his or her capacity as a property owner, to pay for the costs of providing a service to a parcel of property." The Court determined that late penalty charges do not burden landowners as landowners, but rather as delinquent bill payers. "An owner will not incur a late penalty charge merely through ownership and normal use of property … but through an additional act — or in this case, omission: failing to pay his or her bill by the due date." Because Muni Water cannot identify in advance which customers will become delinquent payers, it cannot calculate a per-parcel charge and notify those property owners of a public hearing, as article XIII D, section 6 requires. These charges have nothing to do with water service, rates, nor a customer's water usage.

The Court declined to consider the merit of the legality of the tiered rates, instead finding the Platas failed to meet the claim presentation requirement by omitting this issue from their claim and pleading. The Plata's government claim could be distilled to "You're using the money for the wrong purposes and making up for it by inflating our rates," not "Your rate system tiers are illegal." The Platas consistently framed the issues in the lawsuit as a challenge to use of water funds, not their collection or rates. This is an important victory and those defending rates should take care to compare what was claimed pre-litigation, what was pleaded, and what appears in a trial brief to attempt to preclude surprise issues at trial. This case provides good authority for that effort.

On the statute of limitations issue, the Court agreed that the Plata's challenges to the rate of return and enterprise in lieu transfers were time barred under Government Code § 911.2, subd. (a) since the City ceased these transfers three years before their first government claim.

II. GOVERNMENT CLAIMS ACT

A. *Andrews v. Metropolitan Transit System* (2022) 74 Cal.App.5th 597

Holding: Metropolitan Transit System's ("MTS") notice rejecting passenger's government claim was insufficient to trigger 6-month statute of limitations period and instead provided her with two years to file suit. MTS's rejection notice omitted language advising the claimant she may wish to consult an attorney on the matter. This omission was material and including the remainder of language as required in Government Code § 913, subdivision (b) did not meet the requirements for substantial compliance.

Facts/Background: Treasure Andrews sued the MTS when she was injured on an MTS bus from the driver's "negligent acceleration," which caused her to fall. She submitted a claim for monetary damages to MTS, listing her attorney as the contact for further notices from MTS. MTS rejected her claim on November 17, 2017. The notice included some of the language required under section 913 — specifically, notifying claimant she had 6 months from the date of mailing of the notice to file a court action under section 945.6. However, it omitted the following language from section 913: "You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

Andrews then filed suit on July 3, 2018 — almost 8 months after MTS mailed its notice of rejection. MTS moved and was granted summary judgment in the trial court, which found MTS complied by providing a warning in the rejection notice substantially the same as that provided in section 913, and then mailing it to Andrews' counsel.

Analysis: The rejection notice's omission of the second half of the section 913 warning failed to comply with the statute, and was insufficient to trigger the 6-month statute of limitations in section 945.6, subdivision (a)(1).

The Government Claims Act requires written notice to the claimant or a representative, given in a "precise manner." Section 913, subdivision (a) describes the mandatory requirements for delivery of the notice (see § 915.4) and provides language that "may" be used for the text of the notice. Section 913, subdivision (b) then sets forth a warning that "shall" be included if a claim is wholly or partially rejected. Applying principles of statutory construction, the Court determined section 913's use of the word "shall" means the warning language is mandatory whenever a claim is rejected. According to the Court,

a showing of compliance is significant since it will determine the applicable statute of limitations under section 945.6 for claimant's subsequent lawsuit — 6 months after the date of notice with compliance, or 2 years from accrual absent compliance. And based on the plain language of section 913, its purposes is twofold: "to inform the claimant of the applicable statute of limitations *and* the desirability of promptly consulting an attorney."

MTS argued substantial compliance since section 913 only requires the rejection notice "shall include a warning in substantially the following form." The Court disagreed. Noting from prior court decisions that substantial compliance with a statute is dependent on the meaning and purpose of the statute, the Court noted that one objection of section 913 is to ensure claimants are advised they should consider consulting an attorney and do so promptly. MTS's rejection notice did not comply with this objective since it failed to include that language. The doctrine "excuses literal noncompliance only when there has been 'actual compliance in respect to the substance essential to every reasonable objective of the statute.'" MTS's notice did not. While this case follows prior precedent, it is an important reminder to precisely follow the language of Government Code section 913 when issuing claim rejections.

III. ELECTIONS

A. *Jobs & Housing Coalition et al. v. City of Oakland* (2021) 73 Cal.App.5th 505

Holding: Ballot materials for a citizen initiative special parcel tax that stated a two-thirds voter requirement, even though Council later enacted the measure finding only majority vote was required, were not ineffective and void. Misstatements of law by City officials cannot affect the right of initiative proponents to have their proposal considered under the voter-approval standard required by the California Constitution.

Facts/Background: A group of Oakland citizens placed a proposed special parcel tax on the November 2018 ballot (Measure AA) to fund programs for early childhood education and college readiness. The official ballot materials prepared by the City Attorney's Office stated the measure was for a "special parcel tax" and, in light of the law at that time, that a two-thirds vote was needed to pass. Measure AA received 62.47 percent of the vote. The City Council determined that only a majority vote was actually needed given the Supreme Court's reasoning in *California Cannabis Coalition v. City of Upland* (2017) 3

Cal.5th 924, declaring the measure enacted (though acknowledging by resolution uncertainty in the law whether two-thirds or majority vote was required).

A coalition of stakeholders brought a post-election, reverse-validation action against the City, seeking invalidation of Measure AA as an illegal special tax because it had not received the two-thirds vote required by Propositions 13 and 218. Plaintiffs also alleged enactment by majority vote, when the ballot materials stated a two-thirds voter requirement, constituted a post hoc bait-and-switch that created a patent and fundamental unfairness amounting to a due process violation.

The trial court ruled in favor of the coalition on its motion for judgment on the pleadings, finding Measure AA failed because it needed two-third vote, and enactment of the measure on majority vote amounted to a "fraud on the voters."

Analysis: In an unpublished portion of the decision, the First Appellate District, Division 1 joined decisions of Division Four (*City and County of San Francisco v. All Persons Interested in the Matter of Proposition G* (2021) 66 Cal.App.5th 1058; *City and County of San Francisco v. All Persons Interested in Matter of Proposition C* (2020) 51 Cal.App.5th 703); Division Five (*Howard Jarvis Taxpayers Association v. City and County of San Francisco* (2021) 60 Cal.App.5th 227); and the Fifth Appellate District (*City of Fresno v. Fresno Building Healthy Communities* (2020) 59 Cal.App.5th 220) that a citizen initiative imposing a special parcel tax is enacted when it receives a majority vote. Relying, too, on the holding in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, the court distinguished Proposition 218's treatment of government- and citizen-sponsored initiatives.

In the published portion of the decision, the Court held that Measure AA cannot be invalidated based on the ballot materials' voting-threshold statements because: (1) the statements did not concern the measure's substantive features, (2) were not alleged to be intentionally misleading, and (3) cannot override the law governing the applicable voting threshold.

The Court first found the measure could not be invalidated in a postelection challenge based on inaccuracy of the materials. Any Elections Code challenge to ballot materials must be brought pre-election — it was not; Plaintiffs' only remedy was to bring a due process challenge showing the materials so misleading or inaccurate that the election must be invalidated. Applying the multifactor test from *Horwath v. East Palo Alto* (1989)

212 Cal.App.3d 766, the Court explained this must illustrate the ballot materials prevented voters from making informed choices (essentially, that the result would have been different without the misinformation). The voting threshold was an ancillary matter, and the ballot materials were otherwise informative, explaining the proposed tax's substance and intended allocations. Moreover, the statements were made at a time of legal uncertainty concerning the applicable vote threshold for citizen-initiated tax measures, rendering Oakland's officials' statement of a two-thirds requirement not fundamentally unfair.

Second, the Court found Plaintiffs could not succeed on their challenge to Council's post-election conduct. Finding the ballot materials' incorrect voting statement "lamentable," it did not constitute fraud. The Court distinguished facts in *Hass v. City Council of City of Palm Springs* (1956) 139 Cal.App.2d 1956, where the ordinance for redistricting itself required three-fourths voter approval and thus established the applicable law for that measure, in contrast to Measure AA which was silent on the voting threshold, only included in ballot materials. "A voting threshold identified in ballot materials cannot supplant the law governing the applicable voting threshold … ." Nor was there any evidence of fraudulent intent in light of the evolving legal landscape surrounding citizens' initiatives for special parcel taxes.

Despite the five recent cases on this issue, the San Diego Superior court recently ruled against that City, concluding the ordinance placing an initiative on the ballot was sufficient to increase the voter approval standard from 50% plus 1 to two-thirds. The case is on appeal as *Alliance San Diego v. City of San Diego*. No case number is yet available for the appeal filed March 23, 2022.

B. *County of San Bernardino v. West Valley Water District* (2022) 74 Cal.App.5th 642

Holding: Local water district is required to hold its elections on the statewide general election date starting in November 2022. Though California Voter Participation Rights Act (VPRA) required a change to either the statewide primary or general election date, the VPRA did not eradicate all existing voting laws and does not conflict with Elections Code sections 1303 or 10404, which require the District set its election date on the statewide general election date.

Facts/Background: The District sought by resolution to change its election date from the existing date of November in odd-numbered years, to the statewide primary election date in even-numbered years commencing in June 2022. The County (whose Registrar of Voters serves as the District's elections official under the Uniform District Election law) filed for writ of mandate, declaratory and emergency relief for an order obligating the District to change its election date to the statewide general election date, arguing District's requested election date change would result in an illegal election. The County alleged the Registrar of Voters determined the average voter turnout for the District's elections in November of odd-numbered years (for November 2019, 10.79%) was at least 25 percent less than the turnout for the last four statewide general elections (averaging 61.54% turnout), and thus within the VPRA mandate to set elections on the statewide election date. Harmonizing the VPRA and sections 1303 and 10404, the County urged the District could not choose a date other than the statewide general election date in this instance in order to comply with the VPRA's intent to maximize voter turnout.

On demurrer, the District alleged the language of VPRA allowed the date to be moved to any "statewide election date" — there was no mandatory change to the statewide general election date and that section 10404 did not apply since the VPRA was enacted later. The District also asserted the County lacked standing under the VPRA, only granting standing to registered voters. After the trial court ruled for the County on demurrer, the parties agreed to a stipulated judgment. The trial court found the resolution invalid because when harmonized, sections 1303, 10404, and 14052 require the District to hold its elections on the date of the statewide general election in even-numbered years to fulfill the VPRA's intent.

Analysis: The VPRA requires political subdivisions in the state to consolidate local elections with statewide on-cycle elections if the local jurisdiction's turnout falls at least 25% below the locality's average voter turnout in the previous four statewide general elections. Based on the VPRA's plain language, the District could hold its election on the statewide primary or general election date, if it had a significant decrease in voter turnout on its nonconcurrent date. But, the VPRA could not be read in isolation. Section 1303 provided only one exception to the holding of an election on an odd-numbered year: the statewide general election date. No language in the VPRA supports that it was intended to replace section 1303, subdivision (b), and the two can be read in harmony. Once the District was required to change its election date under the VPRA for low voter turnout, it could only adopt a resolution that set the election date on the statewide general election date under section 1303, subdivision (b). The District waived its arguments on standing

by not seeking a ruling on that point in the stipulated judgment.

IV. OPEN GOVERNMENT

A. *Getz v. Superior Court* (2021) 72 Cal.App.5th 637, review denied Mar. 16, 2022.

Holding: Records in a public agency's custody are assumed to be public records; any claim to the contrary must be supported by substantial evidence. Moreover, the burden to assert and establish exemption from disclosure is on the agency, which would be well advised to segregate privileged documents from others. "An agency cannot resist disclosure based on the burden stemming from actions needed to assuage an abstract fear of improvident disclosure, a fear that could be avoided by simply setting privileged documents apart." The Court rejected the County's claim that reviewing 42,582 emails for privilege was unduly burdensome.

Facts/Background: Getz sought public records under the Public Records Act from El Dorado County concerning its contacts with a homeowner's association, local real estate developer, and law firm. After receiving about 4,500 responsive documents that he was unsatisfied with, Getz broadened the search, seeking all records between the County and four email domains over a 6-year period. This resulted in about 42,582 additional potentially responsive records. The County asked Getz to provide more specific search terms to reduce the County's burden in reviewing the newly responsive records for privilege, but he refused. The County thus provided an index of the records (but not the actual documents) and asked Getz to identify which were relevant. He refused, asking for all documents. When the County failed to provide them, Getz filed a writ of mandate seeking their production.

The County argued the request was overbroad and unduly burdensome. A search based on these broad parameters would likely result in documents not likely to relate to the conduct of official business, and might fall into exemptions from disclosure including the attorney-client privilege. The County estimated a review time of 40 to 50 business days to review for relevance and applicable exemptions. Attorney-client review was particularly important to the County since the law firm that was the subject of the request was also a firm that had worked closely with the County on a matter of common interest.

The trial court agreed with the County, finding its efforts extended well beyond what is

reasonable to comply with a PRA request.

Analysis: The Court of Appeal reversed. Records requests always impose some burden on government agencies, but an agency is obligated to comply so long as the records can be located with reasonable effort. Because the County had already located and indexed the 42,582 emails without objection, the County had demonstrated the records could be located with reasonable effort and the volume of materials was not unmanageable.

The Court found the County's assertion speculative that records may fall outside County official business, particularly since all the domains were work-related accounts and communications with these types of businesses and the County would "naturally deal with work-related matters, e.g., the developer's business with the County in which the developer builds and manages developments." The Court also rejected the County's argument of burden to review for exemptions or privilege, finding only emails with the law firm or specifically referencing County legal matters needed to be reviewed for attorney-client privilege.

The dissenting opinion asserted the relevant inquiry was how burdensome it would have been for the County to make a determination on exemptions. The Court disagreed, stating: "Since the volume of email correspondence in the modern era will always be an order of magnitude greater than [those records] formerly sought in a request under the Act, the argument that the County must review every email furnishes a ready-made 'overly burdensome' response justifying a public agency's refusal to respond to a request under the Act for emails." The Court recommended a Legislature fix so that the burden imposed when email records are requested in volume may be considered; existing statutes, however, "do not make such a burden a basis for refusing disclosure." The Court suggested until then that agencies identify and segregate potentially exempt records when they are created to reduce burden later on a PRA request. This case provides an important reminder to segregate privileged documents from others, utilize search criteria when dealing with large document productions in response to a PRA request, and maintain thorough information (substantial evidence) on the public agency's efforts to search through its documents to find responsive documents. An unsupported claim of undue burden for voluminous document review will not do.

The Court agreed the County need not provide records relating to Getz's alleged involvement in filing a false police report under Government Code section 6254(f). An effort to achieve a legislative response to this ruling seems likely.

B. *Riskin v. Downtown Los Angeles Property Owners Association* (2022) — Cal.Rptr.3d — , 2022 WL 805377

Holding: If appropriate to a particular case, the trial court must determine whether a litigant who obtains partial relief under the CPRA is a prevailing party so as to justify an award of fees by analyzing whether the documents obtained were "so minimal or insignificant" to justify a finding the litigant did not prevail.

Facts/Background: Riskin, a self-described "open records activist" and frequent litigant against Los Angeles' business improvement districts, submitted PRA requests to the Downtown Los Angeles Property Owners Association to produce: (1) emails between the Association and the South Park BID and/or Downtown Neighborhood Counsel, as well as the Board Chairman's emails; (2) emails between the Association and Urban Place Consulting; and (3) a Board Member's emails relating to the Association. The Association produced documents in all three categories, claiming exemptions and deliberative process privilege as to the remainder.

Riskin disagreed, petitioning for a writ to compel release of documents he claimed were wrongly withheld under the deliberative process privilege and due to an inadequate search. The trial court granted the petition in part. After reviewing some documents in camera on the basis of deliberative process privilege, the court denied the request as to category 1 and 3, and ordered the Association undertake an adequate and reasonable search for responsive documents under category 2. The trial court also ordered disclosure of non-privileged portions of one document reviewed in camera.

Following judgment, Rifkin sought attorney fees of $123,119 pursuant to Government Code section 6259, subdivision (a). The Association argued Riskin was not the prevailing party, because the one document he obtained was minimal and insignificant and the trial court has discretion to deny attorney fees. The trial court awarded fees of $71,075.75. Rejecting the Association's argument that *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.4th 1381 authorized the court to deny fees where a PRA plaintiff wins only minimal and insignificant relief, the trial court held that section 6259, subdivision (d) made a fee award mandatory.

Analysis: The Court of Appeal found the trial court erred in concluding it had no discretion to deny Riskin attorney fees. Under the CPRA, the court "shall award court

costs and reasonable attorney's fees to the requester should the requester prevail in litigation filed pursuant to this section." Gov. Code, § 6259, subd. (d). Though the statute does not define the term, based on precedent, a party "prevails" when an action results in defendant releasing a copy of a previously withheld document — e.g., if the lawsuit motivated defendant to produce the document, under a catalyst theory.

It mattered not whether the minimal or insignificant standard was dicta in *Los Angeles Times* — the Court found it appropriate under the CPRA and adopted it. Thus, it is for a court to decide whether the documents that plaintiff obtains from the defendant, as a result of a lawsuit, are so minimal or insignificant as to justify a finding that the plaintiff did not prevail. The Court analogized this to other contexts where a court, despite a mandatory fee provision, has discretion to deny fees where the result is so minimal or insignificant to justify finding it did not prevail, e.g., based on the Public Contract Code or partial success on an anti-SLAPP motion. The matter was remanded to the trial court for it to apply the proper standard and to permit the trial court to exercise its discretion as to whether Riskin is a prevailing party.

Given the volume of Public Records Act litigation and the number of lawyers who file such cases in an apparent search for fees, this is an important ruling and should be cited whenever fees are sought in a PRA case that generated only marginal relief or the facts suggest litigation did not catalyze the outcome.

V. MISCELLANEOUS

A. *Hill RHF Housing Partners, L.P. v. City of Los Angeles, et al.* (2021) 12 Cal.5th 458

Holding: Proposition 218's majority-protest proceeding required for new or increased assessments need not be exhausted before litigation. Property owners are not required to present specific objections to BIDs at public hearings for objections to later be heard on the merits in court.

Facts/Background: A non-profit senior housing provider challenged business improvement district (BID) assessments established in downtown Los Angeles and San Pedro. Each City followed the procedures for BIDs as established in Proposition 218, the Proposition Omnibus Implements Act (Gov. Code, § 53750 et seq.), and the Property and Business Improvement District Law of 1994 (Streets & Highways Code, § 36600 et seq.),

including holding public hearings to consider all objections or protests to the proposed assessments. Assessed property owners overwhelmingly approved renewal of the assessments.

Petitioners voted against renewal of the BID assessments by marking "no" on the ballot, but did not participate in the public hearings or state specific objections to the BID assessments either orally or in writing. They did not identify problems with the assessments or attempt to otherwise exhaust remedies. The City argued the challenger was required to identify at the City's public hearings the issues or specific objections it would later litigate. The trial court ruled for the City on the merits, finding no issue with failure to exhaust. The Court of Appeal, however focused solely on the exhaustion question, applying the issue exhaustion doctrine, and finding petitioners' failure to present their specific objections to the BIDs at the appropriate public hearings meant they had not exhausted their extrajudicial remedies, which prevented the court from considering the merits of their claims.

Analysis: Reversed. The California Supreme Court found that the opportunity to comment on a proposed BID at a public hearing does not involve the sort of "clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties" that has allowed the Court to infer an exhaustion requirement in other contexts. The Court thus would not imply an issue exhaustion requirement in these circumstances. It reasoned that the remedy — a noticed opportunity to participate in a public comment session concerning a proposed legislative act under consideration by local officials — did not provide a fulsome "machinery" to resolve disputes. Though the Council had to "consider" objections, "a requirement that objections be *considered*, by itself, places no legal obligation upon an agency to actually *respond* to whatever comments it might receive." The public comment session was not obviously geared toward resolution of challengers' objections.

The Court also found no compelling policy arguments for imposing an issue exhaustion rule in this context: exhaustion would not promote development of a record for judicial review (Proposition 218 and the PBID Law already require a detailed management district plan and engineer's report), nor need for prompt resolution of issues (served by the PBID Law's 30-day deadline for challenging an assessment). Finally, the Court observed that not requiring exhaustion comports with Proposition 218, with the goal of facilitating challenges to assessments.

The Court's ruling is narrow. It does not preclude an exhaustion defense in legislative contexts like ratemaking, and does not read Proposition 218 to forbid an exhaustion requirement adopted through legislation or by local ordinance.

B. *City of Oxnard v. County of Ventura et al.* (2021) 71 Cal.App.5th 1010, review denied March 9, 2022

Holding: As California Supreme Court precedent in *Valley Medical Transport, Inc. v. Apple Valley Fire Protection Dist.* (1998) 17 Cal.4th 747 established, when a city delegates the administration of ambulance services to the surrounding county, which then assumes control, the city may not later attempt to resume administration of those services. The trial court properly applied this holding when it denied Oxnard's motion for preliminary injunction to prohibit Ventura and Ventura County Emergency Medical Services Agency (VCEMSA) from contracting for ambulance services within City limits.

Facts/Background: The City, County, and other municipalities entered into a joint powers agreement (JPA) in 1971 regarding ambulance services. The JPA provided the County would administer and pay for a countywide ambulance system, and County alone would contract with ambulance service providers for the other JPA signatories. The County established seven exclusive operating areas (EOAs) in which private companies provide ambulance services; the City is in EOA 6, where Gold Coast Ambulance (GCA) is the service provider. In 1980, pursuant to the Emergency Medical Services Act (Health & Safety Code, § 1797.200 et seq.) (the "EMS Act"), the County designated VCEMSA as the exclusive local EMS agency to administer services countywide.

In the 2010s, the City grew dissatisfied with GCA's services (e.g., contending residents in low- and moderate-income areas were twice as likely to experience delayed responses; GCA spent significant time outside EOA 6). City notified County in December 2020 it intended to withdraw from the JPA to begin administering its own ambulance services on July 1, 2021. City requested the County not extend its contract with GCA. The County did so anyway.

City moved for an injunction to prevent the County from providing ambulance services in the City after June 30, 2021, claiming it retained authority under the EMA Act to provide these services because it was indirectly contracting for the services under the JPA. The trial court disagreed, finding the City lacks authority to contract for its own ambulance

services under the EMS Act. City argued that the trial court erred in concluding the City had no authority to contract for ambulance services, and that the City would suffer no irreparable harm absent an injunction.

Analysis: Affirmed. The EMS Act aims to achieve integration and coordination among government agencies and EMS providers. The Legislature contemplated cities would eventually be integrated into local EMS agencies. While the provision provides a transitional time for cities providing EMS services in 1980 to continue to do so, the intent is for them to cede to local EMS agencies after the grandfathering of existing EMS operations. And it only allows for continuance of existing services — "If a city did not provide or exercise administrative control over a specific type of EMS operations (such as ambulance services) on June 1, 1980, it cannot later seek to provide or administratively control that service. … This is true even if the city retains some sort of 'concurrent jurisdiction with the county' over a service."

City could not unilaterally resume administration of EMS services which were already contracted under the JPA to the County, and which the County held as of June 1, 1980 under the EMS Act. It did not matter that the City remained a signatory to the JPA. To read section 1797.201 to permit cities that *indirectly* contracted for ambulance services in 1980 to later resume *direct* contracting for those services would render the law's exemption language meaningless. The Court also reasoned that assuming provision of ambulance services is a police power, the City's exercise of police powers is subject to constitutional constraints. The EMS Act is a general law, and the City may only make and enforce laws that are not in conflict with general laws.

C. *Crenshaw Subway Coalition v. City of Los Angeles* (2022) — Cal.App.5th — , 2022 WL 620093

Holding: A disparate impact claim based on a gentrification theory is not cognizable under the Fair Housing Act (FHA) or the Fair Employment and Housing Act (FEHA). Neither FHA nor FEHA afford relief if it causes race to be used and considered in a pervasive and explicit manner in deciding whether to justify governmental or private actions because this would inject racial considerations into the decision. The court held that recognizing Plaintiffs' gentrification theory would improperly obligate the City to use race in making local planning decisions.

Facts/Background: Three private entities sought to develop what is now the Baldwin Hills Crenshaw Plaza near the Leimert Park neighborhood in Los Angeles. The redevelopment project planned to turn the current retail mall into a mixed-use facility — retail, restaurant, and office space, a hotel, and residential units (condos and apartments, of which 10 percent would be affordable housing). Leimert Park, part of the Crenshaw Corridor, has served as the political, cultural, and commercial heart of the Black community in Los Angeles since the 1960s — 65 percent of Leimert Park's residents are Black and 25 percent Latinx.

Crenshaw Subway Coalition — a nonprofit organization of residents, property owners, and merchants in South Los Angeles — sued the City of Los Angeles, its City Council, and the developer to enjoin the project, alleging violations of the FHA, FEHA and CEQA. The Coalition alleged the project violated the FHA and FEHA due to the gentrification it would cause. Specifically, it would result in an influx of new, more affluent residents, leading to increased rents and property values, which would push out existing, lower-income residents in the surrounding neighborhoods who are already rent-burdened. The displacement will fall predominantly on lower-income Black and Latinx residents. The Coalition sought an injunction halting the project until measures were taken to ensure protected minorities would not be displaced (at one point in the litigation, it was suggested the developer could set aside all of the new residential units for low-income residents).

The trial court granted City and developer's motion for judgment on the pleadings, relying on the Supreme Court's 2020 decision in *AIDS Healthcare Foundation v. Los Angeles* (2020) 50 Cal.App.5th 672, 264 Cal.Rptr.3d 128 subsequently ordered depublished), which rejected a gentrification-based lawsuit under the FHA. The CEQA claim, too, was dismissed as untimely.

Analysis: Affirmed. First, the Court noted that the Supreme Court's depublication of *AIDS Healthcare* was not authority — it could not infer disapproval of the reasoning or holding from the fact of depublication, and its sole task was to review the trial court's ruling, not its rationale. Second, the Court clarified that to the extent the Coalition's theory implicates how to balance social benefits of revitalizing blighted neighborhoods against the resulting social costs of gentrification, it was a question for elected officials, not the Court.

Third, the Court found the FHA and FEHA claims were not legally cognizable based on

the U.S. Supreme Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc*. (2015) 576 U.S. 519. An FHA disparate impact claim requires a showing the challenged policy or practice has a disproportionately adverse impact on minorities (or other protected group) and is otherwise unjustified by a legitimate rationale. However, the FHA "is not a panacea against all wrongs," and was instead designed to end segregation by eradicating discriminatory practices within the housing sector that exclude minorities. In other words, it was not intended to displace valid government policies, and thus part of the analysis for an FHA disparate impact claim is whether judicially created safeguards or cautionary standards bring it outside the scope of FHA. The Court discussed three such standards: FHA **may not** be used to (1) inject race into land use decisions; (2) discourage the construction of affordable housing or displace valid governmental policies; or (3) perpetuate segregation.

The Court found the Coalition's claim ran afoul of each of these safeguards. It injected racial considerations into the City's decision-making since those displaced are minorities. FHA's protected categories do not include socioeconomic status, and only includes race discrimination that has "a significantly disparate impact on nonwhites." If gentrification were a valid theory under FHA, "city officials would be required to avoid gentrification-based displacement for a potential development in a majority minority community, but not for one in a mostly white community." The Court also noted Plaintiffs' gentrification theory aimed to keep the Black and Latinx community together in Leimert Park, and thus to perpetuate the segregation of these minority groups.

The Coalition argued the MJOP ruling must also be reversed since it could make a prima facie case of disparate impact discrimination, and this was enough to survive the pleading stage. The Court disagreed, noting this three-step burden-shifting rubric is merely an evidentiary standard to shift the burden of production to identify meritorious claims. But the burden of proof remains with the FHA plaintiff at all times, and Plaintiff must show its claim is cognizable. It cannot. Moreover, allowing the Coalition's claim to proceed while knowing it will be dismissed on summary judgment would undermine *Inclusive Communities*'s pronouncement that prompt resolution of these cases is important.

Because FEHA provides substantially equal (or broader) protections to FHA, the analysis was the same, specifically the same safeguards read into FHA must be read into FEHA — "namely, the concern that such claims not be used to coopt FEHA into a tool for injecting race into city planning decisions, for discouraging affordable housing, or for perpetuating racial segregation in housing patterns."

D. *Houston Community College System v. Wilson* (2022) 595 U.S. __, 2022 WL 867307

Holding: A community college board of trustee member has no First Amendment retaliation claim arising from the Board of Trustee's censure arising from his repeated litigation against the District. The First Amendment historically permits free speech on both sides and for every faction on every side. Censure is nothing new, and there is no evidence suggesting a verbal censure has ever been widely considered offensive to the First Amendment. Plaintiff cannot make out a First Amendment retaliation claim since the Board's censure does not qualify as a materially adverse action capable of deterring Wilson from exercising his own right to speak.

Facts/Background: In 2013, David Wilson was elected to the Board of Trustees of the Houston Community College System, a public entity. He often disagreed with the Board about the best interests of HCC, and brought multiple lawsuits challenging its actions. By 2016, the Board reprimanded Wilson publicly. Then in 2018, the Board adopted a public resolution "censuring" Wilson and stating his conduct "was not consistent with the best interests of the College" and was "reprehensible." The Board also adopted penalties, which included making Wilson ineligible for Board officer positions in 2018. Wilson amended one of his lawsuits to add a § 1983 claim asserting the Board's censure amounted to retaliation for his exercise of free speech rights (in the form of litigation) and itself violated the First Amendment. The HCC removed the case to federal court. While the district court found Wilson lacked standing, the Fifth Circuit reversed and found Wilson had a viable First Amendment claim.

Analysis: The Supreme Court reviewed only whether Wilson had an actionable First Amendment claim for retaliation arising from the Board's censure, answering "no." To determine whether the Board's censure was impermissible retaliation, the Court noted "elected bodies in this country have long exercised the power to censure their members," and noting "no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson's has ever been widely considered offensive to the First Amendment." Congress censures Members for objectionable speech directed at fellow Members, media comments, and public remarks disclosing confidential information; censure is common, too, at state and local levels. Thus, historically, the First Amendment permits free speech on both sides and for every faction on any side.

Moreover, for a First Amendment retaliation claim, there must be an adverse action by government in response to the speech that would not have been taken absent the retaliatory motive. The Court noted the ease of identifying such specific adverse actions — arrest, prosecution, dismissal from employment. On the other end of the spectrum, a mere frown from a supervisor is not actionable. In distinguishing material from immaterial adverse actions, the Court noted: (1) Wilson is an elected official, and thus expected to shoulder a degree of criticism about his public service, but continue with his free speech nonetheless; and (2) the only "adverse action" is itself speech from Wilson's colleagues that concerns the conduct of public office. The Court concluded there was no adverse action since the censure at issue was itself a form of speech by elected representatives. Too, the censure did not prevent Wilson from doing his job, nor deny him a privilege of office. The facts showed that Wilson did not cower and remain quiet after the censure — he spoke his mind and pursued his lawsuit.

The Court left open whether under different circumstances, censure that materially impairs First Amendment freedoms is actionable, also noting the case's limited scope and inapplicability to questions concerning legislative censures accompanied by punishments, those aimed at private individuals, or those involving censure by one legislative body of a member of another body. The ruling is narrow but helpful especially given that censures are not uncommon in the life of local government.