CALIFORNIA, JANUARY 2017 The First Annual Guide to Significant Cases and Legal Issues in California

# 2016 LEGAL UPDATE

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## 2016 Legal Update Contents

# 2016 LEGAL UPDATE

**Churchwell White LLP is pleased to offer our first Legal Update (the "Update"), an annual guide to significant cases decided by California and federal courts in the past year and legal issues which are likely to be reviewed in 2017. The Update is a streamlined view of case law that may affect public entities, particularly cities and special districts. The Update provides a brief summary of the factual background, holding, and significance of each case.**

With the passage of Proposition 64, which legalized the recreational use of marijuana, the courts are likely to see an increase in litigation surrounding marijuana and hemp regulatory and taxation schemes. The California Supreme Court agreed to review California Cannabis Coalition v. City of Upland (2016) 245 Cal.App.4th 97, which discusses whether a local medical marijuana dispensary initiative, that would require dispensaries to pay a significant sum in annual licensing and inspection fees, is a tax requiring voter consent. Employment matters also continue to be heavily litigated. The California Supreme Court will also be reviewing Alvarado v. Dart Container Corporation (2016) 243 Cal.App.4th 1200, which involves an overtime calculations dispute.

Churchwell White LLP is proud to serve as a trusted resource for our partners in local government and administration. Feel free to contact our firm if you have any questions or would like additional information regarding the case law discussed in the Update.

Best regards,

Douglas L. White, Managing Partner

## **General Municipal** Public Records Act

### League of California Cities v. Superior Court (2015) 241 Cal. App.4th 976

*Summary of Case:*

San Diegans for Open Government ("SDOG") submitted a California Public Records Act ("CPRA") request to the City of San Diego ("City") seeking e-mails sent to or from the San Diego City Attorney's personal e-mail account concerning the official business of the City. The City asserted an exemption to the disclosure of e-mails between a legal assistant for the League of California Cities ("League"), which is an association of California cities and their public officials, and the attorney members of the League on the grounds that these e-mails did not concern city business or were otherwise privileged. SDOG pursued a writ of mandate to compel the disclosure of these e-mails. The trial court declined to perform an in-camera review of the e-mails and found the City failed to meet its burden of demonstrating that the e-mails were privileged or exempt under the Act. The League appealed the trial court's order on the following points: (1) it had standing to bring this action; (2) the e-mails were not public records because the City Attorney received the League's e-mails in his capacity as a member of the League; and (3) the e-mails were protected by the attorney-client privilege.

*Holding:*

On October 28, 2015, the Fourth District of the California Court of Appeal held that the e-mails sent by the League to the City Attorney were public records and were not protected by the attorney-client privilege. The court found that the e-mails sent to the City Attorney's personal e-mail account were forwarded to his City e-mail account, thus providing strong evidence that the e-mails pertained to his work as City Attorney, and were therefore public records. The court also found that there was no evidence that the e-mails were sent by a League member in his capacity as attorney for the League, and therefore were not e-mails sent between an attorney and client. Therefore, the attorney-client privilege would not apply. However, the court also noted that there was a factual question as to whether the person sending some of the League e-mails were actual communications between an attorney and client. The court ordered that the trial court should examine the e-mails to determine whether the e-mails or portions were protected by the attorney work-product doctrine.

*Significance:*

The California Supreme Court is expected to answer the question whether written communications, including e-mail and text messages, relating to city business—which are sent or received by public officials and employees on their private electronic devices using private accounts, are not stored on city servers, and are not directly accessible by the city—constitute "public records" within the meaning of the CPRA. The Court of Appeal in City of San Jose v. Superior Court (2014) 169 Cal.Rptr.3d 840 held that these records were not subject to the CPRA.

### Catalina Island Yacht Club v. Superior Court (2015) 242 Cal. App.4th 1116

*Summary of Case:*

Timothy Beatty, a member of the Catalina Island Yacht Club ("Yacht Club") and its board of directors ("Board"), sued the Yacht Club, alleging board or membership conspired to remove him from the Board and suspend his membership. He also claimed the Yacht Club defamed him. Beatty served inspection demands on the Yacht Club, seeking written communications and other documents relating to his removal from the Board and suspension. The Yacht Club served responses that included boilerplate objections based on the attorney-client privilege and work-product doctrine. The Yacht Club included a privilege log identifying the communications it withheld, and explained these communications were between "counsel for Defendants and Defendants." Beatty filed a motion to compel the Yacht Club to produce the documents. The two parties were ordered to settle the issue with a temporary judge, but their agreement did not detail what information was required in the privilege log. In response, the Yacht Club increased the number of documents included in the privilege log and only identified the communications as e-mails, as well as the sender and recipient of the e-mails.

The trial court held that the Yacht Club submitted an inadequate privilege log, which had the effect of waiving the attorney-client privilege and work-product doctrine.

*Holding:*

On December 4, 2015, the Fourth District of the California Court of Appeal held that a party does not waive the attorney-client privilege and attorney work-product doctrine when it submits an inadequate privilege log that fails to provide sufficient information to evaluate the merits of the objections. Furthermore, a party does not waive the privilege even when no privilege log is provided. Rather, the trial court may order the responding party to provide a further privilege log that includes the necessary information to rule on these objections, impose monetary sanctions for providing a deficient privilege log, and impose evidence, issue, and terminating sanctions if the deficiency or failure persists. The court reasoned that there is no waiver because there are only three statutorily authorized methods for waiving the attorney-client privilege.

*Significance:*

This case holds that the only method of waiving the attorney-client or work-product privilege is through three statutorily authorized methods. These are: (1) disclosing a privileged communication in a non-confidential context; (2) failing to claim the privilege in a proceeding in which the holder has the legal standing and opportunity to do so; and (3) failing to assert the privilege in a timely response to an inspection demand. Otherwise, an order from the court to compel attorney-client or work-product privileged documents may be successfully appealed. However, the best practice is to submit a detailed privilege log in order to avoid potential sanctions by the court. A privilege log must "describe the nature" of the document so that the trial court can assess whether the document falls under the privilege. Blanket privilege claims are insufficient, and courts routinely reject privilege logs that identify distribution lists rather than each employee, or identify senders or recipients by title rather than name and job duties. Attorneys should consult the particular jurisdiction's requirement for privilege logs, as they may differ in how much specificity is needed.

**City of Los Angeles v. Metropolitan Water District of Southern California (Feb. 26, 2016, BS157056)**

*Summary of Case:*

The San Diego Union Tribune, LLC ("Union") filed a California Public Records Act ("CPRA") request with the Metropolitan Water District of Southern California ("District") regarding its Turf Program, a turf-replacement rebate program created in response to the Governor's executive order that turf must be replaced with drought tolerant landscape. The Union sought electronic records for the Turf Program. The requested records included personal information regarding recipients of the program funds, who were residents in Southern California. The District initially redacted the names and address of the participants in the program, but provided general city block numbers. The Union reiterated its request for names and addresses. The District met with the Los Angeles Department of Water & Power ("DWP") regarding the request, as twenty percent of the names and addresses requested were DWP customers. DWP objected to the disclosure of its customers' names and addresses. However, the District informed DWP that it intended to release the requested information. DWP filed a petition to stop the District from disclosing the names and addresses.

*Holding:*

The Los Angeles Superior Court ordered the District to release the names and addresses of the Turf Program participants. California Government Code section 6254.16 states that the CPRA does not require disclosure of the names, utility usage data, home addresses, or telephone numbers of utility customers of local agencies unless the public interest in disclosure of the information "clearly outweighs" the public interest in nondisclosure. Here, the court determined that the public interest in disclosure outweighs the interest in nondisclosure. The court found that an individual's interest in privacy was outweighed the following factors: (1) the customers voluntarily disclosed their personal information to obtain rebates, and did so on a private third party application; (2) participation in the program did not carry social stigma; (3) names and address information could be found through county property records; and (4) there was critical public interest in scrutinizing the expenditure of public funds.

*Significance:*

This case discusses the factors the court will weigh in determining whether the local agency will be required to release customer information in response to a CPRA request. These factors include availability of information from other sources, social stigma regarding disclosure of personal information in connection to a particular program, and voluntary disclosure of personal information to a non-public entity.

**Ardon v. City of Los Angeles (2016) 62 Cal.4th 1176**

*Summary of Case:*

In 2007, the Plaintiff submitted a California Public Records Act ("CPRA") request pertaining to litigation against the City of Los Angeles ("City"). The City withheld 27 documents under the attorney-client privilege and attorney work-product doctrine. However, in 2013, in response to another CPRA request by the Plaintiff regarding the same litigation, the City accidentally disclosed documents that were privileged under the attorney-client privilege and work product doctrine. The Plaintiff refused to return the documents, claiming that the City's disclosure waived the privilege under the CPRA.

*Holding:*

On March 17, 2016, the California Supreme Court issued a decision in support of the City, ruling that the accidental disclosure of privileged documents under the CPRA did not waive any privilege. California Government Code section 6254.5 establishes that the disclosure of privileged documents waives the exemption from disclosure of all other similarly privileged documents. The court reasoned that the purpose of Section 6254.5 was to prevent public agencies from selectively disclosing privileged documents to some parties but not others. Under this rationale, this section was never meant to apply to inadvertent disclosures.

*Significance:*

With public agencies in California receiving thousands of CPRA requests annually, the Court's decision in Ardon v. City of Los Angeles protects public agencies from the accidental disclosure of privileged documents by city staff when fulfilling these requests. However, a public agency may not recharacterize a disclosure as inadvertent in order to revive a privilege. Public agencies inadvertently disclosing privileged documents must promptly request the return of those documents. The best practice remains to thoroughly review all CPRA responses to avoid accidental disclosures in the first place.

**California Public Records Research, Inc. v. Stanislaus County (2016) 246 Cal.App.4th 1432**

*Summary of Case:*

California Public Records Research, Inc. ("Plaintiff") sought a writ of mandate to compel the County of Stanislaus ("County") to reduce the fees it charged for copies of official records. The Plaintiff alleged that by charging three dollars ($3) for the first page and two dollars ($2) for each subsequent page the County was violating California Government Code section 27366. Section 27366 states that copying fees "shall be set by the board of supervisors in an amount necessary to recover the direct and indirect costs of providing the product or service... ." The Board of Supervisors ("Board") for the County contended that the fees were based on a 2001 study that estimated staff spent an average of three minutes processing a copy request, which cost the County an average of $0.99 per minute in productive staff time. Multiplying these two figures, the County estimated that it cost the County an average of $2.97 to process a request for a copy of an official record.

*Holding:*

On April 28, 2016, the Fifth District of the California Court of Appeals found for the Plaintiff, ruling that the Board abused its discretion when it set the copying fees. The court reasoned that the County's basis for the copying costs was faulty because the 2001 study cost estimates were based on a per document basis, not a per page basis. The 2001 study itself demonstrated that the copy costs were unreasonable, because it did not take five minutes or cost five dollars ($5) to provide a copy of a two-page document.

*Significance:*

Local agencies should review their current copy costs and make changes accordingly. While local agencies have the discretion to set copying fees, this case demonstrates the

local agency must provide justification that the fees are the "amount necessary to recover" costs. Therefore, it is recommended that the local agency's legislative body make findings which justify the copy costs on a per page basis.

## **General Municipal** Ralph M. Brown Act

### Castaic Lake Water Agency v. Newhall County Water District (2015) 238 Cal.App.4th 1196

*Summary of Case:*

On March 8, 2013, the Newhall County Water District ("District") posted a notice and agenda for its regular meeting. The notice notified the public that the District planned to hold a regular meeting on March 14, 2013. It also provided that it would hold a closed session with legal counsel pursuant to California Government Code section 54956.9, subdivision (c) to discuss potential litigation in two cases. The litigation concerned Castaic Lake Water Agency ("Agency") and how the District planned to challenge the Agency's approval of new water rates. The Agency sent the District a letter asserting that the District's Board violated the Ralph M. Brown Act ("Brown Act"), which contains provisions to ensure transparency in government, by failing to state the proper Government Code section for the closed session discussion.

*Holding:*

On June 26, 2015 (modified July 22, 2015), the Second District of the California Court of Appeal held that there was no Brown Act violation by the District because the notice given substantially complied with the Act. While the notice erroneously cited Section 54956.9(c) instead of subdivision (d)(4), it adequately advised the public that on March 14, 2013, the District's Board would be meeting with its legal counsel, in closed session, to discuss potential litigation in two cases.

*Significance:*

The substantial compliance applies to the Brown Act's requirement of a description of the subject of a closed session. However, the best practice is for local agencies to state the proper Government Code section in the notice.

### Cruz v. Culver City (2016) 2 Cal.App.5th 239

*Summary of Case:*

Culver City residents sued the Culver City ("City") for violating the Ralph M. Brown Act ("Brown Act"), which are open meeting laws meant to ensure government transparency of public commissions, boards, councils, and other public agencies. The residents alleged that the council violated the Act in two ways: (1) by discussing a change to parking restrictions in their neighborhood even though it was not on the agenda; and (2) by taking action on that issue when the council implicitly decided that the new challenge to those restrictions could proceed as an appeal of an earlier denial by city staff members.

The parking restrictions were implemented in 1982, when residents of the area at issue complained that parishioners of the nearby church crowded the street with cars during church services. In April 2014, the church sought to have these parking restrictions lifted. The church sent a letter to a councilmember in August 2014 about the parking restrictions.

The councilmember mentioned the letter during the council's August 11, 2014 meeting, during the portion of the meeting set aside for the receipt and filing of correspondence from the public. Following a six-minute discussion with the then-mayor and public works director and city engineer, the church's request to review the parking restrictions was placed on the agenda for the next council meeting.

The City brought an anti-SLAPP motion (motion against a lawsuit brought to discourage speech regarding issues of public significance or public participation in government proceedings) to dismiss the residents' action, because the City's alleged misconduct arose from First Amendment activity and because the residents could not show a probability of prevailing on the merits. The Plaintiffs contended their action was exempt from anti-SLAPP provisions because it concerned a matter of public interest. The public interest exemption applies where: (1) the plaintiffs seek no relief greater than what any member of the public would be entitled to; (2) if successful, the judgment would enforce an important right affecting the

public interest; and (3) private enforcement is necessary and poses a financial burden on the plaintiff greater than the plaintiff's stake in the matter.

*Holding:*

The Second District of the California Court of Appeals held that the Council did not violate the Brown Act because the six-minute discussion was not substantive or substantial. The court also held that the residents were unlikely to prevail on the merits of their lawsuit because the City had the authority to review long-standing parking restrictions. On the matter of the anti-SLAPP motion, the court determined the residents' lawsuit did not qualify under the public interest exemption because their lawsuit sought to preserve the parking restrictions, and therefore uniquely benefited them.

*Significance:*

This case found the six-minute discussion about the parking restriction did not violate the Brown Act because it was not substantial or substantive on a non-agendized matter. While this is good news in that the courts will not strictly enforce the Brown Act to penalize every non-agendized discussion, legislative bodies of public agencies should note that this case is very fact specific. Therefore, a non-agendized discussion could potentially violate the Brown Act if the court rules that it is on a substantive matter. Local agencies must still comply with the Brown Act and attempt to avoid discussing matters that are not on the agenda.

## **General Municipal** Conflicts of Interest

### California-American Water Co. v. Marina Coast Water Dist. (2016) 2 Cal.App.5th 748

*Summary of Case:*

In 1995, two public agencies, Marina Coast Water District ("District") and Monterey County Water Resources Agency ("Agency"), and a water company, California-American Water Company ("California-American"), entered into five interrelated agreements to build a $400 million water desalination project. After it was revealed that one of the board members of the Agency had a conflict of interest, California-American claimed that the agreements were void under California Government Code section 1090 ("Section 1090"). That statute states that members of a district may not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. The trial court found that four out of the five agreements were void. On appeal, the District argued that the challenge to the agreements were time-barred and that the trial court lacked jurisdiction to consider the parties' dispute.

*Holding:*

On August 18, 2016, the First District of the California Court of Appeal disagreed with the District and found that a public agency is not bound by the sixty-day limitation period that governs validation actions when it seeks a judicial determination of the validity of a contract under Section 1090. The court noted that finding otherwise would conflict with the purpose of Section 1090, which is to recognize that a contract made by a public officer or employee who has a financial interest in it is "void from its inception." The court also upheld the trial court's ruling that the Agency's board member, Stephen Collins, had a conflict of interest under Section 1090 when he was paid $160,000 by a private company to sell the desalination water plant to the public.

*Significance:*

This case establishes that the 60-day limitation period that typically governs validation actions does not apply to public agencies. It also warns public agencies that conflicts of interest can result in the invalidation of major agreements. Members of public agencies who are unsure whether they have a conflict of interest on an action item should consult their agency's attorney to determine if a conflict exists.

### City of Montebello v. Vasquez (2016) 1 Cal.5th 409

*Summary of Case:*

Arakelian Enterprises, doing business as Athens Disposal Company ("Athens"), held the franchise for residential waste collection in the City of Montebello ("City"). Athens held the franchise for over forty years. City representatives

invited Athens to submit a proposal for a commercial and industrial waste hauling contract. Athens wanted an exclusive contract, in which Athens would pay the City $500,000, improve its residential services, and indemnify the City for any failure to comply with the Integrated Waste Management Act. At a city council meeting, more than twenty people spoke against the contract. The contract was ultimately approved by a three-to-two vote.

The mayor, who was in the minority, refused to sign the contract. He asked the Los Angeles District Attorney's office to investigate possible money laundering by one of the councilmembers, Kathy Salazar ("Salazar"), as well as Meyers-Milias-Brown Act violations by all three councilmembers who voted for the contract. The district attorney ultimately did not file any charges against Salazar.

The City then filed an action against the three councilmembers who voted for the contract as well as the city administrator, alleging a conflict of interest in violation of California Government Code section 1090. The suit sought a declaration that the Athens contract was void, and an order requiring the three councilmembers to disgorge the campaign contributions they received from Athens. The defendants moved to strike the complaint under the anti-SLAPP statute, contending that the suit was a politically driven attempt to penalize them for exercising their constitutional right of free speech in connection with issues of public interest related to their official duties. The City claimed its action fell in the public enforcement exemption of Government Code section 425.16, subdivision (d).

*Holding:*

On August 8, 2016, the California Supreme Court held that the City's case did not fall in the public enforcement exemption of the anti-SLAPP statute. The court reasoned that in order to take advantage of this exemption, the action must be brought both in the name of the people of the State of California, and by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor. Here, the City did not meet either prongs of this exemption. The court also concluded that while the U.S. Supreme Court held that voting by elected officials is not protected under the First Amendment, the anti-SLAPP statute extended to votes at a public meeting. Therefore, the public officials' votes were a protected activity.

*Significance:*

This case does not prevent lawsuits against public officials, but this does indicate that lawsuits based on a public official's vote may face procedural barriers. The court also clarified that lawsuits brought against a local agency as a whole is not protected activity. Thus, anti-SLAPP motions would fail against the local agency as a whole.

## General Municipal Tax

### Ellis v. County of Calaveras (2016) 245 Cal.App.4th 64

*Summary of Case:*

The Plaintiff was constructing a large, detached garage on his property in the County of Calaveras ("County"). In 2009, he was assessed property taxes based on an appraised value of the garage set at $140,000. This assessment was based on 90 percent of the estimated total cost of construction, when the garage was only 75 percent complete. The County and the Plaintiff eventually settled, agreeing that the garage was valued at $25,000 in 2009. The Plaintiff sought to have this base value applied to the 2010 tax year, but the trial court refused to do so. The Assessment Appeals Board dismissed the Plaintiff's appeal for a tax refund, on the theory that the base year value of the garage was incorrect, stating that the appeal was untimely. The Plaintiff then sought a writ of mandamus from the Superior Court, which also dismissed based on the court's previous denial of the Plaintiff's request to have the $25,000 settlement amount applied to 2010.

*Holding:*

On February 25, 2016, the Third District of the California Court of Appeal held that partial construction triggers a new base year for the purposes of property tax assessments. The court reasoned that according to the plain language of California Revenue and Taxation Code section 110.1, when the assessor determines the value

of a partially completed construction as of the lien date, that value is also a 'base year value.' Therefore, the Plaintiff's appeal was timely. However, the court still ruled for the County, finding that even if the base year value was incorrect and had to be reduced, the taxpayer would only be entitled to a retroactive reduction in the base year value for purposes of recalculating the current and prospective regular assessments. Since the construction was ongoing, the 2009 base year value was superseded by the subsequent assessments in 2010, 2011, and 2012.

*Significance:*

Counties should take note of how property tax assessment base years are triggered when construction is incomplete.

**City of Bellflower v. Cohen (2016) 245 Cal.App.4th 438**

*Summary of Case:*

The City of Bellflower, joined by other cities and the League of California Cities ("Cities"), challenged collection provisions in the Health and Safety Code which would allow withholding of sales and use tax revenues as well as property taxes if a redevelopment agency did not distribute agency funds to the county auditor-controller for allocation to local taxing entities. The Cities challenged the practice pursuant to Proposition 22, which limited the power of the Legislature to "reallocate, transfer, borrow, appropriate, restrict the use of, or otherwise use the proceeds of any tax imposed or levied by a local government solely for local government purposes." This Proposition was enacted because the State previously took local tax revenues to cover revenue shortfalls at the State level.

*Holding:*

On March 3, 2016, the Third District of the California Court of Appeal held that Health and Safety Code section 34179.6, subdivision (h) which allows withholding of sales and use tax revenues and property tax revenues, is unconstitutional to the extent it allows the state to reallocate, transfer, or otherwise use tax revenue belonging to the local government. The court reasoned that the language of Proposition 22 was an unambiguous prohibition of the State's ability to divert local taxes for any purpose, whether or not the taxes may have been wrongfully withheld.

*Significance:*

While this case prohibits the State from withholding sales and use tax revenues and property tax revenues in the dissolution of redevelopment agencies, the Court in this case noted that withholding taxes was not the exclusive means to enforce the provisions of the dissolution of redevelopment agencies. Municipalities and other local agencies facilitating the dissolution of redevelopment agencies will likely be subject to enforcement actions by the State in the future, though it is unclear in what form these actions will take.

## **General Municipal** Financial Interests

**Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency (2016) 1 Cal.App.5th 1084**

*Summary of Case:*

Castaic Lake Water Agency ("Agency") wholesales water to four retail purveyors—Santa Clarita Water Division ("Santa Clarita"), respondent Valencia Water Company ("Valencia"), Newhall County Water District, and Los Angeles County Waterworks District No. 36. In 1999, the Agency acquired Santa Clarita's stock and absorbed the district into its own operations. The California Legislature then passed Assembly Bill 134, which allowed the Agency itself to act as a retail purveyor of water in the territory where Santa Clarita used to operate. In 2011, Newhall Land and Farming Company ("Newhall") owned 100 percent of the stock in Valencia, and offered to sell that stock to the Agency. The parties eventually reached an agreement for the Agency to acquire Valencia's stock from Newhall for $73.8 million. Under the terms of the stock acquirement agreement, Valencia's directors were required to resign and were replaced with directors appointed by the Agency. The Agency operated Valencia under the supervision of the Public Utility Commission. The Santa Clarita Organization for Planning and the Environment ("SCOPE") sued the

Agency and other parties to the stock purchase. SCOPE sought inverse validation (when an interested person seeks affirmation of the legality of a public agency's financial transaction) alleged a violation of the California Environmental Quality Act ("CEQA"), illegal expenditure of taxpayer money, and conflict of interest. SCOPE also argued that the Agency violated California Water Code section 12944.7 by engaging in water retail sales, as well as Article XVI, section 17 of the California Constitution, which prohibits public ownership of stock companies.

*Holding:*

On July 28, 2016 (modified August 16, 2016), the Second District of the California Court of Appeal held that inverse validation was not available here because the agreement at issue did not fall under any statutory provision which permitted inverse validation. The court reasoned that while California Government Code section 53511, subdivision (a) states that validation proceedings extend to all contracts, bonds, warrants, obligations, and other evidences of indebtedness, the agreement at issue here did not fall into one of these categories because the Agency purchased the stock using "cash on hand." Furthermore, the court held that the Agency did not violate Article XVI, section 17 of the California Constitution because this provision only applies to stock acquisitions that extend credit, and the provision provided an exception for stock ownership which applied to any corporation, like Valencia, whether or not it was a mutual water company.

*Significance:*

Local water agencies should proceed with caution before attempting to acquire stock. This case indicates that stock acquisitions where the local agency is not lending its credit, but rather owns the entity, is permitted.

**Reed v. Town of Gilbert (2015) 135 S. Ct. 2218**

*Summary of Case:*

Gilbert, a small town in Arizona, adopted a comprehensive Sign Code which prohibited the display of outdoor signs without a permit. Exemptions were made for 23 categories of signs, three of which included "Ideological Signs," "Political Signs," and "Temporary Directional Signs Relating to a Qualifying Event." Each of these three categories were subject to different regulations governing their size, location, and time of display. In 2007, a local church was cited after failing to remove its temporary directional signs within the time limits prescribed by the Sign Code. The church's pastor then filed a lawsuit against the town alleging that the Sign Code abridged the church's freedom of speech in violation of the First Amendment.

*Holding:*

On June 18, 2015 the United States Supreme Court issued its ruling in Reed, striking down the Town's sign ordinance as unconstitutional under the First Amendment for being a content-based regulation of speech. Writing on behalf of a unanimous Court, Justice Clarence Thomas reasoned that the Sign Code was a content-based regulation of speech because the restrictions in the ordinance were entirely dependent upon the communicative content of the sign. Treating "Temporary Directional Signs" less favorably than "Political Signs" or "Ideological Signs" is tantamount to making an unlawful distinction of speech based on the message it conveys. In reaching its decision, the Court made a number of important determinations with respect to municipal sign ordinances. First, sign restrictions that are content-based on their face will almost always be found unconstitutional, regardless of the benign motives a city may have in enacting the law, because of the danger that future government officials may one day abuse the statute to suppress disfavored speech. Second, the Court's hostility towards content-based regulations extends not only to restrictions on particular viewpoints, but also to restrictions that prohibit public discussion of an entire topic. Finally, the town's objective of preserving its aesthetic appeal and ensuring traffic safety did not sufficiently justify the content-based distinctions in the Sign Code.

*Significance:*

This ruling reaffirms the Supreme Court's position that an ordinance, despite being a rational regulation of signs, might nevertheless impinge on First Amendment rights due to its content-based nature. There are, however, plenty of other ways for governments to enact effective sign laws. These include regulations over size, building materials, lighting, moving parts, and location. The most important feature of such regulations is that they remain content-neutral and apply evenhandedly to all signs. One sign ordinance which was validated as content-neutral by the California Court of Appeal was discussed in Lamar Central Outdoor, LLC v. City of Los Angeles (2016) 245 Cal.App.4th 610 (see below).

**City of Corona v. AMG Outdoor Advertising (2016) 244 Cal. App.4th 291**

*Summary of Case:*

On September 1, 2004, the City of Corona ("City") adopted an ordinance which amended its municipal code to prohibit all new off-site billboards, or "outdoor advertising signs," anywhere in the City. The ordinance provided an exception for any off-site billboard erected prior to 2004, which could be relocated in the City pursuant to a relocation agreement. This relocation agreement would allow the City to avoid a taking under eminent domain law.

AMG Outdoor Advertising, Inc. ("AMG") applied for a permit to erect an off-site billboard, but the permit was rejected. The City explained billboards were not allowed in the City, and that all billboards under construction in the City were being built pursuant to a relocation agreement. AMG proceeded with construction despite denial of the permit.

The City eventually filed a complaint against AMG after sending cease and desist letters. AMG claimed that the City enforced the ordinance against them in an impermissibly discriminatory manner, because the City allowed Lamar Advertising Company ("Lamar") to erect new billboards in

the City, while denying AMG from doing so. The Defendants also claimed the 2004 ordinance violated their equal protection rights, was an invalid prior restraint, and violated their free speech rights under the California Constitution.

*Holding:*

On January 7, 2016, the Fourth District of the California Court of Appeal held that there was no evidence supporting the Defendants' claim that Lamar was allowed to erect a new billboard while AMG was not, and that the ordinance did not violate the California Constitution. First, the court found that all billboards being constructed in the City were consistent with the ordinance's exception for grandfathered billboards. This exception merely provided for orderly relocation of existing off-site billboards, and was not an approval of a new billboard application. Therefore, the City was not discriminating between off-site billboard applicants. The ordinance was also not a prior restraint because the City did not have unbridled discretion to permit certain billboards to be constructed. Instead, the ordinance was a content-neutral prohibition which did not burden speech more than necessary to serve a significant government interest. The City's significant interest was increased traffic safety and aesthetics. The court also noted that AMG had alternative forms of communication available. The court also found that a ban of all new off-site commercial billboards, regardless of content, was not a violation of the First Amendment or California's free speech clause per Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 590 and Central Hudson Gas & Elec. v. Public Serv. Comm'n (1980) 447 U.S. 557.

*Significance:*

This case, in conjunction with Lamar Central Outdoor, LLC v. City of Los Angeles (2016) 245 Cal.App.4th 610 (below), clarifies what sign ordinances are considered content-neutral. AMG Outdoor Advertising indicates a sign ban of all new off-site billboards is permitted if such a ban is not based on content. The case also demonstrates that an ordinance which permits relocation of billboards constructed before a complete sign ban ordinance is implemented is valid.

**Lamar Central Outdoor, LLC v. City of Los Angeles (2016) 245 Cal.App.4th 610**

*Summary of Case:*

In 2002, the City of Los Angeles ("City") established a permanent ban, with exceptions, on new "off-site signs"—billboards with commercial messages in locations other than at a property owner's business—including a ban on alterations of legally existing off-site signs. In 2009, the City explicitly banned off-site signs with digital displays. In 2013, Lamar Central Outdoor LLC ("Plaintiff") challenged the city's denial of 45 applications to convert existing off-site signs to digital signs. The Plaintiff argued that the sign ban violated the free speech clause of the California Constitution, because distinguishing between commercial and noncommercial signs, as well as on-site and off-site signs, are content based ordinances subject to strict scrutiny analysis. The Plaintiff also argued that the "pervasive exceptions" to the sign bans caused the ban to fail under an intermediate scrutiny test as well.

*Holding:*

On March 10, 2016, the Second District of the California Court of Appeal held that the sign bans did not violate California's free speech clause. The court reasoned that cities could distinguish between on-site (a sign other than an off-site sign) and off-site signs, reasoning that case law has repeatedly held this distinction as being content-neutral and valid. The court also distinguished this case from Reed v. Town of Gilbert (2015) 135 S. Ct. 2218, which had the effect of invalidating a broad range of sign ordinances for not being content-neutral. The court held that Reed did not change the law because Reed did not concern billboards or commercial speech. The court also found that the sign ban did not fail intermediate scrutiny, because the ban would advance the City's interest in traffic safety and visual blight, is not underinclusive because it has exceptions, and is not more extensive than necessary to serve the City's interests.

*Significance:*

The 2015 decision in Reed v. Town of Gilbert thrust the validity of many cities' sign ordinances into question. Any ordinances which restricted the content of the signs would

be treated as content-based, and therefore would violate the First Amendment. This case assists municipalities in distinguishing and determining what sign ordinances are content-neutral and valid under the United States Constitution and the California Constitution. The case here indicates that a sign ban that protects public safety or furthers aesthetic objectives are content-neutral and valid.

## Ordinances and Major Issues Marijuana

### Kirby v. County of Fresno (2015) 242 Cal.App.4th 940

*Summary of Case:*

The County of Fresno ("County") adopted an ordinance that banned marijuana dispensaries, cultivation, and storage of medical marijuana in all its zoning districts. It classified violations of the ordinance as both public nuisances and misdemeanors. It also limited the use of medical marijuana to qualified medical marijuana patients at their personal homes only. The Plaintiff sued to invalidate the ordinance on the premise that the ordinance created an unconstitutional conflict with the right to cultivate, possess, and use medical marijuana provided by the Compassionate Use Act of 1996 ("CUA") and the Medical Marijuana Program ("MMP"). The Plaintiff specifically argued that it deprived her of the right to cultivate medical marijuana at her home for her personal use. The Plaintiff also claimed that the ordinance conflicted with the MMP, which expressly states that certain persons shall not be subject to arrest for possession or cultivation of medical marijuana in an amount established pursuant to the MMP.

*Holding:*

On December 1, 2015, the Fifth District of the California Court of Appeal held that the ban on cultivation adopted under the County's authority to regulate land use does not conflict with the CUA or the MMP, which do not expressly restrict local government's authority over land use. The court stated that clear indication of the Legislature's intent to restrict local government's inherent power to regulate land use was required in the CUA or MMP in order to invalidate the ordinance. However, the court found that the provision in the ordinance that classified the cultivation of medical marijuana as a misdemeanor was preempted by California's statutory scheme addressing crimes, defenses, and immunities relating to marijuana. Specifically, the attempt to criminalize possession and cultivation was not consistent with the MMP, which imposed an obligation on local officials to not arrest certain persons for possessing or cultivating marijuana.

*Significance:*

This case provides that a county can currently make it impermissible to cultivate marijuana in its jurisdiction through its zoning power. However, it also provides that counties may not criminalize the possession or cultivation of medical marijuana.

### Safe Life Caregivers v. City of Los Angeles (2016) 243 Cal. App.4th 1029

*Summary of Case:*

Nearly twenty medical marijuana collectives and a handful of medical marijuana patients brought challenged Proposition D, the current medical marijuana ordinance of the City of Los Angeles ("City"), which was approved by voters in 2013. Proposition D made it a misdemeanor to own, establish, operate, use, or permit the establishment or operation of a medical marijuana business in the City, subject to a limited immunity. The Plaintiffs claimed that the California Medical Marijuana Regulation and Safety Act ("Act"), enacted in 2015, preempts local medical marijuana regulation in general and Proposition D.

*Holding:*

On January 13, 2016, the Second District of the California Court of Appeal held that there is no constitutional or statutory right to possess, cultivate, distribute, or transport marijuana for medical purposes. The court held that state laws requiring that a hearing be held before a local planning commission prior to the adoption of new zoning restrictions do not apply to voter-approved measures. Furthermore, it found that the Act expressly stated that nothing in its regulatory scheme would preempt local regulation of medical marijuana activity or zoning.

*Significance:*

As discussed below under The Kind and Compassionate v. City of Long Beach (2016) 2 Cal.App.5th 116, the Act does not preempt local regulation of medical marijuana dispensaries.

**City of Palm Springs v. Luna Crest (2016) 245 Cal.App.4th 879**

*Summary of Case:*

Luna Crest Inc. ("Luna") opened a medical marijuana dispensary within the city limits of the City of Palm Springs ("City"). Luna did not obtain a permit as required under the City's municipal code. Luna contended that the ordinance was preempted by federal law, and was therefore invalid and unenforceable. Specifically, Luna claimed that by decriminalizing and affirmatively permitting the operation of medical marijuana dispensaries, the City was violating federal drug laws. Luna opened its dispensary with the express purpose of provoking litigation to test that contention.

*Holding:*

On March 17, 2016, the Fourth District of the California Court of Appeal held that the City ordinance, which requires medical marijuana dispensaries to obtain a permit to operate in the City, is not preempted by federal law. The court reasoned that Luna did not point to any provision of the City's regulation of dispensaries that was in positive conflict with the federal Controlled Substances Act ("Act"). The court further pointed out that the Act did not direct local governments to exercise their regulatory, licensing, or other power in any particular manner, so the exercise of those powers "'with respect to the operation of medical marijuana dispensaries that meet state law requirements would not violate conflicting federal law.'" The court also stated that the federal law conferred immunity on any authorized officer of any State, territory, or political subdivision who is lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances. Additionally, Luna failed to demonstrate that the regulatory scheme at issue would hamper the objectives of the Act, which is to combat recreational drug abuse and to curb drug trafficking.

*Significance:*

This case makes clear that an ordinance that permits medical marijuana dispensaries is not preempted by the federal Controlled Substances Act.

**California Cannabis Coalition v. City of Upland (2016) 245 Cal.App.4th 970**

*Summary of Case:*

The California Cannabis Coalition ("CCC") filed petition for a writ of mandate, requesting the trial court to order the City of Upland ("City") and its city clerk to hold a special election on CCC's medical marijuana dispensary initiative ("Initiative"). The Initiative would repeal existing City code provisions prohibiting medical marijuana dispensaries and would adopt regulations permitting and establishing standards for the operation of medical marijuana dispensaries within the City. The Initiative would also allow the City to permit a maximum of three medical marijuana dispensaries. The petitioners gathered sufficient signatures and requested a special election ballot, but the measure was placed on the November general election by City Council, who argued portions of the ballot measure would actually create a tax in the City. The trial court found for the City, finding that a component of the Initiative, which would require dispensaries to pay $75,000 in annual licensing and inspection fees, is a tax which could only appear on the November ballot.

*Holding:*

On March 18, 2016, the Fourth District of the California Court of Appeal held that Article XIIIC, section 2 of the California Constitution, which requires a two-thirds vote for approving "special" taxes, does not apply to the Initiative, stating that this section refers to taxes imposed by local government, not taxes imposed by initiative. The court justified its reasoning by stating that taxation imposed by initiative is not taxation imposed by government.

*Significance:*

On June 30, 2016, the California Supreme Court agreed to review this decision. The question on review is whether proponents of a new tax may evade constitutional prerequisites by introducing the tax as an initiative rather

than by resolution of the governing body. The Howard Jarvis Taxpayers Association filed the petition for review, contending that the lower court's decision created a loophole that would allow public agencies to increase existing taxes or impose new taxes without voter consent.

**Union of Medical Marijuana Patients, Inc. v. City of Upland (2016) 245 Cal.App.4th 1265**

*Summary of Case:*

In 2007, the City of Upland ("City") adopted an ordinance which specified that no medical marijuana dispensary would not be permitted in any zone in the City. The City conducted an initial study of the 2007 ordinance's potential environmental effects and concluded that there was no substantial evidence that the ordinance would have a significant effect on the environment. The City prepared and adopted a negative declaration under the California Environmental Quality Act ("CEQA"). CEQA is a three-tiered process to ensure that public agencies inform their decisions with environmental considerations.

In 2013, the City adopted an ordinance that expressly prohibited mobile dispensaries within the City. The City did not conduct a preliminary review of the ordinance under CEQA. The Union of Medical Marijuana Patients, Inc. ("UMMP") filed a writ of mandate seeking to set aside the ordinance, claiming that the City violated CEQA because the City did not first consider the ordinance's reasonably foreseeable environmental impacts.

*Holding:*

On March 25, 2016, the Fourth District of the California Court of Appeal held that the ordinance was not a "project" under CEQA, but did not address whether the ordinance was exempt under CEQA's "commonsense" exemption for projects that have no potential to cause a significant effect on the environment. A project is an activity directly undertaken by a public agency that may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. Case law has found that ordinances are activities undertaken by a public agency and are thus potential projects under CEQA. Direct physical changes include dust, noise, and traffic, whereas indirect physical change may be the construction of a new sewage plant. Indirect physical changes are only considered if the change is a reasonably foreseeable impact. Case law also states that a municipal ordinance that merely restates or ratifies existing law is not a project and is not subject to CEQA. The court reasoned that the 2013 ordinance merely restated the 2007 ban on dispensaries, which was inclusive of mobile dispensaries, and thus would not cause a direct or reasonably foreseeable indirect physical change in the environment.

*Significance:*

Due to the recent passage of Proposition 64, allowing the recreational use of marijuana statewide, cities that seek to restrict or prohibit medical marijuana dispensaries within their jurisdiction may continue to face litigation. This case provides some guidance regarding how a court might evaluate a CEQA challenge to an ordinance that restricts the presence of medical marijuana dispensaries in city limits.

**Olive v. Commissioner of Internal Revenue (9th Cir. 2015) 792 F.3d 1146**

*Summary of Case:*

The Plaintiff in this case owned a medical marijuana shop which functioned as both a dispensary and a location where patrons could consume medical marijuana using vaporizers. The Plaintiff filed business income tax returns for 2004 and 2005, which reported the shop's net income as $64,670 and $33,778, respectively. The Plaintiff reported $236,502 and $417,569 as business expenses for 2004 and 2005, but the Tax Court concluded that Internal Revenue Code section 280E precluded the Plaintiff from deducting any of those expenses. Section 280E prohibits deduction of business expenses for trade or businesses consisting of trafficking in controlled substances prohibited by federal law.

*Holding:*

On April 16, 2015, the Ninth Circuit of the United States Court of Appeals agreed with the Tax Court. The court reasoned that the Plaintiff's business was a "trade or business" in the meaning of Section 280E because it was entered into with the dominant hope and intent of realizing

a profit. The business also "consist[ed] of trafficking in controlled substances ... prohibited by Federal law" because its profits and sales were limited to medical marijuana—the games, drinks, and other activities were provided to patrons for free. In this reasoning, the court rejected the Plaintiff's argument that the shop provided caregiving services along with sales of medical marijuana, exempting it from Section 280E.

*Significance:*

As demonstrated by this case, federal taxation has been the biggest hurdle for medical marijuana dispensaries. However, this case also indicates that dispensaries may be able to reduce their tax liability by providing paid services that are not confined to medical marijuana sales, such as caregiving services. The Court specifically cited to Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner (CHAMP) (2007) 128 T.C. 173 as a successful example of a medical marijuana dispensary that was able to take advantage of expense deductions. It is likely that medical marijuana dispensaries will begin to model their businesses around dispensaries as found in CHAMP in order to reduce their tax burden.

**The Kind and Compassionate v. City of Long Beach (2016) 2 Cal.App.5th 116**

*Summary of Case:*

Plaintiffs, two medical cannabis dispensaries and three members of The Kind and Compassionate collective, sued the City of Long Beach ("City"), challenging enforcement of municipal ordinances that first regulated and then entirely prohibited the operation of medical marijuana dispensaries within the City's borders. The primary complaint was that the ordinances were facially discriminatory and had a disparate and adverse impact on persons with disabilities. Plaintiffs also asserted that dispensaries operating prior to the ban had vested property rights, which the City infringed in violation of the Fifth Amendment when it instituted the ban. The Plaintiffs also claimed the City violated the Bane Act, which provides a civil remedy when an individual interferes with another's state or federal rights through threats, intimidation, or coercion, when city employees allegedly threatened the Plaintiffs with administrative action and criminal arrest for running a medical marijuana dispensary.

*Holding:*

On July 12, 2016, the Second District for the California Court of Appeal held in favor of the City, reasoning that the California statutes permitting personal use of medical marijuana did not grant the right to establish dispensaries. The court claimed that the City did not discriminate against individuals with disabilities because these individuals did not have the fundamental right to convenient access to medical marijuana. The court also found no violation of the Bane Act because there was no right to lease property to operate a marijuana collective. Finally, the court found that there was no interference with property rights because the City asserted it never issued a permit to operate a medical marijuana dispensary in the City.

*Significance:*

In 2015, Governor Brown signed into law three bills that comprise the California Medical Marijuana Regulation and Safety Act. This Act regulates all aspects of the medical marijuana business, from taxation to quality control to shipping and packaging. However, this Act does not preempt local medical marijuana ordinances as it relates to express bans of medical marijuana dispensaries, regulatory schemes, and permissive zoning. Cities that elect to permit medical marijuana dispensaries should review the Act, their own ordinances, and amend ordinances in preparation for legalization of recreational use of medical marijuana.

**City of San Jose v. MediMarts, Inc. (2016) 1 Cal.App.5th 842**

*Summary of Case:*

The City of San Jose ("City") brought an action against MediMarts, Inc. and its president for unpaid business taxes. The defendants sought a preliminary injunction against the City's attempts to prohibit them from operating their medical marijuana collective. On appeal, the defendants

contended that payment of the marijuana business tax would force the president to incriminate himself in violation of his Fifth Amendment privilege by admitting criminal liability for violating federal drug laws.

*Holding:*

On July 21, 2016, the Sixth District for the California Court of Appeal held that the privilege of self-incrimination does not apply in the payment of medical marijuana taxes. The court reasoned that the self-incrimination privilege applies only when a person is asked to give testimony in the capacity of a witness, as opposed to paying taxes. It also found that the right applies to persons in their individual capacities. Therefore, this right did not extend to corporate officers who are required to produce tax returns on behalf of a corporation.

*Significance:*

Medical marijuana is already a source of revenue for cities that permit and tax dispensaries in their jurisdiction. However, in cities like San Jose, some of these dispensaries have failed to pay taxes. This decision rejected a Fifth Amendment self-incrimination challenge to such taxes.

## Utilities

### Monterey Peninsula Water Management District v. Public Utilities Commission (Jan. 25, 2016) S208838

*Summary of Case:*

In California, virtually all government-imposed utility taxes and fees are collected through the bills of public utilities, which are subject to regulation by the California Public Utilities Commission ("CPUC"). The Monterey Peninsula Water Management District ("District"), a local government entity not subject to regulation by the CPUC, imposed its statutorily authorized user fee on ratepayers in the Monterey area. This user fee was collected through the California-American Water Company ("Water Company"), a public utility subject to CPUC regulation, and the revenues were used to fund environmental mitigation and water supply programs administered by the District. Despite its lack of authority over the District, CPUC scrutinized the level and elements of the user fee, and rejected a proposal under which the Water Company would continue collecting the District's user fee on its water bills. The CPUC justified its action by claiming that Public Utilities Code section 451 required that all charges demanded or received by any public utility for any product or service rendered be just and reasonable. The CPUC also attempted to justify its scrutiny of the user fee with the fact that the fees funded mitigation programs that the Water Company was legally obligated to perform in the event the District failed to do so.

*Holding:*

On January 25, 2016, the California Supreme Court held that the CPUC does not have the authority to scrutinize government fees that are collected ministerially through the bills of CPUC-regulated public utilities. The Court reasoned that Public Utilities Code section 451 only applied to charges for utility services rendered by the utility itself, not all utility charges. Furthermore, Section 451 did not provide CPUC the express statutory authority needed to regulate a government entity. The court also rejected the CPUC's argument that it could regulate the user fee because it was a "utility surcharge" that might be used by the Water Company for mitigation programs. The court rejected the argument that the user fee could be considered a part of the Water Company's rates or that the Water Company had any current legal obligation to administer the mitigation programs. The court further held that if the Water Company customers had concern over the user fee, it could bring legal action or elect new members to the District's managing board.

*Significance:*

This case represents the first time in over 20 years that the California Supreme Court has issued a decision limiting the CPUC's jurisdiction. This case also makes clear that even when local governmental agencies collect utility fees and taxes through CPUC-regulated utilities, the CPUC's authority does not extend so far that it may review or reject these government fees.

### T-Mobile West LLC v. City and County of San Francisco (2016) __ Cal.Rptr.3d __, 2016 WL 6088425

*Summary of Case:*

In 2011, the City and County of San Francisco ("City") enacted an ordinance requiring all persons to obtain a site-specific permit before seeking to construct, install, or maintain certain telecommunications equipment, known as "Personal Wireless Service Facilities" (hereafter "wireless facilities"), on existing poles in the public right-of-way. The purpose of this ordinance was to regulate the manner of location of construction of telecommunications equipment in order to preserve City aesthetics. T-Mobile West LLC, Crown Castle NG West LLC, and ExteNet Systems (California) LLC, which are telephone corporations, filed for declaratory and injunctive relief on five causes of action: (1) violation of Government Code section 65964, subdivision (b), pertaining to restrictions on the duration of permits for a wireless telecommunications facility; (2) unlawful taking of Plaintiffs' property without due process of law; (3) violation of and preemption by Public Utilities Code sections 7901 and 7901.1; (4) preemption of department of public works regulations granting the planning department review authority under the California Environmental Quality Act; and (5) violation of and preemption of section 6409 of the Middle Class Tax Relief and Job Creation Act of

2012. The question on appeal was whether the ordinance, on its face, conflicted with and was preempted by Public Utilities Code section 7901 and 7901.1.

*Holding:*

On October 13, 2016, the First District of the California Court of Appeal held that the City could regulate construction of telephone facilities based on aesthetic purposes under Public Utilities Code sections 7901 and 7901.1. Section 7901 states that telephone corporations can install telegraph or telephone lines in a manner and at locations where it does not "incommode" the public use of the road or highway, or interrupt the navigation of waters. Section 7901.1 states that municipalities can control the time, place, and manner in which roads, highways, and waterways are accessed, and must be applied in an equivalent manner. The court employed statutory interpretation and comparisons to similar case law in holding that the term "incommode" was broad enough to be inclusive of facility appearances.

*Significance:*

This case clarifies a subset of local government powers relates to how a municipality regulates public utility placement and the aesthetics of the city. Unless new legislation is passed to deregulate construction of telegraph or telephone lines, cities may continue to dictate the location and manners of public rights-of-way for aesthetics reasons.

## Telecommunications

### Montgomery County v. FCC (4th Cir. 2015) 811 F.3d 121

*Summary of Case:*

In 2012, the United States Congress adopted 47 U.S.C. section 6409 ("Section 6409") as a provision of Title VI of the Middle Class Tax Relief and Job Creation Act (the "Spectrum Act"). This Act sought to promote the deployment of wireless services. Subdivision (a) of Section 6409 prohibited state and local governments from denying an "eligible facilities request" to modify an existing wireless tower or base station that does not "substantially change the physical dimensions of the tower or base station." The Federal Communications Commission ("FCC") adopted rules to implement this section. Under these rules, when a locality received a covered facility-modification request, it had sixty days to review the application. If a locality failed to act before the sixty days, the request was "deemed granted." Local governments from Montgomery County, Maryland challenged the FCC rules, claiming that the "deemed granted" remedy violated the Tenth Amendment by forcing local governments to implement a federal scheme. The local governments also argued that the FCC's definitions and rules were arbitrary and capricious.

*Holding:*

On December 18, 2015, the Fourth Circuit of the United States Court of Appeals held for the FCC, finding that the "deemed granted" procedure did not violate the Tenth Amendment. The court reasoned that the "deemed granted" did not require the states to take any action at all, because applications were granted per federal law. Section 6409, subdivision (a) only existed to preempt local regulation which might interfere with the expansion of wireless networks. The local government stated that even though the Spectrum Act contained ambiguities in its language, the court deferred to the FCC's definitions under Chevron, USA, Inc. v. Natural Resources Defense Council (1984) 467 U.S. 837, which stated that the courts should defer to agency statutory interpretation of such ambiguities. The court also rejected the local government's contention that evaluating "substantial change" required a fact-by-fact analysis by local governments, reasoning that physical dimensions could be regulated through quantifiable standards that did not require local input.

*Significance:*

Expansions of wireless infrastructure have been required in recent years due to vast developments of technology. This case indicates that local agencies are unable to control facilities modifications under the Spectrum Act. Local agencies should monitor legislation and technology that may impact local control over wireless infrastructure within their jurisdiction.

### Global Tower Assets, LLC v. Town of Rome (1st Cir. 2016) 810 F.3d 77

*Summary of Case:*

The Telecommunications Act of 1996 ("TCA") provides relief to those who are denied permission to build telecommunications facilities at the state or local level. The TCA provides relief if state or local land use authorities denied such permission through "final action." However, "final action" is not defined. This case discusses whether a denial is a "final action" if the local planning board's decision was still subject to further review by a local board of appeals. Global Tower Assets, LLC, which had its building permit for a wireless communications tower denied by the Town of Rome's ("Town") planning board, argued that the opportunity to bring an administrative appeal should not prevent their TCA challenge from advancing.

*Holding:*

On January 8, 2016, the First Circuit of the United States Court of Appeals held that a decision that is still subject to further review by a local appeals board is not a "final action." The court based its reasoning on basic principles of administrative law and the purposes of the TCA, noting that finality of administrative action is required before obtaining judicial relief in other acts, such as the Administrative Procedure Act.

*Significance:*

The TCA requires an applicant building telecommunications facilities at the state or local level to obtain "final action" before seeking judicial relief.

## Planning

### Construction Industry Force Account Council, Inc. v. Ross Valley Sanitation District (2016) 244 Cal.App.4th 1303

*Summary of Case:*

In 2011, the Ross Valley Sanitary District ("District") authorized the hiring of a team of new employees capable of performing pipe bursting work—a technique to repair portions of a sewer line in a matter of days—and traditional maintenance work to address problems within a particular sewer line section. Public meetings were held to discuss this plan. The plaintiff, Construction Industry Force Account Council, Inc. ("Plaintiff"), objected to this plan on the ground that the Public Contract Code required the District to competitively bid any of its pipe bursting work. The District rejected this argument and used in-house workers to perform the work. The Plaintiff filed a petition for writ of mandate, alleging violation of Public Contract Code section 20803, which states a district project exceeding $15,000 shall be contracted to the lowest responsible bidder after notice. The trial court agreed with the Plaintiff and found that Section 20803 is a "force account limit statute" that required the District to put out a competitive bid on district projects exceeding $15,000. A "force account limit statute" is a ceiling on the value of public works projects that local agencies may perform in-house without contracting out to competitive bidders.

*Holding:*

On January 25, 2016, the First District of the California Court of Appeal found for the District, claiming that Section 20803 was not a "force account limit statute." Therefore, the District was not required competitive bidding for district projects over $15,000. The court reasoned that this provision only applies when a district opts to contract out a district project, and that there was no language in the statute that prevented the District from performing projects using its own labor force.

*Significance:*

This finds indicates that public works districts may perform projects exceeding $15,000 in-house, without the need to competitively bid the project.

### Macy v. City of Fontana (2016) 244 Cal.App.4th 1421

*Summary of Case:*

In 2011, the Legislature adopted legislation which dissolved the redevelopment agencies ("RAs") that were formed by municipalities throughout the state under the Community Redevelopment Law, Health & Safety Code sections 33000 et seq. ("CRL"). Before their dissolution, RAs were funded by "tax increment" funding. Assembly Bill ("AB") 26 provided a fairly detailed scheme for winding down RA operations, distributing their assets, and resolving claims against them. In particular, AB 26 created successor agencies that were given responsibility over certain obligations of each dissolved RA. Shortly before the Legislature dissolved RAs, Virginia Macy, a low-income resident of the City of Fontana ("City"), Libreria Del Pueblo, Inc., and California Partnership (collectively "Plaintiffs") filed a petition for writ of mandate against the Fontana Redevelopment Agency ("Agency") alleging the Agency failed to provide the low and moderate-income housing required under the CRL. The Plaintiffs asked for relief in the form of payment of $27 million into the Agency's low and moderate-income housing fund, which was the amount that they alleged was required by the CRL. The Plaintiffs amended their petition after AB 26 was enacted, and added the City as a defendant in its role as the successor agency and as a municipal corporation. The City filed a demurrer to the petition, arguing that under AB 26, the successor agency may be held liable only for the preexisting obligations of an RA.

*Holding:*

On February 23, 2016 (updated March 23, 2016), the Fourth District of the California Court of Appeal upheld the trial court decision, agreeing that the liabilities of the dissolved RAs are limited to the assets transferred to successor agencies. The language of AB 26 did not include any language that would extend such liability beyond the RA's assets to municipalities and their general funds. The court reasoned that an extension of RA statutory liabilities would require a very clear expression of the Legislature's intention to transfer such liability to municipalities. The court also rejected the Plaintiffs' argument that the City's control over the agency or a 1992 agreement the City

made with the Agency and a developer with respect to distribution of its tax increment revenue would support a claim against the City in its municipal capacity.

*Significance:*

Municipalities that assume the role of the successor agency for dissolved RAs can have some security that claims against the redevelopment agency arising after dissolution of the RA will not extend to its general fund.

**City of El Centro v. Lanier (2016) 245 Cal.App.4th 1494**

*Summary of Case:*

In 2013, the California Legislature adopted California Labor Code section 1782 through Senate Bill 7, which prohibits a charter city from receiving or using state funding or financial assistance for a public construction project if the city has a charter provision or ordinance that authorizes a contractor to not comply with the state prevailing wage laws. This law was implemented to incentivize contractors to require contractors working on local public works projects to pay prevailing wages. Five charter cities sought to prevent the enforcement of Section 1782, stating that it violated the California Constitution on two grounds. The first was that it violated the California Constitution's "home rule" provision, which reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws, provided the subject of regulation is a municipal affair as opposed to a state wide concern. The second was that the law violated the Constitution's prohibition against legislative restrictions on the use of local tax.

*Holding:*

On March 29, 2016, the Fourth District of the California Court of Appeal upheld the constitutionality of California Labor Code section 1782. The court ruled that financially incentivizing local governments to pursue the state's policy goals was generally constitutional because the state's lawmaking authority over the state's budget. The court also found that the law did not violate the California Constitution's local tax provision, reasoning that the law did not expressly require charter cities to pay prevailing wages, did not conflict with charter city law, and was not coercive.

*Significance:*

Charter cities must continue to comply with Senate Bill 7 and California Labor Code section 1782 in order to receive state funding or financial assistance on local public works projects.

**Naraghi Lakes Neighborhood Preservation Ass'n v. City of Modesto (2016) 1 Cal.App.5th 9**

*Summary of Case:*

The City of Modesto ("City") approved a shopping center project adjacent to an established residential neighborhood, Naraghi Lakes Neighborhood Preservation Association ("Association"). The Association filed a petition for writ of mandate challenging the approval of the project. The Association contended that the project was improperly approved and the petition of writ of mandate should be granted because: (1) the project was inconsistent with the City's Urban Area General Plan ("General Plan") regarding the size of the neighborhood shopping centers; (2) the City failed to make findings necessary under the General Plan's rezoning policy; (3) the City failed to comply with the California Environmental Quality Act ("CEQA") because the environmental impact report ("EIR") improperly rejected feasible mitigation measures as to traffic impacts; and (4) no substantial evidence supported the City's CEQA findings regarding urban decay and the statement of overriding considerations was not supported by substantial evidence.

*Holding:*

On June 7, 2016, the Fifth District of the California Court of Appeal held that the City did not prejudicially abuse its discretion on any of the grounds raised by the Association. First, the court reasoned that general plans do not usually state specific mandates or prohibitions, but rather policies. This means that the proposed project must at least by compatible with the objectives and policies of the General Plan. If the City determines that the project is consistent with the General Plan, then the opposition must demonstrate abuse of discretion on the City's part. The court is highly deferential to the City's findings. The court did not find the City abused its discretion. Second, based on the previous reasoning, the court found that the dimensions in the Neighborhood Plan regarding

shopping centers were merely guides for dimensions, not inflexible mandates. The appellate court's CEQA holding was not published.

*Significance:*

When city officials expect opposition to a development project based on inconsistency with the City's General Plan, the city officials must consider the applicable policies in the General Plan, determine the extent to which the proposed project conforms to the policies, make findings on this issue, and ensure these findings are supported by substantial evidence.

**City of Selma v. Fresno County Local Agency Formation Commission (2016) 1 Cal.App.5th 573**

*Summary of Case:*

In 2012, the City of Kingsburg ("City" or "Kingsburg") studied a proposal to annex approximately 430 acres of land in Fresno County (the "Annexation Territory"). In addition to annexing the land into Kingsburg, the project involved detaching portions of the Annexation Territory from the Fresno County Fire Protection District ("FCFPD"), the Consolidated Irrigation District, and the Kings River Conservation District. The project would also annex portions of the Annexation Territory into the Selma-Kingsburg-Fowler County Sanitation District. The City requested the Fresno County Local Agency Formation Commission ("LAFCO") initiate proceedings to approve the annexation. LAFCO eventually began hearings on the reorganization, with request for notice and hearing from the City of Selma ("Selma"), which had initiated California Environmental Quality Act ("CEQA") litigation against Kingsburg over the annexation project. LAFCO informed Selma that it intended to move forward with Kingsburg's annexation application despite the litigation. LAFCO initially published a notice for hearing to be held on April 10, 2013, but continued the hearing so that Kingsburg could negotiate a transition agreement with the FCFPD. The hearing was eventually rescheduled for July 17, 2013. Selma objected to the notice of hearing for the July 17, 2013 meeting, asserting that under Government Code section 56666, subdivision (a), more than seventy days after the originally noticed date of April 10, 2013 had lapsed.

*Holding:*

On July 14, 2016 (modified August 11, 2016, certified for partial publication), the First District of the California Court of Appeal found that when a local agency formation commission sets a public hearing on a reorganization proposal and thereafter continues the hearing date beyond the seventy-day limitation for continuances under Government Code section 56666, subdivision (a), the reorganization proposal is not void. The court reasoned that the seventy-day limitation is a directory, as opposed to a mandatory provision. Whether a provision was "directory" was defined by Government Code section 56106, which provides that the time within which an official or the commission is to act will be directory, unless it relates to notice requirements, Section 56658, subdivision (h), or 56895, subdivision (b).

*Significance:*

Objections regarding timeliness under the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, Government Code sections 56000 et seq., should be interpreted in line with Section 56106.

## Property and Housing

### California Building Industry Ass'n v. City of San Jose (2015) 61 Cal.4th 435

*Summary of Case:*

In 2010, the City of San Jose ("City") adopted a citywide inclusionary housing ordinance that required all residential development projects creating 20 or more units to make 15 percent of their units available for sale at affordable housing prices. The ordinance provided developers with a number of alternatives for compliance, including off-site construction of affordable housing or the payment of in-lieu fees. Additional incentives such as density bonuses and reduced setback requirements were provided to facilitate compliance with the ordinance. The California Building Industry Association ("Association") challenged the ordinance's constitutionality on grounds that it created unlawful exactions and unconstitutional conditions of development approval.

*Holding:*

On June 15, 2015, the California Supreme Court ruled that cities can rely on their general police powers to enact inclusionary requirements and in-lieu fees for affordable housing. In issuing its ruling, the Court addressed several important points for cities and developers to consider. First, inclusionary housing ordinances are authorized under a city's general police powers and do not constitute an "exaction" under federal or state takings law. This case clearly provides that inclusionary housing ordinances and in-lieu fees fall within a municipality's broad discretion to regulate the use of property to serve the legitimate interests of the general public and the community at large. Such restrictions will be upheld so long as they do not deprive landowners of all viable uses of their land. Exactions, on the other hand, are subject to greater scrutiny by the courts and therefore require more support for their adoption at the local level. Specifically, exactions are valid if they are reasonably related to impacts created by the development project itself.

Second, in-lieu fees to satisfy inclusionary housing requirements are not "fees" under the Mitigation Fee Act (Gov. Code § 66000 et seq.), which governs exactions and fees as conditions of development. Monetary exactions will only be held valid if they are imposed to address negative impacts of the project itself and ordinarily require cities to prepare a nexus study pursuant to the Mitigation Fee Act. In the case of inclusionary housing and in-lieu fees, the Court ruled that such ordinances should be construed as general land use restrictions imposed on proposed developments to further a city's objective of providing affordable housing. Accordingly, no nexus study is required under the Mitigation Fee Act to impose in-lieu fees for affordable housing.

*Significance:*

Although this case provides clear support for inclusionary housing and in-lieu fees, all municipalities should review their existing ordinances.

### Harrison v. City of Rancho Mirage (2015) 243 Cal.App.4th 162

*Summary of Case:*

On July 31, 2014, the City of Rancho Mirage ("City") passed an ordinance which amended the City's municipal code that provided rules and regulations for renting private homes as short-term vacation rentals. Among other amendments, it required that a person over the age of 30 sign a contract agreeing to be the responsible person for the rental and ensuring that all of the occupants follow the rules and regulations regarding vacation rentals, in order to minimize negative secondary effects on surrounding residential neighborhoods. The Plaintiff owned a condominium in the City. The Plaintiff filed a complaint that the ordinance violated the Unruh Civil Rights Act, which prohibits a business establishment from discriminating in housing or other accommodations on the basis of age. The City contended that the Act did not apply to legislation by the City.

*Holding:*

On December 18, 2015, the Fourth District of the California Court of Appeal found for the City. The court found that (1) the City was not acting as a business establishment where it was amending an already existing municipal code section for renting private homes as short-term vacation rentals to increase the minimum age of a responsible person for the

rental from the age of 21 years to 30, and (2) the City was not directly discriminating against anyone, and nothing in California's Unruh Civil Rights Act (Civil Code section 51 et seq.) made its provisions applicable to the City's actions. The court reasoned that case law indicates that the term "business establishment" primarily refers to entities which focuses on the economic or business interests of its members. In contrast, the City's focus was to preserve residential neighborhoods. The court also noted that county regulations placing age restrictions on after-hours clubs has been allowed.

*Significance:*

As short-term rentals become more popular through online applications like Airbnb, cities may face tension between residents who see rentals as an opportunity for business, and other residents with concerns regarding noise, traffic, and other nuisances to residential neighborhoods. While the ordinance in this case may have the effect of restraining Airbnb rentals to individuals under the age of 30, it is unclear how a challenge under California Government Code section 65008 would be decided. Section 65008 prohibits local agencies from denying the enjoyment of residence due to age, occupation, or any other characteristic of the individual. A Section 65008 challenge would be interesting here because the ordinance in this case could still allow individuals under 30 to rent as long as they have someone over the age of 30 to sign the short-term lease.

**Property Reserve, Inc. v. Superior Court (2016) 1 Cal.5th 151**

*Summary of Case:*

The California Department of Water Resources ("Department") sought to conduct environmental and geological studies and tests on over 150 privately-owned parcels of property that the state might seek to acquire under its eminent domain power or through negotiation. The Department sought to begin inspections per California Code of Civil Procedure sections 1245.010 et seq., which authorizes court-ordered entry of private property to conduct inspections, including boring and testing, to determine if the properties were suitable for condemnation. The trial court authorized entry and environmental activity on the properties, but denied geological testing. The Court of Appeal affirmed the denial regarding geological testing and reversed the authorization of environmental testing, reasoning that the procedure established by the precondemnation entry and testing statutes did not satisfy the California Constitution's takings clause.

*Holding:*

On July 21, 2016, the California Supreme Court reversed the Court of Appeal, holding that the procedure established by the precondemnation entry and testing statutes satisfies the requirements of the California takings clause when the procedure is reformed to comply with the jury trial requirement clause. In reaching this holding, the Court did not determine whether the geological and environmental testing activities constituted a taking. Instead, the Court reasoned that precondemnation entry and takings statutes (1) require a public entity, before undertaking such entry and testing, to seek and obtain a court order specifically authorizing the activities that are to be conducted on the property and to deposit in court an amount that the court determines to be the probable compensation for the authorized activities, and (2) permit the property owner to obtain damages in the same proceeding for any actual damage and substantial interference with the possession or use of the property caused by the public entity's entry and taking activities. The procedure satisfies the California takings clause when reformed to permit the property owner to obtain a jury determination of damages in the proceeding if the property owner chooses to do so.

*Significance:*

This holding strengthens public agencies' precondemnation inspection rights amidst efforts to restrict public agency power to condemn property for the public good.

## Elections, Referendums, Recalls and Initiatives

### Clark v. McCann (2015) 243 Cal.App.4th 910

*Summary of Case:*

In November 2014, a run-off election was held for a seat on the Chula Vista City Council. The Registrar of San Diego County certified the official canvas results showing that John McCann was the winner over Steve Padilla by two votes. A registered voter ("Contestant") in Chula Vista filed an election contest under California Elections Code section 16100, subdivisions (e), (f), and (g), which allows an election contest when eligible voters were denied their right to vote, when the precinct board conducting the election or canvassing the returns made errors sufficient to change the election results, and that there was an error in the vote-counting programs or summation of ballot counts. The Contestant challenged twelve uncounted ballots. Ten were excluded from the Registrar's count because a P.O. Box, business address, or nonexistent address was listed. Two ballots were submitted by a vote-by-mail ballot, but the two individuals had never applied to be a vote-by-mail voter. The Contestant argued that the voters proved their residence during the voter registration process, and the Registrar's only duty was to compare signatures.

*Holding:*

On December 24, 2015, the Fourth District California Court of Appeal held that the ballots were properly excluded. It rejected the Contestant's argument that the Registrar imposed an "additional" requirement of a proper residence address on the provisional ballot envelope for the vote to count. The court reasoned that the voter registration process to confirm residency in a particular county is faulty because an individual may have recently moved. The court found that the Registrar acted within his discretion when he excluded ballots that did not have the proper address or were not properly registered as vote-by-mail voters. The Registrar was not required to look at other factors like family residence, location of where the individual paid their income tax, and so on because of the short time frame for certifying election results, the volume of ballots, and the administrative burden of processing them.

*Significance:*

This case clarifies that the Registrar acts within his or her discretion when removing ballots for improper addresses or for improper registration.

### Howard Jarvis Taxpayers Ass'n v. Padilla (2016) 62 Cal.4th 486

*Summary of Case:*

In 2014, the California Legislature enacted Senate Bill ("SB") 1272, which sought to submit an advisory question to the voters relating to campaign finance. The bill denounced the United States Supreme Court decision in Citizens United v. Federal Election Comm. (2010) 558 U.S. 310, contending that corporations should be treated as legal entities which hold more narrowly defined rights than afforded to natural persons. Citizens United had the effect of rolling back previous bans on corporate spending in federal elections, leading to potentially unlimited corporate funds being spent on elections. SB 1272 was passed and the Secretary of State designated the advisory question Proposition 49, and began preparing ballot materials. The proposition was to read: "Shall the Congress of the United States propose, and the California Legislature ratify, an amendment or amendments to the United States Constitution to overturn Citizens United v. Federal Election Commission (2010) 558 U.S. 310 [130 S.Ct. 876, 175 L.Ed.2d 753], and other applicable judicial precedents, to allow the full regulation or limitation of campaign contributions and spending, to ensure that all citizens, regardless of wealth, may express their views to one another, and to make clear that the rights protected by the United States Constitution are the rights of natural persons only?" The Petitioners, Howard Jarvis Taxpayers Association and Jon Coupal, filed a petition for writ of mandate to prevent the Secretary of State from placing Proposition 59 on the November 2014 ballot.

*Holding:*

In August 2014, the California Supreme Court removed Proposition 49 from the ballot but did not decide the merits of the case. On January 4, 2016, the California Supreme Court held that in fact, placing Proposition 49 on

the ballot would have been valid. The Court reasoned that the Legislature had the authority to conduct investigations by reasonable means to inform the exercise of its powers. The Court also observed that historically, legislatures could formally consult and seek non-binding input regarding the federal constitutional amendment process. It also noted that nothing in the California Constitution prohibited the use of advisory questions to inform the Legislature of how it should exercise its powers. The Court then found that under a deferential review standard, Proposition 49 was constitutional because it was reasonably related to the exercise of these Legislative powers.

*Significance:*

In March, Senators Benjamin Allen and Mark Leno introduced Senate Bill 254, which is a reiteration of the Overturn Citizens United Act from 2014. It was passed into law without the Governor's signature. This bill placed a voter instruction on the November 2016 ballot that would ask voters if their representatives should "use all of their constitutional authority to overturn Citizens United v. FEC and other applicable judicial precedents." The advisory measure narrowly passed, 53% Yes to 47% No, as Proposition 59 on November 8, 2016.

**White v. City of Stockton (2016) 244 Cal.App.4th 754**

*Summary of Case:*

The Plaintiff sought to remove Ann Johnston as mayor of the City of Stockton ("City") and to enjoin placing her name on the June 2012 municipal election ballot for reelection as mayor. The Plaintiff contended that Johnston was ineligible to sit as mayor and to run for reelection under section 606, article VI of the Stockton City Charter, which read that: "No person elected as either Mayor or Councilmember shall be eligible to serve, or serve, as either Mayor or Councilmember for more than two (2) terms...." The Plaintiff argued that this section limited a person to no more than two cumulative four-year terms. Johnston had served two terms as a councilmember prior to being elected mayor. The trial court found section 606 to be ambiguous because it did not clearly and plainly impose a cumulative term limit. It then found the City's construction of the section as not imposing a cumulative limit was reasonable and not clearly erroneous in light of the official ballot pamphlet used when the voters adopted section 606 and the City's consistent practice of not reading section 606 as imposing a cumulative limit.

*Holding:*

On February 5, 2016, the Third District of the California Court of Appeal held that section 606 applies to the offices of mayor and councilmember separately, not cumulatively. The court reasoned that the materials before the voters when they adopted section 606, the City's consistent interpretation and application of the measure, and other provisions of the city charter regarding elected officers indicated that the voters intended section 606 to apply to the offices of mayor and councilmember separately as opposed to cumulatively.

*Significance:*

This case underscores the importance of drafting ordinances with language that makes clear its intent and effect. While it appears that the court will look to extrinsic evidence to determine the ordinance's legislative history, its intent, and how the City has interpreted the ordinance, the burden of litigation can be alleviated with the use of more precise and accurate language. Cities should also ensure that the enforcement of its ordinances is consistent in each case.

**California Cannabis Coalition v. City of Upland**

See under Ordinances and Major Issues (Marijuana), **page 13.**

## Police

### Stanislaus County Deputy Sheriffs' Association v. County of Stanislaus (2016) 2 Cal.App.5th 368

*Summary of Case:*

The Stanislaus County Deputy Sheriffs' Association ("Appellants"), on behalf of its peace officers, filed this action seeking a judicial declaration that custodial deputies may lawfully carry concealed firearms while off duty without needing to obtain a concealed weapons permit. The Stanislaus County Sheriff's Department ("Respondent") currently permits custodial deputies to carry a concealed firearm while off duty only if that deputy has first obtained a license or a concealed weapons permit. The Appellant argued that the Respondents' practice conflicts with California Penal Code section 25450, which exempts all peace officers listed in Penal Code section 830.1 from the prohibition against carrying a concealed weapon.

*Holding:*

On August 11, 2016, the Fifth District of the California Court of Appeal held for and agreed with the Appellant that peace officers are exempt from the prohibition against carrying a concealed weapon. In finding so, the court looked to opinions issued by the Attorney General, which found that certain specified peace officers were not required to obtain a permit to carry a concealed weapon while off duty. The Attorney General then held that custodial deputies as described in Section 830.1 did not have peace officer status while appearing at community service events, participating in the sheriff's honor guard, or conducting recruitment background checks or internal affairs investigations. During this time, the peace officer exemption would not apply. While the trial court interpreted this to mean that peace officers lost the concealed carry exemption when off duty, the court maintained that a custodial deputy's status as a peace officer did not end when he or she is off duty. The appellate court agreed with this interpretation in finding that custodial deputies could carry a concealed weapons even when off-duty.

*Significance:*

This case holds that off duty peace officers may carry a concealed weapon under certain circumstances. However, this decision does not completely eliminate the local agency's ability to limit the off-duty carrying of concealed weapons. The court stated that the custodial deputies must be in good standing with the Sheriff's Department and have complied with all legal requirements of peace officers under Penal Code sections 830 and 832. There is no definition of "good standing," but it appears to allow for a factual assessment by the local agency in determining if the officer has good standing.

### Mullenix v. Luna (2015) __ U.S. __, 136 S. Ct. 305 (per curiam)

*Summary of Case:*

On March 23, 2010, Sergeant Randy Baker ("Baker") of the Tulia, Texas Police Department followed Israel Leija, Jr. ("Leija") to a restaurant with a warrant for his arrest. Leija sped off when Baker approached his car and informed him he was under arrest. Leija, Baker, and a Trooper from the Texas Department of Public Safety ("DPS") engaged in a high speed 18-minute chase. Leija called the Tulia Police dispatcher, claiming to have a gun and threatening to shoot at the officers if they did not stop chasing him. The dispatcher relayed these threats, with a report that Leija may be intoxicated. DPS Trooper Chadrin Mullenix ("Mullenix") suggested shooting at the car to disable it. He did not receive training in this tactic and had not attempted it before. Before receiving feedback from his supervisor about the plan, who told Mullenix to stand by and see if the tire spikes worked, Mullenix shot six times. Right after he shot, the car hit the tire spikes, at which point the car hit the median and rolled. It was later determined that Leija was killed by Mullenix's shots, four of which struck his upper body. Beatrice Luna sued Mullenix, as an individual and as representative of Leija's estate, under 42 U.S.C. section 1983, alleging that he violated the Fourth Amendment by using excessive force against Leija. Mullenix moved for summary judgment on grounds of qualified immunity and argued that he shot because he was worried the tire spikes would not stop Leija, who

could continue driving and hurt nearby officers. Both the district and appellate court denied summary judgment, finding that the immediacy of the risk that Leija posed was a disputed fact that a reasonable jury could find either in the plaintiff's favor or in the officer's favor.

*Holding:*

On November 9, 2015, the United States Supreme Court ruled on the issue of qualified immunity, but not whether there was a Fourth Amendment violation. The qualified immunity doctrine shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A clear established right is one which is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. This inquiry is very fact specific. The Court ruled that, in light of the factual circumstances here, that deadly force was warranted. The majority rejected the argument that the availability of spike strips was insufficient to find that deadly force was unnecessary, because tire spikes do not always stop cars and present dangers of their own. The majority noted that Mullenix was worried the tire spikes would not work and cause danger to the other officers. The Court cited Scott v. Harris (2007) 550 U.S. 372 in reaching this decision, where the Court held that an officer did not violate the Fourth Amendment when he rammed the car of a fugitive because the fugitive's reckless driving could have caused danger to bystanders.

*Significance:*

This case comes to the opposite conclusion of A.K.H. v. City of Tustin (Sept. 1, 2016) __ F.3d __, 2016 WL 4932330 (discussed below), which denied qualified immunity when an officer shot and killed a suspect. However, these cases may be easily distinguished based on their facts, as A.K.H. involved a suspect who was on foot, and was also reported to not have weapons. The best practice is for police departments to implement trainings focusing on increasing accuracy of threat identifications.

**A.K.H. v. City of Tustin (Sept. 1, 2016) __ F.3d __, 2016 WL 4932330**

*Summary of Case:*

Defendant Osvaldo Villarreal ("officer"), a police officer in the City of Tustin ("City") fatally shot Benny Herrera ("Herrera") during an attempted investigatory stop. The officer had made the stop in response to a 911 call from Herrera's ex-girlfriend who alleged that he used force to take her phone. Herrera was on foot while the officer was in his patrol car. Herrera's right hand was in his sweatshirt pocket. The officer commanded Herrera to take his hand out of his pocket. Less than a second later, just as Herrera's hand came out of his pocket, the officer shot him twice, killing him. Herrera was unarmed. The officer did not claim that he saw, or thought he saw, a weapon in Herrera's hand. Herrera's relatives filed a 42 U.S.C. section 1983 action, a civil action brought when an individual is deprived of a Constitutional right, against the officer.

*Holding:*

On September 16, 2016, the Ninth Circuit of the United States Court of Appeals held the police officer was not entitled to qualified immunity in an action brought pursuant to Section 1983. The court reasoned that the officer could not reasonably believe Herrera posed an immediate threat of harm to the officer. The court noted that the crime at issue was a domestic dispute that ended before police became involved, and that while Herrera did not comply with the officer's commands, he did not attempt to flee, and that the officer escalated to deadly force very quickly and without warning. The court concluded that viewing the evidence in the light most favorable to the plaintiffs, the intrusion on Herrera's interest substantially outweighed any interest in using deadly force. The court further held that the officer violated clearly established Fourth Amendment law, which guards against unreasonable searches and seizures, when he shot and killed Herrera.

*Significance:*

The highly publicized deaths of citizens shot and killed by police have increased scrutiny of the circumstances behind police-involved shootings. Whether deadly force is permissible in a particular situation is highly dependent on the facts. The best practice to guard against excessive force is to implement trainings focusing on increasing accuracy of threat identifications. These trainings may include de-escalation and flexible tactical instruction to implicit bias education.

**Heffernan v. City of Paterson (2016) 578 U.S. __**

*Summary of Case:*

The Petitioner was a police officer working in the office of City of Paterson ("City"). The chief of police and the Petitioner's supervisor were appointed by the City's incumbent mayor, who was running for re-election against Lawrence Spagnola. As a favor to his mother, the Petitioner agreed to pick up and deliver a Spagnola campaign yard sign. Word of this act spread through the police force. The next day, the Petitioner was demoted from detective to patrol officer as punishment for his "overt involvement" in Spagnola's campaign. The Petitioner filed suit under the First Amendment and 42 U.S.C. section 1983for violation of United States constitutional rights. The City suggested that the employee was demoted based on a policy prohibiting police officers from overt involvement in any political campaign. The United States Supreme Court had not previously addressed whether there was a First Amendment violation when an employee is demoted due to an incorrect belief about the employee's political activity.

*Holding:*

On April 26, 2016, United States Supreme Court held that when an employer demotes an employee with the intent to prevent the employee from engaging in protected political activity, the employee may challenge the unlawful action under the First Amendment and Section 1983, despite the fact the employer's actions are based on a factual mistake about the employee's belief. The Supreme Court remanded the case to the lower court, stating that it must resolve whether a policy prohibiting any "overt involvement" in political campaigns was present, if the Petitioner's supervisors were following this policy, and if the policy complied with constitutional standards.

*Significance:*

The remand to the lower court means that the following question remains: Can a government employee be prohibited from participating in partisan political activities? The best practice for California local agencies is to confer with legal counsel to create specific policies regarding political activity outside of regular work hours.

### Friedrichs v. California Teachers Association (2015) 136 S. Ct. 1083

*Summary of Case:*

A group of public school teachers resigned their union membership and objected to paying their portion of the agency fee each year since they were no longer members of the union.

*Holding:*

On March 29, 2016, the Supreme Court of the United States deadlocked on the decision of whether or not public-sector unions may collect union fees from employees who choose not the join a union and who do not want to pay for union collective bargaining activities.

*Significance:*

The 4-4 decision of the Supreme Court had a result of affirming the notion that forcing non-union teachers to pay agency fees did not violate their First and Fourteenth Amendment rights to free speech and association. The public school teachers filed a petition to rehear the case when a ninth Supreme Court justice was appointed, in order to provide a full decision in this matter. On June 28, 2016, the United States Supreme Court denied the public school teachers' request for a rehearing. The denial to rehear this case means that the dispute has been decided. As a result of the ruling, public employees who choose not to join an exclusive bargaining unit or majority bargaining unit may still be required to financially contribute to that unit.

### San Diego Housing Commission v. Public Employment Relations Board (2016) 246 Cal.App.4th 1

*Summary of Case:*

The San Diego Housing Commission ("Commission") challenged the Public Employment Relation Board's ("PERB") granting of an employee organization's request for fact-finding under the Meyers-Milias-Brown Act ("MMBA") after an impasse in negotiations over the effect of the Commission's decision to layoff two employees represented by the Service Employees International Union, Local 122 ("SEIU"). PERB granted the request for fact-finding over the Commission's objection. The Commission argued that the MMBA's fact-finding provisions applied only to an impasse arising during the negotiation of a comprehensive memorandum of understanding ("MOU"), not to an impasse arising during the negotiation of a discrete, bargainable issue.

*Holding:*

On March 30, 2016, the Fourth District of the California Court of Appeal concluded that MMBA fact-finding applies to "single issue" bargaining disputes, not just to impasses arising in MOU bargaining. The court reasoned that PERB's conclusion on this issue was correct because the MMBA did not contain any language expressly limiting its fact-finding provisions to impasses occurring during the negotiation of a comprehensive MOU. PERB also consistently applied analogous fact-finding provisions on other Acts, such as the Higher Education Employer-Employee Relations Act to all types of bargaining disputes, not just disputes arising in the context of a negotiation of MOUs. The court also found that this interpretation of fact-finding provisions was consistent with the legislative history of the MMBA, and that such an interpretation would further the purposes of the MMBA.

*Significance:*

Fact-finding will be required during an impasse in "single issue" bargaining disputes, not just impasses arising in MOU bargaining.

### County of Riverside v. Public Employment Relations Board (2016) 246 Cal.App.4th 20

*Summary of Case:*

The County of Riverside ("County") implemented a new background check policy requiring information technology employees represented by the Service Employees International Union, Local 721 ("SEIU") to pass a background check. An employee's failure to pass the background check provided grounds to discharge the employee. The Union declared an impasse when the County and Union could not reach an agreement during negotiations over the effects of the policy. The Union made a fact-finding request to the Public Employment Relations Board ("PERB"). PERB granted the request over the County's objection. The County filed

suit, claiming that (1) the fact-finding procedures applied only to impasses arising from negotiations for a new or successor memorandum of understanding ("MOU"), not discrete bargainable issues, and (2) the fact-finding procedures violated the County's constitutional right to establish compensation for its employees. In response, PERB filed an anti-SLAPP (strategic lawsuit against public participation) motion to strike the complaint.

*Holding:*

On March 30, 2016, the Fourth District of the California Court of Appeal held that (1) fact-finding procedures also apply to discrete bargainable issues (the reasoning is the same as that found in San Diego Housing Commission v. PERB (2016) 246 Cal.App.4th 1), and (2) the MMBA provisions for impasse resolution through advisory fact-finding do not violate Article XI, section 11, subdivision (a) of the California Constitution when delegating a county's or city's home rule powers, the right to local self-government, to a private person or body. The court explained that the fact-finding provisions do not delegate any power to the fact-finding panels to make any binding decisions affecting public agency operations, and that the public agency still remains the power to refuse an agreement and make its own decisions. The court also found that the anti-SLAPP motion should have been granted because PERB's conduct constituted speech made in connection with an issue under consideration or review in an official proceeding authorized by law.

*Significance:*

This case strengthens the court's decision in San Diego Housing Commission v. PERB (2016) 246 Cal.App.4th 1. Local agencies must engage in fact-finding if a union requests it during an impasse in negotiations in event "single issue" bargaining disputes, not just impasses arising in MOU bargaining.

**County of Trinity v. United Public Employees of California, Local 792 (2016) PERB Dec. No. 2480-M**

*Summary of Case:*

The United Public Employees of California, Local 792 ("UPEC'), which represents the Trinity County General Unit ("GU"), was engaged in negotiations with the County of Trinity ("County") for a 2014 Memorandum of Agreement. In December 2014, GU employees engaged in a strike. On January 14, 2015, a UPEC representative, Steven Allen ("Allen"), sent an email message to the County's negotiator requesting confirmation of the County's interest in participating in a meeting with the GU and Skilled Trades Unit ("STU") negotiations teams. Between January 14 and February 10, 2015, the parties exchanged approximately three to four e-mail messages in an effort to set a date for the two meetings, and settled on February 26, 2015 for both meetings. The meeting did not go forward on February 26 as agreed, and instead, Allen informed the negotiator that the meeting would have to be rescheduled for a later date. Allen also stated that "for now the GU is still at impasse for the 2014 negotiations." The GU gave the County official strike notice on February 27, 2015. In response to the strike notice, the County negotiator informed UPEC that it considered the parties to be in the midst of negotiations, and that any such strike would be an unfair practice under the Meyers-Milias-Brown Act. The strike was authorized from March 2 to March 7, 2015. On March 10, 2015, the County filed an unfair practice charge under the Meyers-Milias-Brown Act ("MMBA").

*Holding:*

On April 25, 2016, PERB held for UPEC. The Court first explained the impasse procedure, stating that a strike that occurs prior to completion of statutory impasse procedures creates a rebuttable presumption that the union has breached its duty to bargain in good faith. The question was whether scheduling a meeting or the making of concessions lifted impasse to revive the bargaining obligation, at which point a strike would be unlawful. PERS stated that a handful of e-mail messages initiated by UPEC to schedule a meeting did not constitute changed circumstances sufficient to revive the bargaining obligation. Thus, both parties were still at impasse. Next, PERB found that the County's allegation that UPEC was willing to consider concessions was unsubstantiated, and in any case would not actually be a concession. PERB also rejected the County's argument that factual disputes should not be resolved at the charge processing and investigation stage of PERB proceedings, but at a formal hearing after issuance of

a complaint. PERB also declined to find that UPEC's tactics were unlawful under a totality of circumstances standard, because the parties were at impasse and not engaged in negotiations at the time of the strike.

*Significance:*

While PERB found UPEC's actions did not rise to the level of an unfair labor practice, it also stated that UPEC's conduct did not serve to promote full communication or to improve employer-employee relations. PERB further held that the County had the option to refuse UPEC's request to meet, respond to the request with a concession substantial enough to revive the bargaining obligation, or unilaterally impose its last, best, and final offer. Local agencies should evaluate all potential options when a strike is imminent, and consider PERB's finding that e-mails which simply initiate meetings are insufficient to revive the duty to bargain.

## **Human Resources** Overtime

### Alvarado v. Dart Container Corporation (2016) 243 Cal. App.4th 1200

*Summary of Case:*

The Plaintiff worked for Dart Container Corporation ("Defendant"). According to the Defendant's written policy, an attendance bonus would be paid to any employee who was scheduled to work a weekend shift and completed the full shift. The bonus was fifteen dollars per day, for working a full shift on Saturday or Sunday, regardless of the number of hours worked beyond the normal scheduled length of a shift. The company used the following formula to calculate the amount of overtime paid:

1. Multiply the number of overtime hours worked in a pay period by the straight hourly rate (straight hourly pay for overtime hours).

2. Add the total amount owed in a pay period for (a) regular non-overtime work, (b) for extra pay such as attendance bonuses, and (c) overtime due from the first step. That total amount is divided by the total hours worked during the pay period. This amount is the employee's "regular rate."

3. Multiply the number of overtime hours worked in a pay period by the employee's regular rate, which is determined in step 2. This amount is then divided in half to obtain the "overtime premium" amount, which is multiplied by the total number of overtime hours worked in the pay period (overtime premium pay).

4. Add the amount from step 1 to the amount in step 3 (total overtime pay). This overtime pay is added to the employee's regular hourly pay and the attendance bonus.

The Plaintiff argued that the company should have used a formula from the Division of Labor Standards Enforcement ("DLSE") Manual sections 49.2.4.2 and 49.2.4.3. The Plaintiff argued that the company's calculation would dilute and reduce the regular rate of pay by including overtime hours when calculating the regular rate of pay used to compute overtime on the Plaintiff's flat sum bonuses.

*Holding:*

On January 14, 2016, the Fourth District of the California Court of Appeal held that whether calculating overtime on flat sum bonuses paid in the same pay period in which they are earned is lawful. The court reasoned that there is no California law specifying a method for computing overtime on flat sum bonuses, and the aforementioned formula complies with federal law, which provides a formula for calculating bonus overtime. The court further held that there was no California law specifying a formula to compute overtime on a flat sum bonus.

*Status:*

On May 11, 2016, the California Supreme Court granted review of this case, which automatically vacated the decision of the Court of Appeal.

### Flores v. City of San Gabriel (9th Cir. 2016) 824 F.3d 890

*Summary of Case:*

A group of police officers sued the City of San Gabriel ("City") for three (3) years of unpaid overtime. The City provided a "Flexible Benefits Plan," which allowed City employees to purchase medical, vision, and dental benefits. City employees were required to use a portion of these monies to purchase vision and dental benefits through the City, but could use the remainder of the funds

as a cash payment as long as the employee provided proof of an alternate medical coverage, such as through a spouse. Employees who elected not to participate in the City's medical benefits had a separate line item in his or her regular paycheck, referred to as "cash-in-lieu."

The City treated the cash-in-lieu payments as benefits, not compensation, and therefore, excluded this amount when calculating an employee's regular rate of pay for overtime purposes. A small group of City police officers brought suit against the City alleging that the "cash-in-lieu" payments should have been considered in their regulate rate of pay for overtime purposes because it was considered compensation for hours worked. As such, these officers alleged that the City owed them three (3) years of back pay because of the miscalculation.

The City argued that the "cash-in-lieu" payments were not considered compensation because this amount was not tied to the amount of work performed for the City. Therefore, the City excluded the "cash-in-lieu" payments from the regular rate of pay.

*Holding:*

On June 2, 2016, the Ninth Circuit held that the Fair Labor Standards Act ("FLSA") requires employers to include cash payments received by employees who waive medical benefits into its regular rate of calculation for overtime purposes, even if the payments are not specifically tied to time worked for the City. The Ninth Circuit reasoned that the "cash-in-lieu" payments should be included in an employee's regular rate of pay for determining that employee's overtime rate since those payments are paid directly to the employee and not to a trustee or to a third party. In its decision, the Ninth Circuit acknowledged the possibility that this decision could discourage employers from offering flexible benefit plans to its employees. However, the court determined that to be an issue for the Legislature to address and not the courts.

*Significance:*

We anticipate that the City will attempt ask the Supreme Court of the United States to review this decision. Agencies should begin considering their options when negotiating benefits with employees. This ruling does not apply to contractual overtime hours, only overtime subject to the FLSA.

**U.S. Department of Labor Overtime Pay Regulations**

On May 18, 2016, the U.S. Department of Labor issued a new regulation that may permit an estimated four (4) million Americans to be eligible for overtime pay for hours worked in excess of forty (40) hours per week. Under the new rules, employees who earn less than $47,476 per year will qualify for overtime pay of time-and-a-half for every hour worked over forty hours per week. This rule will even apply to employees who have managerial duties, as long as he or she earns less than $47,476 per year.

Federal employment law provides two ways for employees to be eligible for overtime pay for hours worked in excess of forty hours per week. First, employees who are not executives, administrators, or professionals, which historically means employees who do not spend their time exercising decision-making authority, may earn overtime pay for any hours worked in excess of forty hours per week.

Alternatively, as of May 18, 2016, an employee is eligible for overtime pay for any hours worked in excess of forty hours per week if he or she makes less than $47,476 per year, regardless of the employee's duties. The new regulation also allows the Department of Labor to adjust the maximum pay for overtime pay every three (3) years.

With these new rules, many employers will be forced to limit eligible employees' hours to forty (40) hours per week, in order to avoid paying overtime. Other employers may decide to increase their employees' base salary above the $47,476 threshold so that they will not be required to pay overtime for hours worked in excess of forty hours per week. Employers had until December 1, 2016 to comply with this new rule.

### Tyson Foods, Inc. v. Bouaphakeo (2016) 577 U.S. __, 136 S. Ct. 1036

*Summary of Case:*

The Plaintiffs were employees of Tyson Foods, Inc. ("Tyson"). The employees were required to wear protective gear, but the exact composition of the gear depended on the tasks performed on a given day. Tyson compensated some, but not all, employees for time it took to change protective gear, and did not record the time each employee spent on those activities. The employees filed suit, alleging that the changing of their protective gear was integral and indispensable to their hazardous work and that Tyson's policy not to pay for those activities denied them overtime compensation required by the Fair Labor Standards Act ("FLSA"). The employees also raised a claim under Iowa wage law. The employees sought certification of their state claims as a class action under Federal Rule of Civil Procedure section 23, and certification of their FLSA claim as a "collective action." Tyson contended that these classes should not be certified because the protective gear required varied for each employee, and therefore, the employee's claims were not sufficiently similar to be resolved on a classwide basis. The trial court held that questions regarding compensation for time spent changing protective gear are common questions in this case.

*Holding:*

On March 22, 2016, the United States Supreme Court held that the trial court was correct in certifying the class. The Supreme Court reasoned that here, questions of law or fact common to class members predominated over any questions affecting only individual members. The employees argued that individual inquiries of employees were unnecessary because it can be assumed each employee spent for the same average time changing between protective gear. The Court agreed with this reasoning and accepted the representative sample as evidence because the employees worked in the same facility, did similar work, and were paid under the same policy.

These facts sufficiently differentiated Tyson Foods from Walmart Stores, Inc. v. Dukes (2011) 564 U.S. 338, which rejected a representative sample as evidence because the employees were not similarly situated in a discrimination case. The Supreme Court did not reach the question of whether class certification was improper because there was no method to ensure that uninjured class members would not receive compensation. The Supreme Court stated that the question of whether uninjured class members could recover must be decided after damages have been disbursed. The Court blamed Tyson Foods for this issue, because it rejected the employees' proposal that the trial be bifurcated into damages and liabilities precisely because it would be difficult to remove uninjured individuals from the disbursement of the awards.

*Significance:*

The holding in this case is extremely specific. Although it approves of statistical, representative samples for this case, the Supreme Court noted that the use of statistical methods will depend on the facts and circumstances particular to those cases. Here, the Supreme Court held that a representative sample is acceptable where the employees are in the same facility, do similar work, and are paid under the same policy. The holding also indicates that employers should propose procedures that would ensure that uninjured class members are identified and excluded from the damages award.

### Kilby v. CVS Pharmacy, Inc. (2016) 63 Cal.4th 1

*Summary of Case:*

The Plaintiff worked as a customer service representative for CVS Pharmacy, Inc. ("CVS"). CVS told the Plaintiff it expected her to stand while performing her various duties. No seat was provided for the Plaintiff's various tasks, from operating a cash register to organizing products to cleaning. This case involved a California wage order requirement that an employer provide suitable seating for employees under certain circumstances. The wage order stated that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably

permits the use of seats." The California Supreme Court was asked to determine if: (1) "nature of work" referred to individual tasks performed throughout the workday, or to the entire range of an employee's duties performed during a given day or shift; (2) when determining whether the nature of work "reasonably permits" use of a seat, what factors a court should consider; and (3) if an employer has not provided a seat, must a plaintiff prove a suitable seat is available to show that the employer has violated the seating provision.

*Holding:*

On April 4, 2016, the California Supreme Court issued its opinion. First, the Supreme Court held that "nature of work" refers to an employee's tasks performed at a given location for which a right to a suitable seat is claimed, rather than a "holistic" consideration of the entire range of an employee's duties anywhere on the jobsite during a complete shift. If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, then a seat is required. Second, whether the nature of work reasonably permits sitting is an objective determination based on the totality of the circumstances. An employer's business judgment and physical layout of the workspace are relevant, but not dispositive. The inquiry focuses on the nature of the work, not an individual employee's characteristics. Third, if an employer argues that there is no suitable seat available, then the burden is on the employer to prove no suitable seat is available.

*Significance:*

This case balances the concerns that the employer and employee have when determining if seating is required. If an employer chooses not to provide seating to an employee, an employer should be able to articulate all factors which contributed to its decision to not provide a seat.

## **Human Resources** Worker Rights

### Poole v. Orange County Fire Authority (2015) 61 Cal.4th 1378

*Summary of Case:*

Under California Government Code section 3255, which is part of the Firefighters Procedural Bill of Rights Act ("Act"), a firefighter has the right to review and respond to any negative comment that is "entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer." The Plaintiff's supervisor maintained a "daily log" regarding each of the employees that he supervised. He included any factual occurrence(s) that would aid him in writing a thorough and fair annual review. Some of the incidents from the log were included in the Plaintiff's annual review, such as how he failed to complete his assigned duties. Some incidents recorded in the log were not included in the review. After discovering that his supervisor maintained a daily log on him, he wrote to the director of human resources of the Orange County Fire Authority ("Authority"), asserting that the inclusion of negative comments in his supervisor's daily log without providing the Plaintiff an opportunity to review those comments violated Section 3255. He requested that all negative comments be removed from the log and that all personnel files be made available for inspection.

*Holding:*

On August 24, 2015, the Supreme Court of California held that the supervisor's log not a file "used for any personnel purposes by his or her employer" because it was not shared with or available to anyone other than the supervisor who wrote the log. In order to determine the scope of "used for any personnel purposes by his or her employer," the Court looked to the plain meaning of the statute, constructing it in a manner that would closely match the Legislature's intent. The Court found that this provision did not relate to all files that might be connected with personnel matters, only personnel files which

were used to determine the firefighter's qualifications for employment, promotion, additional compensation, termination, or disciplinary action. Personnel files are permanent records of employment, and did not include supervisor's logs which was used solely to help its creator remember past events. Even if the logs were used to help draft performance evaluations and other documents that were ultimately placed in the personnel file, the notes were not subject to Section 3255.

*Significance:*

This holding provides that supervisors who maintain daily logs, which are created solely to help the creator remember particular incidents about an employee with accuracy, can do so without needing to review the comments with the employee under Section 3255. Supervisors may consider maintaining personal daily logs for employees which discuss their performance, so that annual performance reviews can be executed with accuracy.

**Ellins v. City of Sierra Madre (2016) 244 Cal.App.4th 445**

*Summary of Case:*

The Public Safety Officers Procedural Bill of Rights Act ("POBRA") provides, under California Government Code section 3303, that a "public safety officer under investigation" by his or her "employing public safety department … that could lead to punitive action" shall be informed of the nature of the investigation prior to any interrogation.

The Plaintiff was a peace officer with the City of Sierra Madre Police Department ("Department"). The Plaintiff had access to the California Law Enforcement Telecommunications System ("CLETS") database, which is a confidential law enforcement database allowing access to an individual's criminal history.

The Department informed the Plaintiff that use of the database for a reason other than official business was improper and grounds for immediate dismissal. The Plaintiff used the database for non-official reasons. In September 2010, the Department formally notified the Plaintiff than an investigation was being conducted regarding an "alleged abuse of [his] peace officer powers and duties." The nature of the alleged abuse was not detailed. The Department attempted to schedule an interview four times, but the Plaintiff did not appear due to medical reasons or at the advice on his representative. In December 2010, the Department issued the Plaintiff a notice of intent to terminate his employment, based on one count of using the CLETS database without authorization and two counts of engaging in insubordination by disobeying his commanding officer's direct order to submit to an interrogation. The Plaintiff defeated one count of insubordination, as he had a valid medical issue. However, the Plaintiff appealed on the other count of insubordination, stating that he was not properly advised of the nature of the investigation prior to his interrogation on October 13, 2010.

*Holding:*

On January 28, 2016, the Second District of the California Court of Appeal held that a public safety officer must be informed of the "nature of the investigation" reasonably prior to any interrogation. Notice is "reasonably prior to" interrogation if it grants the officer sufficient time to meaningfully consult with any representative he or she elects to have present during the interview, although the employing department may postpone disclosure until the scheduled time of the interview—and briefly postpone the commencement of the interview to allow time for consultation—if it has reason to believe that earlier disclosure would jeopardize the safety of any interested parties or the integrity of evidence under the officer's control. Here, the court found that the officer had sufficient time to meaningfully consult with his representative.

*Significance:*

Local agencies should provide sufficient reasons in notices informing an officer that an investigation is being initiated. Furthermore, before conducting interrogations, the local agency should provide sufficient time for the officer to consult meaningfully with his or her representative. This case indicates that a month is sufficient to meet this requirement.

**Seibert v. City of San Jose (2016) 247 Cal.App.4th 1027**

*Summary of Case:*

The Petitioner, a firefighter and paramedic, petitioned the trial court to set aside a decision by the Civil Service Commission ("Commission") of the City of San Jose ("City") denying his appeal from a decision by the San Jose Fire Department ("Department") to terminate his employment. The dismissal was based on five charges of misconduct, two of which were based on his exchange of inappropriate e-mails during work hours with a 16-year-old girl, and three of which stemmed from allegedly improper conduct toward a female coworker. It was unclear what age the girl was based on these e-mails. The trial court set aside the Commission's decision on all but one charge, and found that charge insufficient to sustain the level of discipline imposed.

*Holding:*

On May 31, 2016, the Sixth District of the California Court of Appeal held that the e-mails could not sustain a charge for a violation of any policy because the City's code of ethics, municipal code, fire department regulations, and other sources of disciplinary authority were vague. The City ultimately could not explain how a firefighter violated these policies by engaging in sexual conversations with what appeared on face to be a consenting adult. The court also rejected the City's argument that the act of exchanging sexual e-mails with another was sufficient for termination, pointing to other activities that firefighters engage during idle time on-duty, such as watching movies, online dating, and personal phone calls. The court ultimately found that the e-mail exchange did not violate any City policy. While there was enough evidence to find that the Petitioner should have known, or knew, that the girl was a minor, the standard of review limited the court to determining whether there was substantial evidence to support the trial court's decision to the contrary.

The court then discussed how further proceedings should be handled, particularly with respect to whether the harassment of the female coworker occurred or not. The court interpreted a provision of the Firefighters Procedural Bill of Rights Act ("Act") which states that the Act's protections only "apply to a firefighter during events and circumstances involving the performance of his or her official duties." The court found that alleged unwelcome touching of a fellow firefighter while at a training center is within the scope of the Act. However, it was debatable whether off-premise harassment through voice and text messages, and sending sexual e-mails to a minor while on-duty were covered by the Act.

*Significance:*

This is the first case published by the California Court of Appeal that interprets a provision of the Act to limit the statute's procedural employee protections "to the events and circumstance involving the performance of official duties." This case indicates that even if a firefighter is on-duty and in the fire station when the alleged misconduct occurred, such action may not entitle him or her to the protections of the Act. This case also warns local agencies to have clear policies regarding misconduct and activities in the workplace, and if misconduct occurs, to thoroughly discuss how those policies were violated. Local agencies should consult their legal counsel to discuss whether the provisions of the Firefighters Procedural Bill of Rights Act apply in a particular case.

## **Human Resources** Discrimination and Harassment

**Starkey v. McHugh (2015) 129 F.Supp.3d 882**

*Summary of Case:*

Wayne Lord, a former sergeant at the Presidio of Monterey Police Department ("POMPD"), sexually harassed the Plaintiff while they worked together at POMPD in 2011 and 2012. POMPD is housed under the Department of the Army ("Army"). The Plaintiff sued John M. McHugh ("Defendant"), in his capacity as Secretary of the Army, under Title VII of the Civil Rights Act of 1964 ("Title VII"), claiming the Army was liable to her for sexual harassment and discrimination, and that the Army retaliated against her for complaints by creating a hostile work environment and firing her. The Defendant filed a summary judgment motion, claiming that (1) the Plaintiff did not present sufficient evidence that she reported her harassment as required under Title VII of the Civil Rights Act of 1964, (2) that the Plaintiff did not

present sufficient evidence to support her allegation of a retaliatory hostile work environment resulting from her sexual harassment complaint, and (3) that the Plaintiff had not presented sufficient evidence to support her allegation of retaliatory termination resulting from her complaint.

*Holding:*

On September 9, 2015, the United States District Court of the Northern District of California denied the motion for summary judgment, holding that a reasonable jury could find the Army was liable based on its negligence in controlling her working conditions. The court also noted that a reasonable jury could infer that POMPD created a hostile work environment in response to the Plaintiff's harassment complaint. The court also noted that the Plaintiff's request for additional leave was denied without reason.

*Significance:*

This case indicates that taking adverse action against an employee who has engaged in a protected activity, such as reporting sexual harassment and discrimination, can result in risky litigation if the employer does not have a legitimate, non-discriminatory reason for the adverse action. Employers should consider keeping a thorough and accurate log of all adverse actions and actions surrounding an employee filing discrimination, harassment, or retaliation claims.

**Wallace v. County of Stanislaus (2016) 245 Cal.App.4th 109**

*Summary of Case:*

The Plaintiff was employed as a bailiff at the County of Stanislaus ("County"). The Plaintiff injured his knee and was placed on light duty after surgery. He exhausted paid leave while on leave of absence. The County then accommodated the Plaintiff in a year-long position as a bailiff, which would permit the Plaintiff to avoid prolonged walking or standing. Six months later, the Plaintiff then underwent a medical review, which resulted in a medical report stating that the Plaintiff's disability would limit his ability to work. The County took this report to mean that he could not perform the essential functions of his job even with reasonable accommodation, and placed him on unpaid leave of absence The Plaintiff brought a disability discrimination case against the County after he returned to his job after passing a fitness-for-duty exam. The trial court ruled that the Plaintiff had to demonstrate "animus" or ill will on the part of the County.

*Holding:*

On February 25, 2016, the Fifth District of the California Court of Appeal held that the trial court's instruction was incorrect. Instead, it held that the standard articulated in Harris v. City of Santa Monica (2013) 56 Cal.4th 203 applied. Harris indicated that the Plaintiff only had to prove the requisite discriminatory intent by showing his actual or perceived disability was a "substantial motivating factor/ reason" in the County's decision to place him on a leave of absence. California law did not require an employee with an actual or perceived disability to prove that the employer's adverse employment action was motivated by animosity or ill will against the employee. Under this interpretation, even an employer's erroneous or mistaken belief about the employee's physical condition is prohibited. The court also explained that the burden to prove disability does not shift to the employee in disability discrimination cases where there is direct evidence of the employer's motivation.

*Significance:*

Wallace indicates that employers must proceed with caution before taking adverse action on an employee's actual or perceived disability, even if a physician confirms that the disability would interfere with essential job functions. If an employee states that he or she can still perform the essential functions of the job, the employer should assess whether this statement is true, and engage in the interactive process before deciding to terminate or place the employee on a leave of absence.

**Mitchell v. California Dept. of Public Health (2016) 1 Cal. App.5th 1000**

*Summary of Case:*

The Plaintiff was a health facilities investigator at the State Department of Public Health ("Department"). The Plaintiff resigned from the Department in 2011 after complaining to his employer that he was being discriminated against because of his race (African-American). He filed his complaint with the United States Equal Employment

Opportunity Commission ("EEOC"). The EEOC automatically lodged a copy of the complaint with the Department of Fair Employment and Housing ("DFEH"). DFEH issued a right-to-sue letter which stated that the Plaintiff had one year from July 9, 2011 to bring a civil lawsuit. The letter also stated that pursuant to California Government Code section 12965, subdivision (d)(a), the one-year period would be tolled during the EEOC's investigation of the Plaintiff's complaint. More than two years after the right-to-sue letter was sent, the EEOC issued a letter finding there was reasonable cause to believe the Plaintiff suffered racial discrimination under Title VII of the Civil Rights Act of 1964. The United States Department of Justice issued a federal right-to-sue notice on March 21, 2014. The Plaintiff was required to file suit within ninety days after receiving a federal right-to-sue notice. The Plaintiff filed suit for racial discrimination on July 8, 2014. The Department contended that the Plaintiff's complaint was barred by the ninety (90) day federal statute of limitations time period.

*Holding:*

On July 27, 2016, the Second District of the California Court of Appeal held that the Plaintiff's complaint was timely because the one year statute of limitations period was tolled while the EEOC investigated the Plaintiff's allegations. The statute of limitations began again when the EEOC issued its letter of determination on September 30, 2013. Here, the complaint was filed less than a year after the issuance of the EEOC's letter of determination.

*Significance:*

This case indicates that an employer must consider reasons for tolling when determining the applicable statute of limitations for employee discrimination suits.

**Castro-Ramirez v. Dependable Hwy. Express (2016) 2 Cal. App.5th 1028**

*Summary of Case:*

The Plaintiff was a truck driver for Dependable Highway Express ("DHE"). When he was hired, he told DHE he had a disabled son who required daily dialysis and that he was responsible for administering the dialysis. He requested work schedule accommodations that his supervisor initially granted, which allowed him to administer the dialysis in the evening. Three years later, a new supervisor changed his work schedule which would prohibit him from arriving home early enough to administer the dialysis. The supervisor spoke to a manager and then terminated the Plaintiff. The supervisor told the Plaintiff that he had quit by choosing not the take the assigned shift. The Plaintiff alleged associational disability discrimination in violation of the Fair Employment and Housing Act ("FEHA").

*Holding:*

The Second District of the California Court of Appeal initially issued its decision in April 2016, but the DHE petitioned for a rehearing. The Plaintiff dropped his reasonable accommodation claims. On August 29, 2016, the court found that a reasonable interpretation of the FEHA permits claims based on associational disability discrimination, which is the "disability" that a plaintiff suffers from being associated with a person with disabilities. The court acknowledged that this interpretation was in conflict with the federal Americans with Disabilities Act ("ADA"), but the court reasoned that FEHA was meant to provide greater protections than the ADA. In rejecting the DHE's motions for summary judgment, the court found that a jury could find that the Plaintiff's association with his disabled son was a substantial motivating factor in the supervisor's decision to terminate him, and that DHE's reason for terminating him was pretext.

*Significance:*

The court's holding indicates that refusal to accommodate the Plaintiff's scheduling request could lead to a valid claim of disability discrimination. Employers are advised to proceed carefully when employers ask for accommodations related to caring for a person with disabilities.

## Human Resources Benefits

**Aluma Sys. Concrete Constr. Of California v. Nibbi Bros., Inc. (2016) 2 Cal.App.5th 620**

*Summary of Case:*

In 2011, Aluma Systems Concrete Construction of California, Inc. ("Contractor") entered into an agreement with Nibbi Concrete ("Owner") to design and supply the materials

for wall formwork and deck shoring at the Owner's construction project. The terms of the contract included the following indemnification provision: "To the extent permitted by law, [Owner] shall defend, indemnify and hold harmless [Contractor] against any and all claims, actions, expenses, damages, losses and liabilities, including attorneys fees and expenses, for personal injuries (including death) and/or property damage arising from or in connection with this contract and/or [Contractor]'s equipment and services, except to the extent such claims, actions, expenses, damages, losses and liabilities are caused by the acts or omissions of [Contractor] or anyone directly or indirectly employed by [Contractor] or anyone for whose acts [Contractor] may be liable." Two lawsuits were filed by Owner's employees against Contractor alleging that in August 2011, the employees were injured after a shoring system designed by the Contractor collapsed. The employees alleged negligence on the part of the Contractor. The Contractor alleged that the employees' injuries were proximately caused by the negligence of the Owner and unnamed others. The Contractor tendered the lawsuits to the Owner for defense and indemnification, but received no response. The Contractor then filed a complaint for breach of contract, express indemnification, and declaratory relief. The Owner argued that the contractual indemnification provision did not apply because the lawsuits alleged that the Contractor alone, not the Owner, was negligent.

*Holding:*

On August 16, 2016, the First District of the California Court of Appeal found for the Contractor. The court reasoned that per California Labor Code section 3864, the Owner was only liable to indemnify the Contractor pursuant to the terms of the Contract. The Owner argued the lawsuits arose solely from the Contractor's negligence, and thus, the indemnification provision did not apply. The Contractor argued that the provision applies because the Contractor is jointly and severally liable for all economic damages in the lawsuits, including any attributable to the negligence of the Owner or others, as long as the Contractor is partially responsible. As a result, the indemnification provision provided for proportionate liability. The court found that even though the lawsuits only alleged negligence by the Contractor, this was not conclusive regarding the Owner's fault because the jury could still apportion fault to the Owner. Furthermore, the court held that if the Owner was also at fault for the injuries, the Contractor could use an offset to adjust part or all of the worker's compensation benefits received by the employees.

*Significance:*

This case highlights how a contractual indemnity provision can help shift risks, like compensation of employee injuries.

## **Human Resources** Arbitration Agreements

### Morris v. Ernst & Young, LLP (9th Cir. 2016) 2016 WL 4433080

*Summary of Case:*

Stephen Morris and Kelly McDaniel ("Plaintiffs") worked for the accounting firm Ernst & Young, LLP. They were required to sign agreements not to join with other employees in bringing legal claims against the company. The agreement further required employees to pursue legal claims against Ernst & Young exclusively through arbitration and arbitrate only as individuals and in separate proceedings. Despite this, the Plaintiffs joined in a class action against Ernst & Young. The Plaintiffs claimed that Ernst & Young misclassified them in order to deny them overtime wages in violation of the Fair Labor Standards Act ("FLSA") and California labor laws. The Plaintiffs also contended that the agreements prohibiting concerted actions violated the National Labor Relations Act ("NLRA"), the Norris LaGuardia Act, and the FLSA. The Plaintiffs relied on a determination by the NLRA that concerted action waivers violated the NLRA.

*Holding:*

On August 22, 2016, the Ninth Circuit of the United States Court of Appeals held that an employer violates the NLRA by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment. The court reasoned that there was no conflict between the NLRA and the Federal Arbitration Act ("FAA"),

which governs the enforcement of arbitration agreements. The court concluded this because the FAA's "savings clause" states that arbitration agreements are enforceable, unless there are other grounds for contract invalidation. Requiring plaintiffs to bring claims separately was illegal under the NLRA, so arbitration was not required under the FAA's savings clause. The court also found that the ban on concerted activity was a waiver of substantive, as opposed to procedural, rights, which is prohibited. The Ninth Circuit remanded the question of whether the term "separate proceedings" was severable from the agreement.

*Significance:*

The federal Circuits have split on the question whether class or collective action waivers violate the NLRA, making it highly likely that the United States Supreme Court will address this issue. Furthermore, whereas federal court of appeals decisions are persuasive, they are not binding on the state courts. The California Supreme Court has also previously enforced mandatory arbitral class action waivers in Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348. Employers with arbitration agreements may want to consider including a provision that states if a class action waiver is deemed unlawful, any collective or class action will be heard in court instead by an arbitrator.

## **Human Resources** Litigation

### Hughes v. County of San Bernardino (2016) 244 Cal.App.4th 542

*Summary of Case:*

The Plaintiff was a sheriff's deputy for the County of San Bernardino ("County") for more than thirty years. He was suspended for fifteen days after being served with allegations of misconduct. The Plaintiff filed an appeal with the San Bernardino Civil Service Commission ("Commission"). He could not appear at the Commission hearing because he suffered a heart attack and was on medical leave. His counsel entered into a tentative oral settlement agreement without authorization from the Plaintiff. The hearing officer had the tentative agreement placed on the record with directions to the County to prepare a written settlement agreement, but the County did not prepare a written agreement. Half a year later, the Plaintiff obtained new counsel, who asked the Commission to continue with the administrative appeal. The County objected, arguing the matter was settled pursuant to the agreement. While the issue was pending before the Commission, the Plaintiff retired from the County because of a medical condition. He applied for conversion to an industrial disability retirement. The Commission denied the Plaintiff's request to continue with the administrative appeal. Afterwards, the Plaintiff asked the County to engage in an administrative appeal pursuant to due process requirements and the Public Safety Officers Procedural Bill of Rights Act ("POBRA"). The County denied the request because the Plaintiff had retired and because the parties entered into a settlement agreement. The Plaintiff brought suit demanding an administrative appeal and alleging disability discrimination under the Fair Employment and Housing Act ("FEHA").

*Holding:*

On January 28, 2016, the Fourth District of the California Court of Appeal held that the Plaintiff was not afforded an opportunity for a hearing and was entitled to an administrative appeal. The court reasoned that the County relied solely on the tentative settlement agreement, which was not enforceable under the law because counsel may not settle or impair his or her client's substantial rights without the client's authorization. If the County were to prevail, the Plaintiff would neither receive the benefit of the settlement agreement nor a hearing. In determining whether the Plaintiff was able to proceed with the administrative appeal even after the Plaintiff retired, the court looked to the County's Personnel Rules. The Personnel Rules stated that a "classified employee with regular status may appeal an order of suspension, demotion, reduction in salary step, or dismissal," but did not discuss whether the appeal could move forward if the employee retired after beginning the appeal. The court found that the reference to a "classified employee with

regular status" was simply to distinguish these employees from probationary employees, who do not have appeal rights. It also noted that the County's interpretation would be inequitable.

*Significance:*

This case indicates that when an employee has started an administrative appeal, a local agency may not halt the appeal simply because the employee has retired.

**Pinheiro v. Civil Service Comm. for the County of Fresno (2016) 245 Cal.App.4th 1458**

*Summary of Case:*

The County of Fresno ("County") hired the Plaintiff in as a personnel services manager. In May 2012, the County's personnel director authorized an investigation of the Plaintiff after two County employees reported that he was having an affair with another County employee, Vanessa Salazar ("Salazar"). Salazar told the two employees that the Plaintiff had hit her more than once. An investigation conducted by an outside investigator sustained allegations of dishonesty, insubordination, and misuse of work time. In 2012, the Plaintiff was served with a proposed order of termination, and a notice of a Skelly hearing. The hearing officer determined termination was appropriate. The Plaintiff appealed to the Civil Service Commission for the County of Fresno ("Commission"), which ultimately found the County had just cause to terminate. The causes included making contact with Salazar despite orders not to, violating his confidentiality oath of office, moonlighting by secretly working as a professional poker player, committing petty thefts of bags of potato chips and sodas from stores near his office, and repeatedly lying to his superiors and at the Commission hearing. The Plaintiff appealed, alleging he was denied a fair trial when the County and Commission violated his due process rights by (1) relying on evidence obtained outside the Commission hearing; (2) using law enforcement records as a factor in upholding his dismissal; (3) relying on misconduct more than three years old; (4) relying on evidence that was not admitted and excluding evidence relevant to his defenses; and (5) relying on evidence of contact with Salazar prior to any directive prohibiting contact.

*Holding:*

On March 29, 2016, the Fifth District of the California Court of Appeal held for the Plaintiff and reversed with instructions to vacate the decision. The court reasoned that the fair trial requirement under California Code of Civil Procedure section 1094.5 was not synonymous with constitutional due process and did not require a formal hearing under the due process clause. Section 1094.5 simply required a fair administrative hearing that affords the appellant a reasonable opportunity to be heard. The Plaintiff noted that the Commission considered evidence from a unit modification hearing, which was not a part of the record in front of the Commission. While the Plaintiff was questioned about his testimony at the modification hearing, the Commission could not consult the hearing transcript to gather evidence in order to make its decision. The court also noted that the Plaintiff's credibility was the primary issue in the case against him, so the Commission's use of the modification hearing testimony was significant.

*Significance:*

Parties to an administrative adjudication must ensure that the administrative record is complete prior to filing a writ of administrative mandate in Superior Court.

## Torts

### Hampton v. County of San Diego (2015) 62 Cal.4th 340

*Summary of Case:*

In November 2009, Plaintiff was seriously injured in a collision between his vehicle and another that occurred at an intersection in the County of San Diego ("County"). The issue here was whether the County's design and construction of the intersection afforded inadequate visibility under applicable County design standards, so that it was a dangerous condition of public property. The County claimed design immunity under California Government Code section 830.6.

*Holding:*

On December 10, 2015, the California Supreme Court found for the County. Design immunity under California Government Code section 830.6 is granted if: (1) there is a causal relationship between the design and the accident; (2) the agency made discretionary approval of the design; and (3) substantial evidence supports the reasonableness of the plan. The Plaintiff contested the second prong, noting that the design did not depict the embankment which hampered visibility, and that visibility did not meet County standards. The Court rejected this argument, reasoning that trial courts may not consider if the approving engineer was aware of design standards or that the design met those standard. The policy behind this rule is to avoid second-guessing by a jury regarding governmental design decisions. Finding otherwise would vest design authority in a jury, as opposed to a public official who has this authority. While a trial court may consider whether the approving official had in mind the reasonableness of the design, practically this would be difficult because the approving official would likely be unavailable or would have to testify from memory.

*Significance:*

This case appears to strengthen design immunity for local governments, but local agencies should attempt to address complaints about potential dangerous conditions from public property. In cases of design of public property, local agencies should maintain design plans and as-built plans that accurately reflect what was constructed. Furthermore, such plans should demonstrate discretionary approval by the agency, which means a local agency employee reviewed and had the choice of implementing certain designs.

### Burgueno v. Regents of the University of California (2015) 243 Cal.App.4th 1052

*Summary of Case:*

The decedent was a student at the University of California, Santa Cruz ("UCSC"). His route to campus included traveling on the Great Meadow Bikeway ("Bikeway"). There have been a number of bicycle accidents on the route, which was used as a recreational bike path as well. On February 10, 2011, the Plaintiff was fatally injured in a bicycle accident while biking on the path. The Plaintiff brought action for dangerous condition of public property and wrongful death, stating that the Regents knew the path was unsafe due to the downhill curve, sight limitations, lack of runoff areas, and lack of adequate signs, roadway markings, and physical barriers. The Regents plead several defenses, one of which included a governmental immunity defense as set forth in the Government Code.

*Holding:*

On December 15, 2015, the Sixth District of the California Court of Appeal held that the Regents had absolute immunity from claims arising from the accident pursuant to California Government Code section 831.4 ("Section 831.4"). Under the Government Claims Act, a public entity is not liable for torts (such as physical injury) except as otherwise provided by statute. Section 831.4 precludes governmental liability for injuries caused by the condition of an unpaved road or trail which provides access to various activities, such as hiking, riding, and fishing. This immunity is to encourage public entities to open their property for public recreational use, because the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. The Plaintiff argued that Section 831.4 does not apply here because the Bikeway was not a trail as indicated in the statute, as it was primarily used for bicycle commuting and

produced revenue from student tuition and other sources. The court disagreed with this characterization, stating that even if a trail has recreational and non-recreational uses, it does not undermine the public entity's immunity.

*Significance:*

The use of a public road or trail does not affect government immunity.

**Goddard v. Department of Fish & Wildlife (2015) 243 Cal. App.4th 350**

*Summary of Case:*

On October 22, 2009, Leonard Goddard ("Goddard") drowned in the Tuolumne River after getting caught in a current over a breach in the remnant of the Dennett Dam ("Dam"). The Dam was originally constructed by the City of Modesto ("City"). In 1962, the Department of Water Resources ("DWR") found that the Dam was no longer capable of storing water safely, and it removed the Dam from its jurisdiction. The Department of Fish and Wildlife ("DFW") made a mid-channel breach in the dam in 1995 in order to permit fish to pass at low flow. The DFW later considered removing the structure completely. However, the Dam was neither repaired nor removed. The Plaintiffs filed a government claim for wrongful death and survivor damages for Goddard. The Plaintiffs then filed a complaint against the state and other public entities for government tort liability under California Government Code sections 815.2, 815.4, 820, 830.8, 835, and 840.2. The DFW and DWR answered on the state's behalf.

*Holding:*

On December 23, 2015, the Fifth District of the California Court of Appeal held that the DFW was immune to claims arising from Goddard's death. Section 835 states that a public entity may be liable for an injury caused by a dangerous condition of its property. Property is defined as real or personal property that is "owned or controlled by the public entity." Section 831.2 states that a public entity or public employee is not liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach. This immunity is absolute and applies regardless of the public entity's knowledge of the dangerous condition or failure to give warning. The court noted that this statute has been broadly construed to provide immunity even when the natural condition has been affected in some manner by human activity or nearby improvements. Here, the court found that the current created by the damn remnant was a condition similar to that which in occurs in nature. Furthermore, the court found that DFW did not have jurisdiction over the riverbed, and therefore did not "own" it for the purposes of liability. It also found that DFW did not control the dam remnant, as it did not have the power to repair the breach or remove the remnant.

*Significance:*

As discussed above in Burgueno v. Regents of the University of California (2015) 243 Cal.App.4th 1052, this is good news for public entities which have rivers or lakes accessible to the public. However, this case had a narrow holding in that immunity applied only because the current caused by the dam remnant occurred in nature as well. Local agencies which have unrepaired structures which may be a dangerous condition on their property should consult their legal counsel to determine liability risks.

## **Litigation** Statute of Limitations

### City of San Diego v. Superior Court (2015) 244 Cal.App.4th 1

*Summary of Case:*

Under the Government Claims Act ("Act"), a claimant cannot sue a public entity for damages unless the claimant first files a claim with the entity within a statutory period and the claim has been totally or partially denied or deemed denied within a specified time. If a claim is not timely filed, the claimant may file an application with the entity for leave to present a late claim. The entity must grant or deny the application within forty five (45) days after it was filed. A written notice of denial with specified information must be sent by the entity to the claimant if the late claim is denied. The claimant can file a petition with the trial court for an order relieving him or her from the claims presentation requirements of Section 945.4 of the Act. The petition must be filed within six months from the date of the entity's denial of the late claim application.

On May 8, 2014, the City of San Diego ("City") denied Jeri Dines' ("Dines") application for leave to file a late claim. However, Dines did not file her petition with the trial court for an order relieving her from the claims presentation requirement until November 13, 2014, more than six months after the application had been denied. Dines argued that Government Code section 915.2, subdivision (b), which extends any period of notice and duty to respond for five days if notice is served by mail, gave her an additional five days to file her petition.

*Holding:*

On December 29, 2015, the Fourth District of the California Court of Appeal held that Section 915.2, subdivision (b) does not apply to Section 946.6's six-month limitations period for filing a petition with the court. First, the court cited to Rason v. Santa Barbara City Housing Authority (1988) 201 Cal.App.3d 817 to find that the six-month period begins to run from the denial of the application for leave, not on notice of that denial. The trial court attempted to distinguish Rason by stating that the case had been decided before Section 915.2 was amended in 2002. The court rejected this argument, noting that Section 915.2's five-day extension relates to periods for giving notice and duties to respond to notices, not to limitation periods that run based on an event or date other than the date of the notice.

*Significance:*

This case serves as a warning to claimants and any entities that must meet a deadline to advance a claim or suit forward. The statute of limitations runs from the date of the denial.

## **Litigation** Litigation Procedure

### San Diegans for Open Government v. City of San Diego (2016) Cal.App. LEXIS 783

*Summary of Case:*

On January 24, 2012, the City of San Diego ("City") approved a resolution creating the Convention Center Facilities District ("CCFD"). CCFD was created to provide the City with the ability to levy a special tax to finance the expansion of the San Diego Convention Center ("SDCC"). In May 2012, the City filed a complaint against all interested parties seeking validation of the CCFD and associated special tax plan ("validation action"). Any interested parties who objected to the validity of the City's actions were required to file an answer to the complaint by July 10, 2012. San Diegans for Open Government ("SDOG"), represented by Briggs Law Corporation ("BLG"), filed a verified answer in response to the City's complaint in the validation action. The City moved to strike SDOG's answer and motion for attorney's fees on the basis that at the time SDOG's answer was filed, both SDOG and BLG knew that SDOG was a suspended corporation. This fact was never reported to the City or court.

*Holding:*

On September 22, 2016, the Fourth District of the California Court of Appeals refused to grant SDOG its attorney's fees. The court reasoned that attorney's fees should not be awarded when a suspended corporation files an answer

in a validation action, both the corporation and attorney knew the corporation was suspended, and the corporation was not revived before the expiration of the deadline to appear in that action. The court cited to Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal.App.3d 1509 in finding that a corporation that has had its powers suspended does not have the ability to prosecute or defend a civil action during its suspension. The court did not address the City's motion to strike the answer and SDOG's motion for attorney's fees, as its holding rendered these issues moot.

*Significance:*

A suspended corporation cannot challenge a validation action.

**Catalina Island Yacht Club v. Superior Court (2015) 242 Cal. App.4th 1116**

See under General Municipal (Public Records Act), **page 3.**

## Litigation Privilege

**City of Petaluma v. Superior Court (2016) 248 Cal.App.4th 1023**

*Summary of Case:*

Andrea Waters ("Waters") began working as a firefighter and paramedic for the City of Petaluma ("City") in 2008. She claimed that she was subject to harassment and discrimination based on her sex. Waters claimed that she was subject to retaliation when she complained. The City argued that its records showed that Waters never complained to her supervisors or anyone in the City's human resource department or other City supervisors. In February 2014, Waters went on leave from her job. In May 2014, the City received a notice of charge of discrimination from the U.S. Equal Employment Opportunity Commission ("EEOC") pertaining to the terms and conditions of her employment and training. The City retained outside counsel to conduct a fact investigation regarding the EEOC charge. The retention agreement signed by the City and outside counsel stated that it created an attorney-client relationship. In her suit against the City, Waters sought documents and testimony relating to the City's investigation of her complaint, including the investigatory report created by the outside counsel. The City objected on the ground of attorney-client or work-product doctrine grounds. Waters contested this, stating that the investigation was not privileged because it was a fact-finding operation and outside counsel was not retained to render legal advice.

*Holding:*

On June 8, 2016, the First District of the California Court of Appeal held that fact finding was a legal service entitled to the protection of attorney-client privilege and work product doctrine, despite the fact that outside counsel did not provide legal advice. The court reasoned that ascertaining relevant facts is one step of legal analysis. The court also rejected the ruling that the City waived any privileges that might protect an outside counsel's fact-finding investigation by asserting an avoidable consequences doctrine. The avoidable consequences doctrine has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered. This defense may put the adequacy of an investigation into issue if the person was still employed and able to take advantage of any corrective measures. However, the court found that there is no waiver of privilege if the investigation is conducted after the employee leaves his or her employment when the employer asserts an avoidable consequences doctrine.

*Significance:*

While this case states that fact-finding is privileged, legal counsel should proceed with caution because this holding applies to a situation where the investigation occurred after the employee voluntarily resigned from her job.

## **Litigation** Ethics

**Sheppard, Mullin, Richter & Hampton v. J-M Manufacturing Co., Inc. (2016) 244 Cal.App.4th 590 (rev. granted Apr. 27, 2016)**

*Summary of Case:*

Sheppard, Mullin, Richter & Hampton, LLP ("Sheppard Mullin"), a law firm, sought recovery of attorney's fees from its former client, J-M Manufacturing Company, Inc. ("J-M"). Sheppard Mullin had represented J-M, but Sheppard Mullin was disqualified from the litigation because the firm represented an adverse party in the case, South Tahoe Public Utility District ("District"), without obtaining consent from either client. Sheppard Mullin argued that it was not disqualified because J-M and the firm signed an engagement agreement which J-M agreed to waive any conflicts of interest. J-M argued that its engagement agreement with Sheppard Mullin was unenforceable because it was illegal and it violated the public policy embodied in Rule 3-310 of the Rules of Professional Conduct, which bars simultaneous representation of adverse clients. J-M argued that it did not owe Sheppard Mullin outstanding attorney's fees and that the firm should return attorney's fees paid pursuant to the agreement. The trial court granted Sheppard Mullin's motion to compel arbitration per an arbitration provision in the engagement agreement. The arbitrator found the firm's ethical violation did not require automatic fee disgorgement or forfeiture.

*Holding:*

The California Court of Appeal voided the Sheppard Mullin's engagement agreement because an engagement agreement which includes an advance waiver of conflicts of interest is unenforceable as a matter of public policy. The court reasoned that while a client can waive both current and future conflicts, this requires informed written consent, which was not obtained here. As a result, the court held that Sheppard Mullin was not entitled to attorney's fees received for work done in violation of the Rules of Professional Conduct. Additionally, the court found that the trial court erred by deferring to the arbitrators in determining the enforceability of the entire, as opposed to only a part, agreement.

*Significance:*

The California Supreme Court granted review to an arbitration award question and two questions regarding the law firm's advance waivers of conflicts of interest in its retainer agreement. The case has yet to be reviewed. However, the best practice for legal counsel is to obtain informed written consent from all affected clients if there may be a conflict of interest.

## **Litigation** Attorney's Fees

**California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc. (Jan. 8, 2016) 2016 U.S. Dist. LEXIS 2511**

*Summary of Case:*

The Plaintiff sought a $1.27 million award of attorney's fees and costs under 33 U.S.C. section 1365, subdivision (d), which stated that the court, "in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." The Plaintiff sought this amount "based on the prevailing San Francisco Bay Area market rates for [Plaintiff]'s Bay Area counsel, and the prevailing market rates in Quincy, California."

*Holding:*

On January 8, 2016, the United States District Court for the Eastern District of California held that the requested attorney's fee amount was unjustified. While attorney's fees are calculated based on the prevailing market rates in the relevant legal community, the relevant community here was Sacramento, not the Bay Area. The Plaintiff failed to support a finding that Sacramento counsel was unavailable or incompetent to represent the Plaintiff in this case. Furthermore, the statement that an environmental lawyer believed that the Plaintiff's counsel's rates were well within the market rates charged by attorneys in the San Francisco and Sacramento areas was inadequate to prove personal knowledge or expertise regarding rates for a comparable

Clean Water Act litigator. Since the Plaintiff failed to demonstrate that the attorney's fees were reasonable, the motion for an attorney's fees award was denied.

*Significance:*

Courts will closely scrutinize the evidence and argument presented in support of a motion for attorney's fees. The attorney's fees rates should not exceed those of the local legal community.

**Bravo v. City of Santa Maria (9th Cir. 2016) 810 F.3d 659**

*Summary of Case:*

In this case, police detectives from the City of Santa Maria ("City") had reason to believe that several suspects had evidence of a gang-related shooting. The officers conducted seven simultaneous home searches. Santa Barbara SWAT officers, assisting the City police force in the simultaneous home searches, knocked on the door of the Plaintiff's residence, announced their presence, and then shot off the door locks three seconds later. Two flashbang grenades were then used outside the back door. The officers later learned that the suspect in question was in prison and not in the residence they forcefully entered. The Plaintiff filed suit and ultimately settled with the City of Santa Barbara for $360,000. This included $50,000 to each of the three Plaintiffs, and the rest was comprised of attorney's fees. The district court then granted summary judgment for the County of Santa Barbara and the City. The Ninth Circuit for the United States Court of Appeals reversed the district court regarding the City, but dismissed the County of Santa Barbara. On remand, the trial court entered judgment for $5,000 for the adult plaintiff, $1 for each of his two children, and then $1.02 million against the City in attorney's fees.

*Holding:*

On January 12, 2016, the Ninth Circuit affirmed the trial court's judgment. The Ninth Circuit justified by the fees by reasoning that the litigation benefited the public by emphasizing the necessity of checking a person's custody status before seeking warrants.

*Significance:*

This case is a warning to City public safety officers to double-check the facts of their cases before engaging in intrusive activity, such as forcefully entering into an individual's home. Failure to do so can result in extremely expensive judgments, such as the one in this case.

**San Diego Municipal Employees Assn. v. City of San Diego (2016) 244 Cal.App.4th 906**

*Summary of Case:*

The City of San Diego ("City") sought to compel the San Diego City Employees' Retirement System ("SDCERS") to increase City employees' contributions to their retirement fund to share in covering an $800 million investment loss suffered by the fund. Four public employee labor unions ("Unions") ultimately intervened in the action on the employees' behalf, asserting the same or similar arguments as SDCERS to rebut the City's claims. After the case settled, the Unions moved to recover $1,785,147 in attorney's fees under California Code of Civil Procedure section 1021.5. Section 1021.5 provides attorney's fees where a successful party causes the enforcement of an important right affecting a public interest. The trial court denied the attorney's fees motion, finding the Unions were not entitled to fees because their involvement in the lawsuit was unnecessary to the result that was achieved. On appeal, the Union contended that (1) they were entitled to recover their fees even if their attorneys' services were unnecessary to the result, and (2) the court abused its discretion in concluding their attorneys' services were not necessary.

*Holding:*

On February 9, 2016, the Fourth District of the California Court of Appeal held that the Unions were not entitled to fees as their involvement in the lawsuit was unnecessary to the result that was achieved. The court reasoned that where a private party (Unions) litigates a case on the same side as a non-volunteer public entity (SDCERS) and the former requests attorney's fees, the party must make a significant showing that its participation was material to

the result (i.e. that it provided significant factual and legal theories, and produced substantial, material evidence that were not merely duplicative or cumulative to what was advanced by the governmental agency). The Court noted that SDCERS is a public agency whose job and function it is to ensure the soundness of the City retirement system, so it functioned like a public attorney general in this case in that it had to respond to the City's litigation and protect the city employees' interests.

*Significance:*

Parties typically pay their own attorney's fees, unless otherwise provided by statute. This case provides that an intervening party that litigates successfully, may not be entitled to attorneys' fees under Section 1021.5.

## **Litigation** Labor and Employment Litigation

See under Human Resources (Litigation), **page 31.**

## Aviation

### Federal Aviation Administration Small Commercial Drone Operation Final Rules

On June 21, 2016, the Federal Aviation Administration (the "FAA") issued its final rules for small commercial drone operation. These final rules apply to commercial drones weighing less than 55 pounds. The rules, effective August 20, 2016, replace the Section 333 exemption process, which formerly served as the method for obtaining FAA permission to operate commercial drones.

*Rule Highlights:*

The FAA has created a new pilot's license: Remote Pilot. To commercially operate a small drone, a Remote Pilot must be present and either flying or supervising the drone flight. The new rules generally follow the former Section 333 exemption process. For commercial operators who wish to operate outside the standard rules, the FAA will establish a waiver process. For example, a Remote Pilot hired to film a movie at night would need a waiver from the FAA, since night operations are prohibited.

A notable change, however, is that the new rules authorize package delivery using small drones (transporting property for hire). Packages must be securely attached, may not cross state lines, and certain additional prohibitions exist within the District of Columbia, Hawaii, and any territory or U.S. possession (e.g. Guam). This general permission does not allow for home package delivery because the rules require the drone to remain in visual sight of the operator at all times. The new rules will, however, allow companies to begin testing deliveries up to 1000 feet without further waivers.

People seeking a Remote Pilot license must be 16 years old, be TSA-approved, and pass a written test. Current pilots seeking to add-on a Remote Pilot license must complete an online course from the FAA.

Below is a summary of the small drone rules:

| | Flying Drones for Recreation | Flying Drones Commercially |
|---|---|---|
| **Pilot Requirements** | No license required | Remote Pilot License |
| **Drone Requirements** | Registered if heavier than 0.55 lbs. | Same; Remote Pilot must conduct a pre-flight check |
| **Location Requirements** | Must remain more than 5 miles from any airport unless airport and ATC ("Air Traffic Control") are notified | May fly in Class G airspace; or May fly in Class B, C, D, & E airspace with ATC permission. |
| **Operating Rules** | • Must ALWAYS yield right of way to manned aircraft<br>• Must keep the aircaft in sight (visual line-of-sight)<br>• Drone must be under 55 lbs.<br>• Must follow community-based safety guidelines<br>• Must notify airport and air traffic control tower before flying within 5 miles of an airport | • Must keep the aircraft in sight (visual line-of-sight)<br>• Must fly under 400 feet<br>• Must fly during the day<br>• Must fly at or below 100 mph<br>• Must yield right of way to manned aircraft<br>• Must NOT fly over people<br>• Must NOT fly from a moving vehicle |

## **Water** Water Rates

### Green Valley Landowners Assn. v. City of Vallejo (2015) 241 Cal.App.4th 425

*Summary of Case:*

The Lakes Water System ("LWS") was created to provide the City of Vallejo ("City") with potable water. LWS had three water sources, one of which fell below the State Department of Health Services' standards in 1992. The City receiving its water supply from elsewhere. The City then passed an ordinance shifting 100 percent of the cost of operating the LWS to approximately 809 nonresident customers. As a result, water rates for the nonresident customers increased by over 230 percent. Additional water rate increases occurred in 1995 and 2009, which led to increased fixed service charges to LWS' nonresident customers. Water treatment plant improvements costing a total of nearly $20 million were also shifted to the customers.

The nonresident water customers alleged that they did not know about the improvements until much later. The Plaintiff sued the City for grossly mismanaging and neglecting the LWS, as well as placing the burden on nonresident LWS customers to fund the costly and inefficient water system. The Plaintiffs also alleged that the City engaged in negotiations to sell LWS to a private investor-owned utility for $3 million dollars on a pro rata of its actual value to cover a loan or subsidy for the customers. The Plaintiffs also claimed that their fees were not earmarked for the LWS improvements as required by City ordinances, but were improperly used for other unrelated purposes. The Plaintiff brought these claims on implied contract and common-law tort theories. The trial court dismissed the lawsuit and entered judgment for the City.

*Holding:*

On October 16, 2015, the First District of the California Court of Appeal found for the City. The Plaintiffs first argued that the City made an implied promise that it would "indefinitely share in the cost of operating, maintaining, and improving the LWS." In rejecting this argument, the court reasoned that Vallejo is subject to the law of general law cities, including the provision in the Government Code which does not allow for implied contracts, that there was nothing in the City's charter that discussed the manner of contracting, and that there was no written agreement to share the cost of LWS that was made in writing. The court also rejected the Plaintiff's claim for breach of fiduciary duty and accounting because there is no common-law tort liability for public entities in California. Furthermore, the court held that the Plaintiff's proposal, that the City pay monetary damages equal to the pre-1992 cost sharing, was unreasonable per Proposition 218 because it would place the primary financial burden on City residents while the residents did not receive any water services in return.

*Significance:*

With the ongoing drought in California, local agencies may be faced with opposition to increasing water rates. This case provides some guidance to a city which operates a water system that no longer serves its own residents.

## **Water** Water Rights and Supply

### Pacific Shores Property Owners Assn. v. Department of Fish and Wildlife (2016) 244 Cal.App.4th 12

*Summary of Case:*

The County of Del Norte ("County") regularly breached a sandbar when water levels in a large coastal lagoon rose above four feet mean sea level ("msl"). This protected lands along the lagoon's shore against flooding. The Department of Fish and Game (now the Department of Fish and Wildlife ("Department")) acquired properties, including the sandbar, to protect the lagoon and its significant environmental resources. The Department believed breaching adversely impacted the lagoon's environment and eventually withdrew its permit applications. From 1989 to 2005, the Department only permitted breaching during emergency and interim permits issued by the Commission when the water levels rose above eight feet msl and began flooding properties and roads in the residential subdivision. The Plaintiffs, whose properties suffered flooding damage when the lagoon levels rose above eight feet msl, filed an action for inverse condemnation, alleging that they

suffered a physical taking due to the Department's actions and a regulatory taking by the California Coastal Commission ("Commission") retaining land use jurisdiction over the subdivision instead of transferring it to the County. The trial court found the Department and the Commission liable for a physical taking and awarded damages, but concluded the plaintiffs' claim for a regulatory taking was barred.

*Holding:*

On January 20, 2016, the Third District of the California Court of Appeal held that the Department was liable for inverse condemnation for a physical taking of the Plaintiffs' properties. The court rejected the Department's argument that it was not liable because the properties were historically subject to flooding. The court found that the Department was strictly liable when it flooded the properties by intentionally reducing flood protections that the Plaintiffs historically enjoyed for the purpose of protecting environmental resources. The court also held that had a reasonableness standard applied, the Department would have been liable because the Plaintiffs contributed more than their fair share to the Department's efforts to protect environmental resources. The court dismissed the suit against the Commission because the statute of limitations had lapsed.

*Significance:*

The court clarified that while the Department has no duty to provide flood protection or protection at a particular level, the Department's intentional stripping of historical flood protections were subject to inverse condemnation actions.

**Department of Finance v. Commission on State Mandates (2016) 1 Cal.5th 749**

*Summary of Case:*

Article XIIIB, section 6, subdivision (a) of the California Constitution requires the State to reimburse a local government when it mandates the local government to provide a new program or higher level of service. There are exceptions, which include new programs or increased service mandated by federal law or regulation. The services in question here were provided by local agencies that operate storm drain systems pursuant to a state-issued permit. In order to receive a permit, the local agency must maintain the quality of California's water and comply with the federal Clean Water Act ("CWA"). In this case, Los Angeles County, the Los Angeles County Flood Control District, and 84 cities (collectively "Operators") sought reimbursement for the cost of satisfying the conditions. The conditions included installing and maintaining trash receptacles at transit stops, as well as inspecting certain commercial and industrial facilities and construction sites.

*Holding:*

On August 29, 2016, the California Supreme Court held that the service imposed here was reimbursable. The Court reasoned that the conditions in the permit were not federally mandated, but rather imposed as a result of the state's discretionary action. The Court explained that federal law did not compel the state to impose the permitting conditions, as the Environmental Protection Agency ("EPA") could do so under the CWA. The State argued that the CWA conferred discretion on the State and regional boards in deciding what conditions were necessary to comply with the CWA, but the Court disagreed, as the permit had more exacting and additional conditions than what federal law required.

*Significance:*

This case is significant because the state will now be required to reimburse a local government that operates storm drain systems pursuant to a state-issued permit. The state may continue to argue that certain provisions in the permit are not reimbursable because they are imposed by the CWA, but the state will have the burden of proving, in front of the Commission of State Mandates, that the provision falls into the reimbursement exception.

### United States Army Corps of Engineers v. Hawkes Co. (2016) __ U.S. __, 136 S. Ct. 1807

*Summary of Case:*

The Clean Water Act ("CWA") regulates the discharge of pollutants into United States waters. The U.S. Army Corps of Engineers ("Corps") issues permits allowing the discharge of pollutants. The Corps also issue jurisdictional determinations ("JD") that assist landowners in ascertaining if their property contains United States waters. Preliminary JDs advises whether a property owner "may" have United States waters on their land, whereas approved JDs state definitively whether there are United States waters on the land. An approved JD is considered an administratively appealable final agency action and is binding for five years on the Corps and Environmental Protection Agency ("EPA"). In this case, Hawkes Co., Inc. ("Hawkes") sought to expand its operations into wetlands. It applied for a discharge permit and was issued an approved JD finding that the wetlands contained United States waters. Hawkes brought an administrative appeal, which was unsuccessful, and then brought suit in federal district court. The trial court held that the Corps' JD was not a final agency action for which there is no other adequate remedy in a court.

*Holding:*

On May 31, 2016, the United States Supreme Court held that an approved JD is a final agency action that is subject to judicial review. The Supreme Court reasoned that for an agency action to be final under the Administrative Procedures Act, two prongs must be met. First, the action must mark the consummation of the agency's decision-making process. Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. The Supreme Court found that an approved JD met the first prong because it marks the consummation of the Corps' decision-making on the question of whether a property contains United States waters. The Supreme Court also found the second prong was met because the approved JD also gives rise to direct and appreciable legal consequences. Therefore, Hawkes could bring judicial action to review the approved JD without having to exhaust other remedies.

*Significance:*

This case clarifies the procedure for when landowners can appeal determinations regarding pollutant discharge permits with the Corps.

### Environmental Protection Agency and Department of Defense Final Rule; "Clean Water Rule: Definition of 'Waters of the United States,'" 80 Fed.Reg. 37,054 (June 29, 2015), 817 F.3d 261

On June 29, 2015, the Environmental Protection Agency and the Department of Defense issued a final rule which defined the "waters of the United States" for the purposes of the Clean Water Act. The Clean Water Act governs water pollution in the waters of the United States. This detailed clarification will assist landowners to determine which bodies of water will be subject to the Clean Water Act's regulations.

## Land Use and The California Environmental Quality Act ("CEQA")

### Center for Biological Diversity v. California Department of Fish and Wildlife (2015) 62 Cal.4th 204

*Summary of Case:*

The Department of Fish and Wildlife ("DFW") and the United States Army Corps of Engineers ("Corps") prepared a joint environmental impact report ("EIR") for two natural resource plans. The DFW and Corps, the lead federal agency, issued and certified an EIR. The DFW found that the project could significantly impact certain freshwater fish, but that it would take mitigation measures, and that the project's emissions of greenhouse gases would have a less than significant impact on the global climate. The Plaintiffs challenged the DFW's action by a petition for writ of mandate. The superior court granted the petition, but the Court of Appeal reversed, rejecting all of the plaintiffs' California Environmental Quality Act ("CEQA") claims.

*Holding:*

On November 30, 2015, the California Supreme Court held that the EIR could determine whether the project was consistent with meeting statewide emission reduction goals, but the report's finding that the project's emissions would not be significant was not supported by a reasoned explanation based on substantial evidence. Specifically, the Court disagreed with the EIR's failure to adjust the statewide emissions reduction goals to the specific nature of the project and relative population densities. The Court also held that the EIR's mitigation measures calling for the capture and relocation of the fish was a taking prohibited under California Fish and Game Code section 5515, subdivision (a). Furthermore, the court found that the Plaintiffs exhausted their administrative remedies regarding certain claims of deficiency by raising them during an optional comment period on the final report.

*Significance:*

This case demonstrates the need to include substantial evidence in EIRs to support a contention that a particular project's environmental effects will not need to be mitigated. Even if the state provides certain guidelines for emissions, these statistics must be tailored to the particular project (i.e., must be specifically relevant to the project at issue). Taking the additional time to ensure that an EIR has all necessary information will help avoid litigation for failure to meet CEQA requirements.

### Preserve Poway v. City of Poway (2016) 245 Cal.App.4th 560

*Summary of Case:*

The City of Poway ("City") approved a project to close a horse boarding facility and build twelve homes under a mitigated negative declaration ("MND"). The Plaintiffs asserted that the project required an environmental impact report ("EIR") under the California Environmental Quality Act ("CEQA"), instead of an MND, because there was substantial evidence that the elimination of the horse boarding facility may have a significant impact on the City's horse-friendly "community character."

*Holding:*

On March 9, 2016, the Fourth District of the California Court of Appeal held that economic or social effects of a project shall not be treated as significant effects on the environment. Rather, changes to "community character" are political and policy considerations for the City's elected officials.

*Significance:*

Projects that may be subject to CEQA do not need an EIR if the project would only cause changes to the City's economy or social character.

### Center for Biological Diversity v. County of San Bernardino (2016) 247 Cal.App.4th 326

*Summary of Case:*

This case involved a public-private partnership to pump fresh groundwater from an underground aquifer located below real property owned by Cadiz, Inc. The Center for Biological Diversity, San Bernardino Valley Audubon Society, and Sierra Club, San Gorgonio Chapter ("Plaintiffs") challenged the approval of the project under the California Environmental Quality Act ("CEQA"). The Santa Margarita Water District ("District") was named as the lead agency for the project. The significant issue in this case was that the Plaintiffs argued that the District was improperly

designated as the lead agency for the project, and such error required preparation of a new environmental impact report ("EIR").

*Holding:*

On May 10, 2016, the Fourth District of the California Court of Appeal held that the District was properly designated as the lead agency because it was jointly carrying out the project with the property owner, Cadiz, Inc., and because it was the agency with the principal authority for approving and supervising the project as a whole. The public agency and private entity in this case had an agreement which noted that the public agency would be the lead in this case.

*Significance:*

This case clarifies that for public/private partnerships, the agency with the authority for approving and supervising the project as a whole is the lead agency for the purposes of CEQA. This is helpful as local agencies begin to partner with private entities to construct infrastructure and public facilities. The question of which entity is will be the lead is up to the public agency and private entity, and should be memorialized in a written agreement.

**Spring Valley Lake Assn. v. City of Victorville (2016) 248 Cal. App.4th 91**

*Summary of Case:*

A project that required a general plan amendment, zone change, site plan, conditional use permit, and parcel map included plans for a Walmart store of approximately 184,946 square feet. The City of Victorville ("City") approved the project. The Plaintiff challenged the City's decision on the basis that the City violated the California Environmental Quality Act ("CEQA") by failing to prepare an adequate environmental impact report ("EIR"), failing to recirculate the EIR after adding significant new information to it, failing to make adequate findings regarding the project's significant impacts, failing to make required findings before approving the project's parcel map, and failing to provide sufficient evidence to support a finding that the project's parcel map and zone change were consistent with the general plan's on-site electricity generation requirement. Walmart intervened as a party in interest.

*Holding:*

On May 25, 2016, the Fourth District of the California Court of Appeal held partially for the Plaintiff and rejected all of Walmart's claims. First, the court found that there was insufficient evidence that the project could meet the standard set forth by the general plan, which required that new construction be fifteen percent more efficient than 2008 Title 24 standards. The court also held that the City's revisions to the EIR included "significant new information" requiring recirculation of the EIR. These revisions included discussions of the project's consistency with the general plan's air quality policy, as well as a water quality and hydrology analysis for the project's revised storm water management plan which would not have any new impacts on the environment.

*Significance:*

This case demonstrates the importance of providing detailed EIRs that provide sufficient evidence of conformity to the local agency's general plan, as well as the provisions of CEQA. Even inadvertently leaving out required EIR sections can prolong the CEQA process for developments. The best practice is to take additional time before releasing the EIR to ensure that all necessary information is included in the report, and that few, if no, amendments are required to be made to the EIR after it is ready for circulation.

**Ukiah Citizens for Safety First v. City of Ukiah (2016) 248 Cal.App.4th 256**

*Summary of Case:*

The City of Ukiah ("City") evaluated a proposal to build a Costco Wholesale Corporation ("Costco") retail store and gas station under the California Environmental Quality Act ("CEQA"). In an environmental impact report ("EIR"), the City identified traffic and noise impacts to certain intersections near where the Costco was to be built, but found that the project could not be mitigated to a level that was less than significant. The City certified the EIR. The Plaintiffs challenged the City's certification of the EIR. The Plaintiffs contended that the EIR did not property identify and analyze potentially significant energy impacts generated

by the project, that the EIR's analysis of transportation, traffic, and noise impacts was inadequate, and the project was inconsistent with applicable zoning requirements.

*Holding:*

On June 21, 2016, the First District of the California Court of Appeal held for the Plaintiffs, finding that the EIR fails to sufficiently analyze potential energy impacts and that the adoption of an addendum to the EIR subsequent to approval of the EIR and of the project failed to comply with CEQA requirements. The energy impact analysis in the EIR at issue here did not contain a separate section analyzing energy impacts, but mentioned such impacts in sections which discussed impacts to public utilities, air quality, and climate change. The court specifically held that the EIR failed to calculate the energy use attributable to vehicle trips generated by the project, as well as the operational and construction energy use of the project.

*Significance:*

Developers or local agencies that must issue an EIR for a new project should read through the provisions of the CEQA carefully to ensure that all required analysis has been completed and included in the EIR.

**Bay Area Citizens v. Association Bay Area Governments (2016) 248 Cal.App.4th 966**

*Summary of Case:*

California's Sustainable Communities and Climate Protection Act of 2008 (Senate Bill ("SB") 375) required the California Air Resources Board ("CARB") to set automobile and light truck greenhouse gas ("GHG") emissions reduction targets for each of California's regional planning bodies. These standards were to be achieved through regional land use and transportation planning strategies. The Metropolitan Transportation Commission ("MTC") and Association of Bay area Governments ("ABAG") prepared an environmental impact report ("EIR") for the approval of a project named "Plan Bay Area" ("Project"), which was the agencies' first sustainable communities plan prepared pursuant to SB 375. The Plaintiffs sued under the California Environmental Quality Act ("CEQA"), claiming that the EIR prepared for the Project did not adequately describe its objectives, failed to consider and analyze alternatives, and did not provide the public and lead agencies with information on the Project's greenhouse gas emissions impacts.

*Holding:*

On June 30, 2016, the First District of the California Court of Appeal held that local agencies are not required to count statewide emissions reductions in developing their regional plan. The court reasoned that it was absurd for regional agencies to adopt the GHG emissions reductions which were already expected from statewide mandates in developing regional plans and determining if CARB's regional targets were met. The court stated that this conclusion was absurd because it would render SB 375 pointless. Therefore, the project met its CEQA obligations by considering greenhouse gas emissions reductions through land use and transportation patterns, as opposed to statewide mandates.

*Significance:*

SB 32, which was recently enacted by the California Legislature, would require CARB to ensure that statewide greenhouse gas emissions be reduced to at least forty percent (40%) below the 1990 statewide greenhouse gas emissions level by December 31, 2030. CARB will likely release new provisions on how to meet the provisions of this bill. Regional planning agencies will need to take note of CARB's specific emissions targets under this bill, as opposed to the statewide mandate.

**Communities for a Better Environment v. Bay Area Air Quality Management District (2016) 1 Cal.App.5th 715**

*Summary of Case:*

The Bay Area Air Quality Management District ("District") approved an alteration to an ethanol rail-to-truck transloading facility in Richmond. The alternation would allow the facility to transload Bakken crude oil, which Communities for a Better Environment ("CBE") argued was highly volatile and explosive, and would have significant adverse environmental impacts. According to CBE, these impacts would include increases in toxic air contaminants, potential contamination of California's waterways, and increases in greenhouse gas emissions. The District authorized Kinder Morgan Material Services, LLC

("Kinder Morgan") to continue its alterations on the facility without a California Environmental Quality Act ("CEQA") review, reasoning that the project was exempt from review because it was "ministerial."

CBE sought a writ of mandate and declaratory relief, but the case was dismissed without leave to amend, concluding that the suit was time-barred under California Public Resources Code section 21167, subdivision (d). The issue on appeal was whether CBE could amend its petition and complaint to allege that the action was timely by virtue of the discovery rule. CBE argued that it could not learn, even with reasonable diligence, of the project any earlier because the District did not give an optional public notice of exemption ("NOE") about the project.

*Holding:*

On July 19, 2016, the First District of the California Court of Appeal held that the following dates under Section 21167, subdivision (d) apply: (1) if the agency files an NOE under Section 21152, subdivision (b), the action must be brought within 35 days of the NOE's filing; (2) if the NOE has not been filed, the action must be brought within 180 days of the agency's decision to carry out or approve the project; and (3) if a project is taken without the agency's formal decision, then the action must be brought within 180 days of the project's commencement. CBE failed to file the action in 180 days after the District's formal approval of the project. The court reasoned that the discovery rule cannot postpone the running of limitations periods in Section 21167, subdivision (d), and that the Plaintiff had constructive notice of a potential CEQA violation on all three dates of accrual under Section 21167, subdivision (d).

*Significance:*

Plaintiffs seeking to contest air quality district permits based on a CEQA violation must do so within the three alternative dates discussed in Section 21167, subdivision (d). Districts review and approve decisions on hundreds of permit applications every day and often do not give notice for CEQA exemptions for routine approvals. Therefore, it is on potential Plaintiffs to keep track of what permits are approved.

**California Building Industry Assn. v. Bay Area Air Quality Management District (2016) 2 Cal.App.5th 1067**

*Summary of Case:*

The Bay Area Air Quality Management District ("District") is a regional agency charged with limiting non-vehicular air pollution in the San Francisco Bay Area. The District published thresholds of significance concerning certain air pollutants, along with guidelines concerning their use and the analysis of air quality issues under the California Environmental Quality Act ("CEQA"). In 2009, the District drafted new proposed thresholds of significance, partly in response to the California Legislature's adoption of laws addressing greenhouse gases. The California Building Industry Association ("CBIA") expressed concern at public hearings held by the District regarding the proposed revisions, stating that the thresholds and guidelines were too stringent. The thresholds would require more environmental impact reports ("EIRs") or stop projects altogether. The thresholds were passed in 2010 and published in the District's CEQA guidelines. CBIA contested these thresholds on the basis that it was a "reverse-CEQA" process—developers would be required to determine how existing environmental conditions would impact future residents or users of a proposed project.

*Holding:*

On August 12, 2016, the First District of the California Court of Appeal modified its opinion in response to the California Supreme Court's decision on this issue. The court's opinion noted that the California Supreme Court held that CEQA "does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents" but does require an analysis of how a project might exacerbate existing environmental hazards. Based on this ruling, the court declined to invalidate the new threshold levels, but narrowed its usage to the extent permissible under CEQA. Proper uses included voluntarily using the thresholds on projects proposed by the District, determining whether a new project would worsen existing conditions and thus affect future users of the new project, using the thresholds

to assess hazards for school district lead projects, and determining health risks to future occupants of certain housing projects.

*Significance:*

Local agencies seeking to implement regulations that go beyond what is required in CEQA should consult their legal counsel before attempting to implement new mandates.

**Citizens for Ceres v. City of Ceres (2016) 3 Cal.App.5th 237**

*Summary of Case:*

After conducting an environmental review, the City of Ceres ("City") approved the development of a Walmart Supercenter to replace an existing Walmart store. Citizens for Ceres ("Citizens") filed a petition for writ of mandate to enforce the California Environmental Quality Act ("CEQA"), alleging several defects in the environmental impact report that the City certified when it approved the project. After prevailing in trial court, the real parties in interest, Walmart Stores, Inc. and Walmart Real Estate Business Trust filed a memorandum of costs in which they requested costs of preparing the administrative record.

*Holding:*

On September 12, 2016, the Fifth District of the California Court of Appeal disagreed with Hayward Area Planning Assn. v. City of Hayward (2005) 128 Cal.App.4th 176 in holding that developers can recover the costs of preparing an administrative record where the City incurred the preparation costs and the developer reimbursed the City for the costs. Hayward Area Planning Assn. held that a prevailing real party in interest could not recover the costs of preparing an administrative record, as long as the record was prepared in one of three ways outlined in California Public Resources Code section 21167.6. The court distinguished the case at issue because the Citizens requested the City to prepare the administrative record.

*Significance:*

This case indicates that a developer can recover the cost of preparing the administrative record where the City incurred the preparation costs and the developer reimbursed the City for the costs.

**Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist. (2016) 1 Cal.5th 937**

*Summary of Case:*

San Mateo County Community College District ("District") proposed a district-wide facilities improvement plan that called demolishing and renovating various buildings. The District approved the plan after it determined the plan would have no potentially significant, unmitigated effect on the environment. The District then made changes to the plan, which included the demolition of a building scheduled to be renovated, and the renovation of two buildings that were originally slated for demolition. The District approved the changes after concluding that they did not have to prepare a subsequent or supplemental environmental impact report ("EIR") under California Public Resources Code section 21166 and 14 C.C.R. section 15162. The Court of Appeals held that the District's amendments were not merely a change to the project, but a whole new project altogether.

*Holding:*

On September 19, 2016, the California Supreme Court held that when an agency proposes changes to a previously approved project, the California Environmental Quality Act ("CEQA") does not authorize courts to invalidate the agency's action based solely on their own abstract evaluation of whether the agency's proposal is a new project. Rather, the agency's environmental review obligations depend on the effect of the proposed changes on the decision-making process. An agency that proposed project changes must determine if the previous environmental document is still relevant in light of the proposed changes, and if any revisions of the previous document are required due to the involvement of new, previously unstudied significant environmental impacts. The District argued that the project changes were appropriately presented in the addendum, which demonstrated there would not be more severe environmental impacts due to these changes.

*Significance:*

It is rare for a court to not find substantial evidence in the record to support an agency's decision to proceed under CEQA's subsequent review provisions. Therefore, other plaintiffs challenging subsequent changes to a project, must determine if the initial environmental document retains relevance to the decision-making process.

**Union of Medical Marijuana Patients, Inc. v. City of Upland (2016) 245 Cal.App.4th 1265**

See under Ordinances and Major Issues (Marijuana), **page 13.**

## Renewable Energy

### California Public Utilities Commission Decision 16-01-044

On January 28, 2016, the CPUC approved Decision 16-01-044 ("Decision"), adopting a Net Energy Metering ("NEM") successor tariff that continues the existing NEM structure while making adjustments to align the costs of NEM successor customers more closely with those of non-NEM customers. These changes only impact customers that interconnect under the new NEM successor tariff, and not to existing NEM customers.

New elements to the NEM successor tariff made by the Decision include:

- New one-time interconnection fee: Requires NEM successor customers with systems under 1 MW to pay a reasonable, pre-approved interconnection fee.
- Customers larger than 1 MW will pay all interconnection fees and upgrade costs.
- Actual historical interconnection costs are projected to be about $75 to $150.
- Non-bypassable charges: NEM successor customers will pay non-bypassable charges on each kilowatt-hour (kWh) of electricity they consume from the grid.
- All utility customers, except current NEM customers, pay non-bypassable charges on all energy they consume from the grid. Current NEM customers only pay on usage from the grid after NEM exports are subtracted.
- Non-bypassable charges are equivalent to approximately 2-3 cents per kWh.
- Time-of-use ("TOU") rate: Residential NEM successor customers to take service on a TOU rate.

This decision is being reviewed by the Energy Division Staff of the CPUC after having received rehearing applications from various utility companies.

## National Environmental Protection Act ("NEPA")

### Conservation Congress v. U.S. Forest Service (Feb. 24, 2016) 2016 U.S.Dist.LEXIS 22657

*Summary of Case:*

The Plaintiff brought action against the United States Forest Service ("Forest Service") and the United States Fish and Wildlife Service ("FWS"), alleging a violation of the National Environmental Protection Act ("NEPA"), the Endangered Species Act ("ESA"), the National Forest Management Act of 1976 ("NFMA"), and the Administrative Procedure Act ("APA") when the defendants approved the Harris Vegetation Management Project ("Project"). The Plaintiff alleged that the Forest Service violated NEPA because it did not take a "hard look" at the impacts of the Harris Project on the northern spotted owl.

*Holding:*

On February 24, 2016, the United States District Court for the Eastern District of California held that there was a rational connection between the northern spotted owl's foraging and dispersal habitat and the conclusions regarding thinning and species composition in those areas. The court reasoned that it only sets aside agency actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Under this highly deferential standard, the court found that the Forest Service fulfilled its obligation to take a "hard look" at the impacts of the Harris Project on the northern spotted owl.

*Significance:*

Plaintiffs seeking to overturn agency actions should consider the court's deference to the agency's decision before deciding to challenge an agency decision.

## Endangered Species Act

### Center for Environmental Science, Accuracy & Reliability v. Sacramento Regional County Sanitation District (June 3, 2016) 2016 U.S.Dist.LEXIS 72840

*Summary of Case:*

The Plaintiff brought action against the Sacramento Regional County Sanitation District ("District") alleging that the District violated the Endangered Species Act ("ESA"). The Plaintiff alleged that the District's discharges were toxic to delta smelt's, an ESA-listed species, food supply, impair delta smelt feeding, and interfere with population-levels of the delta smelt. The Plaintiff asserted that this was a "taking" of the ESA-listed species.

*Holding:*

On June 3, 2016, the United States District Court for the Eastern District of California found for the District because the Plaintiffs failed to demonstrate subject matter jurisdiction. The court reasoned that the citizen suit provision in the ESA provides that "no action may be commenced ... prior to sixty days after written notice of the violation has been given to the Secretary [of the Interior]...." The court noted that strict compliance with such notice requirements was required, but no notice was received by the Secretary.

*Significance:*

Plaintiffs seeking to bring action under particular statutes must take care to follow all procedural requirements outlined in its provisions. Failing to do so can lead to dismissal of the case on a procedural matter.

## Steve Churchwell

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**Steve Churchwell is a partner at Churchwell White LLP. Since 1982, he has assisted clients in charting a successful course through the challenging waters of California government and politics. He represents corporations, associations, Indian tribes and government agencies in regulatory matters, political law compliance and enforcement issues, legislative affairs, and related litigation.**

A native of Memphis, Tennessee, Steve brings a bit of Southern charm and twang to the Churchwell White office. He is a graduate of Vanderbilt University and the University of Tennessee College of Law. Steve was a partner at DLA Piper LLP (US) from 2005 to 2013 and served as General Counsel for the Fair Political Practices Commission from 1993 to 2000.

Steve has served as lead counsel to more than two dozen statewide initiative or referendum measures, and has successfully litigated cases involving many of the measures. He has two 7-0 victories in the California Supreme Court and many other appellate wins.

Steve has worked on issues in many areas of public policy, including ethics/conflicts of interest, charter schools, energy, government contracts, healthcare, infrastructure projects, internal investigations, as well as constitutional law and public finance.

For his accomplishments and experience, Steve has been given the highest rating of AV® by Martindale-Hubbell and was selected for inclusion as a Northern California SuperLawyer multiple times. Steve is a Past President of the California Political Attorneys Association and helped develop methodology used by the Ethisphere Institute, which annually ranks the World's Most Ethical Companies.

Steve's scholarly articles have been published in Intellectual Property Law Review, Pepperdine Law Review, Tennessee Law Review and Criminal Law Bulletin.

Steve is very committed to providing pro bono legal services. He is passionate about giving back and creating a better society for others, beliefs which are reflected in the work and culture of the attorneys at Churchwell White. As a result of his commitment to pro bono work, Steve was named by the National Law Journal to its "2013 Pro Bono Hot List." He was one of only 10 attorneys in the United States selected for this honor, based on his work on juvenile justice issues, including Senate Bill 9 (Yee), the Fair Sentencing for Youth Act. Steve also won the 2009 National Pro Bono Award at DLA Piper for his work in South Africa with Zimbabwean women refugees.

## Douglas White

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**As a founding and managing partner of Churchwell White LLP, Doug White has set himself apart as a widely respected thought leader and legal practitioner. Doug's "clients first" approach is focused in the areas of real estate, land use, municipal law and litigation. His diverse groups of clients range from cities, counties, special districts, and other public agencies to developers, builders, lenders, professional associations, unions and business owners. Doug has vast experience in land use entitlements and project approvals, CEQA and NEPA, real estate contracts and commercial transactions, leasing, building and project certifications, project financing, eminent domain, public contracting and regulatory and governmental affairs.**

Doug currently serves as the City Attorney for the City of Dixon and Deputy City Attorney for the cities of Oakdale, Patterson, and Riverbank and is also special counsel for a number of other cities. In addition to his work with cities, he also serves as General Counsel for San Miguel Community Services District and California Valley Community Services District. As such, he advises public entities and officials on issues pertaining to the Brown Act, Political Reform Act, Public Records Act, public contracting, code enforcement, and other municipal and public law matters. In addition to his municipal work, Doug has also successfully represented public and private clients in high-profile litigation matters and has obtained favorable judgments and settlements.

Prior to forming Churchwell White, Doug served as legal counsel and Vice President of Government Affairs for the California Bankers Association as well as legal staff for the Fair Political Practices Commission. Doug also benefits from his extensive political experience as Chief of Staff, Legislative Director and consultant to various elected officials, including former Congressman Dennis Cardoza and former State Superintendent of Public Instruction Jack O'Connell.

Doug has been recognized as one of the leading attorneys in the United States on issues related to renewable energy and sustainability and been named by the California Real Estate Journal as one of California's Green Leaders. He has also been named a Rising Star by Super Lawyers Magazine and been featured as a speaker and moderator at state and national conferences. Doug is an AV Rated attorney and was also honored by his peers in the 2014, 2015 and 2016 Best of the Bar by the Sacramento Business Journal.

Doug is not only an innovative leader in his field, but also in the office. As managing partner, he leads by example, incorporating his business experience and technical know-how into ensuring Churchwell White LLP remains at the forefront in providing exceptional legal services to its clients. In addition to all of those roles, Doug is a dedicated family man, occasional half-marathon runner, and California wine enthusiast.

## Barbara A. Brenner

**Partner**

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**Barbara A. Brenner is a partner of Churchwell White LLP with extensive experience in the areas of natural resources, environmental, land use, energy and municipal law. Prior to joining Churchwell White, Barbara was formerly a partner at Stoel Rives LLP, practicing in their natural resources and environmental group as well as land use. As a leader of the Churchwell White team, Barbara advises public and private clients in permitting, regulatory compliance, transactional and litigation matters involving water resources, water quality, endangered species, land use, energy, eminent domain and general municipal matters.**

In the area of water resources, Barbara has extensive experience with the protection and acquisition of water resources, water contract interpretation and negotiations, water supply planning and assessments, aquifer storage and recovery, water transfers and water quality. Barbara's in-depth experience in water law allows her to represent water districts and other purveyors, growers, ranchers, and other rural landowners, as well as various industry clients, including those involved in the agricultural, timber, renewable energy, and land use and development sectors that are addressing California's myriad of water supply and quality challenges.

Within her natural resources practice, Barbara assists clients with the state and federal Endangered Species Acts, wetlands, land conservation permitting, and related litigation. She has assisted private and public interests with the evaluation of Habitat Conservation Plans, Natural Community Conservation Plans, Biological Opinion consultations, California Incidental Take Permits, 404 individual permits, timber harvest plans, and conservation easements.

Barbara's land use practice includes representing private land owners, developers, and public agencies in matters involving local government planning and zoning, Coastal Act permitting, CEQA and NEPA compliance, Clean Water Act compliance, land development strategy, eminent domain and related litigation.

Barbara's municipal practice includes serving as general and special counsel to special districts, joint power agencies, cities, and counties. Barbara regularly advises on compliance with the Brown Act, Public Records Act, Public Contract Code, as well as various other laws impacting public agencies.

In a case of Barbara's work rubbing off on her hobbies (or perhaps it's the other way around), Barbara enjoys scuba diving, cycling, boating, gardening, and traveling when she can get away from the office. Whether vocation or avocation, Barbara's enthusiasm and appreciation for the great outdoors is evident in all that she does. As an advocate for the outdoors and appreciation of open space, Barbara is an active board member of the Placer Land Trust.

## Randy Pollack

**Partner**

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**Randy Pollack specializes in developing and directing government and regulatory affairs strategies through lobbying, political grassroots, public relations efforts and organizing industry coalitions. He regularly represents businesses and trade associations before the California Legislature, the executive branch and state agencies. Randy has served as the lead lobbyist on issues involving chemical policy, dietary supplements, consumer packaging, cosmetics, privacy, financial, education and agricultural issues.**

Additionally, he has extensive knowledge in working with the California Department of Food & Agriculture, Cal-EPA, Department of Health Services, Consumer Services Agency and various other agencies to resolve issues on behalf of his clients. In a November 2009 survey, California Legislators voted Randy as the "Most Underrated Lobbyist" working at the Capitol – a testament to the effective and pragmatic approach he employs on behalf of his clients.

Before joining Churchwell White LLP, Randy established his own company focusing on legislative and regulatory affairs. Prior to that, Randy was a shareholder of a national law firm where he directed legislative and regulatory strategies for Fortune 500 companies and trade associations. Randy's 25 years of government experience include serving as Chief Deputy Legal Affairs Secretary to former Governor George Deukmejian, where he counseled the Governor and senior staff on a variety of legal, public policy and legislative issues. As chief consultant to the Assembly Agriculture Committee, he oversaw issues affecting California's $20 billion agricultural industry. In addition, Randy served as legal advisor to the California Public Employment Relations Board.

Randy Pollack is a registered California lobbyist and a member of the California and New York Bars. He received his J.D. from University of the Pacific, McGeorge School of Law and his B.A. degree from the State University of New York, Buffalo. As an attorney and lobbyist, Randy is an AV® Peer Review Rated lawyer, the highest rating given by Martindale-Hubbell for legal ability and ethical standards. Although Randy is happily tied to the Capitol and Sacramento, and enjoys spending time with his family and playing golf in the nice weather, he still holds out hope that the Buffalo Bills will win a Super Bowl sometime in his lifetime.

## Tom Hallinan

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**Tom Hallinan brings extensive, and a career's worth, of municipal knowledge to the Churchwell White team. Tom currently represents the communities of Empire, Grayson, Oakdale, Riverbank, Ceres and Patterson as City Attorney and Special District General Counsel. As such, he is experienced in providing legal advice on the Brown Act, Political Reform Act, Public Records Act, contracts and procurement, and all phases of real property development including public finance. He also prosecutes all municipal code violations.**

A 20-year member of the Central Valley City Attorney's Association, Tom is also active in the League of California Cities' City Attorney Department, where he has served as the Department's representative to the Annual Conference Planning Committee and on the Transportation, Communication and Public Works Committee. He was recently appointed as the Central Valley representative to the League's Legal Advocacy Committee.

Tom is an elected member of the Yosemite Community College District Board of Trustees, where he is currently serving his fifth four-year term. He also serves on the Stanislaus-Ceres Oversight Board of the former Redevelopment Agency, and the Stanislaus County Assessment Appeals Board. Hallinan has served as a Governor's appointee to the 38th District Agricultural Association, and on numerous local non-profit boards and commissions. In 2015, Tom was appointed to the California Law Revision Commission by Governor Brown. He was also recently appointed as a member of the Gaming Policy Advisory Committee of the California Gambling Control Commission.

Prior to joining Churchwell White LLP, Tom worked in the California Legislature, and for the State of California, Department of Toxic Substances Control, and the U.S. Attorney's Office.

Having served for two decades as both an elected official; and federal, state, county and city appointee, Tom is knowledgeable of and works well with all government agencies.

## Elisabeth White

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**Elisabeth L. White is a partner with Churchwell White LLP whose practice focuses on issues related to healthcare law, administrative law, and government affairs. As a registered lobbyist, Elisabeth has assisted a wide variety of both public agencies and private companies. Her experience as an attorney sets her apart as a lobbyist, providing her with a thorough understanding into the nuances of legislation and the language of a bill.**

Prior to joining Churchwell White LLP, Elisabeth lobbied on behalf of Costco Wholesale, the California Construction Trucking Association, West Basin Municipal Water District, the City of La Canada Flintridge, and the San Diego Association of Governments (SANDAG). In particular, Elisabeth represented the City of Inglewood and advocated on their behalf before the California State Legislature. A significant project of impact involved working with Southern California water agencies and other Southern California cities to successfully oppose the City and its residents from being charged additional money for the water they were receiving.

Apart from lobbying, Elisabeth also advises clients on issues related to healthcare compliance, State licensing and certification, Medicare certification, Medicare and Medi-Cal enrollment and complex healthcare agreements. She also advises clients on, among other things, required governmental filings (e.g., Statement of Economic Interests) and political law issues including committee and campaign reporting.

Elisabeth has represented large hospital systems, foundations and physician groups. She has also worked in an in-house setting as a law clerk for both UC Davis Health System and Dignity Health. As a legislative advocate, she advanced the interests and priorities of healthcare organizations, Southern California cities, large corporations and special interest associations before the State Legislature. Elisabeth is a member of the American Health Lawyers Association and the California Society for Health Care Attorneys. She was named a 2015 Rising Star by Super Lawyers Magazine in the areas of Government Relations, State, Local & Municipal Law, and Health Care. In her time away from the office, Elisabeth stays very active chasing her twin daughters and son (all age five and under).

## S. Craig Hunter

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**Craig Hunter's diverse practice is primarily focused on the areas of real property, public contract procurement, environmental and general business litigation, as well as state administrative procedures and regulatory compliance.**

Prior to entering law school, Craig worked for 12 years in the land title industry as a part of the Sacramento and Yolo County operations of Ticor Title Insurance Company, and in the Yolo County operations of Western Title Insurance Company. This background has provided Craig with unique expertise in several real estate sub-specialties. As a result, he often represents clients in real property remediation issues, commercial transactional matters, as well as title, boundary, and easement disputes.

Besides real property matters, Craig is well-versed and experienced in environmental law including CEQA compliance, environmental permitting and compliance, and federal and state court environmental litigation. In that capacity, Craig has represented food processors, mining and agricultural operations, and general business entities including major truck stop operators, dry cleaners, gasoline service stations, automotive repair facilities, and small machine manufacturers. Other work includes assisting commercial agricultural leasing clients in general business matters and as secured creditors in bankruptcy proceedings. He has also represented agricultural lenders in a variety of security issues, including judicial foreclosures and lender liability actions.

A seasoned litigator, Craig's litigation practice frequently deals with matters in both state and federal courts, as well as at various appellate levels. In addition to the California courts, Craig is admitted to the Eastern and Northern Federal District Courts of California, to the Ninth Circuit Court of Appeals, and to the United States Supreme Court.

Craig earned his law degree from the University of the Pacific, McGeorge School of Law. Upon graduating With Great Distinction, Craig was also admitted into the Order of the Coif and the Traynor Honor Society, and received American Jurisprudence Awards for Real Property, Constitutional Law, Remedies and Tax.

For relaxation, Craig enjoys flying (he holds a private pilot's license and owns a Cessna Skylane), golfing, and reading (fiction, historical novels, and biographies). Craig is married, has two adult daughters, and (arguably) the cutest granddaughter. It's better not to argue with a litigator though.

## Michael Lyions

**Of Counsel**

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**Michael Lyions joins Churchwell White LLP with over forty years of municipal law experience. Prior to joining the Churchwell White LLP team, Mike served as the City Attorney for the City of Ceres for more than forty-four years, a testament to his legal ability and loyalty as a contract employee. As City Attorney, Mike assisted the City with legal matters regarding city operations and procedures, as well as representing the City in cases of litigation. In this capacity, he also provided legal counsel to the Redevelopment Agency, Planning Commission, City Council, and other local agencies.**

In addition to serving as City Attorney, Mike also managed a general practice law firm in Modesto, California. However, in 2002, Mike sold his interest in the firm to devote his full-time legal services exclusively to Ceres. Mike's combined years in private and public law have built up a vast experience and knowledge base in all aspects of general municipal law.

Born and raised in Manteca, California, Mike's practice naturally grew out of the communities within the San Joaquin Valley. Now, as an Of Counsel attorney, Mike's municipal wisdom will continue to expand in Sacramento and further enrich the Churchwell White LLP team.

## Kurt D. Hendrickson

**Of Counsel**

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**Kurt Hendrickson is a litigator with a focus on business and governmental disputes involving contract, real property, and employment law. Kurt also handles professional licensing and disciplinary matters before regulatory agencies such as the Medical Board of California, the Bureau of Automotive Repair, and the Mine Safety and Health Administration (MSHA).**

His representation includes counseling clients, investigation, discovery, mediation/arbitration, and litigating cases through trial. One of Kurt's goals is to ensure his clients understand the litigation process and the work and resources involved in their case.

Kurt serves as Vice President of the Barristers' Club of Sacramento and is the former Treasurer, Media Chair and Membership Chair for the organization. He also served as the Membership-Committee Chairman for the Sacramento County Bar Association.

During law school, Kurt clerked for Commissioner William A. Mundell at the Arizona Corporations Commission. He worked as a state field director for three grassroots programs for a 2006 gubernatorial campaign in California. Kurt was an active participant in on-campus activities and served as the President of the Junior Barristers Club, an affiliate of the Barristers' Club of Sacramento.

When he is not working, Kurt enjoys many outdoor activities including golf and fishing. He enjoys camping and traveling with his wife, Nicole, and two small dogs, Peanut and Walnut. Additionally, he maintains a regular workout routine and can be found playing basketball at a downtown athletic club.

## Nubia Goldstein

**Attorney**
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**If Nubia Goldstein's career seems perfectly tailored towards municipal law, that's because it is. From majoring in Government at California State University, Sacramento to choosing Public Law and Policy as her academic focus at the University of the Pacific, McGeorge School of Law, Nubia has developed a background in politics and policy that continually influences her diverse municipal work today.**

As part of the Churchwell White LLP team, Nubia's areas of practice include real estate and land use, litigation, eminent domain and legislative advocacy. Nubia serves as City Attorney for the city of Newman, and advises Churchwell White LLP's municipal clients on issues related to the Brown Act, conflicts of interest, election law and land use matters. She represents the firm's public and private clients in all stages of litigation, mediation and alternative dispute resolution. She is a member of the Public Law section of the California State Bar, a member of the Hispanic National Bar Association, and a registered lobbyist.

Before entering law school, Nubia gained both legislative experience working at the Capitol for a California Assemblywoman and political know-how while working on local election campaigns. The time spent staffing bills and communicating with constituents and lobbyists naturally carried over to her desire to practice law. While at McGeorge, Nubia participated in several student organizations and served as President and Executive Chair of McGeorge's Public Legal Services Society. In addition to graduating with distinction, she earned the Witkin Award for Excellence in two courses, was admitted to the Traynor Honor Society, and received the Outstanding Student service Award for her significant contributions to the McGeorge community.

Outside of her academic honors, Nubia built upon her governmental relations and legal experience at the California Attorney General's Office, Fair Political Practices Commission, and the Department of Fair Employment and Housing. She also previously worked in the Civil Law and Motion Department of the Sacramento County Superior Court. The accumulation of all of these experiences naturally drew Nubia towards municipal law as an intersection of politics, policy, and law.

Although it may seem like Nubia's entire life revolves around solving municipal matters, she does get out of the office to explore local eateries, museums, and sporting events. And while she is an ardent local sports fan and spends the fall managing her fantasy football team, she leaves the physical participation to the professionals.

## Robin Baral

**Attorney**

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**Robin Baral provides specialized counsel to public and private entities in the areas of land use, environmental law, regulatory proceedings and municipal law. Robin's practice focuses on the intersection of land use, water supply planning and large-scale infrastructure projects. In the public sector, Robin currently serves as Deputy City Attorney for the City of Dixon and the City of Riverbank, while providing counsel to cities and water districts throughout California.**

Robin's land use practice is highlighted by his ability to work with developers and municipalities to negotiate development agreements, process complex entitlement packages, and establish viable finance mechanisms for large infrastructure improvements, such as wastewater treatment upgrades and recycled water facilities.

Robin is actively working with several public entities to finance, develop and construct surface water and groundwater storage projects, and treatment projects totaling hundreds of millions of dollars.

Robin works closely with public entities, and their constituents, in a variety of matters involving municipal finance, such as Proposition 218 proceedings, the adoption of impact fees, the formation of special assessments and other voter-approved taxes. He is skilled in working with agencies and citizens' groups in connection with local initiatives and ballot measures. In each case, Robin understands the benefit of providing effective counsel in response to the specific needs and concerns of the local community.

In addition to his public practice, Robin represents industrial operators, natural resource companies and renewable energy companies in obtaining entitlements for new projects, along with providing guidance during regulatory proceedings and administrative actions by state agencies.

Prior to entering private practice, Robin volunteered as a Special Deputy Attorney in the California Attorney General's office, Environment Section. In law school, Robin interned in the Land Law Section for nine months, through the California Attorney General's Law School Honors Program in Los Angeles.

Robin has developed close ties with the Sacramento region since relocating to the area in 2011. He currently serves as a director of the Yolo Land Trust, and he also enjoys volunteering and participating in seminars by the Urban Land Institute. These groups exemplify Robin's passion for balancing smart urban development with the preservation of a vibrant agricultural economy. When he is not serving his community, Robin enjoys exploring and eating his way through the best restaurants and local establishments throughout California.

## Josiah M. Young

**Legislative Advocate/Attorney***

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**Josiah Young is both a registered lobbyist and attorney for Churchwell White LLP, providing strategic counsel to the firm's public and private clients. Josiah seeks to achieve clients' government affairs objectives by advocating on their behalf before legislative, regulatory and administrative bodies, drawing on his experience in policy and political work including coalition building, grassroots mobilization, strategic planning, legislative/initiative campaigns, direct lobbying, legislative tracking, regulatory monitoring and procurement services.**

As a Sacramento lobbyist, Josiah has worked on issues including renewable energy, advanced vehicle technology manufacturing, and environmental justice, regularly presenting targeted messages to key stakeholders. As a member of the Churchwell White LLP team, Josiah sits on the 2017 California Special Districts Association Legislative Committee.

Licensed to practice law by the State of New York, Josiah also counsels Churchwell White LLP clients on transactional matters, municipal and special district law, and political issues.

After earning his bachelor's degree in business management from Morehouse College, Josiah attended American University Washington College of Law where he focused on commercial transactions and was active on campus, serving as President of the Black Law Students Association. While in law school, Josiah interned for a US House of Representatives member, where he worked on legislative research and drafting, as well as constituent outreach. Also, while in law school, Josiah clerked in the Office of the General Counsel for the US Department of Commerce. There, he spent time reviewing contracts, providing general litigation support, and drafting congressional correspondence. Upon graduating from law school in two and a half years, Josiah went on to oversee policy and grassroots advocacy work for several national NGOs.

When not working, Josiah enjoys spending time with his family, reading and exercising to stay fit.

**Licensed to practice law in NY*

## Karl Schweikert

**Attorney**

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**Not many people can claim to be a pilot, much less a CFO and attorney. However, Karl Schweikert has transformed his diverse experiences and natural problem-solving skills into an informed law practice that focuses on litigation, aviation and airport land use, governmental relations, and administrative law.**

Prior to launching his legal career, Karl spent 14 years working for Silicon Valley start-ups in marketing and finance, as well as 8 years as a professional pilot. Karl then received his Juris Doctor from the University of the Pacific, McGeorge School of Law with great distinction. While in school, he served as President of the McGeorge Health Law Association and was admitted to several honors societies, including the Order of the Coif. He additionally worked as a summer associate at DLA Piper and interned with Judge Ronald Sargis in the Eastern District of California Bankruptcy Court.

Since joining Churchwell White, Karl has been able to combine his love for aviation and his talents for communication and problem solving. As an AOPA Panel Attorney and member of the ABA Forum on Air and Space Law, as well as a member of the Healthcare and Business sections of the Sacramento County Bar Association, Karl has gained favorable rulings for a number of professional boards and worked on several issues regarding aviation and airport land use.

And if Karl's other titles are not enough, he can also add lifeguard, college athlete, springboard diver, and school board trustee to his name.

## Kerry Fuller

**Attorney**

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**Kerry Fuller's practice focuses on public law, land use, environmental, and political law. She currently serves as Deputy City Attorney to the City of Newman and advises the firm's other public clients on a variety of matters.**

Kerry's exposure to California's complex water system started early. Due to her father's work as an engineer for a water agency in the San Bernardino Valley, Kerry became fascinated with the vast web of infrastructure and accompanying laws and agreements that govern California's water.

After graduating from the University of California, Santa Barbara with degrees in Political Science and Psychology, Kerry spent several years working in Washington D.C. for Hillary Clinton's 2008 presidential primary campaign, as well as for Defenders of Wildlife, an environmental nonprofit. It was there, encouraged by her mentors and still fascinated by California's water system, that Kerry became inspired to become a lawyer. As a result, Kerry returned to California, where she graduated from the University of California, Davis with her Juris Doctor. While in law school, Kerry worked as a law clerk at the California Attorney General's Office in the Environment, Land Law, and Natural Resources Section and continued to explore her interest in water by taking classes focusing on water law and ocean and coastal laws. She also served as an Executive Editor of UC Davis' environmental journal, Environs, and was selected for a Michael H. Remy Scholarship to attend the 2012 Environmental Law Conference at Yosemite.

From inspiration to actuality, Kerry now flexes her decision-making and problem-solving skills as a member of the Churchwell White team. Kerry belongs to the Public Law and Environmental Law Sections of the California State Bar, and channels all of her experiences into her municipal, water, and environmental practices.

## Helane Seikaly

**Attorney**

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**After graduating from Southern Methodist University with degrees in Political Science and French, Helane Seikaly spent a year working in Dallas on a Texas Gubernatorial campaign before attending law school in Houston. While in law school, Helane became very involved in South Texas' nationally renowned Advocacy Program. While she was there, she competed in many mock trial tournaments, winning the American Bar Association's sponsored Labor & Employment Mock Trial Tournament in 2012.**

Because of her passion for being in the courtroom, Helane accepted a position at the Harris County District Attorney's Office as an intern in the felony division. During her third year of law school, she first chaired a jury trial with minimal supervision by the prosecutor. She received a favorable verdict.

During law school, Helane became very passionate about labor and employment law which led her to an internship at the Equal Employment Opportunity Commission (EEOC) in Houston to further gain inside experience to real world employment issues. During her time with the EEOC, Helane assisted Administrative Law Judges with preliminary hearings on discrimination claims filed by Federal employees. She also wrote decisions for the Administrative Law Judges on motions for summary judgment usually filed by Federal agencies.

Because of her love for France, after college Helane spent a year in a small French town in the center of Burgundy, France teaching English to high school students. While she was there, she was able to take advantage of traveling all over France to experience the country like a local. She also attended the largest wine festival in all of France.

## Embert P. Madison, Jr.

**Attorney**

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**Embert P. Madison, Jr.'s practice focuses on the areas of public law, real estate and land use, and political law. Prior to joining the Churchwell White LLP team, Embert spent several years at the state Capitol. This previous experience with the California Legislature, created a natural transition to working with cities, counties and special districts.**

During his time at the Capitol, Embert toed the political ropes staffing taxation, health, and employment issues while working at the Capitol for a California Assembly Member. He also gained unique legal experience working as counsel for the Legislature at the Office of Legislative Counsel (OLC). Embert's practice areas at the OLC included taxation (income and sales and use taxation), public contracting, and state and local government.

While in law school, Embert served as a Judicial Extern for the Honorable John A. Mendez at the United State District Court, Eastern District. During this time, he diversified his experience reviewing civil rights claims, employment matters and federal rules of court. He also worked for Chairman Emeritus of the California Board of Equalization, Jerome E. Horton, analyzing tax appeal cases. Embert was an active participant on campus as President of the Black Law Student's Association, and as a member of Moot Court, Real Estate Club and the UC Davis School of Law Business Law Journal.

When he is not working, Embert enjoys learning about real estate markets and being active by biking or playing basketball. He is a lifelong Lakers enthusiast.


## Vincent M. Vu

**Attorney**

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**Prior to joining Churchwell White LLP, Vincent Vu was a Criminal Prosecutor with the Los Angeles City Attorney's Office, Central Trials Unit, where he handled criminal misdemeanor prosecutions. During this time, he prosecuted four jury trials and argued motions and other hearings. Vincent's criminal-litigation perspective transitions well into municipal code enforcement and other litigation matters.**

Vincent attended the University of California, Hastings College of the Law, where he served as the Editor-in-Chief of the Hastings West-Northwest Journal of Environmental Law and Policy. He served as Co-Chair for the 2014 California Water Law Symposium.

During law school, Vincent complemented his academic studies by working with various organizations, including: the Honorable Yvonne Gonzalez Rogers, United States District Court for the Northern District of California; Shute, Mihaly & Weinberger LLP; the Natural Resources Defense Council; the California Attorney General's Office Natural Resources Section; and the California Coastal Commission. He received his B.A. in Psychology and Social Behavior with a minor in Political Science from the University of California, Irvine. Vincent also participated in the University of California, Washington D.C. program, where he interned with Public Citizen's Congress Watch Division.

## Christopher LaGrassa

**Attorney**

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**Born and raised in Sacramento, Christopher LaGrassa always knew he wanted to be a professional that could contribute back to his hometown and other local communities. As a result, Chris's practice focuses on public law, land use, political law and civil litigation.**

Chris received his undergraduate degree from the University of California, Irvine with a degree in Political Science. His degree focused on political theory with an emphasis on local government. His passion for politics and local government even inspired him to volunteer for Assemblymember Kevin McCarty's campaigns in both 2010 and 2014.

Prior to joining Churchwell White LLP, Chris earned a wealth of public and political law experience working as a law clerk for the City of Elk Grove, Kronick Moskovitz Tiedemann & Girard, the Fair Political Practices Commission and Nielsen Merksamer Parrinello Gross & Leoni, LLP. These experiences gave him a comprehensive understanding of serving public agencies from the inside and out. As a member of the Churchwell White LLP team, Chris is excited to assist public entities in creating innovative solutions and positive change for their communities.

In his spare time, Chris is a passionate Sacramento sports fan. He can be seen attending every Sacramento Republic home game, proudly rooting for his younger brother, Matt (#16). Chris is also well known amongst his peers and friends for shamelessly defending the Sacramento Kings.

## Elaine Won

**Attorney**

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**Elaine Won has always been guided by her passion for public service and politics. This passion led her to the Office of the UC Student Regent, where she assisted the Student Regent in advocating for policies beneficial to students in the University of California system. She also interned at Congressman Mike Honda's District Office, where she dealt directly with various local and federal issues in California's 17th congressional district.**

After graduating from the University of California, Irvine, Elaine attended UC Davis School of Law. She began to pursue public law because it complemented her interest in public service and politics. Elaine worked at Churchwell White LLP during the summer after her second year, where she assisted in variety of litigation and transaction law matters and expanded on her employment and labor law experience within a public law context. In order to build her litigation and employment law practice, Elaine also externed at the Office of the Attorney General – Employment and Administrative Mandate Section. At the Office of the Attorney General, Elaine gained firsthand experience interviewing witnesses and engaging in pre-trial matters.

Elaine is passionate about staying involved in her community and assisting low-income individuals access legal services. She plans on working to solidify the structure of the Grace Lee Boggs Asian Pacific Islander Legal Clinic, which she co-founded in law school to assist underserved low-income Asian Pacific Islanders in the Sacramento and Yolo County area.

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## Firm

Churchwell White LLP is a law firm with deep roots in California. Based in the state's capital, we have a particular focus on sound public policy. Our lawyers and lobbyists work in the areas of government relations, regulatory matters, public law, political issues, ethics and conflicts of interest, real estate and land use, environmental and natural resources, water, litigation and more.

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