

## LEGAL ADVOCACY PROGRAM REPORT

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### INTRODUCTION AND OVERVIEW

Cal Cities advocates before the courts through the Legal Advocacy Program because laws affecting cities are made in the courts as well as in the Legislature. Cal Cities weighs in on legal issues when participation is likely to affirmatively advance cities' collective legal interests by establishing legal precedent that will help cities more effectively serve their communities. The charge of the Legal Advocacy Committee (LAC) is to identify those cases and Attorney General opinions that are of such significance on a statewide basis as to merit the collective investment of city resources through Cal Cities' participation.

This report summarizes notable cases, rulings and legal victories, pending Cal Cities litigation, and cases in which Cal Cities filed amicus briefs or letters between March 23, 2023 and June 21, 2023. The report is provided to keep the Board informed of Cal Cities' legal advocacy. **No further Board action is required.** Cal Cities legal staff is available to answer any questions.

### NOTABLE CASES AND RULINGS, AND LEGAL VICTORIES

#### California Supreme Court

The California Supreme Court issued opinions in two cases in which Cal Cities filed amicus briefs. The rulings provide cities with clarity on several important issues, as follows:

- In ***Tansavadi v. City of Rancho Palos Verdes***, the court held statutory design immunity is limited to claims alleging a public entity created a dangerous condition and does **not** extend to claims alleging a public entity failed to warn of a design element that resulted in a dangerous condition. A public entity retains a duty to warn of known dangers that a roadway presents to the public.
- In ***Davis v. Fresno Unified School District***, the court determined the **judicial validation** process, which allows public agencies to quickly determine the validity of bonds and construction agreements and insulates such determinations after the expiration of a 60-day challenge period, does not apply to all contracts for construction of bond-financed capital improvements. Instead, the court determined a bond-funded lease-leaseback construction agreement was a "contract" subject to judicial validation under Government Code section 53511 *only if* the debt financing of the project directly depends on that agreement; the contract itself must provide for financing.

For more information on these cases and how they might affect your city, please refer to the May 3<sup>rd</sup> [Cal Cities Advocate](#) newsletter article.

The California Supreme Court also recently issued a decision in **Leon v County of Riverside**, determining the **statutory immunity for instituting or prosecuting a judicial or administrative proceeding** within the scope of employment (Government Code section 821.6), which immunizes public employees from claims of injury caused by wrongful prosecution, does not extend to claims based on other injuries incurred during law enforcement investigations. The case is significant because several courts of appeal had previously determined Section 821.6 immunized public employees from liability for any injury incurred during the course of the institution and prosecution, including an investigation that proceeds it. The decision restricts the scope of immunity available to public employees, and cities under Section 821.6.

Lastly, the California Supreme Court granted review of two cases, wherein Cal Cities submitted letters supporting city requests for review, including:

- **Stone v. Alameda Health System**, involves the issue of whether all public entities are exempt from obligations in the **Labor Code and wage orders** regarding meal and rest breaks, overtime, and payroll records, or only those public entities that exercise sovereign governmental powers. Cal Cities filed a joint amicus letter with CSAC and the California Association of Joint Powers Authorities, in support of the petition for review, arguing the exemption should continue to apply to all public agencies.
- **Make UC a Good Neighbor v. The Regents of the University of California**, involves a challenge to the UC Regents' **Environmental Impact Report (EIR)** for a long-range development plan and a student housing project. The court of appeal found merit to the CEQA challenge, based upon the Regent's decision not to analyze potential noise impacts relating to loud student parties. In a joint amicus letter with CSAC in support of the petition for review, Cal Cities argued the court of appeals' decision was contrary to CEQA's charge of analyzing and mitigating environmental impacts, not social impacts.

### California State Appellate Courts

California appellate courts recently issued opinions in four cases in which Cal Cities filed amicus briefs. Several of the rulings were favorable and provided clarity to cities on several important issues, as follows:

- The First District Court of Appeal issued a favorable opinion in **CSHV 1999 Harrison LLC v. County of Alameda**, a case in which Cal Cities filed a joint amicus brief. The case considered the viability of **documentary transfer taxes** administered by the city and county on property owned by CalSTRS-created LLCs. The LLCs argued they were exempt from the transfer taxes because the property was being transferred to the State or its political subdivisions. The trial court disagreed, and the LLCs filed an appeal. The appellate court ruled in favor of the city and county and agreed with

Cal Cities' argument that the CalSTRS-created LLCs could not avoid property transfer taxes as a governmental entity because the LLCs are separate entities.

- The First District Court of Appeal also issued a favorable, partially published opinion in **Claremont Canyon Conservancy v. Regents of the University of California**, a case concerning the **level of specificity required in an Environmental Impact Report (EIR)**. In that matter, a plan was created to remove certain trees and other flammable vegetation near UC Berkeley. The plan specified criteria for tree removal with experts (arborists and registered professional foresters) reviewing and confirming the selected trees and vegetation for removal. Plaintiffs filed a CEQA action, alleging that the project description in the EIR was inadequate because it did not identify the specific trees to be removed. Consistent with Cal Cities arguments made in a joint amicus brief with CSAC, the court held that so long as the EIR provides sufficient information to analyze environmental impacts, including the objective criteria being used, a project description for large-scale vegetation removal subject to future changing conditions need not specify, on a detailed level, the trees to be removed.
- The Third District Court of Appeal issued an opinion in **South Lake Tahoe Property Owners Group v. City of South Lake Tahoe**, a case concerning **short-term vacation rental regulations** enacted by initiative, which prohibit the use of short-term rentals in residential zones, except for permanent residents' dwellings. Consistent with the arguments made in Cal Cities' amicus brief, the court held that the City's time-limited short-term rental permits did not create vested property rights and the City's local zoning authority was not preempted by the regional planning agency. However, the court remanded the case back to the trial court to determine whether the City's regulations violated the Dormant Commerce Clause of the U.S. Constitution because they favored City residents, an issue that was not clearly raised in the appeal or underlying complaint.
- The Fourth District Court of Appeal issued a favorable decision in **Palmer v. City of Anaheim**, a case in which Cal Cities filed an amicus brief. The case involved a **Proposition 218 challenge to a voter-approved charter amendment** authorizing the city to transfer a certain percentage of its electric rate revenues to the general fund, and to include the transfer amount as part of its electric utility rates. The plaintiffs argued that the transfer charge was an unconstitutional tax because the rates exceeded the city's cost of providing electric utility service. The court disagreed, finding the city did not violate Proposition 218, because voters approved the practice through an amendment to the city's charter. In a footnote, the court also agreed with a Cal Cities amicus brief argument that failed legislation should not be used as a source to determine voter intent.

### Federal Courts

There are two social media cases, **Lindke v. Freed** and **O'Connor-Ratcliff v. Garnier**, pending before the United States Supreme Court with potential impact to cities and city officials. The issue in both cases is whether a public official violates the First Amendment by blocking someone from their personal social media account, which the official uses to communicate

issues related to their public office. Courts have applied different tests to determine if an official's use of social media is "state action," in violation of the First Amendment. The Supreme Court's decisions should provide guidance to help cities and city officials avoid liability related to officials' use of personal social media accounts. The National League of Cities (NLC) and International Municipal Lawyers Association (IMLA) are filing amicus briefs, seeking clarity from the high court. Cal Cities is a member of the NLC and IMLA, participating in legal advocacy on a national level.

Lastly, a panel of the Ninth Circuit Court of Appeals, in ***California Restaurant Association v. City of Berkeley***, held that the federal Energy Policy and Conservation Act (EPCA) preempted the City of Berkeley's ordinance prohibiting natural gas connections to most newly constructed buildings. The City of Berkeley and Cal Cities in its amicus brief, argued a federal law which sets energy standards for appliances should not preempt city building ordinances adopted to protect local health, safety, and welfare, which are police powers expressly reserved to the states under the Tenth Amendment of the US Constitution, and delegated by the state to cities. Cal Cities joined the NLC and CSAC in an amicus brief in support of the City's request for a rehearing by the full court.

### **PENDING CAL CITIES LITIGATION**

When authorized by the Board, Cal Cities initiates or affirmatively participates as a party in litigation to advance cities' collective interests. With Board approval, Cal Cities joined a local government coalition in ***League of California Cities v. Federal Communications Commission (FCC)***, Ninth Circuit Court of Appeals, Case No. 20-71765, **challenging an FCC Ruling pertaining to wireless facilities**. FCC rules implementing the Middle Class Tax Relief and Job Creation Act of 2012, also known as the Spectrum Act, require local governments to approve certain modifications to existing wireless facilities that do not substantially change the physical dimensions of the site. The FCC implementing rules address what constitutes a "substantial change." In 2019, the FCC adopted a Declaratory Ruling to "clarify" and change the rules to allow a significant increase in the height of additional antenna permitted to be added to existing towers and undoing protections used by local governments to preserve concealment elements or enforce prior conditions of approval. The FCC Ruling significantly limits local control over modifications to existing telecommunications facilities.

Opening briefs were filed in January 2021, but the parties agreed to hold the case in abeyance to allow the FCC to reconsider the rule. Earlier this year, after the FCC failed to take any concrete steps toward reconsideration, the local government coalition ended the abeyance. The FCC filed its principal brief on March 1 and the wireless industry, intervenors in the action, filed their brief on March 8. The local government coalition filed a reply brief in early April. The court recently scheduled the matter for **oral argument on July 11**.

### **AMICUS BRIEFS FILED**

An amicus curiae brief is a "friend-of-the-court" brief filed by a non-party in a case who, nonetheless, may be affected by the outcome. With approval of the LAC and Cal Cities' Executive Director, Cal Cities recently filed amicus briefs in the following four cases:

**Duarte v. City of Stockton**, United States Supreme Court, Case No. 22-1080 (**42 U.S.C. § 1983**)

The issue in this case is whether *Heck v. Humphrey* 512 U.S. 477 (1994), which held that Section 1983 civil rights claims must be dismissed if they require plaintiffs to prove the unlawfulness of their conviction, applies in situations where an entry of a plea is held in abeyance pending a criminal defendant's compliance with certain conditions, and the criminal charges are thereafter dismissed. In this matter, the plaintiff pled "no contest" to resisting a peace officer. Although plaintiff entered the equivalent of a guilty plea, the court held its acceptance of the plea in abeyance, pending plaintiff's completion of certain conditions. After the conditions were satisfied, the charges were dismissed and the plaintiff sued the police department for false arrest and excessive force. The district court held that plaintiff's claims were barred by *Heck v. Humphrey*, but a panel of the Ninth Circuit Court of Appeals reversed. The panel held that the *Heck* bar requires an actual judgment of conviction, not its functional equivalent. The City sought a petition for writ of certiorari to the United States Supreme Court.

Cal Cities filed a joint amicus brief with the International Municipal Lawyers Association (IMLA) and CSAC in support of the City's petition for a writ of certiorari. The brief argues diversion should not inherently prevent the application of the *Heck* bar and that, at a minimum, the Court should provide a clear rule reconciling the varying circuit holdings on this issue so that all jurisdictions are fully aware of the Section 1983 implications for diversion and dismissal.

The outcome of this case is important to cities because if diversion and other similar mechanisms do not preclude subsequent Section 1983 civil rights actions challenging the circumstances underlying the arrest, the incentive to offer diversion and dismissal will be reduced, and liability for cities will be significantly increased.

**Cal Cities thanks amicus brief writer Nadia Sarkis with Miller Barondess, LLP.**

**Peridot Tree, Inc. v. City of Sacramento**, Ninth Circuit Court of Appeals, Case No. 22-16783

This issue in this case is whether a federal district court judge properly abstained from determining whether a **city cannabis policy** violates the dormant commerce clause of the United States Constitution.

The City of Sacramento offers cannabis business development resources and the opportunity to apply for storefront cannabis dispensary permits through a Request for Qualifications (RFQ) process. To be eligible to compete, applicants must be current or former residents of the City living in low-income housing for at least five years. Plaintiff, an out-of-state majority shareholder of a California corporation, filed suit in a federal district court alleging the city's cannabis program discriminated against out-of-state applicants in violation of the Dormant Commerce Clause of the United States Constitution. The City

argued that the RFQ process were not a permit guarantee, just a chance to compete for one. The district court judge abstained from hearing the case on the merits, noting that despite the federal causes of action, the state court – not federal court - was the proper venue to decide the issue due to the peculiar nature of the federal/state relationship with respect to cannabis. Plaintiff appealed the district court's decision to the Ninth Circuit Court of Appeals.

Cal Cities filed a joint brief with the Rural County Representatives of California (RCRC) and CSAC in support of the City. The brief noted the uniqueness of the delicate federal/state relationship with regards to cannabis policy and argued that application of the Dormant Commerce Clause to California's regulation of cannabis products would have a fatally disruptive effect upon that scheme. The brief also argued that if the Dormant Commerce Clause is found applicable to the sale of cannabis products, the City's regulation served the legitimate local purpose of furthering social equity programs in disproportionately impacted areas within the state, which could not be served as well by nondiscriminatory means.

The outcome of this case is important because federal judicial review of local cannabis programs causes uncertainty in cities' administration of the programs, and preempts local control of local public health, safety and welfare matters.

**Cal Cities thanks amicus brief writer Arthur Wylene with RCRC.**

**Redondo Beach v. Bonta**, Los Angeles Superior Court, Case No. 22STCPO1143 **(SB 9)**

The issue in this case is whether SB 9, which requires ministerial approval of certain land use applications, violates the California Constitution by interfering with charter cities' home rule authority over land use and zoning.

SB 9 generally requires cities to ministerially approve applications that would create two lots on any parcel zoned as single-family residential as well as applications to develop two units of at least 800 square feet on each of those lots. Four charter cities filed a legal challenge to SB 9, alleging it interferes with the "home rule" authority guaranteed under Article XI, Section 5 of the California Constitution, which grants charter cities the right to make and enforce local laws concerning municipal affairs, which has traditionally included local land use and zoning. State law may only preempt charter cities' home-rule powers if the law is reasonably related and narrowly tailored to address a matter of statewide concern.

Cal Cities filed an amicus brief noting SB 9 did not clearly articulate the matter of statewide concern it intends to address. This distinguishes SB 9 from other state housing laws that appellate courts have recently upheld in the face of constitutional challenges. The amicus brief also argues that to the extent the purpose of SB 9 is to ensure access to affordable housing, SB 9 is not reasonably related or narrowly tailored to that purpose. SB 9 applies regardless of whether cities have identified sites to accommodate their share of the regional housing need, and it does not require the ministerially approved units or lot splits to be restricted for affordable housing. The amicus brief argues SB 9 is an unnecessarily broad

measure that strips charter cities of their discretion to determine the location, density, and site characteristics of housing without any indication that eliminating such discretion will result in the construction of more affordable housing units. The hearing on the Petition for Writ of Mandate is scheduled for **September 5, 2023**.

**Cal Cities thanks amicus brief writers Derek Cole and Tyler Sherman with Cole Huber LLC.**

**Patz v. City of San Diego**, Cal. Fourth District Court of Appeal, Case No. D080308 (**Prop. 218**)

The issue in this case is whether the City's tiered water rates for residential water users and fees for water usage during peak demand times violates Proposition 218.

To establish retail water service rates, the City of San Diego retained a consultant to conduct a detailed analysis of historic usage data and perform a series of complex calculations to allocate costs and the rates to each cost tier. Ultimately, the City established a practice of calculating the tiered fees using "peaking factors" (ensuring that the system could handle peak water demands). Despite the City's efforts, the trial court found that the City's tiered structure violated Proposition 218 because the City failed to prove, by substantial evidence, that the tiers correlated with the actual cost of providing water at those tiered levels for a given parcel.

Cal Cities joined the Association of California Water Agencies and CSAC in an amicus brief arguing the trial court applied an incorrect and more burdensome standard to justify the utility rates than is required by law. The brief also argued that no perfect data on which to make rates exists, thus only reasonable estimates and judgments are required.

The decision is significant to cities because if it stands, specific and granular data will be required to justify utility rates and it could lead to considerable uncertainty, litigation risk and reduced predictability in government finance.

**Cal Cities thanks amicus brief writers Michael Colantuono and Vernetra Gavin from Colantuono Highsmith & Whatley LLP.**

#### **AMICUS LETTERS SUBMITTED**

The California Supreme Court accepts letter briefs from non-parties on the issue of whether they should grant review of an appellate case, and whether an appellate court decision should be de-published. Cal Cities was a party to **six** recent amicus letters, several are discussed below.

**Hamilton and High LLC v. City of Palo Alto**, California Supreme Court, Case No. S279718

The issue in this case is whether fees paid by developers in lieu of otherwise mandatory development standards are subject to the **Mitigation Fee Act (MFA)**.

A developer, who paid in-lieu fees for reduced parking, subsequently sued the City for a refund of the fees on the basis that the fees were not included in the City's five-year findings required by the Mitigation Fee Act. The City argued that the MFA should not apply to the in-lieu parking fee because the developer voluntarily elected to pay the fee and the fee was, therefore, not strictly a "condition" of approval – as required by the MFA. The court of appeal reversed a favorable trial court ruling, holding that in lieu fees are subject to the MFA, finding the City violated the MFA by failing to satisfy the reporting requirements and therefore, needed to refund the fees.

Cal Cities joined a local government coalition letter in support of the City's petition for review to the California Supreme Court. The amicus letter argued that the court of appeal extended the MFA beyond its intended scope in a way that was inconsistent with precedent, contrary to legislative intent, and creates a substantial harm to local development and governance.

The decision that the parking in-lieu fees are subject to the Mitigation Fee Act creates substantial uncertainty for cities in planning and development of infrastructure, and incentivizes cities to eliminate the development-friendly, economically efficient options that in-lieu fees offer due to the risk of financial forfeiture and regulatory disruption.

**Cal Cites thanks amicus letter writer Adam Hofmann with Hanson Bridgett.**

**Martinez v. City of Clovis**, California Supreme Court, Case No. S280039

Two issues raised in this case are: (1) whether cities may accommodate a **Regional Housing Needs Allocation (RHNA)** lower income unit shortfall carried over from a previous housing cycle by implementing an overlay zone on sites that also allow lower densities for residential development; and (2) whether technical non-compliance with RHNA zoning in Housing Element Law is a per se (automatic) violation of the state statutory requirement to affirmatively further fair housing.

The City of Clovis amended its general plan to allow multi-family developments by-right in a public facilities zone and added a city-wide overlay allowing high density multi-family housing by right on existing residentially zoned parcels from 1 to 10 acres. The State Department of Housing and Community Development (HCD) informed the City that its housing element complied with the Housing Element Law. A resident filed a petition for writ of mandate, seeking declaratory and injunctive relief, alleging the City's housing element did not substantially comply with the Housing Element Law and as a result, the City discriminated against lower-income housing in violation of state law.

The court of appeal disregarded HCD's approval of the City's housing element and held the City's use overlay zone was insufficient to satisfy the minimum density requirements in the Housing Element Law. The court interpreted the law to place more exacting zoning



standards on sites being used to accommodate a RHNA carryover, finding the statute at issue required specific minimum densities and development by right. The court denied application of Housing Element Law allowance for “[r]esidentially zoned sites that are capable of being developed at a higher density” and reasoned that while the overlay allows multi-family housing at the required density, the base zoning does not and because development may occur at a density that is lower than the statutory minimum, the overlay does not substantially comply with Housing Element Law.

As to the discrimination claims, the court held that the trial court used the incorrect standard and determined that a discrimination claim under Government Code section 65008(b)(1)(C) may be established by proving a disparate impact on developments intended for occupancy by lower-income families, even where there is no denial of a particular development. Finally, the court held that the City violated its duty to affirmatively further fair housing when its housing element failed to comply with density requirements imposed by the Housing Element Law.

Cal Cities filed an amicus letter in support of the City's petition for review by the California Supreme Court, and request for de-publication of the appellate court decision. The amicus letter argues that overlay zones are flexible zoning tools used frequently by local governments to meet their regional housing needs and they encourage development of affordable housing; a practice the state has sanctioned for many years. The brief also argued that the court - without supporting legal authority - created a per se liability standard regarding whether a city affirmatively furthers fair housing based solely upon a city's technical non-compliance with Housing Element Law.

If the appellate court decision stands, it would prohibit the use of overlay zones to meet RHNA carryover requirements if the underlying zoning does not also meet the Housing Element Law density requirements. The decision could undermine the viability of numerous HCD approved housing elements that relied upon the overlay zoning tool. It may also lead to a proliferation of lawsuits against cities alleging discrimination and related claims for a technical non-compliance with Housing Element Law.

**Cal Cities thanks amicus letter writers Barbara Kautz and Dolores Bastian Dalton with Golfarb & Lipman, LLP.**

### **ATTORNEY GENERAL OPINION LETTER BRIEFS SUBMITTED**

The California Attorney General provides legal opinions upon request to designated state and local public officials and government agencies on issues arising in the course of their duties. The formal legal opinions of the Attorney General have been accorded "great respect" and "great weight" by the courts. Prior to issuing an opinion, the Attorney General accepts letter briefs from interested parties. Cal Cities recently filed comment letters on the following opinion requests:

**Attorney General Request No. 23-101**

**Senate Bill 1439** expanded the Levine Act to local elected officials but left ambiguity as to whether it applied to contributions made prior to January 1, 2023. Despite the Fair Political Practices Commission (FPPC) issuance of an opinion concluding that Senate Bill 1439 did not apply to contributions made prior to January 1, 2023, a senator sought an opinion from the California Attorney General's office regarding its application to contributions made prior to January 1, 2023.

Cal Cities filed a comment letter, consistent with the arguments it made before the FPPC, against retroactive application of the statute. The letter argued it would be unfair and confusing to apply the statute retroactively, and FPPC enforcement would raise due process concerns. Thank you to Alison Leary, Senior Deputy General Counsel, for drafting the comment letter.

An opinion letter from the Attorney General agreeing SB 1439 does not apply retroactively would provide clarity and hopefully, final resolution of the issue.

### **Attorney General Request 23-102**

The Ventura County District Attorney determined that the attendance of a majority of the city council at a state of the city address was a public meeting subject to the **Ralph M. Brown Act**. The Ventura City Attorney disagreed and requested the D.A. seek an opinion from the Attorney General. The following questions were submitted to the AG for opinion: (1) Is it a violation of the Brown Act for a mayor to deliver a "State of the City" address to attendees at a fee-only private event specifically held to facilitate the address, where all or a quorum of fellow council members are in attendance? (2) Does the "conference exception" of the Brown Act apply? (3) Does the "community meetings exception" of the Brown Act apply?

Cal Cities submitted a comment letter noting the determination of whether a meeting is subject to the Brown Act is a highly fact-specific inquiry. The letter also noted the diversity of approaches California cities take to state of the city addresses and requested any opinion issued on this matter be narrowly tailored to the specific facts presented. Thank you to Harveen Gill, Assistant General Counsel, for drafting the comment letter.

The opinion issued by the Attorney General in this matter is significant to cities because it may extend the application of the Brown Act to events that were not previously considered public meetings or were previously considered to be exempt from Brown Act requirements.