Contents

Preface
Acknowledgments
Cutoff Dates and CEB Citation

1 Nature of Municipal Corporations

2 Open Government and Ethics

3 Elections

4 Personnel

5 Finance and Economic Development

6 Municipal Services and Utilities

7 Public Contracting

8 Public Property

9 Regulating Businesses and Personal Conduct

10 Land Use

11 Protecting the Environment

12 Code Enforcement

13 Liability and Litigation

List of Abbreviations

Table of Statutes, Regulations, and Rules
Table of Cases
Table of References
Index
The California Municipal Law Handbook Reader Suggestion Form

© The Regents of the University of California

Preface

Originally published by the League of California Cities in 1993, this handbook is the collective product of hundreds of municipal attorneys' efforts. The purpose of the book is to provide municipal law practitioners a "source of first resort" in researching a given area of California municipal law. Updated annually since its inception, the book (and the League) reached a milestone this year when the University of California's Continuing Education of the Bar (CEB) assumed publication of the annual update. Partnering with CEB has allowed the League to tap into CEB's legal editing expertise and superb reputation. An electronic, searchable version of this handbook, with links to California statutes and cases, may be found at CEB.com.

Like every edition since 1993, the 2010 handbook has been updated by an Editorial Board of city attorneys appointed by the President of the League's City Attorneys' Department. The League expresses its deep appreciation to each of the 2010 Editorial Board members, all of whom contributed countless hours to this important project. The League also gratefully acknowledges the work of the many reviewers who assisted the committee in producing the final handbook. The names of the attorneys who served as Editorial Board members or reviewers are listed in the Acknowledgments.

The California Municipal Law Handbook is meant as a "source of first resort" when researching an issue in municipal law. It is not intended to function as a comprehensive "treatise" on California municipal law. Whenever possible, the handbook provides references to other sources that may cover a particular topic in more detail. In keeping with the emphasis on practicality, the handbook also offers a host of "practice tips" for municipal lawyers.

Because of the scope of the handbook, certain legal or factual issues in any given area of municipal law may receive only a passing reference or may be omitted altogether. As with any legal publication, there is a risk that the law will change the day after the document comes back from the printer. Attorney readers are urged to read the statutes and cases cited in the handbook to make sure they remain good law.

The handbook is for general information only and is not intended as legal advice or as a substitute for consultations with an agency's municipal attorney. Subtle variations in circumstances can produce differing results under the law. Reasonable city attorneys can disagree on what the law requires in a given situation. Non-attorneys using this handbook are urged to consult with their agency's attorney when confronting a situation that may have legal ramifications.

The California Municipal Law Handbook is just one of a number of legal resources that the League makes available to city attorneys. Along with this handbook and primary legal resources, city attorneys should check the City Attorneys' Department webpage at www.cacities.org/attorneys for city attorneys' conference papers, city attorney opinions, sample forms, sample ordinances, and League publications that may also be of assistance in researching a given area of municipal law. CEB also has many additional publications to assist attorneys in the area of public and municipal law. See CEB.com and the CEB catalog.

CEB Real Property Practice Group Manager John K. Chapin, Attorney Editor Ann H. Davis, and Legal Editors Julie Brook, Ragnhild Fougner, Karen Nutter, Dorothy Robins, and Philip Weverka contributed to the 2010 edition. Administrative support was provided by Nila Kanzaria and Akanke Peyton. Karen Lamoreux handled copyediting and production. CEB's Indexing staff prepared the index. Composition was performed by CEB's Electronic Publishing staff.

Patrick Whitnell
General Counsel
League of California Cities

John K. Chapin
CEB Practice Group Manager
Real Property

Pamela J. Jester
Director

© The Regents of the University of California

Acknowledgments

2010 Editorial Board
of The California Municipal Law Handbook

Sandra J. Levin, Chair
City Attorney,
La Habra Heights and Sierra Madre
Colantuono & Levin, PC

Catrina Archuleta
Deputy City Attorney, Los Angeles
City LA-Community Redevelopment Agency

Ariel Pierre Calonne
City Attorney, San Buenaventura

Scott H. Campbell
Best Best & Krieger, LLP

Tim Giles
City Attorney, Goleta

Jonathan P. Hobbs
Kronick, Moskovitz, Tiedemann, & Girard, PC

Christi Hogin
City Attorney, Malibu and Lomita
Jenkins & Hogin, LLP

Jolie Houston
City Attorney, Los Altos
Assistant City Attorney, Gilroy
Berliner Cohen

Tarquin Preziosi
Senior Deputy City Attorney, Oceanside

Javan N. Rad
Assistant City Attorney, Pasadena

Bill Sartor
Assistant City Attorney, Tracy

Stacey Sheston
McDonough Holland & Allen PC

Joanna Smith
Assistant City Attorney, Goleta

Harriet Steiner
City Attorney, Davis
McDonough Holland & Allen PC

Peter Thorson

City Attorney, Temecula
Richards Watson & Gershon

Reviewers

Sophie Akins
Best Best & Krieger, LLP

James L. Arnone
Latham & Watkins, LLP

Alexandra M. Barnhill
Brownstein Hyatt Farber Schreck, LLP

Paul E. Bennett, II
Jenkins & Hogin, LLP

Karl H. Berger
Jenkins & Hogin, LLP

Colin Burns
Harper & Burns LLP

William T. Chisum
Kronick Moskovitz Tiedemann & Girard, PC

Michael G. Colantuono
Colantuono & Levin, PC

Anthony P. Condotti
Atchison, Barisone, Condotti & Kovacevich, PC

Jonathan P. Cristy
Kronick Moskovitz Tiedemann & Girard, PC

Melissa C. Crosthwaite
Richards, Watson & Gershon, PC

Paula de Sousa
Best Best & Krieger, LLP

Leslie E. Devaney
Stutz Artiano Shinoff & Holtz, A.P.C.

Christopher J. Diaz
Richards, Watson & Gershon, PC

Greg Diaz
City Attorney, Merced

Miles Dolinger
Berliner Cohen

Tyree Dorward
Best Best & Krieger, LLP

Christina M. Doyle
Woodruff, Spradlin & Smart

Lawrence J. Duran
Senior Deputy City Attorney, Sacramento

Mona G. Ebrahimi
Kronick Moskovitz Tiedemann & Girard, PC

James Eggart
Woodruff, Spradlin & Smart

Jeffrey R. Epp
City Attorney, Escondido

Jamie Errecart
McDonough Holland & Allen PC

Laura J. Fowler
McDonough Holland & Allen PC

Deborah J. Fox
Meyers Nave

Marley S. Fox
Orbach, Huff & Suarez, LLP

Brad L. Fuller
Assistant City Attorney, Pasadena

Barbara Gadbois
Gibbs, Giden, Locher, Turner & Senet, LLP

Katrina C. Gonzales
Richards, Watson & Gershon, PC

Sarah Gorman
City Clerk, Santa Clarita

Mark Gorton
McDonough Holland & Allen PC

R. Jacob Gould
Stutz Artiano Shinoff & Holtz, A.P.C.

Gregg Gu
Deputy City Attorney, Riverside

Ricia R. Hager
Woodruff, Spradlin & Smart

Forrest Hansen
Berliner Cohen

Krysten E. Hicks
Meyers Nave

Bradley R. Hogin
Woodruff, Spradlin & Smart

Laura Hollender
Meyers Nave

Alan Holmberg
City Attorney, Oxnard

Kimberly Hood
McDonough Holland & Allen PC

Michael Houston
Rutan & Tucker LLP

Jeff Kagan
Orbach, Huff & Suarez, LLP

Heather A. Kenny
Aleshire & Wynder, LLP

Shria Klima
Richards, Watson & Gershon, PC

Sarah J. Knecht
Assistant City Attorney, Santa Barbara

Candice K. Lee
Richards, Watson & Gershon, PC

Norman M. Levedahl
McDonough Holland & Allen PC

Gene A. Lucero
Latham & Watkins, LLP

Whitman F. Manley
Remy, Thomas, Moose and Manley, LLP

Gary J. McCarthy
Deputy City Attorney, Escondido

Brooke Miller
Best Best & Krieger, LLP

Joseph M. Montes
Burke Williams Sorensen, LLP

David E. Moser
Ebbin Moser & Skaggs LLP

Greg Murphy
Burke Williams Sorensen, LLP

Neal Myers
Daly and Heft, LLP

Deborah L. Nash
Deputy City Attorney, Oceanside

Laura Palazzolo
Berliner Cohen

Vic Pappalardo
Berliner Cohen

Bradley D. Pierce
Pierce Law Firm

Robert Pittman
Rutan & Tucker LLP

Julie Raney

McDonough Holland & Allen PC

Rachel Richman
Burke Williams Sorensen, LLP

Kenneth Rozell
Assistant City Attorney, Merced

Omar Sandoval
Woodruff, Spradlin & Smart

Christina Sansone
General Counsel—Public Works, Glendale

Diego Santana
Woodruff, Spradlin & Smart

Theodore Schneider
Myers, Widders, Gibson, Jones & Schneider, LLP

Susan L. Schoenig
McDonough Holland & Allen PC

Theodore Senet
Gibbs, Giden, Locher, Turner & Senet, LLP

Daniel G. Sodergren
City Attorney, Tracy

Patrick Q. Sullivan
Assistant City Attorney, Torrance

Eric S. Vail
City Attorney, Hemet and Temple City
Burke Williams Sorensen, LLP

Joann Victor
Gianelli & Morris

Ethan Walsh
McDonough Holland & Allen PC

Stephanie Wersel
Berliner Cohen

Serita R. Young
Richards, Watson & Gershon, PC

Shirin Zandpour
Latham & Watkins, LLP

Shawn Zovod
Ebbin Moser & Skaggs LLP

Editorial Boards and Reviewers of Past Editions

More than 300 California Municipal Law Attorneys

Staff, League of California Cities

Patrick Whitnell, General Counsel
Kourtney Burdick, Deputy General Counsel

Janet Reynolds, Legal Secretary/Office Manager

Legal Editing and Indexing

Continuing Education of the Bar, California

© The Regents of the University of California

Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of March 5, 2010.

CEB Citation

Cite this publication as: The California Municipal Law Handbook (Cal CEB Annual).

© The Regents of the University of California

1

Nature of Municipal Corporations

I. INTRODUCTION §1.1
A. Distinction Between Cities, Counties, and Other Local Agencies
1. Counties Are State Agents §1.2
2. Cities' Relationship to the State
a. Establishment of Cities §1.3
b. Limitations on Legislature's Power Over Cities §1.4
(1) Prohibition Against Special Legislation §1.5
(2) Prohibition Against Legislative Delegation of Municipal Authority §1.6
3. Charter Counties Versus Charter Cities §1.7
4. Special Districts §1.8
B. Legal Foundation of Cities
1. Constitutional Foundation §1.9
2. Laws Governing City Formation §1.10
3. Classes of Cities §1.11
a. General Law Cities §1.12
b. Charter Cities §1.13
C. Constitutional Grants of Municipal Authority §1.14
1. Police Power §1.15
a. Scope of Police Power §1.16
b. Preemption §1.17
c. Penalties §1.18
2. Taxing Power §1.19
a. Scope of Taxing Power §1.20
b. Compared to Police Power §1.21
3. Eminent Domain Power §1.22
4. Public Works Power §1.23
a. Scope of Public Works Power §1.24
b. Municipal Utilities §1.25
5. Corporate Power §1.26
a. General Law Cities §1.27
b. Charter Cities §1.28
(1) Constitutional Basis of "Municipal Affairs" Doctrine §1.29
(2) "Municipal Affair" Defined §1.30
(3) Relationship to Preemption §1.31
D. Constitutional Limits on Municipal Authority
1. Public Purpose §1.32
2. Federal Preemption Doctrine §1.33
a. Preemption Due to Occupation of Field §1.34
b. Preemption Due to Conflict With Federal Law §1.35
c. Preemption Due to Conflict With State General Law §1.36
(1) Duplication of State Law §1.37
(2) Contradiction of State Law §1.38
(3) State Law Occupies Field §1.39
d. Defining the Preempted Field §1.40
e. Examples of Valid Overlapping State and Local Regulation §1.41
3. Prohibition Against Gifts of Public Funds §1.42
a. Public Purpose Exception §1.43
b. Charter City Exception §1.44
4. Additional Compensation §1.45
5. Debt Limit §1.46
a. Special Fund Doctrine §1.47
b. No Pledge of Revenue Beyond 1 Year §1.48
c. Contingency Exception §1.49
d. Appropriations Exception §1.50
6. Tax and Appropriations Limits §1.51
a. General Property Tax Limit §1.52
b. Appropriation Limit §1.53

c. Voter Requirement for Imposition of Taxes §1.54
d. Special Assessments and Property-Related Fees and Charges §1.55
e. Other Tax Limitations §1.56
7. Contract Limitations §1.57
8. First Amendment Limitations
a. United States Constitution §1.58
b. California Constitution §1.59
c. Religion Issues
(1) Establishment Clause §1.60
(2) Invocations §1.61
(3) Religious Displays §1.62
(4) Public Aid to Religious Organizations §1.63
(5) Free Exercise Clause §1.64
9. Fourth Amendment Limitations §1.65
10. Fifth Amendment Limitations §1.66
11. Fourteenth Amendment Limitations §1.67
a. Equal Protection Clause §1.68
b. Due Process Clause §1.69
E. Other Public Purpose Entities
1. Within the Boundaries of Municipalities §1.70
2. Independent of Municipal Boundaries §1.71
a. Special Districts §1.72
b. Statutory Authority for Special Districts §1.73
c. Changes in Organization §1.74
d. Characteristics of Special Districts §1.75
3. Joint Powers Agencies §1.76
a. Delegated Powers Under Joint Powers Agreements §1.77
b. Use of Joint Powers Agencies in Financing §1.78
4. Regional Governments §1.79
5. Council of Governments §1.80
a. Determination of Housing Needs §1.81
b. Proposed Revisions to Housing Needs Determination §1.82
c. Housing Share Transfers §1.83
6. Nonprofit Corporations and Other Organizations §1.84
F. Intergovernmental Relations
1. Regulation of Federal Lands
a. Supremacy Clause §1.85
b. Property Clause §1.86
c. Implied Immunity §1.87
d. Intergovernmental Cooperation Act §1.88
2. Power Reserved for States Under Tenth Amendment §1.89
a. Generally Applicable Laws §1.90
b. When Local Governments Are Used as Implements of Federal Regulation §1.91
3. Immunity Under the Eleventh Amendment §1.92
a. State Immunity §1.93
b. Municipality Immunity §1.94
4. Federal and State Grants
a. Acceptance of Grants §1.95
b. Compliance With Grants §1.96
5. State Intergovernmental Relations
a. State Mandates §1.97
b. Public Utilities Commission §1.98
(1) Overriding Authority §1.99
(2) Authority Over Cellular Siting §1.100
c. State Agencies §1.101
d. Intergovernmental Immunity §1.102
(1) Federal Supremacy §1.103
(2) Immunity From Assertion of Constitutional Rights §1.104
(3) State Immunity From Zoning and Building Code Regulations §1.105
6. Eminent Domain §1.106

II. MUNICIPAL ORGANIZATION AND REORGANIZATION
A. Local Agency Formation Commissions (LAFCOs) §1.107
1. History and Purpose §1.108
2. General Role §1.109

3. Composition of LAFCOs §1.110
4. Funding for LAFCOs §1.111
5. Powers of LAFCOs §1.112
a. Particular Powers of LAFCOs §1.113
b. Changes of Organization §1.114
(1) Changes Relating to Farmland Security Zones §1.115
(2) Conditions on Changes §1.116
c. Spheres of Influence §1.117
(1) Factors Considered Determining Sphere of Influence §1.118
(2) Mandatory Service Reviews §1.119
(3) Updates and Amendments to Sphere of Influence §1.120
d. Provision of New or Extended Services Outside of Boundaries §1.121
e. LAFCO as Project for CEQA Purposes §1.122
6. Limitations on LAFCO Power
a. Limitations on Imposing Conditions §1.123
b. Limitations on Approving or Disapproving Changes of Organization §1.124
c. Mandatory LAFCO Approval §1.125
7. LAFCO Proceedings §1.126
a. Evidence Gathering §1.127
b. Time Limits §1.128
c. Judicial Review §1.129
d. Jurisdictional Overlaps §1.130
8. Subsidiary Districts §1.131
a. Initiating Proceedings to Establish Subsidiary District §1.132
b. Conducting Proceedings to Establish Subsidiary District §1.133
c. Revenue Consequences of Subsidiary District Merger Into City §1.134
B. Incorporation §1.135
1. Initiating Incorporation Proceedings by Petition §1.136
2. Conducting Incorporation Proceedings §1.137
3. Deciding on Incorporation §1.138
a. Appropriations Limits §1.139
b. Approval or Disapproval of Proposal §1.140
c. Reconsideration of Decision on Proposal §1.141
d. Decision on Proposal §1.142
e. Elections to Confirm Incorporation §1.143
4. Effects of Incorporation
a. City Jurisdiction §1.144
b. Effect of County Ordinances §1.145
c. City Council Terms of Office §1.146
d. Property §1.147
e. Services in First Full Fiscal Year §1.148
C. Annexation and Detachment §1.149
1. Procedures for Annexation §1.150
a. When Annexation Is Appropriate §1.151
b. Property Tax Negotiations §1.152
c. Effect of Annexation Agreement Requiring Waiver of Protest Rights §1.153
2. Procedures for Detachment §1.154
3. LAFCO Approval or Disapproval
a. With No Notice and Hearing §1.155
b. With Notice and Hearing §1.156
4. Elections on Annexation or Detachment §1.157
5. Effects of Annexation
a. Jurisdiction §1.158
b. Service Provision §1.159
c. Charges for Property Use §1.160
d. Responsibility for Bonds §1.161
e. Acceptance of County Roads and Highways §1.162
f. Previously Authorized Taxes, Assessments, Fees, or Charges §1.163
6. Effects of Detachment
a. Jurisdiction §1.164
b. Interest and Principal on Debts §1.165
c. Taxing Authority §1.166
d. Public Employees in Special Reorganizations §1.167
D. Consolidation, Dissolution, and Disincorporation §1.168
1. Types of Consolidation

a. Consolidation of Cities §1.169
b. Consolidation of Districts §1.170
2. Effects of Consolidation
a. Property Rights and Debts §1.171
b. Civil and Criminal Liability §1.172
c. Taxation §1.173
3. Effects of Dissolution/Disincorporation
4. Powers Cease §1.174
a. Debts Must Be Paid §1.175
b. Revenues Go to Successor §1.176
c. Public Property Must Be Returned §1.177
d. Effects of Reorganization Generally §1.178

III. INTERNAL ORGANIZATION OF CITIES
A. Forms of Government §1.179
1. Council/Manager §1.180
2. Council/Administrator §1.181
3. Strong Mayor §1.182
B. City Council
1. Qualification of Members §1.183
a. General Law Cities §1.184
b. Charter Cities §1.185
2. At-Large or District Elections §1.186
3. Oath of Office §1.187
4. Vacancies and Termination of Office §1.188
a. Vacancy Defined §1.189
b. Common Bases for Finding of Vacancy
(1) Resignation §1.190
(2) Non-residence §1.191
(3) Abandonment §1.192
(4) Incompatible Offices and Activities §1.193
(5) Accepting Free Transportation §1.194
(6) Recall §1.195
(7) Conviction §1.196
c. Filling Vacancies §1.197
(1) Limits on the Appointment Power §1.198
(2) Result of Appointment §1.199
5. Challenges to Right to Hold Office §1.200
6. De Facto Officers §1.201
C. Office of Mayor §1.202
1. Establishing/Eliminating the Office of Elected Mayor §1.203
2. Features of the Office of Elected Mayor
a. Authority §1.204
b. Salary §1.205
c. Making Appointments §1.206
3. Mayor Pro Tempore §1.207
D. Compensation and Expenses
1. Strict Construction §1.208
a. Gifts of Public Funds §1.209
b. Ethics Training §1.210
2. Compensation §1.211
a. Salary Adjustments §1.212
b. Compensation for Service on Other Commissions, Committees, Boards, or Authorities §1.213
c. Compensation for Attendance Beyond Certain Meetings §1.214
3. Expenses §1.215
a. Expenses for Meals for Third Parties §1.216
b. Expenses of Council Spouses §1.217
c. Flat Expense Allowances §1.218
4. Benefits §1.219
E. Limitations on the Right to Hold Office §1.220
1. Analyzing Limitations on the Right to Hold Public Office §1.221
2. Term Limitations in Cities §1.222
F. Conduct of Council Members
1. Rights and Roles of Council Members §1.223
2. Public Decorum §1.224

3. Enforcement of Decorum §1.225
4. Censure §1.226
G. Exercise of Legislative Authority §1.227
1. Distinction Between Ordinances and Resolutions §1.228
2. Ordinances §1.229
a. Authority §1.230
b. Effect §1.231
c. Validity §1.232
d. Permissible Subjects §1.233
e. Severability Clauses §1.234
f. Ordinance Procedure
(1) Drafting Ordinances §1.235
(2) Adopting Ordinances §1.236
g. Effective Date
(1) Generally on 31st Day After Adoption §1.237
(2) Certain Ordinances Take Effect Immediately §1.238
h. Publication of Ordinance §1.239
i. Adoption by Reference §1.240
j. Penalty for Violation of Ordinance §1.241
k. Amendment or Repeal of Ordinance §1.242
3. Resolutions §1.243
a. Resolutions as Ordinances §1.244
b. Permissible Subjects for Resolutions §1.245
c. Procedure for Adopting Resolutions §1.246
d. Effective Date §1.247
4. Minute Order or Motion §1.248
H. Appointed Commissions and Boards §1.249
1. Methods of Selection §1.250
2. Qualifications §1.251
3. Removal §1.252
4. Compensation §1.253
5. Delegation of Authority §1.254
I. Officials: Powers and Duties
1. City Manager §1.255
2. City Attorney §1.256
3. City Clerk §1.257
4. City Treasurer §1.258
5. Police Chief §1.259
6. Fire Chief §1.260

© The Regents of the University of California

§1.1 I. INTRODUCTION

A municipal corporation is a public corporation, created for public purposes. *City of San Francisco v Canavan* (1872) 42 C 541, 558 (citing *Payne & Dewey v Treadwell* (1860) 16 C 221, 233). The state may create, expand, diminish, or abolish municipal corporations and other public corporations subject only to the state's own laws and the California Constitution. *Weber v City Council* (1973) 9 C3d 950, 957, 109 CR 553. "Every city organized under this part shall have a name, and by such name has perpetual succession, and may sue and be sued. It shall have a common seal, alterable at the pleasure of the legislative body." Govt C §34501.

The legislature must prescribe uniform procedures for formation of cities. Cal Const art XI, §2. Once formed, a city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general law. Cal Const art XI, §7. General laws have a uniform statewide operation and generally prohibit local or special legislation. Cal Const art IV, §16.

For further information on municipal corporations, see California Government Tort Liability Practice (4th ed Cal CEB 1999); California Land Use Practice (Cal CEB 2006); Condemnation Practice in California (3d ed Cal CEB 2005).

© The Regents of the University of California

1

Nature of Municipal Corporations

I. INTRODUCTION §1.1
A. Distinction Between Cities, Counties, and Other Local Agencies
1. Counties Are State Agents §1.2
2. Cities' Relationship to the State
a. Establishment of Cities §1.3
b. Limitations on Legislature's Power Over Cities §1.4
(1) Prohibition Against Special Legislation §1.5
(2) Prohibition Against Legislative Delegation of Municipal Authority §1.6
3. Charter Counties Versus Charter Cities §1.7
4. Special Districts §1.8
B. Legal Foundation of Cities
1. Constitutional Foundation §1.9
2. Laws Governing City Formation §1.10
3. Classes of Cities §1.11
a. General Law Cities §1.12
b. Charter Cities §1.13
C. Constitutional Grants of Municipal Authority §1.14
1. Police Power §1.15
a. Scope of Police Power §1.16
b. Preemption §1.17
c. Penalties §1.18
2. Taxing Power §1.19
a. Scope of Taxing Power §1.20
b. Compared to Police Power §1.21
3. Eminent Domain Power §1.22
4. Public Works Power §1.23
a. Scope of Public Works Power §1.24
b. Municipal Utilities §1.25
5. Corporate Power §1.26
a. General Law Cities §1.27
b. Charter Cities §1.28
(1) Constitutional Basis of "Municipal Affairs" Doctrine §1.29
(2) "Municipal Affair" Defined §1.30
(3) Relationship to Preemption §1.31
D. Constitutional Limits on Municipal Authority
1. Public Purpose §1.32
2. Federal Preemption Doctrine §1.33
a. Preemption Due to Occupation of Field §1.34
b. Preemption Due to Conflict With Federal Law §1.35
c. Preemption Due to Conflict With State General Law §1.36
(1) Duplication of State Law §1.37
(2) Contradiction of State Law §1.38
(3) State Law Occupies Field §1.39
d. Defining the Preempted Field §1.40
e. Examples of Valid Overlapping State and Local Regulation §1.41
3. Prohibition Against Gifts of Public Funds §1.42
a. Public Purpose Exception §1.43
b. Charter City Exception §1.44
4. Additional Compensation §1.45
5. Debt Limit §1.46
a. Special Fund Doctrine §1.47
b. No Pledge of Revenue Beyond 1 Year §1.48
c. Contingency Exception §1.49
d. Appropriations Exception §1.50
6. Tax and Appropriations Limits §1.51
a. General Property Tax Limit §1.52
b. Appropriation Limit §1.53

c. Voter Requirement for Imposition of Taxes §1.54
d. Special Assessments and Property-Related Fees and Charges §1.55
e. Other Tax Limitations §1.56
7. Contract Limitations §1.57
8. First Amendment Limitations
a. United States Constitution §1.58
b. California Constitution §1.59
c. Religion Issues
(1) Establishment Clause §1.60
(2) Invocations §1.61
(3) Religious Displays §1.62
(4) Public Aid to Religious Organizations §1.63
(5) Free Exercise Clause §1.64
9. Fourth Amendment Limitations §1.65
10. Fifth Amendment Limitations §1.66
11. Fourteenth Amendment Limitations §1.67
a. Equal Protection Clause §1.68
b. Due Process Clause §1.69
E. Other Public Purpose Entities
1. Within the Boundaries of Municipalities §1.70
2. Independent of Municipal Boundaries §1.71
a. Special Districts §1.72
b. Statutory Authority for Special Districts §1.73
c. Changes in Organization §1.74
d. Characteristics of Special Districts §1.75
3. Joint Powers Agencies §1.76
a. Delegated Powers Under Joint Powers Agreements §1.77
b. Use of Joint Powers Agencies in Financing §1.78
4. Regional Governments §1.79
5. Council of Governments §1.80
a. Determination of Housing Needs §1.81
b. Proposed Revisions to Housing Needs Determination §1.82
c. Housing Share Transfers §1.83
6. Nonprofit Corporations and Other Organizations §1.84
F. Intergovernmental Relations
1. Regulation of Federal Lands
a. Supremacy Clause §1.85
b. Property Clause §1.86
c. Implied Immunity §1.87
d. Intergovernmental Cooperation Act §1.88
2. Power Reserved for States Under Tenth Amendment §1.89
a. Generally Applicable Laws §1.90
b. When Local Governments Are Used as Implements of Federal Regulation §1.91
3. Immunity Under the Eleventh Amendment §1.92
a. State Immunity §1.93
b. Municipality Immunity §1.94
4. Federal and State Grants
a. Acceptance of Grants §1.95
b. Compliance With Grants §1.96
5. State Intergovernmental Relations
a. State Mandates §1.97
b. Public Utilities Commission §1.98
(1) Overriding Authority §1.99
(2) Authority Over Cellular Siting §1.100
c. State Agencies §1.101
d. Intergovernmental Immunity §1.102
(1) Federal Supremacy §1.103
(2) Immunity From Assertion of Constitutional Rights §1.104
(3) State Immunity From Zoning and Building Code Regulations §1.105
6. Eminent Domain §1.106

II. MUNICIPAL ORGANIZATION AND REORGANIZATION
A. Local Agency Formation Commissions (LAFCOs) §1.107
1. History and Purpose §1.108
2. General Role §1.109

3. Composition of LAFCOs §1.110
4. Funding for LAFCOs §1.111
5. Powers of LAFCOs §1.112
a. Particular Powers of LAFCOs §1.113
b. Changes of Organization §1.114
(1) Changes Relating to Farmland Security Zones §1.115
(2) Conditions on Changes §1.116
c. Spheres of Influence §1.117
(1) Factors Considered Determining Sphere of Influence §1.118
(2) Mandatory Service Reviews §1.119
(3) Updates and Amendments to Sphere of Influence §1.120
d. Provision of New or Extended Services Outside of Boundaries §1.121
e. LAFCO as Project for CEQA Purposes §1.122
6. Limitations on LAFCO Power
a. Limitations on Imposing Conditions §1.123
b. Limitations on Approving or Disapproving Changes of Organization §1.124
c. Mandatory LAFCO Approval §1.125
7. LAFCO Proceedings §1.126
a. Evidence Gathering §1.127
b. Time Limits §1.128
c. Judicial Review §1.129
d. Jurisdictional Overlaps §1.130
8. Subsidiary Districts §1.131
a. Initiating Proceedings to Establish Subsidiary District §1.132
b. Conducting Proceedings to Establish Subsidiary District §1.133
c. Revenue Consequences of Subsidiary District Merger Into City §1.134
B. Incorporation §1.135
1. Initiating Incorporation Proceedings by Petition §1.136
2. Conducting Incorporation Proceedings §1.137
3. Deciding on Incorporation §1.138
a. Appropriations Limits §1.139
b. Approval or Disapproval of Proposal §1.140
c. Reconsideration of Decision on Proposal §1.141
d. Decision on Proposal §1.142
e. Elections to Confirm Incorporation §1.143
4. Effects of Incorporation
a. City Jurisdiction §1.144
b. Effect of County Ordinances §1.145
c. City Council Terms of Office §1.146
d. Property §1.147
e. Services in First Full Fiscal Year §1.148
C. Annexation and Detachment §1.149
1. Procedures for Annexation §1.150
a. When Annexation Is Appropriate §1.151
b. Property Tax Negotiations §1.152
c. Effect of Annexation Agreement Requiring Waiver of Protest Rights §1.153
2. Procedures for Detachment §1.154
3. LAFCO Approval or Disapproval
a. With No Notice and Hearing §1.155
b. With Notice and Hearing §1.156
4. Elections on Annexation or Detachment §1.157
5. Effects of Annexation
a. Jurisdiction §1.158
b. Service Provision §1.159
c. Charges for Property Use §1.160
d. Responsibility for Bonds §1.161
e. Acceptance of County Roads and Highways §1.162
f. Previously Authorized Taxes, Assessments, Fees, or Charges §1.163
6. Effects of Detachment
a. Jurisdiction §1.164
b. Interest and Principal on Debts §1.165
c. Taxing Authority §1.166
d. Public Employees in Special Reorganizations §1.167
D. Consolidation, Dissolution, and Disincorporation §1.168
1. Types of Consolidation

a. Consolidation of Cities §1.169
b. Consolidation of Districts §1.170
2. Effects of Consolidation
a. Property Rights and Debts §1.171
b. Civil and Criminal Liability §1.172
c. Taxation §1.173
3. Effects of Dissolution/Disincorporation
4. Powers Cease §1.174
a. Debts Must Be Paid §1.175
b. Revenues Go to Successor §1.176
c. Public Property Must Be Returned §1.177
d. Effects of Reorganization Generally §1.178

III. INTERNAL ORGANIZATION OF CITIES
A. Forms of Government §1.179
1. Council/Manager §1.180
2. Council/Administrator §1.181
3. Strong Mayor §1.182
B. City Council
1. Qualification of Members §1.183
a. General Law Cities §1.184
b. Charter Cities §1.185
2. At-Large or District Elections §1.186
3. Oath of Office §1.187
4. Vacancies and Termination of Office §1.188
a. Vacancy Defined §1.189
b. Common Bases for Finding of Vacancy
(1) Resignation §1.190
(2) Non-residence §1.191
(3) Abandonment §1.192
(4) Incompatible Offices and Activities §1.193
(5) Accepting Free Transportation §1.194
(6) Recall §1.195
(7) Conviction §1.196
c. Filling Vacancies §1.197
(1) Limits on the Appointment Power §1.198
(2) Result of Appointment §1.199
5. Challenges to Right to Hold Office §1.200
6. De Facto Officers §1.201
C. Office of Mayor §1.202
1. Establishing/Eliminating the Office of Elected Mayor §1.203
2. Features of the Office of Elected Mayor
a. Authority §1.204
b. Salary §1.205
c. Making Appointments §1.206
3. Mayor Pro Tempore §1.207
D. Compensation and Expenses
1. Strict Construction §1.208
a. Gifts of Public Funds §1.209
b. Ethics Training §1.210
2. Compensation §1.211
a. Salary Adjustments §1.212
b. Compensation for Service on Other Commissions, Committees, Boards, or Authorities §1.213
c. Compensation for Attendance Beyond Certain Meetings §1.214
3. Expenses §1.215
a. Expenses for Meals for Third Parties §1.216
b. Expenses of Council Spouses §1.217
c. Flat Expense Allowances §1.218
4. Benefits §1.219
E. Limitations on the Right to Hold Office §1.220
1. Analyzing Limitations on the Right to Hold Public Office §1.221
2. Term Limitations in Cities §1.222
F. Conduct of Council Members
1. Rights and Roles of Council Members §1.223
2. Public Decorum §1.224

3. Enforcement of Decorum §1.225
4. Censure §1.226
G. Exercise of Legislative Authority §1.227
1. Distinction Between Ordinances and Resolutions §1.228
2. Ordinances §1.229
a. Authority §1.230
b. Effect §1.231
c. Validity §1.232
d. Permissible Subjects §1.233
e. Severability Clauses §1.234
f. Ordinance Procedure
(1) Drafting Ordinances §1.235
(2) Adopting Ordinances §1.236
g. Effective Date
(1) Generally on 31st Day After Adoption §1.237
(2) Certain Ordinances Take Effect Immediately §1.238
h. Publication of Ordinance §1.239
i. Adoption by Reference §1.240
j. Penalty for Violation of Ordinance §1.241
k. Amendment or Repeal of Ordinance §1.242
3. Resolutions §1.243
a. Resolutions as Ordinances §1.244
b. Permissible Subjects for Resolutions §1.245
c. Procedure for Adopting Resolutions §1.246
d. Effective Date §1.247
4. Minute Order or Motion §1.248
H. Appointed Commissions and Boards §1.249
1. Methods of Selection §1.250
2. Qualifications §1.251
3. Removal §1.252
4. Compensation §1.253
5. Delegation of Authority §1.254
I. Officials: Powers and Duties
1. City Manager §1.255
2. City Attorney §1.256
3. City Clerk §1.257
4. City Treasurer §1.258
5. Police Chief §1.259
6. Fire Chief §1.260

© The Regents of the University of California

§1.1 I. INTRODUCTION

A municipal corporation is a public corporation, created for public purposes. *City of San Francisco v Canavan* (1872) 42 C 541, 558 (citing *Payne & Dewey v Treadwell* (1860) 16 C 221, 233). The state may create, expand, diminish, or abolish municipal corporations and other public corporations subject only to the state's own laws and the California Constitution. *Weber v City Council* (1973) 9 C3d 950, 957, 109 CR 553. "Every city organized under this part shall have a name, and by such name has perpetual succession, and may sue and be sued. It shall have a common seal, alterable at the pleasure of the legislative body." Govt C §34501.

The legislature must prescribe uniform procedures for formation of cities. Cal Const art XI, §2. Once formed, a city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general law. Cal Const art XI, §7. General laws have a uniform statewide operation and generally prohibit local or special legislation. Cal Const art IV, §16.

For further information on municipal corporations, see California Government Tort Liability Practice (4th ed Cal CEB 1999); California Land Use Practice (Cal CEB 2006); Condemnation Practice in California (3d ed Cal CEB 2005).

© The Regents of the University of California

A. Distinction Between Cities, Counties, and Other Local Agencies

§1.2 1. Counties Are State Agents

Counties are expressly designated as political subdivisions of the state in the California Constitution. See Cal Const art XI, §1(a). See also Govt C §23002 ("The several existing counties of the State and such other counties as are hereafter organized are legal subdivisions of the State"); *People ex rel Younger v County of El Dorado* (1971) 5 C3d 480, 491, 96 CR 553 (counties have also been declared public corporations or quasi-corporations). A major function of counties is to assist the state in administering state programs. See *County of Marin v Superior Court* (1960) 53 C2d 633, 638, 2 CR 758 (counties were created to advance state policies in areas of finance, education, social welfare, transportation, and administration of justice); *Wilkinson v Lund* (1929) 102 CA 767, 772, 283 P 385 (noting county is governmental agency of state exercising some of powers of state government). See also *Central Pac. Ry. Co. v Costa* (1927) 84 CA 577, 586, 258 P 991.

© The Regents of the University of California

A. Distinction Between Cities, Counties, and Other Local Agencies

§1.2 1. Counties Are State Agents

Counties are expressly designated as political subdivisions of the state in the California Constitution. See Cal Const art XI, §1(a). See also Govt C §23002 ("The several existing counties of the State and such other counties as are hereafter organized are legal subdivisions of the State"); *People ex rel Younger v County of El Dorado* (1971) 5 C3d 480, 491, 96 CR 553 (counties have also been declared public corporations or quasi-corporations). A major function of counties is to assist the state in administering state programs. See *County of Marin v Superior Court* (1960) 53 C2d 633, 638, 2 CR 758 (counties were created to advance state policies in areas of finance, education, social welfare, transportation, and administration of justice); *Wilkinson v Lund* (1929) 102 CA 767, 772, 283 P 385 (noting county is governmental agency of state exercising some of powers of state government). See also *Central Pac. Ry. Co. v Costa* (1927) 84 CA 577, 586, 258 P 991.

© The Regents of the University of California

2. Cities' Relationship to the State

§1.3 a. Establishment of Cities

Cities have not been designated as political subdivisions of the state in either the California Constitution or statute. Cities are created as instruments of local self-government for the residents of cities under uniform procedures established by the legislature. Cal Const art XI, §2; Govt C §§56000-57550. Once established, cities have certain constitutional authority to govern local affairs, but remain subject to general law. Cal Const art XI, §§5, 7. Thus, cities may assist the state in providing government services. See, *e.g., Arques v City of Sausalito* (1954) 126 CA2d 403, 406, 272 P2d 58 (municipal corporations exercise part of state sovereignty in management and control over streets). Cities may be treated as political subdivisions of the state for certain federal law purposes. See *City of S. Lake Tahoe v California Tahoe Reg'l Planning Agency* (9th Cir 1980) 625 F2d 231, 233, cert denied (1980) 449 US 1039 (cities considered political subdivision of state for federal standing purposes).

© The Regents of the University of California

§1.4 b. Limitations on Legislature's Power Over Cities

The constitution limits the power of the legislature to interfere with the governance of cities. In addition to the requirement that the powers granted to cities by Cal Const art XI, §7 be limited only by general laws (see §1.3), two important limitations are the prohibition against local or special legislation found in Cal Const art IV, §16 and the prohibition against delegation of municipal powers to a private person or other legal entity found in Cal Const art XI, §11(a).

© The Regents of the University of California

2. Cities' Relationship to the State

§1.3 a. Establishment of Cities

Cities have not been designated as political subdivisions of the state in either the California Constitution or statute. Cities are created as instruments of local self-government for the residents of cities under uniform procedures established by the legislature. Cal Const art XI, §2; Govt C §§56000-57550. Once established, cities have certain constitutional authority to govern local affairs, but remain subject to general law. Cal Const art XI, §§5, 7. Thus, cities may assist the state in providing government services. See, *e.g., Arques v City of Sausalito* (1954) 126 CA2d 403, 406, 272 P2d 58 (municipal corporations exercise part of state sovereignty in management and control over streets). Cities may be treated as political subdivisions of the state for certain federal law purposes. See *City of S. Lake Tahoe v California Tahoe Reg'l Planning Agency* (9th Cir 1980) 625 F2d 231, 233, cert denied (1980) 449 US 1039 (cities considered political subdivision of state for federal standing purposes).

© The Regents of the University of California

§1.4 b. Limitations on Legislature's Power Over Cities

The constitution limits the power of the legislature to interfere with the governance of cities. In addition to the requirement that the powers granted to cities by Cal Const art XI, §7 be limited only by general laws (see §1.3), two important limitations are the prohibition against local or special legislation found in Cal Const art IV, §16 and the prohibition against delegation of municipal powers to a private person or other legal entity found in Cal Const art XI, §11(a).

© The Regents of the University of California

§1.5 (1) Prohibition Against Special Legislation

The legislature may not enact local or special legislation when general law can be made applicable. Cal Const art IV, §16. This provision has been construed as the substantial equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution. *City of Los Angeles v State* (1982) 138 CA3d 526, 533 n2, 187 CR 893. It generally precludes the legislature from singling out a specific city for individualized treatment. However, a statute that applies to a class of cities that includes only one city may be sustained so long as the individualized treatment bears a rational relationship to a legitimate state purpose. *City of Los Angeles v State,* 138 CA3d at 534; *Pasadena v Stimson* (1891) 91 C 238, 251, 27 P 604; *White v State* (2001) 88 CA4th 298, 305, 105 CR2d 714. For example, it is common practice to use population as a basis for the determination of areas in which particular requirements must apply. *Keenan v San Francisco Unified Sch. Dist.* (1950) 34 C2d 708, 713, 214 P2d 382. The legislature may establish other reasonable classifications among cities and prescribe different powers and regulations for each of the classes. However, the powers and regulations must be uniform within each of the classes. *In re Application of Jacobson* (1936) 16 CA2d 497, 500, 60 P2d 1001. Further, if the classification goes beyond designation by a general classification, and effectively results in singling out a particular city, then the law is no longer a general law. *Desmond v Dunn* (1880) 55 C 242, 250.

© The Regents of the University of California

§1.5 (1) Prohibition Against Special Legislation

The legislature may not enact local or special legislation when general law can be made applicable. Cal Const art IV, §16. This provision has been construed as the substantial equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution. *City of Los Angeles v State* (1982) 138 CA3d 526, 533 n2, 187 CR 893. It generally precludes the legislature from singling out a specific city for individualized treatment. However, a statute that applies to a class of cities that includes only one city may be sustained so long as the individualized treatment bears a rational relationship to a legitimate state purpose. *City of Los Angeles v State,* 138 CA3d at 534; *Pasadena v Stimson* (1891) 91 C 238, 251, 27 P 604; *White v State* (2001) 88 CA4th 298, 305, 105 CR2d 714. For example, it is common practice to use population as a basis for the determination of areas in which particular requirements must apply. *Keenan v San Francisco Unified Sch. Dist.* (1950) 34 C2d 708, 713, 214 P2d 382. The legislature may establish other reasonable classifications among cities and prescribe different powers and regulations for each of the classes. However, the powers and regulations must be uniform within each of the classes. *In re Application of Jacobson* (1936) 16 CA2d 497, 500, 60 P2d 1001. Further, if the classification goes beyond designation by a general classification, and effectively results in singling out a particular city, then the law is no longer a general law. *Desmond v Dunn* (1880) 55 C 242, 250.

© The Regents of the University of California

§1.6 (2) Prohibition Against Legislative Delegation of Municipal Authority

The legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with city improvements, money, or property, or levy taxes or assessments, or perform municipal functions. Cal Const art XI, §11. The legislature may, however, authorize the deposit of public money in banks and other financial institutions and the investment of public money. Thus, for example, the legislature cannot delegate the municipal function of setting employee salaries to an arbitration panel. *County of Riverside v Superior Court (Riverside Sheriff's Ass'n)* (2003) 30 C4th 278, 132 CR2d 713. The test of whether an entity to which the legislature seeks to delegate authority is a public or private entity depends on case-by-case evaluation of applicable executive and legislative controls. *California Ass'n of Retail Tobacconists v State* (2003) 109 CA4th 792, 817, 135 CR2d 224.

The constitutional prohibition against delegation of municipal authority does not apply when it is the local agency, not the legislature, that is doing the delegation. 109 CA4th at 828. Delegation of municipal authority by a city itself, although not governed by the provisions of the constitution, is subject to the settled rule against delegation of legislative power. Generally, a city may delegate specific administrative power to subordinate boards or persons subject to imposition of standards that constrain the discretion of the board or person. See, *e.g., Pacific Legal Found. v Brown* (1981) 29 C3d 168, 201, 172 CR 487; *Bagley v City of Manhattan Beach* (1976) 18 C3d 22, 26, 132 CR 668; *Kugler v Yocum* (1968) 69 C2d 371, 71 CR 687.

© The Regents of the University of California

§1.6 (2) Prohibition Against Legislative Delegation of Municipal Authority

The legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with city improvements, money, or property, or levy taxes or assessments, or perform municipal functions. Cal Const art XI, §11. The legislature may, however, authorize the deposit of public money in banks and other financial institutions and the investment of public money. Thus, for example, the legislature cannot delegate the municipal function of setting employee salaries to an arbitration panel. *County of Riverside v Superior Court (Riverside Sheriff's Ass'n)* (2003) 30 C4th 278, 132 CR2d 713. The test of whether an entity to which the legislature seeks to delegate authority is a public or private entity depends on case-by-case evaluation of applicable executive and legislative controls. *California Ass'n of Retail Tobacconists v State* (2003) 109 CA4th 792, 817, 135 CR2d 224.

The constitutional prohibition against delegation of municipal authority does not apply when it is the local agency, not the legislature, that is doing the delegation. 109 CA4th at 828. Delegation of municipal authority by a city itself, although not governed by the provisions of the constitution, is subject to the settled rule against delegation of legislative power. Generally, a city may delegate specific administrative power to subordinate boards or persons subject to imposition of standards that constrain the discretion of the board or person. See, *e.g., Pacific Legal Found. v Brown* (1981) 29 C3d 168, 201, 172 CR 487; *Bagley v City of Manhattan Beach* (1976) 18 C3d 22, 26, 132 CR 668; *Kugler v Yocum* (1968) 69 C2d 371, 71 CR 687.

© The Regents of the University of California

§1.7 3. Charter Counties Versus Charter Cities

Charter cities enjoy more autonomy than charter counties do. See *Johnson v Bradley* (1992) 4 C4th 389, 405, 14 CR2d 470 (noting constitutional provisions relating to charter counties contain no general reservation of local autonomy and no grant of "plenary" authority over local election matters and quoting Sato, *"Municipal Affairs" in California,* 60 Cal L Rev 1055, 1115 (1972)).

© The Regents of the University of California

§1.7 3. Charter Counties Versus Charter Cities

Charter cities enjoy more autonomy than charter counties do. See *Johnson v Bradley* (1992) 4 C4th 389, 405, 14 CR2d 470 (noting constitutional provisions relating to charter counties contain no general reservation of local autonomy and no grant of "plenary" authority over local election matters and quoting Sato, *"Municipal Affairs" in California,* 60 Cal L Rev 1055, 1115 (1972)).

© The Regents of the University of California

§1.8 4. Special Districts

Special districts are public corporations formed to perform particular governmental functions within a specific territory. Such districts first appeared in California after the legislature passed the Wright Act of 1887 (Stats 1887, ch 29) to establish a system of irrigation districts. The first special district formed in California was the Turlock Irrigation District in Stanislaus County.

Special districts may be created under general law or, under appropriate circumstances, a special act. *American River Flood Control Dist. v Sweet* (1932) 214 C 778, 782, 7 P2d 1030; *South Santa Clara Valley Water Conserv. Dist. v Santa Clara Valley Water Dist.* (1978) 76 CA3d 852, 143 CR 193. Special districts have only those powers conferred on them by the legislature. *Los Angeles County Flood Control Dist. v Southern Cal. Edison Co.* (1958) 51 C2d 331, 339, 333 P2d 1; *In re Bonds of Madera Irrig. Dist.* (1891) 92 C 296, 315, 28 P 272; *Turlock Irrig. Dist. v Hetrick* (1999) 71 CA4th 948, 84 CR2d 175. Examples of government services provided by special districts include: fire protection, public education, health care, parks and recreation, water, sewer, power, and transportation. Establishment of special districts does not violate the constitutional prohibition against delegation of municipal powers to private bodies. *Joint Highway Dist. No. 13 v Hinman* (1934) 220 C 578, 584, 32 P2d 144. See §1.6. Special districts have been variously characterized as "public corporations," "municipal corporations," "quasi-municipal corporations," "state agencies," "public agencies," "agencies or auxiliaries of the state," and by a variety of other descriptions, depending on the purpose for which the classification is being made. *Turlock Irrig. Dist. v Hetrick,* 71 CA4th at 952. Regardless of classification, such districts have only those limited powers specified by the legislature. *Turlock Irrig. Dist. v Hetrick, supra*. The distinction between cities and special districts is thoroughly discussed in *People ex rel City of Downey v Downey County Water Dist.* (1962) 202 CA2d 786, 796, 21 CR 370.

On special districts, see §1.72.

© The Regents of the University of California

B. Legal Foundation of Cities

§1.9 1. Constitutional Foundation

"The Legislature shall prescribe uniform procedure for city formation and provide for city powers." Cal Const art XI, §2(a). Municipalities receive their power from the California Constitution and/or applicable general laws. *Long v City of Fresno* (1964) 225 CA2d 59, 65, 36 CR 886.

© The Regents of the University of California

§1.10 2. Laws Governing City Formation

Procedures for city formation and annexation of territories to cities are governed by the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000. See Govt C §§56000-57550. See also *County of Los Angeles v City Council of the City of Lawndale* (1962) 202 CA2d 20, 25, 20 CR 363; *County of San Mateo v City Council of Palo Alto* (1959) 168 CA2d 220, 221, 335 P2d 1013 (annexation of territory to city is governed by general laws of state and is not municipal affair). On procedures for organization and reorganization of cities, see §§1.107-1.178.

© The Regents of the University of California

§1.11 3. Classes of Cities

The California Government Code classifies cities as charter or general law cities. See Govt C §§34100-34102. General law cities derive their corporate powers from general laws enacted by the legislature. See generally *Irwin v City of Manhattan Beach* (1966) 65 C2d 13, 51 CR 881. Charter cities, on the other hand, derive their corporate powers directly from the constitution, subject to limitations of their respective charters and enactments of the legislature on matters of statewide concern. See *Johnson v Bradley* (1992) 4 C4th 389, 394, 14 CR2d 470 (discussing historic foundations of home rule in California).

© The Regents of the University of California

§1.12 a. General Law Cities

General law cities are organized as provided in the California Government Code. See Govt C §34102. The term "city" includes a city and county and an incorporated town. Govt C §20. By ordinance, general law municipalities may change their corporate name from city to town or from town to city. Govt C §§34502-34504. Any city may enact, amend, or repeal a charter for its own government. Govt C §34450.

NOTE: Some Government Code provisions apply only to general law cities (see, *e.g.,* Govt C §36501 (governing officers and employees)), and others apply to both general law and charter cities. See, *e.g.,* Govt C §34090 (on destruction of city records).

Cities organized under the laws of the state are subject to all constraints imposed by the general law, even those applicable to municipal affairs. Such cities have those powers conferred by the California Constitution, including the "police power" and those powers conferred by state law. See Cal Const art XI, §7.

General law establishes the organizational structure of general law cities. See, *e.g.,* Govt C §§34851-34906 (providing for alternative forms of government), 36501 (requiring general law cities to be governed by city council of five members, city clerk, city treasurer, police chief, fire chief, and such subordinate officers or employees as required by law). General law cities may also, by vote of the people, exercise the option to be governed by a council of from four to nine council members "by" or "from" districts and to impose term limits on council membership. Govt C §§34871, 36502.

© The Regents of the University of California

§1.13 b. Charter Cities

A charter is a written document, approved by the electorate, which operates as a "constitution" for the adopting city. The provisions of Cal Const art XI, §3(a) authorize the adoption of a city charter and provide that such a charter has the force and effect of state law. Charter cities have the power to make and enforce all ordinances and regulations with respect to municipal affairs, including those relating to the creation and regulation of a police force and sub-government within the city, the conduct of city elections, and the dealings with municipal officers and employees. Cal Const art XI, §5(b). Charters act as instruments of limitation on the broad power of charter cities over matters of municipal affairs. *City of Glendale v Trondsen* (1957) 48 C2d 93, 98, 308 P2d 1.

The provisions of Cal Const art XI, §5(a), the "home rule" provision, affirmatively grant charter cities supremacy over "municipal affairs," *i.e.,* a city charter is subject only to conflicting provisions in the state or federal constitutions and preemptive state law on matters of statewide concern.

NOTE: What was once a matter of local concern can later become a matter of statewide concern, controlled by the general laws of the state. *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 13, 283 CR 569 (rejecting static and compartmentalized description of "municipal affairs"); *Codding Enters. v City of Merced* (1974) 42 CA3d 375, 377, 116 CR 730.

Charters are effective when filed with the Secretary of State; the charter must also be published in the official state statutes. Amendments, revisions, and repeal of a charter are handled in the same manner as adoption of a charter. An amendment or repeal to a charter may be proposed by the governing body or by initiative; the governing body's consent is not needed in the case of an initiative. *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 143, 130 CR 465.

© The Regents of the University of California

§1.14 C. Constitutional Grants of Municipal Authority

The California Constitution contains a number of grants of power to cities. On constitutional limits to many of these powers, see §§1.32-1.69.

© The Regents of the University of California

§1.15 1. Police Power

Any city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. Cal Const art XI, §7. The word "police" is derived from the Greek word "polis" meaning "city." McQuillin, Municipal Corporations §24.02 (3d rev ed 1988). The term "police power," in its original and most comprehensive meaning, denotes the power of government in every sovereignty, the power to govern persons and things. *Munn v Illinois* (1877) 94 US 113, 125, 24 L Ed 77, 84. The police power of a state is its right to adopt regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. *Chicago, B. & Q. Ry. Co. v Illinois* (1906) 200 US 561, 592, 50 L Ed 596, 26 S Ct 341.

© The Regents of the University of California

§1.16 a. Scope of Police Power

The legislative power of a city under Cal Const art XI, §7, within its boundaries, is as broad as that of the state legislature, subject only to limitations of general law. *Candid Enters., Inc. v Grossmont Union High Sch. Dist.* (1985) 39 C3d 878, 885, 218 CR 303; *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 140, 130 CR 465; *Carlin v City of Palm Springs* (1971) 14 CA3d 706, 711, 92 CR 535. The police power "is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race." *Miller v Board of Pub. Works* (1925) 195 C 477, 485, 234 P 381. The exercise of police power must:

- Be reasonably related to a legitimate governmental purpose. *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 159, 130 CR 465. See *Consolidated Rock Prods. Co. v City of Los Angeles* (1962) 57 C2d 515, 522, 20 CR 638 (there must be reasonable basis in fact to support legislative determination of regulation's wisdom and necessity); and
- Have reasonable tendency to promote the public health, morals, safety, or general welfare of the community. *Carlin v City of Palm Springs* (1971) 14 CA3d 706, 711, 92 CR 535 (city has broad discretion in determining what is reasonable in endeavoring to protect public health, safety, morals, and general welfare of community).

© The Regents of the University of California

§1.17 b. Preemption

The California Constitution's grant of broad police power to cities also imposes a limitation on the exercise of that power; local laws may not conflict with "general" or state laws. See Cal Const art XI, §7. When such general laws are adopted, the state law is said to have "preempted" the power of a city to adopt a local law. For example, the state has exclusive power to regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages. Cal Const art XX, §22. Thus, local regulation is constitutionally preempted and is subject to legislative authorization.

On the federal preemption doctrine, see §§1.33-1.41.

© The Regents of the University of California

§1.18 c. Penalties

A city has authority to impose criminal or civil penalties to ensure obedience to its regulations; however, those penalties must not be "oppressive" or "unreasonable." *Hale v Morgan* (1978) 22 C3d 388, 398, 149 CR 375.

© The Regents of the University of California

§1.19 2. Taxing Power

Taxation is the power of the government to raise revenue for public purposes. *City of Madera v Black* (1919) 181 C 306, 310, 184 P 397; *Perry v Washburn* (1862) 20 C 318, 350. Local governments may impose taxes authorized by the legislature. See Cal Const art XIII, §24.

On taxation power, see chap 5.

© The Regents of the University of California

§1.20 a. Scope of Taxing Power

Charter authority is comprehensive enough to provide for the levying of taxes for municipal purposes without the specific delegation of authority from the legislature. *Ex Parte Braun* (1903) 141 C 204, 74 P 780; *Security Sav. Bank & Trust Co. v Hinton* (1893) 97 C 214, 32 P 3. Historically, taxation has been considered to be a municipal affair for charter cities (*West Coast Adver. Co. v San Francisco* (1939) 14 C2d 516, 95 P2d 138), subject to control by the legislature on matters of statewide concern. *California Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 283 CR 569. A general law city, with certain limitations, may levy any tax that a charter city may levy. Govt C §37100.5. State law may specifically exempt certain matters from taxes levied by general law cities. See, *e.g.,* Rev & T C §7282 (no occupancy tax on state park campsites).

NOTE: The state legislature may not impose taxes for local purposes but may authorize local governments to impose them. Cal Const art XIII, §24.

© The Regents of the University of California

§1.21 b. Compared to Police Power

The power to regulate is different from the power to generate revenue. The power to impose regulatory fees is not dependent on a legislatively authorized taxing power but exists under the police power. *Mills v County of Trinity* (1980) 108 CA3d 656, 662, 166 CR 674. However, a requirement for payment for a particular municipal service, such as solid waste disposal, may be considered an exercise of the police power or the taxation power. See *City of Glendale v Trondsen* (1957) 48 C2d 93, 103, 308 P2d 1.

© The Regents of the University of California

§1.22 3. Eminent Domain Power

A municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by law. *City of Menlo Park v Artino* (1957) 151 CA2d 261, 266, 311 P2d 135; *City & County of San Francisco v Ross* (1955) 44 C2d 52, 55, 279 P2d 529. The source of government's general eminent domain power is Cal Const art I, §19. The constitutional derivation of the eminent domain means a city cannot contract away the power of eminent domain. *Glendale v Superior Court* (1993) 18 CA4th 1768, 1778, 23 CR2d 305.

On eminent domain power, see chap 8.

© The Regents of the University of California

§1.23 4. Public Works Power

Cities may establish, purchase, and operate public works to furnish residents with light, water, power, heat, transportation, or means of communication. Cal Const art XI, §9. It is a self-executing grant of power. *City of Mill Valley v Saxton* (1940) 41 CA2d 290, 294, 106 P2d 455. The courts have extended this provision to airports. *City & County of San Francisco v Western Air Lines, Inc.* (1962) 204 CA2d 105, 126, 22 CR 216; *Pipes v Hilderbrand* (1952) 110 CA2d 645, 647, 243 P2d 123.

NOTE: The constitutional grant of authority does not obligate a city to establish a municipal utility. See, *e.g., Glenbrook Dev. Co. v City of Brea* (1967) 253 CA2d 267, 274, 61 CR 189 (dealing with water services).

© The Regents of the University of California

§1.24 a. Scope of Public Works Power

A city may furnish public works services outside its boundaries, except within another municipal corporation that furnishes the same service and does not consent. Cal Const art XI, §9(a). A city may establish conditions and regulations for persons or corporations that establish and provide these services. Cal Const art XI, §9(b).

© The Regents of the University of California

§1.25 b. Municipal Utilities

Publicly owned municipal utilities are a proprietary activity, but they are not regulated by the Public Utilities Commission or any other supervising agency absent a legislative grant of authority under Cal Const art XI, §9 and Govt C §39732. *American Microsystems, Inc. v City of Santa Clara* (1982) 137 CA3d 1037, 1042, 187 CR 550. See generally Pub Util C §§10001-10303 (general laws relating to municipally owned utilities). A municipal utility is delegated certain powers of government; only in reference to those delegated powers will it be regarded as a governmental entity. *Davoust v City of Alameda* (1906) 149 C 69, 71, 84 P 760. Generally, in the conduct of its proprietary functions, it is to be treated as a private entity. See also *Ravettino v City of San Diego* (1945) 70 CA2d 37, 42, 160 P2d 52; *Logan v City of Glendale* (1933) 132 CA 169, 170, 22 P2d 552.

Rates charged by a municipally owned utility must be fair, reasonable, just, uniform, and nondiscriminatory; reasonable discretion is given to the officers whose duty it is to fix rates. *American Microsystems, Inc. v City of Santa Clara* (1982) 137 CA3d 1037, 1042, 187 CR 550. The person challenging the rate has the burden to show it is unreasonable or unfair. *Hansen v City of San Buenaventura* (1986) 42 C3d 1172, 1180, 233 CR 22. In certain situations, a municipality may charge out-of-city users a higher rate than city users pay. 42 C3d 1172 at 1184 (city entitled to rate of return on water services to non-city residents). See also *Howard Jarvis Taxpayers Ass'n v City of Roseville* (2002) 97 CA4th 637, 649, 119 CR2d 91 ("*Hansen*'s observations, however, were made 10 years before Proposition 218 added article XIII D to the state Constitution").

On municipal utilities, see chap 6.

© The Regents of the University of California

§1.26 5. Corporate Power

A municipal corporation has the power "to do everything necessarily incident to a proper discharge of its public functions but no right to do more can be implied, and in the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals." *Ravettino v City of San Diego* (1945) 70 CA2d 37, 44, 160 P2d 52. The concept of the public welfare is extremely broad; thus, cities may engage in a wide variety of enterprises that may also be provided by private persons. Further, cities have significant latitude in the management and disposal of public property for the common benefit.

On management of public property, see chap 8.

© The Regents of the University of California

§1.27 a. General Law Cities

A general law city has only those corporate powers expressly conferred on it by the constitution or legislature, together with such powers as are "necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation." *Irwin v City of Manhattan Beach* (1966) 65 C2d 13, 20, 51 CR 881; *Wiltshire v Superior Court* (1985) 172 CA3d 296, 302, 218 CR 199.

NOTE: *Irwin v City of Manhattan Beach, supra,* is a restatement of the traditional "Dillon's Rule" of the powers of subordinate governments. With respect to matters within the scope of city power granted by Cal Const art XI, §7, its holding is difficult to reconcile with later cases describing the broad scope of the police power. See §§1.15-1.18.

"Implied powers" includes those powers that "arise by natural implication from the grant of express powers, or by necessary inference from the purposes or functions of the municipality." Rhyne, The Law of Local Government Operations §4.7 at 65 (1980). See also *Frisbee v O'Connor* (1932) 119 CA 601, 7 P2d 316.

© The Regents of the University of California

§1.28 b. Charter Cities

By virtue of Cal Const art XI, §5, corporate powers are a municipal affair for charter cities that are to be "free from legislative interference with respect to matters of local or internal concern." *Butterworth v Boyd* (1938) 12 C2d 140, 147, 82 P2d 434.

© The Regents of the University of California

§1.29 (1) Constitutional Basis of "Municipal Affairs" Doctrine

The provisions of Cal Const art XI, §5 generally vest charter cities with plenary authority over municipal affairs, free from any constraint imposed by the general law and subject only to constitutional limitations. See *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 12, 283 CR 569; *Bishop v City of San Jose* (1969) 1 C3d 56, 62, 81 CR 465; *Ex Parte Braun* (1903) 141 C 204, 209, 74 P 780. However, in addition to explicitly granting sovereignty over municipal affairs, the home rule provision also implicitly recognizes state legislative supremacy over matters that are not municipal affairs and are, instead, "statewide concerns." *California Fed. Sav. & Loan Ass'n*, 54 C3d at 13.

© The Regents of the University of California

§1.30 (2) "Municipal Affair" Defined

There is no exact definition of the term "municipal affairs," and what is deemed a municipal affair may change over time as conditions in society change. *Committee of Seven Thousand v Superior Court* (1988) 45 C3d 491, 505, 247 CR 362; *Bishop v City of San Jose* (1969) 1 C3d 56, 62, 81 CR 465; *Isaac v City of Los Angeles* (1998) 66 CA4th 586, 599, 77 CR2d 752. Whether a given activity is a municipal affair, over which a charter city has sovereignty, or a statewide concern, over which the legislature has authority, is an issue for the courts that depends on the facts and circumstances of each particular case. The terms "municipal affair" and "statewide concern" are "ultimate legal conclusions rather than factual descriptions." *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 17, 283 CR 569. A matter is of statewide concern rather than only a municipal affair when its impact is "primarily regional," even if its impacts are not truly statewide. *Committee of Seven Thousand,* 45 C3d at 505 (although construction of local roads has been considered local concern, construction of major highways is not).

© The Regents of the University of California

§1.31 (3) Relationship to Preemption

The issue of whether an area is a "municipal affair" is part of the overall preemption analysis for charter cities. The threshold inquiry is whether a conflict exists between a charter city law and a state law. If no conflict exists, the charter city law stands. If an actual conflict exists, the court will find the matter is a municipal affair unless it qualifies as a matter of statewide concern. Even if the subject matter is one of statewide concern, the state law must be reasonably related and narrowly tailored to addressing that statewide concern. See *Johnson v Bradley* (1992) 4 C4th 389, 14 CR2d 470; *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 283 CR 569.

© The Regents of the University of California

D. Constitutional Limits on Municipal Authority

§1.32 1. Public Purpose

Exercise of the police power must be reasonably related to a legitimate governmental purpose. *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 159, 130 CR 465. A reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity must exist. *Consolidated Rock Prods. Co. v City of Los Angeles* (1962) 57 C2d 515, 522, 20 CR 638.

© The Regents of the University of California

§1.33 2. Federal Preemption Doctrine

Under the supremacy clause of the United States Constitution, state laws that interfere or conflict with federal law are "preempted" or invalid. US Const art V, cl 2; *Wisconsin Pub. Intervenor v Mortier* (1991) 501 US 597, 604, 115 L Ed 2d 532, 111 S Ct 2476 (citing *Gibbons v Ogden* (1824) 22 US 1, 6 L Ed 23). This doctrine is referred to as the federal preemption doctrine. See *Garcia v San Antonio Metro. Transit Auth.* (1985) 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005.

Federal preemption analysis is generally the same for state and local laws. *Wisconsin Pub. Intervenor v Mortier* (1991) 501 US 597, 605, 115 L Ed 2d 532, 111 S Ct 2476 (citing *Hillsborough County v Automated Med. Labs., Inc.* (1985) 471 US 707, 85 L Ed 2d 714, 105 S Ct 2371, and *City of Burbank v Lockheed Air Terminal, Inc.* (1973) 411 US 624, 36 L Ed 2d 547, 93 S Ct 1854). Federal law may preempt a state or local law in one of two general ways (*Crosby v National Foreign Trade Council* (2000) 530 US 363, 372, 147 L Ed 2d 352, 120 S Ct 2288):

(1) Congress demonstrates its intent to occupy the field of regulation and supplant state or local authority; or

(2) State or local law conflicts with federal law by making it impossible to comply with federal law or by creating an obstacle to the goal of the federal law.

The key focus of any preemption analysis is to ascertain congressional intent and the purpose of the allegedly preemptive law. *Cipollone v Liggett Group, Inc.* (1992) 505 US 504, 120 L Ed 2d 407, 112 S Ct 2608; *E. I. Malone v White Motor Corp.* (1978) 435 US 497, 504, 55 L Ed 2d 443, 98 S Ct 1185. Congressional intent to preempt state legislation is not presumed. Historic police power regulation is not assumed to be invalidated by federal law unless that was the "clear and manifest purpose of Congress." *Columbus v Ours Garage & Wrecker Serv., Inc.* (2002) 536 US 424, 432, 153 L Ed 2d 430, 122 S Ct 2226 (citing *Wisconsin Pub. Intervenor v Mortier* (1991) 501 US 597, 606, 115 L Ed 2d 532, 111 S Ct 2476 (quoting *Rice v Santa Fe Elevator Corp.* (1947) 331 US 218, 230, 91 L Ed 1447, 67 S Ct 1146)). Congressional intent is evidenced by the language, structure, and purpose of the federal statute. *CSX Transp. v Easterwood* (1993) 507 US 658, 123 L Ed 2d 387, 113 S Ct 1732.

© The Regents of the University of California

§1.34 a. Preemption Due to Occupation of Field

Federal intent to supplant local regulation may be expressly stated in the terms of the federal statute, or may be implied in the following circumstances (*Wisconsin Pub. Intervenor v Mortier* (1991) 501 US 597, 604, 115 L Ed 2d 532, 111 S Ct 2476):

- a scheme of federal regulation is so pervasive as to leave no room for local regulation;
- the federal interest is so dominant the federal system will be assumed to preclude enforcement of state laws on the same subject; or
- the goals "sought to be obtained" and the "obligations imposed" by the federal statute reveal a purpose to preclude state authority. A city cannot impose conditions on a subject matter within its authority if the conditions interfere with the federal regulatory scheme. *Golden State Transit Corp. v City of Los Angeles* (1989) 493 US 103, 107 L Ed 2d 420, 110 S Ct 444.

A state law that regulates in an area just outside the preempted field is valid, unless Congress intended that the particular activity be unregulated. For example, some labor practices have been left unregulated, to be controlled by economic forces. These areas are not open to state or local government regulation. *Machinists v Wisconsin Employment Relations Comm'n* (1976) 427 US 132, 49 L Ed 2d 396, 96 S Ct 2548. Another example is the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001-1461). Although ERISA preempts laws that "relates to" employee benefit plans, a law that requires the payment of severance benefits but does not require the establishment of an ongoing plan is not preempted. *Fort Halifax Packing Co. v Coyne* (1987) 482 US 1, 23, 96 L Ed 2d 1, 107 S Ct 2211.

NOTE: Federal regulations can also have a preemptive effect when Congress confers discretion on an administrator to implement a statute by the issuance of regulations intended to preempt state law. The preemption analysis focuses on whether the federal agency properly exercised the authority delegated to it by Congress. *City of New York v FCC* (1988) 486 US 57, 64, 100 L Ed 2d 48, 108 S Ct 1637; *Louisiana Pub. Serv. Comm'n v FCC* (1986) 476 US 355, 90 L Ed 2d 369, 106 S Ct 1890.

© The Regents of the University of California

§1.35 b. Preemption Due to Conflict With Federal Law

Preemption does not occur by mere fact that the state or local requirement is more demanding than the federal statute. State or local laws may impose regulatory requirements that are more stringent than federal requirements, but the state cannot completely exclude federally licensed commerce. More stringent state or local laws, however, may be preempted if it is physically impossible to comply with both the state or local law and the federal requirement or the subject area has been occupied or requires occupation by the federal government. *Florida Lime & Avocado Growers, Inc. v Paul* (1963) 373 US 132, 141, 10 L Ed 2d 248, 83 S Ct 1210.

PRACTICE TIP 1: Courts are more inclined to uphold state and local regulation when applying the federal preemption doctrine than they are inclined to uphold local regulation when applying the state preemption doctrine.

PRACTICE TIP 2: The courts look for an actual manifestation of affirmative congressional intent to occupy the field and do not seem to imply it easily, especially in the area of historic police power regulations.

PRACTICE TIP 3: City attorneys should create a record to: (1) demonstrate why the city's regulation achieves significant public purposes historically within the states' police power; (2) show why it is compatible with or furthers any existing federal laws in the area; and (3) identify any language in the federal statute, regulations, or legislative or regulatory history which recognizes or accepts related state or local regulation.

© The Regents of the University of California

§1.36 c. Preemption Due to Conflict With State General Law

A city may not enact local laws that conflict with "general" or state laws. Cal Const art XI, §7. Local legislation that conflicts with the general laws of the state is void. *Cohen v Board of Supervisors* (1985) 40 C3d 277, 290, 219 CR 467; *People ex rel Deukmejian v County of Mendocino* (1984) 36 C3d 476, 204 CR 897. A local law conflicts with state law within the meaning of Cal Const art XI, §7 if it either (1) duplicates, (2) contradicts, or (3) enters a field which has been fully occupied by state law, whether expressly or by legislative implication. *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 283 CR 569; *Candid Enters., Inc. v Grossmont Union High Sch. Dist.* (1985) 39 C3d 878, 885, 218 CR 303; *Bravo Vending v City of Rancho Mirage* (1993) 16 CA4th 383, 397, 20 CR2d 164.

NOTE: Charter cities are exempt from this restriction as to judicially declared "municipal affairs." *Johnson v Bradley* (1992) 4 C4th 389, 397, 14 CR2d 470; *Bishop v City of San Jose* (1969) 1 C3d 56, 61, 81 CR 465.

The mere fact that the state, in the exercise of its police power, has enacted certain regulations does not prohibit a municipality from imposing additional requirements. So long as no conflict exists between the two, the requirements of the municipal ordinance are not unreasonable or discriminatory, and the state has not preempted the field, both will stand. *California Rifle & Pistol Ass'n, Inc. v City of West Hollywood* (1998) 66 CA4th 1302, 78 CR2d 591.

© The Regents of the University of California

§1.37 (1) Duplication of State Law

The principle that local law may not "duplicate" state law is reiterated in many cases, but is best explained in *Pipoly v Benson* (1942) 20 C2d 366, 371, 125 P2d 482. According to that court, when the local law is identical to state law, there is an "inevitable conflict of jurisdiction," and because of this conflict, the local law is not valid "supplementary legislation," but conflicts with state law and is invalid. *Pipoly* also describes the duplicative local law as purporting to operate in a field occupied by the state law it duplicates. However, later cases treat occupation of a field by state law as a separate and independent basis for invalidating a local law on the basis that it is duplicative of state law. Duplication is not present when state and local laws are not coextensive. *Sherwin-Williams Co. v City of Los Angeles* (1993) 4 C4th 893, 897, 902, 16 CR2d 215 (state law regulating transfer and possession of aerosol paint and requiring retailers to post warning against vandalism does not duplicate and thus preempt local law regulating display of aerosol paint and broad-tipped marker pens; although both are graffiti prevention measures, they are "different in scope and substance").

For examples of local laws invalidated as duplicative of or substantially identical to state law, see *A & B Cattle Co. v City of Escondido* (1987) 192 CA3d 1032, 1043, 238 CR 580 (city licensing scheme regulating sale of materials marketed for use with illegal drugs is invalid because it substantially duplicated state drug paraphernalia law); *Cohen v Board of Supervisors* (1985) 40 C3d 277, 292, 219 CR 467 (provisions of local licensing scheme for escort services that prohibit escort from engaging in criminal conduct are invalid as duplicative of state criminal law, but remainder of licensing scheme is not preempted by state law). See also *O'Connell v City of Stockton* (2005) 128 CA4th 831, 27 CR3d 696 (court found that city ordinance was preempted by state's Uniform Controlled Substances Act (Health & S C §§11000-11651) in connection with civil forfeiture in drug trade, disagreeing with contrary holding in *Horton v City of Oakland* (2000) 82 CA4th 580, 98 CR2d 371).

© The Regents of the University of California

§1.38 (2) Contradiction of State Law

A local law contradicts state law when its purpose is inimical to the purpose of the state law (see *Ex Parte Daniels* (1920) 183 C 636, 641, 192 P 442); prohibits what the legislature intends to authorize (see *Northern Cal. Psychiatric Soc'y v City of Berkeley* (1986) 178 CA3d 90, 105, 223 CR 609); or otherwise fails to follow state mandates (see *Bank of the Orient v Town of Tiburon* (1990) 220 CA3d 992, 269 CR 690). The mere fact that the local law imposes restraints that the state law does not impose does not establish a conflict. "On the contrary the absence of a statutory restraint is the very occasion for municipal initiative." *Fisher v City of Berkeley* (1984) 37 C3d 644, 707, 209 CR 682, aff'd (1986) 475 US 260.

© The Regents of the University of California

§1.39 (3) State Law Occupies Field

State law may occupy a field either expressly or by implication. *Candid Enters., Inc. v Grossmont Union High Sch. Dist.* (1985) 39 C3d 878, 886, 218 CR 303. When the state law contains provisions that expressly declare the legislature's intent to preempt local regulation, a local law will be invalidated unless it is found to regulate a different "field" of regulation.

In determining whether the legislature has impliedly occupied or preempted a field to the exclusion of local regulation, the court must look at "the whole purpose and scope of the legislative scheme." *Candid Enters., Inc. v Grossmont Union High Sch. Dist., supra*. An intent to occupy the field will be found in any one of the following circumstances: "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality." *In re Hubbard* (1964) 62 C2d 119, 128, 41 CR 393, overruled in part on other grounds by *Bishop v City of San Jose* (1969) 1 C3d 56, 81 CR 465. See *Western Oil & Gas Ass'n v Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 C3d 408, 423, 261 CR 384; *Fisher v City of Berkeley* (1984) 37 C3d 644, 708, 209 CR 682, aff'd (1986) 475 US 260; *People ex rel Deukmejian v County of Mendocino* (1984) 36 C3d 476, 485, 204 CR 897.

Preemption will *not* be implied when

- the legislative scheme either permits or recognizes local regulation (*People ex rel Deukmejian,* 36 C3d at 485);
- there is a significant local interest that may differ from one locality to another (*Fisher,* 37 C3d at 707; *Gluck v County of Los Angeles* (1979) 93 CA3d 121, 133, 155 CR 435); or
- there is a long tradition of local regulation and a legislatively imposed duty to preserve and protect the public health (*Western Oil & Gas,* 49 C3d at 424; *People ex rel Deukmejian,* 36 C3d at 484).

© The Regents of the University of California

§1.40 d. Defining the Preempted Field

Because a local law can be invalidated as preempted only when it regulates the same "field" in which the legislature has evinced its intent to occupy, either expressly or by implication (see §1.39), the way in which the relevant field is described is often crucial to the result: a narrow definition of the field limits the preemptive effect of state law, and a broad definition increases its preemptive reach. *Candid Enters., Inc. v Grossmont Union High Sch. Dist.* (1985) 39 C3d 878, 886 n4, 218 CR 303; *California Water & Tel. Co. v County of Los Angeles* (1967) 253 CA2d 16, 27, 61 CR 618.

In defining a "field" for purposes of preemption, apply a patterned approach, *i.e.,* a field should not be defined merely by uniting a series of statutes containing a common noun such as "rent" (see *Fisher v City of Berkeley* (1984) 37 C3d 644, 707, 209 CR 682, aff'd (1986) 475 US 260); rather, an area of legislation that is logically related and reflects a patterned approach to the subject constitutes a potentially preempted field. *Galvan v Superior Court* (1969) 70 C2d 851, 862, 76 CR 642. In addition, consider whether the local law has a separate and independent purpose from the allegedly preemptive state law, in which case it may be found to regulate a separate field. *Santa Monica Pines, Ltd. v Rent Control Bd.* (1984) 35 C3d 858, 869, 201 CR 593; *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 148, 130 CR 465; *Kelly v Yee* (1989) 213 CA3d 336, 341, 261 CR 568.

© The Regents of the University of California

§1.41 e. Examples of Valid Overlapping State and Local Regulation

Local governments may enact laws, even on matters of statewide concern, in the absence of a preemptive state law. *Bishop v City of San Jose* (1969) 1 C3d 56, 62, 81 CR 465. Such enactments must be under some identified source of authority (*i.e.,* police power, statute, charter, constitution). Local laws that overlap state laws have been upheld in various areas and on various theories, including the following:

- **Zoning ordinances.** See *Santa Monica Pines, Ltd. v Rent Control Bd.* (1984) 35 C3d 858, 869, 201 CR 593 (Subdivision Map Act does not preempt local regulation of condominium conversion because local law has "evident, independent police power source and purpose" to conserve rental housing). But see *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804 (merger provisions of local zoning ordinance impliedly preempted by Subdivision Map Act).
- **Eviction regulations.** *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 148, 130 CR 465 (procedural regulation of evictions by landlords serves purpose distinct from local law establishing substantive defenses and thus local law is not preempted).
- **Trespass laws.** *In re Cox* (1970) 3 C3d 205, 220, 90 CR 24 (state law on trespasses does not reflect legislative intent to preempt local law prohibiting person from remaining on business premises after being asked to leave); *Sports Comm. Dist. 37 AMA, Inc. v County of San Bernardino* (1980) 113 CA3d 155, 169 CR 652 (local law on trespass not preempted by state trespass law).
- **Gun laws.** *Galvan v Superior Court* (1969) 70 C2d 851, 859, 76 CR 642 (regulation of numerous aspects of registration, possession, and discharge of guns does not preempt local regulation of licensing of guns); *California Rifle & Pistol Ass'n, Inc. v City of West Hollywood* (1998) 66 CA4th 1302, 78 CR2d 591 (prohibition on sale of certain handguns not preempted by state firearm regulations). But see 77 Ops Cal Atty Gen 147 (1994) (state law preempts city prohibition on sale of handgun ammunition).
- **License taxes.** *Pesola v City of Los Angeles* (1975) 54 CA3d 479, 126 CR 580 (local government may assess equine license tax despite state scheme for taxing racehorses);
- **Drug laws.** *People v Orozco* (1968) 266 CA2d 507, 72 CR 452 (local government may ban glue-sniffing despite existence of numerous statutes regulating dangerous and intoxicating drugs and other substances);
- **Safety regulations.** *DeAryan v Butler* (1953) 119 CA2d 674, 260 P2d 98 (local requirement regarding fluoridation of water not preempted by state regulation of water quality). But see *City of Watsonville v Department of Health Servs.* (2005) 133 CA4th 875, 35 CR3d 216 (local ordinance affecting fluoridation of public water system preempted by state law); 83 Ops Cal Atty Gen 24 (2000) (concluding state law requiring fluoridation supersedes charter city's ordinance prohibiting fluoridation when funds are made available to install and operate fluoridation system).

PRACTICE TIP 1: Create a good record before the city council when it adopts an ordinance that arguably may be preempted. Describe in staff reports the important public purposes to be served, especially those that address local problems that differ from one jurisdiction to another.

PRACTICE TIP 2: Define a separate and independent purpose for the city's regulation from that of any existing state law on the subject.

PRACTICE TIP 3: Describe the city's purposes and goals in such a way as to fit within areas of regulation that have been traditionally treated as the province of the city or that state law has recognized as subject to local regulation.

PRACTICE TIP 4: Beware of relying on preemption cases without verifying the continued effectiveness of their holdings. This area of law is changing very rapidly, and older decisions may have been effectively overruled by the legislature or later cases. Although this handbook gives a conceptual framework to be applied, the specific holdings on preemption of particular subjects should be carefully checked.

© The Regents of the University of California

§1.42 3. Prohibition Against Gifts of Public Funds

A city may not make a gift of public funds. Cal Const art XVI, §6. An appropriation benefiting a private party constitutes an unconstitutional gift of public funds if the public agency receives no consideration in exchange for the expenditure (*Allen v Hussey* (1950) 101 CA2d 457, 473, 225 P2d 674) or if the expenditure does not fulfill a public purpose (*County of Alameda v Janssen* (1940) 16 C2d 276, 281, 106 P2d 11).

© The Regents of the University of California

§1.43 a. Public Purpose Exception

This prohibition against gifts of public funds does not preclude expenditures and disbursements for public purposes, even if a private person incidentally benefits. *Redevelopment Agency of San Pablo v Shepard* (1977) 75 CA3d 453, 457, 142 CR 212; *Schettler v County of Santa Clara* (1977) 74 CA3d 990, 1003, 141 CR 731. The determination of a public purpose lies with the legislative body; the concept is liberally construed and the legislative action is upheld unless it is totally arbitrary. *Mannheim v Superior Court* (1970) 3 C3d 678, 690, 91 CR 585; *Community Mem. Hosp. v County of Ventura* (1996) 50 CA4th 199, 207, 56 CR2d 732. In determining whether a public purpose exists, only the legal propriety of the expenditure should be examined, not economic or governmental wisdom. *City of Oakland v Oakland Raiders* (1982) 32 C3d 60, 73, 183 CR 673.

NOTE: Redevelopment is held to serve a public purpose. *In re Redevelopment Plan for Bunker Hill Urban Renewal Project 1B of Community Redev. Agency* (1964) 61 C2d 21, 41, 37 CR 74, cert denied sub nom *Babcock v Community Redev. Agency* (1964) 379 US 899, cert denied sub nom *Trautwein v Community Redev. Agency* (1964) 379 US 28; *Board of Supervisors v Dolan* (1975) 45 CA3d 237, 245, 119 CR 347.

On redevelopment, see chap 5.

© The Regents of the University of California

§1.44 b. Charter City Exception

The constitutional prohibition on a gift of public funds has been held not to apply to a charter city, unless the city's charter itself contains a similar prohibition. *Tevis v City & County of San Francisco* (1954) 43 C2d 190, 272 P2d 757; *Los Angeles Gas & Electric Corp. v City of Los Angeles* (1922) 188 C 307, 205 P 125.

© The Regents of the University of California

§1.45 4. Additional Compensation

A city may not grant additional compensation to any officer, employee, or contractor after a contract has been performed or services rendered. Cal Const art XI, §10. Public agency actions authorizing retroactive salary increases to employees have been held not to violate this section and are not a gift of public funds. *San Joaquin County Employees' Ass'n, Inc. v County of San Joaquin* (1974) 39 CA3d 83, 113 CR 912. Similarly, a contract providing severance pay for termination was found not to be a gift of public funds. *Miller v City of Sacramento* (1977) 66 CA3d 863, 136 CR 315.

PRACTICE TIP: To avoid violating this section (Cal Const art XI, §10), bonus or pay for performance programs should be authorized in advance as part of the compensation plan. Individual bonuses for senior officials, such as the city manager, may be paid in consideration of a contract renewal.

© The Regents of the University of California

§1.46 5. Debt Limit

A city may not "incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity." Cal Const art XVI, §18. This prohibition prevents the pledge of general fund revenue beyond the year in which that revenue is received. *Rider v City of San Diego* (1998) 18 C4th 1035, 1045, 77 CR2d 189. The purpose of this constitutional provision is to provide the people who must pay the cost of providing public services an opportunity to express their approval of a long-term indebtedness. *City of Saratoga v Huff* (1972) 24 CA3d 978, 989, 101 CR 32.

There are several exceptions to the constitutional debt limitation, including the special fund doctrine (see §1.47).

© The Regents of the University of California

§1.47 a. Special Fund Doctrine

Under the special fund doctrine, revenue bonds or other obligations of a governmental body payable solely from a special fund do not violate the constitutional debt limitation. The governmental body must not be liable to maintain the special fund out of its general fund or by tax levies, if the special fund is insufficient. *California Hous. Fin. Agency v Elliott* (1976) 17 C3d 575, 587, 131 CR 361; *City of Palm Springs v Ringwald* (1959) 52 C2d 620, 624, 342 P2d 898. The indebtedness cannot be a general indebtedness or obligation of the governmental body concerned; thus the payments into the special fund beyond the current year cannot be a charge on the general fund. The revenue must be supplied by the agency to be benefited. *City of Palm Springs v Ringwald, supra*. Additionally, the municipality may not suffer a loss if the special fund is insufficient to pay the obligation incurred. *Board of State Harbor Comm'rs v Dean* (1953) 118 CA2d 628, 633, 258 P2d 590. A city reserving the right to make discretionary contributions to the special fund does not vitiate the application thereto of the special fund doctrine. *Board of Supervisors v Dolan* (1975) 45 CA3d 237, 248, 119 CR 347. An example of the application of the special fund doctrine would be the pledge of revenues from a water system to fund the construction of additional water facilities. *Shelton v City of Los Angeles* (1929) 206 C 544, 551, 275 P 421.

© The Regents of the University of California

§1.48 b. No Pledge of Revenue Beyond 1 Year

If a lease or other agreement does not create an immediate indebtedness for aggregate installments, but confines the liability to each installment as it falls due and each year's payment is for consideration furnished that year, then there is no violation of the constitutional debt limitation. *City of Los Angeles v Offner* (1942) 19 C2d 483, 122 P2d 14; *Mayhew Tech Ctr., Phase II v County of Sacramento* (1992) 4 CA4th 497, 508, 5 CR2d 702 (upholding lease-purchase agreement that allowed state to unilaterally terminate lease without penalty). If an instrument creates full and complete liability on its execution (*e.g.,* if it is actually a conditional sales contract of which an immediate indebtedness or liability exceeding the limitation arises), then the contract is void. *Mayhew Tech Ctr., supra*. See *Dean v Kuchel* (1950) 35 C2d 444, 447, 218 P2d 521.

PRACTICE TIP: Carefully examine each agreement to determine whether it is legally classified as a lease or as a conditional sales contract; the latter is prohibited.

© The Regents of the University of California

§1.49 c. Contingency Exception

An obligation that the local agency does not have to pay until a condition precedent to the obligation occurs is treated as a debt only when the legal obligation for payment exists. 67 Ops Cal Atty Gen 349, 352 (1984).

© The Regents of the University of California

§1.50 d. Appropriations Exception

An obligation for which an appropriation is made at the time of its creation from reasonably anticipated funds subject to appropriation is not within the constitutional limitation on indebtedness. *Pooled Money Inv. Bd. v Unruh* (1984) 153 CA3d 155, 160, 200 CR 500. For this doctrine to be invoked, there must be an underlying appropriation for expenditures and an actual or expected cash deficit in the general fund resulting in insufficient money to pay the expenditures when they become due. 153 CA3d at 164. There must also be the constructive presence of anticipated revenues in the treasury.

© The Regents of the University of California

§1.51 6. Tax and Appropriations Limits

The provisions of Cal Const arts XIIIA, XIIIB, XIIIC, and XIIID, all added by initiative, limit the taxation and appropriation power of local government.

These provisions are also discussed in chap 5.

© The Regents of the University of California

§1.52 a. General Property Tax Limit

California Constitution article XIIIA was enacted by the voters in 1978 as Proposition 13. Under its terms, the maximum amount of any ad valorem tax on real property is not to exceed 1 percent of the full cash value of the property. Cal Const art XIIIA, §1(a). "Full cash value" means the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred. The 1-percent tax limit does not apply to a tax levy to pay bonded indebtedness for the acquisition or improvement of real property previously approved by two-thirds of the voters. The California Supreme Court upheld Proposition 13 in *Amador Valley Joint Union High Sch. Dist. v State Bd. of Equalization* (1978) 22 C3d 208, 149 CR 239. The United States Supreme Court upheld Proposition 13 in *Nordlinger v Hahn* (1992) 505 US 1, 120 L Ed 2d 1, 112 S Ct 2326.

© The Regents of the University of California

§1.53 b. Appropriation Limit

The provisions of Cal Const art XIIIB (also known as the "Gann Initiative") establish an appropriation limit for local governments. Whereas Cal Const art XIIIA was aimed at controlling ad valorem property taxes and the imposition of new special taxes (see §1.52), Cal Const art XIIIB was aimed at placing limits on the authorization to expend the proceeds of taxes. *City Council of the City of San Jose v South* (1983) 146 CA3d 320, 333, 194 CR 110.

The provisions of Cal Const art XIIIB limit the amount of tax revenues a government entity may appropriate each year. Annual appropriations that are subject to limitation may not exceed an appropriations limit based on a calculated limit for fiscal year 1978-1979, adjusted annually for population and cost of living increases. Cal Const art XIIIB, §§1, 8(h).

Appropriations subject to limitations are authorizations to spend "the proceeds of taxes levied by or for that entity." Cal Const art XIIIB, §8(b). Proceeds of taxes include, but are not restricted to, "all tax revenues and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service; and (2) the investment of tax revenues." Cal Const art XIIIB, §8(c). There are provisions for the return of all revenues received in excess of the spending limit. Cal Const art XIIIB, §2(b). There is also a provision for emergency spending above the appropriations limit. Cal Const art XIIIB, §3(c)(1).

© The Regents of the University of California

§1.54 c. Voter Requirement for Imposition of Taxes

The provisions of Cal Const art XIIIC establish requirements for voter approval of all general and special local taxes. It also provides that the power of initiative to affect local taxes, assessments, and property-related fees and charges is applicable to all local governments, and that such power cannot be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee, or charge. See *Rossi v Brown* (1995) 9 C4th 688, 38 CR2d 363 (use of initiative power to repeal tax ordinance or to bar adoption of tax is not prohibited). See also *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 45 CR2d 207 (tax approved by less than two-thirds of voters is invalid under Proposition 62).

© The Regents of the University of California

§1.55 d. Special Assessments and Property-Related Fees and Charges

The provisions of Cal Const art XIIID establish procedural and substantive limitations on special assessments and property related fees and charges.

© The Regents of the University of California

§1.56 e. Other Tax Limitations

The provisions of Cal Const art XIII contain a variety of tax limitations. Included among these are limitations on local taxes on nonprofit organizations (Cal Const art XIII, §26), banks (Cal Const art XIII, §27), and insurance companies (Cal Const art XIII, §28).

© The Regents of the University of California

§1.57 7. Contract Limitations

Public agencies may not discriminate against or grant preferential treatment to individuals or groups on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment or public contracting. Cal Const art I, §31.

© The Regents of the University of California

8. First Amendment Limitations

§1.58 a. United States Constitution

Congress shall make no law "abridging the freedom of speech or the press," or "respecting an establishment of religion, or prohibiting the free exercise thereof." US Const amend I. In addition, the First Amendment to the United States Constitution protects an individual's right to privacy. *Lawrence v Texas* (2003) 539 US 558, 156 L Ed 2d 508, 123 S Ct 2472; *Roe v Wade* (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705.

© The Regents of the University of California

§1.59 b. California Constitution

Every person "may freely speak, write and publish his or her sentiments on all subjects"; laws "may not restrain or abridge liberty of speech or press." Cal Const art I, §2. "Sentiments" are protected from any prepublication sanctions (prior restraints). *Pines v Tomson* (1984) 160 CA3d 370, 392, 206 CR 866. These protections extend to city council members in certain circumstances when petitioning their own government for the redress of grievances. *Levy v City of Santa Monica* (2004) 114 CA4th 1252, 1261, 8 CR3d 507. Provisions of the California Constitution have been construed as "more protective, definitive and inclusive of rights to expression of speech" than their federal counterparts. *Robins v Pruneyard Shopping Ctr.* (1979) 23 C3d 899, 908, 153 CR 854, aff'd (1980) 447 US 74.

The California Constitution also guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference" and prohibits the legislature from making any "law respecting an establishment of religion." Cal Const art I, §4. The state constitution strictly prohibits any governmental support for religious purposes (Cal Const art XVI, §5) and the use of public money for religious schools (Cal Const art IX, §8). "These sections are 'proof' of the framers' intent to build a Jeffersonian wall of separation between church and state in California." *Sands v Morongo Unified Sch. Dist.* (1991) 53 C3d 863, 909, 281 CR 34, cert denied (1992) 505 US 1218.

California's right to privacy is express and thus more expansive than its federal counterpart. The provisions of Cal Const art I, §1 makes the pursuit and obtaining of privacy an "inalienable right." This right to privacy protects a citizen's participation in a medical procedure, including an abortion. *Chico Feminist Women's Health Ctr. v Scully* (1989) 208 CA3d 230, 241, 256 CR 194.

NOTE: California and the federal courts are struggling to balance the right to speech enjoyed by persons who wish to picket against the right to privacy enjoyed by persons who choose to participate in a medical procedure. See *City of San Jose v Superior Court (Thompson)* (1995) 32 CA4th 330, 38 CR2d 205, cert denied (1995) 516 US 932; *Feminist Women's Health Ctr. v Blythe* (1993) 17 CA4th 1543, 22 CR2d 184, vacated and remanded (1995) 512 US 1249, 129 L Ed 2d 888, 114 S Ct 2776, on remand 32 CA4th 1641, 39 CR2d 189, cert denied (1995) 516 US 987 (upholding ordinance prohibiting targeted picketing within 300 feet of residence.); *Schenck v Pro Choice Network of Western New York* (1997) 519 US 357, 137 L Ed 2d 1, 117 S Ct 855 (upholding 15-foot fixed buffer, but rejecting floating buffer around medical clinics); *Madsen v Women's Health Ctr.* (1994) 512 US 753, 129 L Ed 2d 593, 114 S Ct 2516 (upholding buffer zone around medical clinic). But see *Hill v Colorado* (2000) 530 US 703, 147 L Ed 2d 597, 120 S Ct 2480 (upholding eight-foot floating buffer around person from others who knowingly approach without consent).

© The Regents of the University of California

c. Religion Issues

§1.60 (1) Establishment Clause

A regulation or activity that does not "establish" religion will (*Lemon v Kurtzman* (1971) 403 US 602, 29 L Ed 2d 745, 91 S Ct 2105)

- have a valid state secular purpose;
- have a principal or primary effect that neither discriminates nor inhibits religion; and
- not produce excessive government entanglement with religion.

Government may accommodate the free exercise of religion, but government may not coerce anyone to support or participate in religion or its exercise or act to establish a state religion or religious faith. *Board of Educ. of Kiryas Joel v Grumet* (1994) 512 US 687, 129 L Ed 2d 546, 114 S Ct 2481 (statute creating school district to serve only Satmar Hasidic community not constitutional as it delegated state's discretionary authority over public schools to religious community, in violation of establishment clause); *Lee v Weisman* (1992) 505 US 577, 120 L Ed 2d 467, 112 S Ct 2649. See *Stark v Independent Sch. Dist.* (8th Cir 1997) 123 F3d 1068, cert denied (1998) 523 US 1094 (school attended primarily by students belonging to particular religion did not violate establishment clause because government can neutrally provide benefits to broad class of citizens defined without reference to religion). See also *Paulson v City of San Diego* (9th Cir 2002) 294 F3d 1124, cert denied (2003) 538 US 978 (proposed sale of government land that gave financial inducement to bidders to preserve cross-violated California Constitution).

© The Regents of the University of California

§1.61 (2) Invocations

Including clergy in a public school graduation who offer nonsectarian prayers violates the establishment clause of the United States Constitution. *Lee v Weisman* (1992) 505 US 577, 120 L Ed 2d 467, 112 S Ct 2649. See *Sands v Morongo Unified Sch. Dist.* (1991) 53 C3d 863, 281 CR 34, cert denied (1992) 505 US 1218 (school district's practice of conducting prayers at public school graduation ceremonies violates establishment clause; practice involved governmental selection or approval of religious speakers and governmental approval of content of public prayer). But see *Edwards v Aguillard* (1987) 482 US 578, 96 L Ed 2d 510, 107 S Ct 2573 (approach in *Marsh* is not appropriate in analyzing proper roles of church and state in public schools); *Marsh v Chambers* (1983) 463 US 783, 790, 77 L Ed 2d 1019, 103 S Ct 3330 (upholding practice of opening legislative sessions with prayer based on "unique history" of legislative prayer); *Rubin v City of Burbank* (2002) 101 CA4th 1194, 124 CR2d 867, cert denied (2003) 538 US 1034 (interpreting *Marsh* as requiring preclusion of words "Jesus Christ" from invocation at city council meeting); 76 Ops Cal Atty Gen 281 (1993) (concluding that board of supervisors may open meeting with invocation).

© The Regents of the University of California

§1.62 (3) Religious Displays

Secular displays do not violate the establishment clause. See *County of Allegheny v American Civil Liberties Union* (1989) 492 US 573, 106 L Ed 2d 472, 109 S Ct 3086 (annual menorah display was secular display of cultural diversity). Religious displays implicate the question of whether avoiding an establishment clause violation provides a compelling state interest justifying a content-based restriction on speech in a public forum. See *County of Allegheny, supra* (display of crèche inside county courthouse violated establishment clause as it patently endorsed Christian message). See also *McCreary County v American Civil Liberties Union* (2005) 545 US 844, 162 L Ed 2d 729, 125 S Ct 2722; *Van Orden v Perry* (2005) 545 US 677, 162 L Ed 2d 607, 125 S Ct 2854; *Separation of Church & State Comm. v City of Eugene* (9th Cir 1996) 93 F3d 617 (display of 51-foot Latin cross violates establishment clause when, despite contention of secular purpose, display may reasonably be perceived as governmental endorsement of religion); *Kreisner v City of San Diego* (9th Cir 1993) 1 F3d 775, cert denied (1994) 510 US 1044 (in public park, a traditional public forum, city may not forbid private group's overtly religious Christmas display based on its religious nature without unconstitutionally violating free speech); *Ellis v City of La Mesa* (9th Cir 1993) 990 F2d 1518, cert denied sub nom *County of San Diego v Murphy* (1994) 512 US 1220, cert denied sub nom *City of San Diego v Paulson* (1994) 513 US 925 (city-approved display of Latin crosses in public parks and on city's official insignia violated "no preference clause"); *Hewitt v Joyner* (9th Cir 1991) 940 F2d 1561, cert denied (1992) 502 US 1073 (county's ownership and maintenance of public park containing exclusively immovable religious statuary depicting scenes from New Testament violate establishment clause of both United States and California constitutions); *Fox v City of Los Angeles* (1978) 22 C3d 792, 150 CR 867 (annual display of lighted cross by city violates state constitution's establishment clause).

© The Regents of the University of California

§1.63 (4) Public Aid to Religious Organizations

California's constitution prohibits public agencies from supporting religious institutions. Cal Const art XVI, §5. See also Cal Const art IX, §8 (no public money for religious schools). The constitution prohibits not only material aid to religion, but also any official involvement that promotes religion. *California Educ. Facilities Auth. v Priest* (1974) 12 C3d 593, 116 CR 361.

This constitutional prohibition is intended to ensure the separation of church and state and to guarantee that the power, authority, and financial resources of the government are never devoted to the advancement or support of religious or sectarian purposes. This includes aid in the intangible form of prestige and power. *Sands v Morongo Unified Sch. Dist.* (1991) 53 C3d 863, 281 CR 34, cert denied (1992) 505 US 1218.

© The Regents of the University of California

§1.64 (5) Free Exercise Clause

Courts evaluate the following factors in determining whether a governmental practice impermissibly interferes with the free exercise of religion (*Callahan v Woods* (9th Cir 1984) 736 F2d 1269, 1273):

- the magnitude of the statute's impact on the exercise of the religious belief;
- the existence of a compelling state interest justifying the imposed burden on the exercise of the religious belief; and
- the extent to which recognition of an exemption from the statute would impede the state's objectives.

Examples of cases involving the free exercise clause include *City of Boerne v Flores* (1997) 521 US 507, 138 L Ed 2d 624, 117 S Ct 2157 (striking down Religious Freedom Restoration Act of 1993); *Christian Gospel Church, Inc. v City & County of San Francisco* (9th Cir 1990) 896 F2d 1221, cert denied (1990) 498 US 999 (denial of zoning permit that would have enabled church to hold worship services in residential neighborhood was not violation of free exercise clause); *Cottonwood Christian Ctr. v Cypress Redev. Agency* (CD Cal 2002) 218 F Supp 2d 1203 (court held that Religious Land Use and Institutionalized Persons Act of 2000 preempts state land use and zoning regulations that substantially burden religious use of property unless law is shown to be in furtherance of compelling governmental interest and is least restrictive means of furthering that interest; see chap 10).

© The Regents of the University of California

§1.65 9. Fourth Amendment Limitations

"The Fourth Amendment and the personal rights which it secures have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman v U.S.* (1961) 365 US 505, 511, 5 L Ed 2d 734, 81 S Ct 679. The ban on unreasonable searches and seizures is directly applicable to the federal government by the Fourth Amendment, and to the states and political subdivisions, including cities, indirectly by the Fourteenth Amendment. *Mapp v Ohio* (1961) 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684. The standard of reasonableness under both amendments is the same. *Ker v California* (1963) 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623. Homes, personal property such as cars, private correspondence, and conversations are all covered.

© The Regents of the University of California

§1.66 10. Fifth Amendment Limitations

The federal government, under the Fifth Amendment, and the states under the Fourteenth Amendment, can regulate the use of private property whenever such regulation is reasonable and reasonably related to the public health, safety, morality, or general welfare. *Goldblatt v Town of Hempstead* (1962) 369 US 590, 8 L Ed 2d 130, 82 S Ct 987. Unreasonable, arbitrary, or capricious interference with the use of private property is unconstitutional. *Nectow v City of Cambridge* (1928) 277 US 183, 72 L Ed 842, 48 S Ct 447. On use of police power, see §§1.15-1.18.

Due process of law requires that just compensation be made by a government to the owner of private property taken by that government. On eminent domain power, see chap 8.

© The Regents of the University of California

§1.67 11. Fourteenth Amendment Limitations

The Fourteenth Amendment, a post-Civil War addition to the Constitution, has been construed to apply the principles of the Bill of Rights to the States and other governmental entities.

© The Regents of the University of California

§1.68 a. Equal Protection Clause

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause creates no new rights, but it requires that persons under like circumstances be given equal protection and security in the enjoyment of personal and civil (including political) rights, the acquisition and enjoyment of property, the enforcement of contracts, and the prevention and redress of wrongs. Everyone must be subject to similar taxes and penalties. These issues are discussed in the context of specific subjects throughout this handbook.

© The Regents of the University of California

§1.69 b. Due Process Clause

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The California Constitution also contains due process guarantees. Cal Const art I, §§7, 15. Originally, due process was strictly procedural. The protection was against administrative or judicial procedures that failed to provide adequate notice and an opportunity to be heard before an individual was deprived of property or personal rights. The clause has also been interpreted as a limitation to prevent unreasonable or arbitrary legislation. This aspect is known as substantive due process. Substantive due process is well-illustrated by cases dealing with the police power and with taxation. Both procedural due process and substantive due process issues are discussed in the context of specific subjects throughout this handbook.

© The Regents of the University of California

E. Other Public Purpose Entities

§1.70 1. Within the Boundaries of Municipalities

There are other public purpose entities that exist within the boundaries of municipalities. These are entities of limited powers that cover all or a portion of the territory in an incorporated city and have a specifically prescribed purpose specified by the statute under which it is established or activated within a city. Among the more prevalent of these entities are the following.

- **Redevelopment agencies.** These agencies have broad powers within an established redevelopment project area and their legislative body often is identical in membership to the city council. See Cal Const art XVI, §16; Health & S C §§33000-33855.
- **Industrial development authorities.** These entities exist to issue bonds to companies interested in constructing industrial and/or research and development facilities, and their legislative body may be completely different from or the same as that of the city. See Govt C §§91500-91574.
- **Housing authorities.** These authorities are creatures of statute that are activated and conduct business only after the city council has adopted a resolution declaring the need for the authority to function in the city. See Health & S C §§34200-34380.

NOTE: Generally, the purpose of housing authorities is to provide safe and sanitary residential dwelling accommodations for lower income residents. Housing authorities must conduct their operations in accordance with the state law providing for their existence.

- **Subsidiary districts.** These districts have limited powers under which the city council has designated and empowered them to act as the ex officio board of directors of the district. See Govt C §56078.

© The Regents of the University of California

§1.71 2. Independent of Municipal Boundaries

Public agencies of limited powers, including special districts described §1.72, may overlap all or a portion of the territory of a city. These entities generally provide specific services such as water service, sewer service, flood control, vector control, fire protection, parks and recreation services and facilities, and a variety of other specific services. Many of these districts exercise the police power of the state within their boundaries and thus function independently. See *Rodeo Sanitary Dist. v Board of Supervisors of Contra Costa County* (1999) 71 CA4th 1443, 1447, 84 CR2d 601.

PRACTICE TIP: When dealing with a municipal corporation of limited power, determine whether general laws apply to its affairs or whether the enabling statute is the exclusive source of power and limitations.

© The Regents of the University of California

§1.72 a. Special Districts

Special districts are public corporations formed to perform particular governmental functions within a specific territory. For purposes of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550), a special district is "an agency of the state, formed under general law or special act, for the local performance of governmental or proprietary functions within limited boundaries." Govt C §56036(a). Although county service areas are considered special districts, agencies such as counties, cities, the state, school and community college districts, special assessment, and improvement districts, are not. Govt C §56036(a)(1).

Special districts may be created under general law or, under appropriate circumstances, a special act. *American River Flood Control Dist. v Sweet* (1932) 214 C 778, 782, 7 P2d 1030; *South Santa Clara Valley Water Conserv. Dist. v Santa Clara Valley Water Dist.* (1978) 76 CA3d 852, 857, 143 CR 193. The California Constitution did not formally recognize special districts before the adoption of Proposition 13 in 1978. Since then, the only references to special districts in the Constitution are in connection with tax limitation provisions. See Cal Const arts XIIIA, §4; XIIIB, §8(d); XIIIC, §1.

© The Regents of the University of California

§1.73 b. Statutory Authority for Special Districts

The statutory authority for a special district is in either a principal act or a special act. A principal act is a statute that applies to all special districts of a particular type. Examples include the Fire Protection District Law of 1987 (Health & S C §§13800-13970) and the Local Health Care District Law (Health & S C §§32000-32492). There are approximately 60 principal act statutes that can be used anywhere within the state to create a special district. There are more than 3000 principal act districts in California. The most common types, accounting for more than 50 percent of all such districts, are county service areas, fire protection districts, community service districts, and cemetery districts.

NOTE: A list of the principal act statutes appears in Appendix A to the Special District's Annual Report for fiscal year 2006-2007, available at the website of the Controller of the State of California at www.sco.ca.gov).

Special act districts are formed under legislation tailored to the unique needs of a specific area. Examples include districts that are regional in nature, provide unique services, require special financing, or have specific governing board requirements. There are approximately 120 special act districts in California. Unlike principal act statutes, special act statutes are not codified as part of the California State Codes. However, the majority of all special act districts are water districts whose special acts appear as an appendix to the California Water Code.

NOTE: Special districts have only those powers conferred on them by the legislature. *Los Angeles County Flood Control Dist. v Southern Cal. Edison Co.* (1958) 51 C2d 331, 338, 333 P2d 1; *In re Bonds of Madera Irrig. Dist.* (1891) 92 C 296, 315, 28 P 272; *Turlock Irrig. Dist. v Hetrick* (1999) 71 CA4th 948, 953, 84 CR2d 175. Special districts are subject to the provisions of the Ralph M. Brown Act (Govt C §§54950-54963), the California Public Records Act (Govt C §§6250-6276.48), the Political Reform Act of 1974 (Govt C §§81000-91014), and other laws applicable to local government.

© The Regents of the University of California

§1.74 c. Changes in Organization

The authority and procedure for changes of organization (which include formation, annexation, detachment, consolidation, merger, and dissolution (Govt C §§56035, 56100)), are provided by the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550), except that proceedings for the formation of a district are conducted as authorized by the principal act of the district with the LAFCO serving as the conducting authority. Govt C §56100. If a conflict arises between the procedural requirements of the principal act and those of Cortese-Knox, the Cortese-Knox procedural requirements prevail. Govt C §56100.

© The Regents of the University of California

§1.75 d. Characteristics of Special Districts

The following are characteristics of special districts:

- **Voters.** A landowner-voter district is one whose principal act provides that owners of land within the district are those entitled to vote on the election of district officers and other district matters. Govt C §56050. A registered-voter district is one whose principal act provides that registered voters residing within the district are those entitled to vote on the election of district officers and other district matters. Govt C §56072.
- **Dependent or independent.** Special districts may have their own governing board, or they may be governed by an already existing general purpose government (*i.e.,* a city or county). Special districts governed by an existing county board of supervisors or city council are known as "dependent districts." Those with their own elected or appointed governing boards are known as "independent special districts." See Govt C §56044.
- **Enterprise or non-enterprise.** Special districts that rely primarily on the ability to charge fees for their services are known as enterprise districts. Those that rely primarily on general revenues, such as property taxes, are known as non-enterprise districts.
- **Single function or multifunction.** Special districts that provide only one type of public service are known as single-function districts; those that provide more than one service are known as multifunction districts.

© The Regents of the University of California

§1.76 3. Joint Powers Agencies

Under Govt C §§6500-6536, public agencies may enter into agreements to jointly exercise common powers. A joint powers agreement may establish a joint powers agency or take the form of an operating agreement. A public agency may not acquire new functions or powers through a joint powers agreement. *City of Oakland v Williams* (1940) 15 C2d 542, 549, 103 P2d 168. Joint powers agreements may be made with public agencies and with certain other entities such as hospitals and mutual water companies. See, *e.g.,* Govt C §§6524-6525.

NOTE: If the joint powers agreement creates an agency or entity separate from the parties to the agreement, a notice of the creation must be filed with the Secretary of State. Govt C §§6503.5, 53050-53051.

PRACTICE TIP: When creating a joint powers agency, carefully review the provisions of Govt C §§6500-6536.

© The Regents of the University of California

§1.77 a. Delegated Powers Under Joint Powers Agreements

The powers that may be delegated by a joint powers agreement include the power of eminent domain. *Burbank-Glendale-Pasadena Airport Auth. v Hensler* (2000) 83 CA4th 556, 562, 99 CR2d 729. The delegated powers may include implied as well as express powers, but the implied powers must be necessary to carry out the powers expressly granted. 33 Ops Cal Atty Gen 156 (1959).

NOTE: The common power to be exercised may be exercised within the entire territorial jurisdiction of all participating agencies or within only a portion of the territorial jurisdiction of any one or more of the participating agencies. Govt C §6502. The agreement may authorize the issuance of bonds for projects outside the territorial jurisdiction of the participating agencies only under the conditions specified in Govt C §6586.5(b). 83 Ops Cal Atty Gen 82 (2000). On use of joint powers agencies in financing, see §1.78.

© The Regents of the University of California

§1.78 b. Use of Joint Powers Agencies in Financing

Each joint powers entity has the power to issue revenue bonds for a wide range of public projects. Examples include exhibition halls; sports arenas; public buildings; parks and recreation centers; generation or transmission of electrical energy; disposal, treatment or conversion to energy and reusable materials; water or waste water facilities; local streets, roads, bridges; major thoroughfares; mass transit facilities; airports; police or fire stations; public works facilities; public health facilities; criminal justice facilities; libraries; parking garages; publicly operated low income housing; public improvements in redevelopment project areas; telecommunication systems or services; and equipment necessary to support such public facilities and deliver public services. Govt C §6546. See *Rider v City of San Diego* (1998) 18 C4th 1035, 77 CR2d 189 (upholding lease revenue bonds issued by joint powers agency to finance convention center).

NOTE: If an agreement creating a joint powers agency as a separate legal entity is not filed with the Secretary of State, the agency cannot issue bonds or otherwise incur indebtedness until the filing is complete. Govt C §6503.5.

The Marks-Roos Local Bond Pooling Act of 1985 (Govt C §§6584-6599.3) provides specific authorization for a joint powers agency to pool all of the capital needs of the agencies that are party to the agreement into one bond issue.

© The Regents of the University of California

§1.79 4. Regional Governments

Although regional government has been proposed and considered by various legislators and groups such as Bay Vision 20/20 and LA 2000, regional government is still only a concept in California. The closest division California has to regional government is an air pollution control district, such as the South Coast Air Quality Management District (Health & S C §§40400-40540) and the Bay Area Air Quality Management District (Health & S C §§40200-40276). These districts have the authority to adopt rules and regulations to reduce air pollution in their respective areas. The legislature has also created regional agencies for the comprehensive planning and implementation of regional transportation facilities. See, *e.g.,* Pub Util C §§132350-132372.4 (San Diego Regional Transportation Consolidation Act); Pub Util C §§170000-170084 (San Diego County Regional Airport Authority Act).

© The Regents of the University of California

§1.80 5. Council of Governments

A council of governments (referred to throughout this chapter as COG) is a single or multi-county council created by a joint powers agreement under Govt C §§6500-6536. See Govt C §65582(b). On joint powers agreements, see §§1.76-1.78. One of the functions of a COG is to determine housing needs for the counties and cities within its region. COGs may also assist in regional planning by preparing congestion management plans, transportation plans, and air quality plans.

© The Regents of the University of California

§1.81 a. Determination of Housing Needs

Based on data provided by the Department of Finance in consultation with each COG, the Department of Housing and Community Development (HCD) determines the regional share of the statewide housing need at least 26 months before each required revision of the housing element. Govt C §65584.01. The HCD must provide the COGs with data describing the HCD assumptions and methodology used in determining statewide need. Govt C §65584.01.

After the HCD makes its determination, each COG determines the existing and projected housing need for its region based on information provided by the HCD; the HCD may revise the COG's determination if necessary to obtain statewide consistency. Govt C §65584.01. Each COG must submit information regarding the assumptions and methodology to be used in allocating regional need to the HCD and to the cities and counties within its jurisdiction. Govt C §65584.01.

© The Regents of the University of California

§1.82 b. Proposed Revisions to Housing Needs Determination

Within 60 days of the COG's determination of regional housing needs, a city or county may propose to revise the determination of its share. The proposed revision must be based on available data and accepted planning methodology, and must be supported by adequate documentation. Govt C §65584.05(b). The COG then has 60 days after the 60-day time period to accept, modify, or reject the proposed revision. Govt C §65584.05(c). When certain conditions are met, the COG must reduce the share of regional housing need for a county. Govt C §65584.05(g).

If the proposed revision is not accepted, the city or county has a right to a public hearing. Govt C §65584.06(d)(2). Determinations of the COG are subject to judicial review under CCP §1094.5 (administrative mandate). Undoubtedly, a city would first have to request a hearing to avoid a failure to exhaust administrative remedies. *State Bd. of Equalization v Superior Court* (1980) 111 CA3d 568, 571, 169 CR 3.

© The Regents of the University of California

§1.83 c. Housing Share Transfers

Cities and counties may transfer a percentage of regional housing needs to another city or county. The transfer requires an agreement between the two local entities and is subject to COG review. See generally Govt C §65584.07.

© The Regents of the University of California

§1.84 6. Nonprofit Corporations and Other Organizations

Cities are empowered to provide many services that are often carried out, with or without the involvement of the city, by nonprofit corporations, unincorporated associations, and similar entities, such as volunteer emergency services organizations, homeowners' associations, and animal welfare leagues. Nonprofit corporations are established and recognized by the Secretary of State under the Nonprofit Corporation Law (Corp C §§5000-10841) and are permitted to carry out the broad powers defined therein. See Corp C §§5140, 7140, 9140.

To qualify for exemption from federal, state, and local taxation, nonprofit corporations must generally satisfy the requirements of §501 of the Internal Revenue Code which governs exempt organizations. 26 USC §501. Many organizations qualify under §501 because they serve charitable purposes that supplement or replace governmental duties. For example, a nonprofit organization that provides fire protection, ambulance, and rescue services is a qualified "501(c)(3)" organization that "lessens the burdens of government." Rev Rul 74-361, 1974-2 Cum Bull 159. Cities are authorized to establish, fund, and operate nonprofit organizations (Corp C §§5065, 5120); however, many nonprofits carrying out public services are run independently of government involvement.

© The Regents of the University of California

F. Intergovernmental Relations

1. Regulation of Federal Lands

§1.85 a. Supremacy Clause

The supremacy clause prevents state and local agencies from regulating land owned or leased by the federal government if such regulation would burden or interfere with the federal function or if the development takes place in an area under the exclusive jurisdiction of the federal government. See US Const art V, cl 2. For that reason, the federal government need not comply with zoning regulations on land owned or leased by the federal government in constructing a building that serves an instrumentality of the federal government, such as a post office. Even on land not owned or leased by the federal government, state and local agencies cannot burden or interfere with federal functions, *e.g.,* a building owned by the United States Postal Service need not comply with county zoning regulations. 68 Ops Cal Atty Gen 310-311 (1985).

© The Regents of the University of California

§1.86 b. Property Clause

State and local agencies are also prohibited from regulating land owned or leased by the federal government under the property clause, which provides that the Congress has the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." US Const art IV, §3.

© The Regents of the University of California

§1.87 c. Implied Immunity

Even in the absence of the supremacy clause or property clause, the federal government would be immune from state and local regulation because there is an implied constitutional immunity of the federal government from state and local regulation. *Penn Dairies, Inc. v Milk Control Comm'n* (1943) 318 US 261, 269, 87 L Ed 748, 63 S Ct 617.

© The Regents of the University of California

§1.88 d. Intergovernmental Cooperation Act

To prevent the federal government from completely disregarding local land use concerns, the Intergovernmental Cooperation Act (31 USC §§6501-6508) provides that "[t]o the extent possible, all national, regional, state and local viewpoints shall be considered in planning development programs and projects of the United States." 31 USC §6506(c). See also 40 USC §901.

© The Regents of the University of California

§1.89 2. Power Reserved for States Under Tenth Amendment

The Tenth Amendment to the United States Constitution provides the "powers not delegated to the United States by the Constitution, not prohibited by it to the states, are reserved to the states, respectively, or to the people." US Const amend X. Courts have had great difficulty discerning the line drawn by the Tenth Amendment between federal and local power.

© The Regents of the University of California

§1.90 a. Generally Applicable Laws

Several cases interpreting the Tenth Amendment have concerned the federal government's power to subject state and local governments to generally applicable laws. The United States Supreme Court's decisions in this area have flip-flopped. See, *e.g., Maryland v Wirtz* (1968) 392 US 183, 20 L Ed 2d 1020, 88 S Ct 2017 (state schools and hospitals are subject to Fair Labor Standards Act (FLSA) (29 USC §§201-219)); *National League of Cities v Usery* (1976) 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465 (overruling *Wirtz*; state employers are not subject to FLSA); *Garcia v San Antonio Metro. Transit Auth.* (1985) 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (overruling *Usery*; transit authority is subject to FLSA).

In *South Carolina v Baker* (1988) 485 US 505, 99 L Ed 2d 592, 108 S Ct 1355, the Supreme Court upheld the elimination of federal tax exemptions for interest on state and local bonds, rejecting the state's argument that the elimination of these exemptions was the result of a defect in federal tax policy that would require the Court to invoke Tenth Amendment protection for the state. *Baker* makes it clear that judicial intervention is only appropriate in the narrow instance of an extraordinary defect in the political process itself. *U.S. v County of San Diego* (9th Cir 1995) 53 F3d 965 (county can tax possessory interest private firm has in nuclear device that operates for Federal Department of Energy).

PRACTICE TIP: Although presently state and local governments are subject to federal laws that apply to private parties (for example, labor laws), many municipal lawyers are including Tenth Amendment defenses in pleadings to preserve the defense in the event the United States Supreme Court chooses to reconsider the approach taken in *Garcia v San Antonio Metro. Transit Auth., supra*.

© The Regents of the University of California

§1.91 b. When Local Governments Are Used as Implements of Federal Regulation

A second issue under the Tenth Amendment to the United States Constitution is the extent to which Congress may use the states and local governments as implements of federal regulation. The issue is whether Congress may direct or otherwise motivate state and local government to regulate in a particular field or in a particular way. See *New York v U.S.* (1992) 505 US 144, 166, 120 L Ed 2d 120, 112 S Ct 2408. Although Congress has substantial powers to govern the nation directly, the constitution has never been understood to confer on Congress the ability to require the states to govern according to Congress's instructions. 505 US at 162. Congress cannot compel the states to enact or enforce a federal regulatory program. See *Printz v U.S.* (1997) 521 US 898, 138 L Ed 2d 914, 117 S Ct 2365.

Congress can, however, encourage states to regulate in a particular way and may hold out incentives as a way of influencing states' policy choices. *New York v U.S.* (1992) 505 US 144, 120 L Ed 2d 120, 112 S Ct 2408 (under its spending power, Congress may attach conditions on receipt of federal funds). When Congress has the authority to regulate private activity, it has the power to offer the states the choice of regulating the activity according to federal standards or having state law preempted by federal regulation. 505 US at 167, 175 (determining Congress "crossed the line distinguishing encouragement from coercion" by giving states the "choice" of either regulating low-level radioactive waste according to federal specifications or taking title to all such waste generated in their borders).

© The Regents of the University of California

§1.92 3. Immunity Under the Eleventh Amendment

The Eleventh Amendment to the United States Constitution provides that the "[j]udicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State" and was directed specifically toward preventing suits against states by citizens of other states or by citizens or subjects of foreign jurisdictions. Immunity flows from concepts of state sovereign immunity generally.

Over the years, the United States Supreme Court has not been consistent with respect to what the amendment really does and how it relates to the other parts of the Constitution. In dealing with questions of governmental immunity from suit, the Court has traditionally treated interchangeably precedents dealing with state immunity and those dealing with federal governmental immunity.

© The Regents of the University of California

§1.93 a. State Immunity

The immunity of a state from suit is a privilege that it may waive at its pleasure by either a law specifically consenting to suit in the federal courts, or by initiating or participating in litigation.

With respect to governmental entities that derive their authority from the state (*e.g.,* Tahoe Regional Planning Agency, Bay Conservation and Development Commission, Coastal Commission) but that are not the state, the Supreme Court closely examines state law to determine

- the nature of the entity,
- whether it is an arm of the state, or
- whether it is to be treated like a municipal corporation or other political subdivision.

An arm of the state has immunity: "agencies exercising state power have been permitted to invoke the [Eleventh] Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v Tahoe Reg'l Planning Agency* (1979) 440 US 391, 400, 59 L Ed 2d 401, 99 S Ct 1171 (citing *Edelman v Jordan* (1974) 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347).

NOTE: The fact that a state agency can be indemnified for the costs of litigation does not divest the agency of its Eleventh Amendment immunity. *Regents of Univ. of Cal. v Doe* (1997) 519 US 425, 431, 137 L Ed 2d 55, 117 S Ct 900.

In *Seminole Tribe of Florida v Florida* (1996) 517 US 44, 64, 134 L Ed 2d 252, 116 S Ct 1114, the Supreme Court ruled that Congress lacks the power under US Const art I to abrogate state immunity under the Eleventh Amendment, and ruled in *Alden v Maine* (1999) 527 US 706, 754, 144 L Ed 2d 636, 119 S Ct 2240, that the broad principle of sovereign immunity reflected in the Eleventh Amendment bars suits against states in state courts as well as federal.

© The Regents of the University of California

§1.94 b. Municipality Immunity

Municipal corporations, though they partake under state law of the state's immunity, do not have immunity in federal court and the states may not confer it. See *Moor v County of Alameda* (1973) 411 US 693, 36 L Ed 2d 596, 93 S Ct 1785.

NOTE: In *National League of Cities v Usery* (1976) 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465, the Court extended the state immunity from regulation to political subdivisions.

Entities created through interstate compacts (subject to congressional approval) may also be subject to suit. *Lake Country Estates, Inc. v Tahoe Reg'l Planning Agency* (1979) 440 US 391, 401, 59 L Ed 2d 401, 99 S Ct 1171.

© The Regents of the University of California

4. Federal and State Grants

§1.95 a. Acceptance of Grants

Cities in California are authorized directly and by implication to accept grants from other public entities that are authorized by appropriate law to make such grants. See, *e.g.,* Govt C §§16366.1-16367.8; Health & S C §50517.5; Pub Res C §5096.151. Grants are most commonly found in state and federal areas in which congressional or legislative grant programs are established for particular fields of activity.

© The Regents of the University of California

§1.96 b. Compliance With Grants

When a federal grant authorizes expenditures for purposes that would not otherwise be expressly authorized under applicable state law, the local entity is still authorized to act in accordance with the provisions of the federal grant.

When a federal grant's terms require affirmative action in hiring or contracting, the city may comply with federal requirements despite the general prohibition against preferential treatment in employment or contracting. Cal Const art I, §31(e).

© The Regents of the University of California

5. State Intergovernmental Relations

§1.97 a. State Mandates

Whenever the legislature or any state agency mandates a new program or higher level of service on any local government, the state must provide a subvention of funds to reimburse the local government for the costs of such program or increased level of service. Cal Const art XIIIB, §6. The legislature may, however, but need not, provide for such subvention of funds for the following mandates: legislative mandates requested by the local agency affected; legislation defining a new crime or changing an existing definition of a crime; or legislative mandates enacted before January 1, 1975, or executive orders or regulations initially implementing legislation enacted before January 1, 1975. Cal Const art XIIIB, §6. See also *City of Sacramento v State* (1990) 50 C3d 51, 266 CR 139; *Hayes v Comm'n on State Mandates* (1992) 11 CA4th 1564, 15 CR2d 547; 2 Cal Code Regs §§1184.5-1184.11-; Govt C §§17615-17617 (additional "exceptions" to mandate).

PRACTICE TIP: The state may suspend mandated programs as part of the budget process. See Govt C §17581. Accordingly, review each year's state budget bills for suspended or repealed mandates.

© The Regents of the University of California

§1.98 b. Public Utilities Commission

The Public Utilities Commission (PUC) is a constitutionally created entity in California that is vested with jurisdiction to regulate and control enumerated public utilities. Cal Const art XII, §§1-9. The PUC has regulatory power and rate-making power over the designated public utilities. Contacts involving the PUC generally arise when the local agency is dealing in some capacity or manner with a regulated utility. The PUC has the powers assigned to it under the California Public Utilities Code and other applicable general laws. See generally Pub Util C §§201-2119.

© The Regents of the University of California

§1.99 (1) Overriding Authority

To the extent the PUC has by general order or specific regulation directed the activity of a particular utility within the boundaries of a city, the PUC's authority will control to the exclusion of the power of the city except as to the usage of city property by a utility. A city's police power is limited in regulating public utilities. Cal Const arts XI §7, XII §8; Pub Util C §701. See *San Diego Gas & Elec. Co. v City of Carlsbad* (1998) 64 CA4th 785, 75 CR2d 534.

© The Regents of the University of California

§1.100 (2) Authority Over Cellular Siting

Under General Order 159A (May 8, 1996), the PUC has authority to preempt local jurisdictions and authorize cellular facilities when the cellular utility can demonstrate it has provided the local agency with two or more acceptable sites, but the cellular utility is unlikely to obtain a permit for either site.

NOTE: The PUC staff take the position the PUC has plenary authority over the siting of certain facilities and transmission substations. On the PUC's rule-making and rate-making authority, see 53 Cal Jur 3d, Public Utilities.

© The Regents of the University of California

§1.101 c. State Agencies

Numerous state agencies interact with cities in a variety of ways. Some of the more significant ones for municipalities include the following:

- **Office of Planning and Research** (OPR) (www.opr.ca.gov), which assists the governor and the administration in land use planning, research, and liaison with local government; small business advocacy; rural policy; environmental justice; renewable energy research and support; innovation in government; service, volunteerism, and mentoring; policy and legislative research and support; community vitalization and development; and coordination of interagency task forces. The OPR is viewed by other state agencies as the coordinator for several environmental and state planning programs. The OPR is also engaged in ongoing reviews of state policies relating to community development. Major activities of the OPR with an impact on local governments include: recommending and implementing state policies with regard to land use and growth planning; providing technical planning advice to local governments; advising project proponents and government agencies on provisions of the California Environmental Quality Act; and operating the State Clearinghouse for environmental and federal grant documents. See Govt C §§65025-65054.5.
- **Housing and Community Development** (HCD) (www.hcd.ca.gov), California's principal housing agency, has the mission of providing leadership, policies, and programs to expand and preserve safe and affordable housing opportunities and promoting strong communities for all Californians. The HCD advocates for and supports housing development; develops, administers, and enforces building codes, manufactured housing standards, and mobile home park regulations; and administers state and federal housing, community development, and childcare facilities finance programs. The HCD issues determinations on the compliance of a city's housing element with state-mandated requirements for general plan housing elements. Govt C §§65580-65589.8.
- **California Coastal Commission** (www.coastal.ca.gov), which has primary responsibility for implementing the California Coastal Act of 1976 (Coastal Act) (Pub Res C §§30000-30900). The Coastal Act is a comprehensive scheme to govern land use planning in the coastal zone. The Coastal Act requires each local government lying in whole or in part within the coastal zone to prepare and submit a local coastal program to the Coastal Commission. Pub Res C §30500(a). The Coastal Commission consists of 15 members, not all of whom are voting members. Pub Res C §§30301, 30301.5.
- **State Lands Commission** (www.slc.ca.gov), which has primary responsibility for oil and gas drilling production and operations on lands within the offshore territorial boundaries, inland bays, and waterways of California, except for lands upstream from a line running north and south through the point where Contra Costa, Sacramento, and Solano Counties meet, and lands in the Bolsa Chica field of Orange County. Pub Res C §§6101-6111; 2 Cal Code Regs §§1900-2980.9. Developments in these areas may require approval by the State Lands Commission as well as the local entity.
- **California Environmental and Natural Resources Agencies.** The following state agencies have various roles and responsibilities with regard to aspects of the environment and may have authority over various activities undertaken by cities or developers. On their roles in protecting the environment, see chap 11.
- California Air Resources Board
- California Department of Conservation
- California Department of Fish and Game
- California Department of Forestry and Fire Protection
- California Department of Pesticide Regulation
- California Department of Toxic Substances Control
- California Department of Water Resources
- California Environmental Protection Agency
- California Integrated Waste Management Board
- California Resources Board
- State Water Resources Control Board

- **Office of Mine Reclamation** (OMR), created in 1991 to administer the Surface Mining and Reclamation Act of 1975 (SMARA) (Pub Res C §§2710-2796.5), provides assistance to cities, counties, state agencies, and mine operators for reclamation planning and promotes cost-effective reclamation. OMR strives to reclaim mined lands to a beneficial end-use through the implementation of SMARA; to prevent or minimize the adverse environmental effects of mining by providing assistance to lead agencies and miners in the review of reclamation plans; and to minimize residual hazards to public health and safety through the Abandoned Mine Lands program.

© The Regents of the University of California

§1.102 d. Intergovernmental Immunity

The liability of one governmental entity to another is the subject of a considerable body of appellate opinions.

© The Regents of the University of California

§1.103 (1) Federal Supremacy

The federal supremacy clause generally limits any responsibility of federal agencies to a local governmental entity except when congressional enactment or judicial decisions have conferred jurisdiction.

© The Regents of the University of California

§1.104 (2) Immunity From Assertion of Constitutional Rights

An entity that is judicially determined to be a political subdivision of the state (for example, a county, a redevelopment agency, or a housing authority) is not generally permitted to assert constitutional rights of, *e.g.,* equal protection and due process against its parent public entity because it is an agent of that state government. See *Star-Kist Foods, Inc. v County of Los Angeles* (1986) 42 C3d 1, 6, 227 CR 391; *City of S. Lake Tahoe v California Tahoe Reg'l Planning Agency* (9th Cir 1980) 625 F2d 231, 233-234, cert denied (1980) 449 US 1039 (cities bound by "political subdivision" rule); *San Diego Unified Port Dist. v Gianturco* (SD Cal 1978) 457 F Supp 283, 289, aff'd (9th Cir 1981) 651 F2d 1306 (protections afforded by Fourteenth Amendment and contract clause do not extend to political subdivisions).

© The Regents of the University of California

§1.105 (3) State Immunity From Zoning and Building Code Regulations

Subjecting the state in its exercise of sovereign activities to local zoning and building code regulation constitutes a conflict with the general laws and thus is prohibited unless the state consents to local regulation. *Hall v City of Taft* (1956) 47 C2d 177, 183, 302 P2d 574 (school property immune from local plan check and building permit requirements).

NOTE: The fact that a city is a charter city does not by itself authorize the application of local zoning regulation to state agencies. *Regents of Univ. of Cal. v City of Santa Monica* (1978) 77 CA3d 130, 136, 143 CR 276.

The law governing regulation of "local agencies" by cities and counties was enacted in response to *Hall v City of Taft* (1956) 47 C2d 177, 183, 302 P2d 574. See Govt C §§53090-53097.5. These provisions require that local agencies comply with all applicable building and zoning ordinances of the city or county in which the territory of the local agency is situated, but that local agencies are immune from city or county regulation of facilities for water storage or treatment or electrical energy. For purposes of these provisions, the definition of "local agency" excludes a city, county, or state, and certain rapid transit districts and bridge and highway districts. Govt C §53090(a).

NOTE: School district boards and other local agencies may nullify a city or county zoning ordinance. See Govt C §§53094(b) (school district boards), 53096 (other local agencies).

Cities and counties are mutually exempt from each other's planning and zoning ordinances with respect to city-owned property situated within a county, and county-owned property situated within a city, irrespective of whether the city or county is acting in a governmental or proprietary capacity. See *Lawler v City of Redding* (1992) 7 CA4th 778, 783, 9 CR2d 392; 40 Ops Cal Atty Gen 243, 244 (1962). But see 68 Ops Cal Atty Gen 114, 118 (1985) (governmental agency may not transfer its "section 53090 immunity" to lessee for purely private purposes).

NOTE: State law does impose certain procedural requirements on uses of property that are not in conformity with the relevant general plan. See Govt C §65402.

© The Regents of the University of California

§1.106 6. Eminent Domain

Property owned by a public entity and devoted to a public use is not subject to the exercise of another entity's powers of eminent domain unless the use for which the property is sought is a more necessary public use than the existing public use. CCP §1240.610. A redevelopment agency cannot condemn another public entity's property without consent. Health & S C §33395.

© The Regents of the University of California

II. MUNICIPAL ORGANIZATION AND REORGANIZATION

§1.107 A. Local Agency Formation Commissions (LAFCOs)

The legislative branch has the power to create local governments and set their boundaries. The California legislature has delegated much of its authority over the boundaries of cities and special districts to a local agency formation commission (referred to throughout this chapter as LAFCO) in each county. Each county must have a LAFCO. Govt C §56325.

© The Regents of the University of California

§1.108 1. History and Purpose

The Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (the Act) (Govt C §§56000-57550) took effect January 1, 2001. It substantially amended the Cortese-Knox Local Government Reorganization Act of 1985, which took effect January 1, 1986. The Act unified into one statutory scheme the three major laws that governed local agency boundary changes: the Knox-Nisbet Act of 1963, which established a local agency formation commission in each county and gave it regulatory authority over local agency boundary changes; the District Reorganization Act of 1965, which combined the separate laws governing special districts into a single statute; and the Municipal Organization Act of 1977, which consolidated the laws governing city incorporation and annexation. *Fallbrook Sanitary Dist. v San Diego Local Agency Formation Comm'n* (1989) 208 CA3d 753, 758, 256 CR 590.

PRACTICE TIP: The statutory changes made by the consolidation of these three acts were largely non-substantive (*L.I.F.E. Comm. v City of Lodi* (1989) 213 CA3d 1139, 1144 n3, 262 CR 166); thus, cases decided under the repealed acts are often still authoritative.

Among the stated legislative purposes for the creation of LAFCOs are: discouraging urban sprawl and preserving open space and prime agricultural lands, efficiently providing government services, and encouraging orderly formation and development of new local agencies. See Govt C §§56300, 56377. When forming a new local agency, a LAFCO must determine whether existing agencies can feasibly provide the needed services in a more efficient and accountable manner. Govt C §56301.

NOTE: Section 286 of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550) declares that it is intended to implement the recommendations of the Commission on Local Governance for the 21st Century. The commission ceased to exist on July 1, 2000.

PRACTICE TIP: For information on the Act, obtain a copy of the Guide to Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (revised annually; published by the Assembly Committee on Local Government and available online at www.assembly.ca.gov/acs/newcomframeset.asp?committee=17 (click on Committee Publications).

© The Regents of the University of California

§1.109 2. General Role

LAFCO has been described as the "watchdog" that the legislature has established to guard against duplication of services that result from the indiscriminate formation of new local agencies or the haphazard annexation of territory to existing local agencies. *Timberidge Enters., Inc. v City of Santa Rosa* (1978) 86 CA3d 873, 884, 150 CR 606. Any formation of a new district, incorporation of a city, annexation to or detachment from a city or district, disincorporation of a city, dissolution of a district, consolidation of cities or special districts, or merger or establishment of a subsidiary district is a "change of organization" that must be approved by LAFCO. See Govt C §§56021, 56375. A "reorganization" is any two or more changes of organization initiated in a single "proposal." Govt C §§56069, 56073. A "special reorganization" is a reorganization consisting of the detachment of territory from a city, or from a city and county, and incorporation of the detached territory as a city. Govt C §56075.5.

LAFCOs are required to adopt written policies and procedures and to exercise their powers in a manner that is consistent with those policies and procedures and encourages and provides for planned, well-ordered, efficient urban development patterns. Govt C §56300. LAFCOs are also required to adopt written procedures for the evaluation of proposals; and standards and procedures for evaluating service plans and initiating a change, organization, or reorganization. Govt C §56375(a), (g)-(h).

PRACTICE TIP: Each LAFCO must provide access to notices and other commission information through an Internet website. Govt C §56300(f). Cities should become familiar with local LAFCO procedures and standards.

© The Regents of the University of California

§1.110 3. Composition of LAFCOs

Most LAFCOs consist of seven members; two members from the county board of supervisors, two from the city councils within the county, two from the legislative bodies of independent special districts within the county, and one member of the public chosen by the other six members. Govt C §56325.

NOTE: The composition and number of members of LAFCOs in Los Angeles, Sacramento, San Diego, Santa Clara, and Kern counties are governed by specific statutes. See Govt C §§56326-56328.5. Special rules also apply in a county with no cities. See Govt C §56329.

A LAFCO's members must exercise independent judgment on behalf of the interests of residents, property owners, and the general public in furthering the Act's purposes. Those appointed on behalf of local agencies must represent the public's interests, not solely the interests of their appointing agencies. Govt C §56325.1.

© The Regents of the University of California

§1.111 4. Funding for LAFCOs

LAFCO costs are divided evenly among cities, special districts, and the county. Each LAFCO must adopt an annual budget following noticed public hearings, which budget must be approved by the board of supervisors, cities, and each independent special district. Govt C §56381.

© The Regents of the University of California

§1.112 5. Powers of LAFCOs

A LAFCO "is a creature of the legislature and has only those express (or necessarily implied) powers which are specifically granted to it by statute." *Simi Valley Recreation & Park Dist. v Local Agency Formation Comm'n* (1975) 51 CA3d 648, 687, 124 CR 635. Nevertheless, a LAFCO's delegated powers are formidable, in light of the legislature's declaration that the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550) provides the "sole and exclusive authority and procedure" for changes of organization and reorganizations. Govt C §56100.

© The Regents of the University of California

§1.113 a. Particular Powers of LAFCOs

The powers and duties of LAFCOs are enumerated in Govt C §§56133, 56375, 56425. The most significant of these powers are the following:

- Adopt and update a sphere of influence for each local agency (Govt C §§56425, 56430);
- Approve or disapprove all boundary change proposals (Govt C §56375(a));
- Impose conditions on boundary changes (Govt C §56886);
- Initiate proposals for the formation of a new district or districts, consolidation of districts, dissolution of a district, merger of a district with a city, establishment of a subsidiary district, and a reorganization that includes any of those changes (Govt C §56375(a)); and
- Review and approve or disapprove requests from cities and districts to provide new or extended services outside their jurisdictional boundaries (Govt C §§56133-56434).

© The Regents of the University of California

§1.114 b. Changes of Organization

The authority and procedure for changes of organization (which include formation, annexation, detachment, consolidation, merger, and dissolution (Govt C §§56035, 56100)) are provided by the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550). Proceedings for the formation of a special district are conducted as authorized by the principal act of the district, with the LAFCO serving as the conducting authority. Govt C §56100. The Act will prevail in any conflicts between the procedural requirements of the principal act and those of the Act. Govt C §56100.

A LAFCO has broad powers to approve or disapprove, wholly or partially, with or without conditions, any annexations or other changes of organizations initiated either by citizens or by local agencies. Govt C §56375(a). A LAFCO has the power to initiate certain changes of organization affecting special districts. Govt C §56375(a).

NOTE: A confirmation election is required when a LAFCO initiates a change of organization affecting a special district and receives a timely and sufficient petition requesting that the proposal be submitted to the voters. Govt C §57113.

© The Regents of the University of California

§1.115 (1) Changes Relating to Farmland Security Zones

As to a change of organization or reorganization initiated after January 1, 2003, there are specific rules relating to farmland security zones:

- A LAFCO may not approve a proposal resulting in annexation of land unless the city's facilities or services will benefit the land uses in that zone and the landowner consents to the annexation. Other narrow exceptions apply. See Govt C §56749. See also Govt C §51296.3.
- A LAFCO may not approve a proposal resulting in annexation of land subject to a farmland security zone contract to a special district that provides certain urban facilities or services, unless those facilities or services benefit land uses allowed under the contract and the landowner consents to the annexation. Govt C §51296.4.
- A LAFCO may not approve or conditionally approve a proposal resulting in annexation to a city or special district of land subject to a California Land Conservation Act (Williamson Act) contract if the city or district provides certain urban facilities or services, unless (Govt C §56856.5(c)):

NOTE: Williamson Act subvention payments to local governments were suspended for fiscal year 2009-2010 due to the ongoing state budget crisis. This means that counties administering Williamson Act contracts are no longer receiving money from the state to make up for the loss in revenue caused by land being subjected to Williamson Act contracts. Although subvention payments have been customary for many years, they have never been guaranteed. The Williamson Act contracts between landowners and local governments remain in force, however, regardless of the availability of subvention payments. See www.conservation.ca.gov/dlrp/lca/Pages/Index.aspx.

- those facilities or services, or other facilities or services of the city or district, benefit land uses allowed under the contract,
- the city or county administering the contract after the annexation has policies and measures in place to ensure long-term continuation of the land uses allowed under the contract, or
- the proposal encourages and provides efficient urban development patterns that consider preservation of existing open space lands, or the proposal is necessary to provide services to such development patterns.

© The Regents of the University of California

§1.116 (2) Conditions on Changes

A LAFCO has extensive powers to impose terms and conditions on any change of organization or reorganization. For the applicable terms and conditions, see Govt C §56886. A LAFCO also may impose any conditions not specifically enumerated, but necessary or incidental to the conditions specified. Govt C §56886(v).

Most conditions are of a fiscal nature, *i.e.,* the transfer of debt and of authority for and revenue from taxes, service fees, or assessments. The general terms and conditions of Part 5 (commencing with Govt C §57300) of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (the Act) (Govt C §§56000-57550) apply to a proposal only to the extent that a LAFCO has not imposed specific terms and conditions under Govt C §56886. Govt C §57302. A LAFCO can make any additions or deletions to a proposal that do not alter the general nature of the proposal. *Fallbrook Sanitary Dist. v San Diego Local Agency Formation Comm'n* (1989) 208 CA3d 753, 765, 256 CR 590. A LAFCO may also impose certain procedural requirements or limitations on a proposal. Govt C §56885.5.

A LAFCO may conditionally approve a change of organization or reorganization subject to certification by the California Coastal Commission of an amendment to the local coastal program of a city or county. Govt C §56887. Similarly, a LAFCO may conditionally approve (re)organization changes subject to the acquisition, improvement, sale, transfer, or division of real or personal property, as long as such changes do not regulate land use, property development, or subdivision requirements. Govt C §56886.

© The Regents of the University of California

§1.117 c. Spheres of Influence

A sphere of influence is a plan for the probable physical boundaries and service area of a local agency. Govt C §56076. A LAFCO must adopt a sphere of influence for each city, county service area, and district or special district within the county, except for school districts, community college districts, special assessment districts, improvement districts, and Mello-Roos Act community facilities districts. Govt C §§56036, 56054, 56425(a). Each LAFCO must enact policies designed to promote the logical and orderly development of areas within its sphere. Govt C §56425(a). All LAFCO determinations on changes of organization must be consistent with the spheres of influence of affected agencies. Govt C §56375.5. A LAFCO may recommend governmental reorganizations to agencies, using their spheres of influence as the basis for the reorganizations. Govt C §56425(h). A LAFCO may not approve a proposed incorporation unless it finds that the proposal is consistent with the spheres of influence of affected agencies. Govt C §56720(b).

© The Regents of the University of California

§1.118 (1) Factors Considered Determining Sphere of Influence

In determining a sphere of influence, a LAFCO must consider and make a written determination on the following (Govt C §56425(e)):

- the present and planned uses in the area,
- the need for public facilities and services,
- the present capacity of public facilities and adequacy of services, and
- the existence of any social or economic community interest that may be relevant to the agency.

A LAFCO is to give great weight to an agreement between a city and county on a new or updated sphere of influence for the city. Govt C §56425(b); 84 Ops Cal Atty Gen 66 (2001).

NOTE: Sphere of influence determinations alone are not subject to environmental review under the California Environmental Quality Act. *City of Agoura Hills v Local Agency Formation Comm'n* (1988) 198 CA3d 480, 493, 243 CR 740.

© The Regents of the University of California

§1.119 (2) Mandatory Service Reviews

For spheres of influence prepared after January 1, 2001, LAFCOs must conduct a service review of the municipal services provided in the county or other appropriate area designated by the LAFCO and prepare a written statement of its determination on each of the following (Govt C §56430):

- infrastructure needs or deficiencies;
- growth and population projections for the affected areas;
- financing constraints and opportunities;
- cost-avoidance opportunities;
- opportunities for rate restructuring;
- opportunities for shared facilities;
- government structure options, including an evaluation of consolidation or reorganization of service providers;
- evaluation of management efficiencies; and
- local accountability in governance.

In conducting a service review, a LAFCO must comprehensively review all the agencies that provide the identified services within the area designated by LAFCO. Govt C §56430(b). See Govt C §56378.

© The Regents of the University of California

§1.120 (3) Updates and Amendments to Sphere of Influence

After adopting a sphere of influence, a LAFCO is required to review and update, as necessary, the adopted sphere at least once every 5 years. Govt C §56425(g). The same service review required for establishing a sphere of influence (see §1.119) is required for a sphere update. Govt C §56430(a). In addition, any person or local agency may file a written request with a LAFCO for amendment of a sphere of influence or urban service area adopted by the LAFCO. A LAFCO may charge a fee that does not exceed its estimated reasonable cost in providing this service. Govt C §§56383(a)(3), 56428(f). Changes to a sphere of influence determination require prior notice and a public hearing. Govt C §§56427-56428. A LAFCO may approve or disapprove the request with or without amendment, wholly, partially, or conditionally. Govt C §56428(e).

NOTE: A LAFCO may not approve or conditionally approve change to a sphere of influence for land subject to a farmland security zone contract or a California Land Conservation Act of 1965 (Williamson Act) contract if the affected local agency provides certain urban facilities or services, unless these facilities or services benefit land uses allowed under the contract and the landowner consents to the change. Govt C §§56426, 56426.5.

PRACTICE TIP 1: The Governor's Office of Planning and Research has guidelines for the service review a LAFCO must conduct when adopting or updating a sphere of influence (Govt C §§56425, 56430). These guidelines are available online at www.opr.ca.gov/planning/docs/MSRGuidelines.pdf.

PRACTICE TIP 2: An applicant for a sphere of influence amendment should submit substantial evidence relating to each of the factors considered by the LAFCO. *City of Agoura Hills v Local Agency Formation Comm'n* (1988) 198 CA3d 480, 493, 243 CR 740. Applicants should review the LAFCO guidelines and policies to ensure satisfaction of any additional requirements for information. An applicant may wish to concurrently process a sphere of influence amendment and related change(s) of organization.

© The Regents of the University of California

§1.121 d. Provision of New or Extended Services Outside of Boundaries

With limited exceptions, a city or district cannot provide new or extended service by contract outside of its jurisdictional boundaries without prior written LAFCO approval. LAFCO may authorize a city or district to provide new or extended service outside its boundaries, but within its sphere of influence, in anticipation of a later change in organization. Under certain conditions, LAFCO may also authorize a city or district to provide new or extended services outside its jurisdictional boundaries and outside its sphere of influence to respond to a threat to the health or safety of residents of the affected territory. Govt C §56133.

© The Regents of the University of California

§1.122 e. LAFCO as Project for CEQA Purposes

LAFCO determinations are often deemed "projects" within the meaning of the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177). *Bozung v Local Agency Formation Comm'n* (1975) 13 C3d 263, 282, 118 CR 249; *City of Agoura Hills v Local Agency Formation Comm'n* (1988) 198 CA3d 480, 243 CR 740. CEQA exemptions may apply to some changes of organization. See 14 Cal Code Regs §§15300, 15319-15320.

© The Regents of the University of California

6. Limitations on LAFCO Power

§1.123 a. Limitations on Imposing Conditions

Although a LAFCO's power to impose conditions is broad (see §1.116), a LAFCO cannot impose conditions that:

- Directly regulate land use density or intensity, property development, or subdivision requirements (Govt C §§56375(a), 56886);

NOTE: A LAFCO must require a city to either prezone land to be annexed to the city or present evidence that existing development entitlements on the land are vested or already at buildout and are consistent with the city's general plan. A LAFCO decision on a proposal to annex territory to a city must be based on the general plan and prezoning of the city. A LAFCO may not specify how the land is to be prezoned. Govt C §56375(a).

- Require a city to provide services to an area outside its sphere of influence, unless that condition mitigates effects resulting directly from an annexation (Govt C §56376); or
- Impose on a local agency annexation standards or frequency of maintenance requirements for any existing street or road within the annexed area, or require that the agency maintain an existing public facility it does not own (Govt C §56376.5).

© The Regents of the University of California

§1.124 b. Limitations on Approving or Disapproving Changes of Organization

Although LAFCOs possess broad discretion when considering changes of organization (see §1.114), they are limited in approving or disapproving changes of organization in the following circumstances:

- **Non-contiguous Territory.** With limited exceptions (see Govt C §§56742-56747), territory to be annexed to a city or district must be contiguous to it and territory proposed to be incorporated must be contiguous to other territory included in the proposal. Govt C §§56031, 56119, 56741.
- **State Tidelands and Submerged Lands.** State tidelands or submerged lands cannot be annexed by a city except when approved by the State Lands Commission. Govt C §56740.
- **Creation of Islands.** Territory cannot be annexed to, or incorporated into, a city if that would create an unincorporated pocket surrounded by the city or the city and the ocean. Govt C §56744. This requirement may be waived when it would be detrimental to orderly growth and the territory cannot reasonably be annexed to another city or incorporated. Govt C §56375(m).
- **Revenue Neutrality of Incorporation.** A LAFCO may not approve a reorganization that includes an incorporation unless it finds that the effect of the incorporation is revenue neutral. Govt C §56815.

© The Regents of the University of California

§1.125 c. Mandatory LAFCO Approval

LAFCO approval is mandatory on a proper application by resolution for annexation to a city of territory contiguous to it if the territory is (Govt C §56375(a)(4))

- not prime agricultural land,
- designated for urban growth by the general plan of the annexing city,
- either substantially developed or developing, not within the sphere of another city, and
- substantially surrounded by the annexing city or contiguous to a county boundary or the ocean, within an urban service area determined by the LAFCO, or an island, within a city, of unincorporated territory no larger than 150 acres and meeting certain other statutory requirements.

© The Regents of the University of California

§1.126 7. LAFCO Proceedings

The procedures applicable to LAFCO proceedings vary based on the type of proposal for change of organization. See Govt C §§56650-56898.

© The Regents of the University of California

§1.127 a. Evidence Gathering

LAFCOs hold hearings primarily to gather information. Govt C §56666. They have broad discretion to approve or disapprove a proposal based on the evidence presented at the hearings. Govt C §§56107, 56375, 56880. However, in reviewing a proposal, LAFCOs must consider the factors listed in Govt C §56668, and for district annexations and some city detachments, the factors listed in Govt C §56668.3.

© The Regents of the University of California

§1.128 b. Time Limits

The limits established by the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550) for action by an official or LAFCO are directory, not mandatory, except as to the following (Govt C §§56106, 56658(i), 56895(b)):

- notice requirements,
- setting the date for a LAFCO hearing on a proposal, and
- requests to amend or reconsider LAFCO resolution-making determinations.

© The Regents of the University of California

§1.129 c. Judicial Review

LAFCOs act in a quasi-legislative capacity when exercising discretion in making determinations on proposals. *City of Santa Cruz v Local Agency Formation Comm'n* (1978) 76 CA3d 381, 387, 142 CR 873. This means LAFCO decisions are likely to be upheld as long as statutory procedures are followed and any substantial evidence supports LAFCO determinations. Technical noncompliance with certain statutory procedures will not invalidate the affected proceedings. Govt C §56107. See *City of Agoura Hills v Local Agency Formation Comm'n* (1988) 198 CA3d 480, 492, 243 CR 740.

Judicial inquiry into LAFCO determinations and decisions is limited to the question of whether there was fraud or prejudicial abuse of discretion evidenced by a lack of substantial evidence, in light of the whole record, to support the determination or decision. Govt C §56107.

PRACTICE TIP 1: Challenge incomplete LAFCO decisions by traditional mandate under CCP §1085. *Bozung v Local Agency Formation Comm'n* (1975) 13 C3d 263, 271, 118 CR 249.

PRACTICE TIP 2: Challenge a completed change of organization, reorganization, or sphere of influence determination by a validation action. CCP §§860-870.5; Govt C §56103. A completed change of organization or reorganization may also be challenged by a quo warranto action. *Hills for Everyone v Local Agency Formation Comm'n* (1980) 105 CA3d 461, 466, 164 CR 420.

© The Regents of the University of California

§1.130 d. Jurisdictional Overlaps

A proposal regarding a district may apply to more than one county, in which case the LAFCO of the principal county has exclusive jurisdiction. Govt C §§56123, 56387. The principal county is the county where all or the greatest portion of the entire assessed value of all taxable property within the district is located. Govt C §56066.

Exclusive jurisdiction may be vested in the LAFCO of a non-principal county if (Govt C §§56124, 56388):

- the LAFCO of the principal county so agrees;
- the LAFCO of the principal county officially designates the LAFCO of the non-principal county; and
- the LAFCO of the non-principal county agrees to assume exclusive jurisdiction.

© The Regents of the University of California

§1.131 8. Subsidiary Districts

A subsidiary district is a district of limited powers for which the city council is designated and empowered to act as the ex officio board of directors. Govt C §56078. Examples of such districts include: fire protection districts, harbor districts, municipal water districts, port districts, library districts, hospital districts, sanitary districts, and public cemetery districts. See Govt C §56037.

© The Regents of the University of California

§1.132 a. Initiating Proceedings to Establish Subsidiary District

A LAFCO may initiate a proposal to establish a subsidiary district. Govt C §56375(a). In addition, a resolution by the legislative body of the affected local agency or a petition by the requisite number of voters or landowners may be submitted to The LAFCO to apply for the establishment of a subsidiary district. Govt C §§56652-56654, 56866. The signature requirements for a petition are 5 percent of the registered voters of the district or of the registered voters within the territory of the city outside the boundaries of the district. Govt C §56866(a). For a landowner district, the petition must be signed by 5 percent of the landowner-voters within the district who also own not less than 5 percent of the assessed value of land, or 5 percent of the registered voters residing within the territory of the city outside the boundaries of the district. Govt C §56866(b).

© The Regents of the University of California

§1.133 b. Conducting Proceedings to Establish Subsidiary District

The LAFCO is the conducting authority in subsidiary district proposals. Govt C §§56854, 57077. The LAFCO must hold a protest hearing on a proposal to establish a subsidiary district. Govt C §57002. If, before the conclusion of proceedings on a proposal to establish a subsidiary district, the LAFCO receives a majority protest to the district, and such protest is not withdrawn, it must terminate proceedings and the proposed district must be abandoned. Govt C §§57077-57078.

NOTE: When proceedings on the establishment of a subsidiary district have been terminated, either because of a majority protest or because the voters have voted not to confirm establishment of the district, no similar proposal may be filed with the LAFCO within 2 years thereafter unless LAFCO waives the restriction. Govt C §57090.

If, at the conclusion of proceedings on a proposal to establish a subsidiary district, the LAFCO does not receive a majority protest to the subsidiary district, it must take one of the following actions if it determines to establish the district:

- Order establishment of the district subject to confirmation by the voters, or in the case of a landowner district, subject to confirmation by the affected landowners, unless the enabling statute authorizing establishment of the district provides otherwise (Govt C §57077(a)(1)); or
- Order establishment of the district without an election if the proposal meets any of the conditions described in Govt C §56854(a), and the city has consented to the proposal as required by Govt C §§56854(b) and 57077(a)(2).

© The Regents of the University of California

§1.134 c. Revenue Consequences of Subsidiary District Merger Into City

When the city council is the governing body of the subsidiary district, the merger of that district into the city will not be subject to the property tax exchange formulas and negotiations requirements of Rev & T C §§99 and 99.01 if by resolution the city (Govt C §57087.3):

- continues to provide the subsidiary district's services to areas outside the city but within the district at the same levels as provided within the city, and
- assumes all district's assets, liabilities, and revenues.

© The Regents of the University of California

§1.135 B. Incorporation

Incorporation is a "change of organization" subject to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (the Act) (Govt C §§56000-57550), and the Act provides the exclusive authority and procedure for incorporation of a city. See Govt C §§56021, 56100. Courts must take judicial notice of the existence and organization of cities incorporated under the Act. Govt C §57380.

PRACTICE TIP 1: The Governor's Office of Planning and Research is required to promulgate minimum statewide advisory guidelines for the incorporation process. Govt C §56815.2. Final incorporation guidelines and related documents are available at www.opr.ca.gov/planning/publications/LAFCO_October_21_guidelines.pdf.

Because the procedures for incorporation described in the Act are complex, this section provides only an overview of the procedures applicable to an incorporation initiated by citizen petition and does not discuss all statutes prescribing the incorporation process.

PRACTICE TIP 2: For relevant resources, see Guide to Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (revised annually, published by the Assembly Committee on Local Government and available online at www.assembly.ca.gov/acs/newcomframeset.asp?committee=17 (click on Committee Publications); and Curtin, Curtin's California Land Use and Planning Law (revised annually and published by Solano Press, P.O. Box 773, Point Arena, California 95468).

© The Regents of the University of California

§1.136 1. Initiating Incorporation Proceedings by Petition

The proceeding is deemed initiated on the date the petition for incorporation is accepted for filing and a certificate of filing is issued by the executive officer of the local agency formation commission (LAFCO). Govt C §56651. The petition's contents and notice requirements are set by statute. Govt C §§56700, 56700.4. The petition may propose the name of the proposed city (Govt C §56722), and may provide for appointment of a city manager and elective offices, except the city council. Govt C §56723.

The petition must be signed by either (Govt C §56764):

- 25 percent or more of the registered voters in the area to be incorporated; or
- 25 percent or more of the landowners who own not less than 25 percent of the assessed value of land in the area.

All signatures must be affixed within 6 months of the date of the first signature and filed within 60 days of the last. Govt C §56705(a).

NOTE: The same timelines apply to petitions for a special reorganization, *i.e.,* detachment of territory from a city and incorporation of that territory as a new city. Govt C §§56705(b)(2), 56075.5.

The executive officer of the LAFCO has 30 days to determine the sufficiency of the petition. Govt C §56706. Insufficient petitions are filed with the executive officer as a public record without prejudice to a new filing. Govt C §56709.

© The Regents of the University of California

§1.137 2. Conducting Incorporation Proceedings

The application (see Govt C §56652), petition (see §1.136), and fees are filed with the executive officer of the LAFCO. If sufficient, the executive officer issues a certificate of filing and the LAFCO proceeds to act by setting the petition for hearing not more than 90 days following the issuance of the certificate of filing. Govt C §56658(i). The hearing may be continued, but not more than 70 days from the original date. Govt C §56666.

The executive officer must issue a report with recommendations 5 days before the hearing and provide copies to particular persons and entities. Govt C §56665. The executive officer prepares (or causes to be prepared) a comprehensive fiscal analysis of the proposed city's projected public service and facilities costs and projected revenues for the first 3 years of incorporation and the fiscal impacts on other entities. Govt C §56800. The state controller may be requested to review the fiscal analysis, with 45 days to issue a report. Govt C §56801.

PRACTICE TIP 1: Do not rely on the fiscal analysis after incorporation as setting out a completely accurate picture of the city's financial status. The financial officer of a new city may need to perform further research as to potential liabilities of the city, because the fiscal analysis may have omitted significant liabilities (such as those associated with a merged district) or the costs associated with legal mandates (such as preparation of a general plan).

© The Regents of the University of California

§1.138 3. Deciding on Incorporation

In making its decision, the LAFCO must consider a broad array of factors, including population, land use, and community services. Govt C §56668. The LAFCO determines the amount of the property tax exchange. If all services are not transferred (Govt C §56810):

- The county auditor determines the proportion of all property taxes to all general revenue;
- The LAFCO determines the total net cost of providing services; and
- The LAFCO multiplies the ratio of property tax to general revenue by total cost of services to determine the property tax transfer.

PRACTICE TIP: Counsel to a newly incorporated city should review the decision in *City of Highland v County of San Bernardino* (1992) 4 CA4th 1174, 6 CR2d 346 to ensure that this calculation is consistent with its holdings. Counsel may also recommend an audit be performed on these calculations.

The LAFCO evaluates the exchange of both revenue and responsibility for service delivery. See Govt C §56815. The LAFCO may not approve a proposal that includes an incorporation unless it finds that the revenues lost by the county as a result of incorporation are substantially equal to the county's reduction in expenditures for services the new city will assume. Govt C §56815(b). The LAFCO may impose tax sharing or other conditions to mitigate the negative fiscal effect of an incorporation. Govt C §56815(c).

© The Regents of the University of California

§1.139 a. Appropriations Limits

The LAFCO determines provisional appropriations limits; the city council determines permanent appropriations limits. Govt C §§56812, 57120. See also Cal Const art XIII B, §4; Govt C §§7900-7914. It determines the provisional appropriations limit by estimating the amount of revenue from proceeds of taxes for the first full fiscal year, then adjusting for cost of living and population increases for the next fiscal year. Govt C §56812(a). The city determines the proposed permanent limit by calculating the actual revenue received from proceeds of taxes for the first fiscal year and adjusting for cost of living and population increases in the second fiscal year. Govt C §56812(b). The permanent appropriations limit is set at the first municipal election following the first full fiscal year. Adoption of the permanent appropriations limit is not considered a change in the city's appropriations limit for purposes of Cal Const art XIIIB. Govt C §56812(c).

PRACTICE TIP: Because the first municipal election need not be held unless there is a proposition to be voted on or non-council offices to be filled (see Govt C §57379), the city council may need to establish by resolution a further provisional appropriations limit for the second fiscal year.

© The Regents of the University of California

§1.140 b. Approval or Disapproval of Proposal

Within 35 days after the hearings, the LAFCO adopts a resolution making determinations approving or disapproving the proposal, with or without amendments or conditions. Govt C §56880. The resolution making determinations must include the information required by Govt C §56881.

The LAFCO's resolution accepts or rejects each of the findings or recommendations made in the executive officer's report and fiscal analysis. Govt C §56803. To approve or conditionally approve an incorporation, the LAFCO must also find that the proposal is consistent with the Act and the spheres of influence of affected agencies, and that the comprehensive fiscal analysis, executive officer's report, and testimony received have been reviewed. Govt C §56720.

NOTE: The resolution approving an incorporation must, on the applicant's request, specify that the first election of city officers is to be held after voter approval of the proposal. Govt C §56724. If the proposal is disapproved, no similar proposal involving the same territory may be initiated for 1 year from the date the resolution terminating proceedings is adopted. Govt C §56884(a). The LAFCO may, however, waive the requirements of Govt C §56884(a) if it determines that they are detrimental to the public interest. Govt C §56884(b).

© The Regents of the University of California

§1.141 c. Reconsideration of Decision on Proposal

The LAFCO must review any request for reconsideration submitted within 30 days of adoption of the resolution approving or denying the proposal. Govt C §56895. The request must (Govt C §56895(a)):

- Specify the modification to the LAFCO resolution being requested; and
- State what new or different facts could not have been presented previously or what new law warrants the reconsideration.

Any such request tolls the time to file an action under Pub Res C §21167 (California Environmental Quality Act). Govt C §56895(d). However, a request for reconsideration is not a jurisdictional prerequisite for judicial review of a LAFCO's determinations. *Sierra Club v San Joaquin Local Agency Formation Comm'n* (1999) 21 C4th 489, 510, 87 CR2d 702. See §1.129.

© The Regents of the University of California

§1.142 d. Decision on Proposal

Following adoption by a LAFCO of a resolution making determinations, the proposed incorporation is considered by the LAFCO sitting in its capacity as the commission. Govt C §57000. The executive officer sets the proposal for hearing and gives notice within 35 days of the adoption of the resolution, and the hearing is held no sooner than 21 days and no later than 60 days after notice. Govt C §57002(a). The hearing may be continued for no more than 35 days for a proposal that includes an incorporation. Govt C §57050.

NOTE: Once the notice goes out, the LAFCO cannot accept or act on a conflicting application. Govt C §57003.

Within 30 days after the hearing concludes, the conducting authority must adopt a resolution making a finding on written protests and either terminate the proceedings, if a majority protest exists as described in Govt C §57078, or order the incorporation subject to the confirmation of the electors or landowners. Govt C §57076. The required contents of the resolution ordering a change of organization, including an incorporation, are described in Govt C §57100. When the resolution orders an incorporation subject to an election, the required contents of the resolution are described in Govt C §§57115-57116 and 57120.

Proposals not completed within 1 year after approval by a LAFCO will be deemed "abandoned," unless the time is extended by the LAFCO. Govt C §57001.

© The Regents of the University of California

§1.143 e. Elections to Confirm Incorporation

The election is controlled by the Elections Code and Govt C §§57125-57150. See Govt C §57125.

NOTE: In cases of conflict, the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550) governs over the Elections Code. Govt C §57125(a)(2).

The ballot questions are set out in statute. Govt C §§57133-57135. The executive officer prepares an impartial analysis of not more than 500 words to be approved or modified by the LAFCO and included in the ballot pamphlet. Govt C §§57144, 57148(a)(1). Opponents and proponents may prepare ballot arguments for the ballot pamphlet of not more than 300 words. Govt C §§57145-57148. If more than one argument is submitted for or against a measure, the election official chooses the arguments for the ballot pamphlet, giving preference and priority to the arguments, if any, submitted by the legislative body (or members thereof) of an affected agency. Govt C §57145(b).

Only voters residing in the territory to be incorporated may vote to confirm the incorporation. Govt C §57118. This limitation has been upheld against a constitutional challenge. *Board of Supervisors v Local Agency Formation Comm'n* (1992) 3 C4th 903, 13 CR2d 245, cert denied (1993) 507 US 988. However, for a special reorganization, an election is called in both the territory to be detached from the city and in the entire territory of the city from which the detachment is proposed. Govt C §57119.

If a majority vote "yes," the LAFCO will confirm the results by issuing a certificate of completion confirming the order for the change of organization and indicating the name and the highest vote-getters for offices or calling an election to fill city offices. Govt C §§57176, 57178. For a special reorganization, a majority vote of approval is required in both elections for the proposal to be confirmed. Govt C §57176.1. If a majority votes "no," the LAFCO executes a certificate of termination of proceedings. Govt C §57179.

© The Regents of the University of California

4. Effects of Incorporation

§1.144 a. City Jurisdiction

After the effective date of an incorporation, all territory incorporated, and all inhabitants of or voters residing within the new city, are subject to the jurisdiction of, and have rights and duties conferred on them as inhabitants and voters of, the new city. Govt C §57375.

© The Regents of the University of California

§1.145 b. Effect of County Ordinances

If the new city includes territory formerly unincorporated, the city must immediately adopt an ordinance continuing the effectiveness of county ordinances previously applicable within that territory. The ordinances remain in effect for 120 days, or until specifically superseded by the city, whichever occurs first. Special provisions govern Orange County cities. Govt C §57376.

PRACTICE TIP 1: After expiration of the 120-day period, the county ordinances that have not been superseded, or the ordinances of another jurisdiction, should be adopted by reference. If a district was merged into the new city, the ordinances and resolutions of that entity should be adopted by the city to the extent consistent with the objectives of the incorporation or needed to provide services previously provided by the district.

PRACTICE TIP 2: After *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 45 CR2d 207, and Proposition 218, any ballot question on incorporation should include a request for approval of the continuation of county taxes. See Memorandum from League of California Cities Ad Hoc Proposition 62 Advisory Committee, p 16 (December 11, 1995).

PRACTICE TIP 3: The League of California Cities has published the Proposition 218 Implementation Guide (2007), available at 1400 K Street, 4th Floor, Sacramento, CA 95814, telephone (916) 658-8257; fax (916) 658-8220; or online at www.cacities.org/munilaw.

© The Regents of the University of California

§1.146 c. City Council Terms of Office

The three council members elected with the lowest winning number of votes hold office until the first succeeding election and the two with the highest number of votes serve until the second municipal election. Govt C §57377. The exception is when the first municipal election is less than 1 year from the incorporation election; then the three lowest vote-getters will serve until the second municipal election and the two highest vote-getters will serve until the third municipal election. The first election need not be held unless some other office or proposition is on the ballot. Govt C §57379.

© The Regents of the University of California

§1.147 d. Property

Property held in trust for the city, by officers, boards, or persons, must be conveyed to the city. Govt C §57382. Roads or highways previously accepted by the county into the county road system become city streets on the effective date of the incorporation. Govt C §57385.

© The Regents of the University of California

§1.148 e. Services in First Full Fiscal Year

When a new city was previously unincorporated territory, the county must continue services, without additional charge, for the remainder of the fiscal year of incorporation or until the city requests a discontinuation, whichever occurs first. On request of the board of supervisors, the LAFCO must condition the incorporation on reimbursement of the county by the city over 5 years for the net cost, which includes the direct and indirect costs of providing the services, of county services so provided. Govt C §57384.

© The Regents of the University of California

§1.149 C. Annexation and Detachment

Annexation and detachment are "changes of organization" subject to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550). See Govt C §56021. "Annexation" adds territory to a city or district, and "detachment" removes area from a city or district. Govt C §§56017, 56033. As with incorporation, the procedures are specifically governed by statute.

PRACTICE TIP: A resource on the Act is the Guide to Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (revised annually; published by the Assembly Committee on Local Government and available online at www.assembly.ca.gov/acs/newcomframeset.asp?committee=17 (click on Committee Publications).

© The Regents of the University of California

§1.150 1. Procedures for Annexation

The Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550) provides that LAFCO proceedings for annexation of territory, as with other reorganizations, may be initiated either by:

- resolution of the affected local agency (Govt C §56654(a)), or
- petition with the required signatures of landowners or registered voters (Govt C §56767).

The resolution or petition must state whether or not the city will succeed to any existing California Land Conservation Act of 1965 (Williamson Act) contracts. Govt C §§56738, 56752.

© The Regents of the University of California

§1.151 a. When Annexation Is Appropriate

A LAFCO may approve annexation to a city after notice and hearing (see §1.156) if the proposed annexation is (Govt C §56375(d)):

- located in unincorporated, noncontiguous territory, subject to the limitations specified in Govt C §56742,
- located in the same county as that in which the city is located, and
- owned by a city and used for municipal purposes.

© The Regents of the University of California

§1.152 b. Property Tax Negotiations

Local agencies affected by an annexation must negotiate an exchange of property tax revenues within 60 days. Rev & T C §99(b)(4). For annexations initiated before January 1, 1998, or after January 1, 2005, the failure of a city and county to reach a property tax agreement deprives the LAFCO of jurisdiction to continue annexation proceedings. The LAFCO may not issue a certificate of filing under Govt C §56658 and continue processing an application for annexation unless the city and county reach a property tax agreement under Rev & T C §99. There is no statutory duty on the city to reach a property tax agreement with the county, but it is likely the city can be required to negotiate in good faith. *Greenwood Addition Homeowners Ass'n v City of San Marino* (1993) 14 CA4th 1360, 1377, 18 CR2d 350.

For annexations initiated between January 1, 1998, and January 1, 2010, additional analysis, mediation, and public hearings are required if the city and county fail to reach an agreement regarding property taxes. Rev & T C §99.

© The Regents of the University of California

§1.153 c. Effect of Annexation Agreement Requiring Waiver of Protest Rights

A city may enforce an annexation agreement that requires the landowner, as a condition of receiving city sewer services, to waive the right to protest the annexation of the property to the city. The waiver is binding on the landowner, future owners, and long-term lessees of the property, but not other occupants unless they have actual knowledge of the agreement. 76 Ops Cal Atty Gen 227 (1993). But see *Hussey v City of Portland* (9th Cir 1995) 64 F3d 1260 (similar agreement in which residents were required to consent to annexation in return for receiving subsidized hook-up costs was unconstitutional).

PRACTICE TIP: A city might attempt to reach a master property tax exchange agreement with the county so that each annexation's tax issues need not be negotiated separately.

© The Regents of the University of California

§1.154 2. Procedures for Detachment

The Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550) provides that LAFCO proceedings for detachment of territory, as with other reorganizations, may be initiated by either:

- resolution of the affected local agency (Govt C §56654(a)), or
- petition with the required signatures of landowners or registered voters (Govt C §56768).

NOTE: A detachment of territory from a city and the incorporation of the detached territory as a new city is a "special reorganization" governed by specific statutes. Govt C §§56075.5, 56734, 57119, 57132.5, 57176.1.

© The Regents of the University of California

3. LAFCO Approval or Disapproval

§1.155 a. With No Notice and Hearing

Annexations and detachments may be approved or disapproved without notice or hearing by the LAFCO when all the owners of land affected by the proposal have given a written consent to the proposal and there is no objection by the affected city or district. Govt C §56663.

© The Regents of the University of California

§1.156 b. With Notice and Hearing

If the LAFCO holds a hearing, it must within 30 days after the hearing make findings as to the value of the written protest and (Govt C §57075):

- terminate the proceedings, if a majority protest exists;
- order annexation or detachment subject to voter confirmation when the requisite number of written protests were made; or
- order the annexation or detachment without election.

NOTE: Special requirements apply when inhabited territory is proposed to be annexed to a city with more than 100,000 people that is located in a county with more than 4 million in population. Govt C §57075.5. Special requirements also apply to landowner-voter districts (Govt C §57076), and when a reorganization includes a detachment of territory from a city. Govt C §56668.3.

The majority protest provision applicable to annexations in uninhabited territory contained in Govt C §57078(a) does not violate constitutional equal protection requirements. *Broadmoor Police Protection Dist. v San Mateo Local Agency Formation Comm'n* (1994) 26 CA4th 304, 314, 31 CR2d 536.

© The Regents of the University of California

§1.157 4. Elections on Annexation or Detachment

Elections on the annexation of territory to a city or the detachment of territory from a city ordinarily will be held only within the territory to be annexed or detached. Govt C §57118. However, an election held on the question of annexation to a city in which the value of the land to be annexed equals 50 percent or more of that within the city or the number of registered voters equal 50 percent or more of the number in the city must be held within the city as well as in the affected territory. Govt C §56759. Special election requirements apply for "special reorganizations." Govt C §§57119, 57132.5, 57176.1.

© The Regents of the University of California

5. Effects of Annexation

§1.158 a. Jurisdiction

On and after the effective date of the annexation, the territory, inhabitants, and voters of the area annexed are subject to the jurisdiction of the city or district and have rights and duties as if the area had been a part of the city or district at incorporation or formation. Govt C §57325.

© The Regents of the University of California

§1.159 b. Service Provision

As an alternative to the prescribed division of taxes and assessments collected in a district, the city and the district can agree the district will continue to provide services for the annexed territory until the end of the fiscal year for which taxes or assessments have been levied. Govt C §57326.

© The Regents of the University of California

§1.160 c. Charges for Property Use

No charge for the use or right of use of property of a district or city may be required because of the annexation. Govt C §57327.

© The Regents of the University of California

§1.161 d. Responsibility for Bonds

The annexed area becomes responsible for bonds and other contracts and obligations of the city or district, but not for bonds, contracts, or obligations of any improvement district. Govt C §57328.

© The Regents of the University of California

§1.162 e. Acceptance of County Roads and Highways

Any roads or highways within the annexed area that had been accepted into the county road system become city streets on the effective date of the annexation, but need not be improved to city standards. Govt C §57329.

© The Regents of the University of California

§1.163 f. Previously Authorized Taxes, Assessments, Fees, or Charges

The annexed area becomes subject to the previously authorized taxes, benefit assessments, fees, or charges of the city. Govt C §57330.

© The Regents of the University of California

6. Effects of Detachment

§1.164 a. Jurisdiction

On and after the effective date of the detachment, the territory, inhabitants, and voters of the detached area cease to have the rights and duties of the city or district and are not subject to its jurisdiction. Govt C §57350.

© The Regents of the University of California

§1.165 b. Interest and Principal on Debts

The city/district from which territory is detached retains liability for payment of interest and principal on debts from before the detachment, and may levy and collect from the detached area payments to cover that area's proportional liability for the debt. Govt C §57351.

The detached area continues to be liable for principal and interest on bonds in the city or district. Govt C §57354.

© The Regents of the University of California

§1.166 c. Taxing Authority

If the detached area pays its obligations, the city or district loses its authority to levy taxes on the detached area. Govt C §57352.

NOTE: No one in the detached area is entitled to refunds of taxes, assessments, or charges paid to the city or district. Govt C §57353.

© The Regents of the University of California

§1.167 d. Public Employees in Special Reorganizations

Special requirements apply to the continuing status of public employees, collective bargaining agreements, and certain employee benefits as a result of special reorganizations. Govt C §56734.

© The Regents of the University of California

§1.168 D. Consolidation, Dissolution, and Disincorporation

"Consolidation," "dissolution," and "disincorporation" are changes in organization under the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550). Govt C §56021.

A "consolidation" is the uniting or joining of two or more cities located in the same county into a single new successor city, or two or more districts formed under the same principal act into a single new successor district. Govt C §56030. Streamlined procedures apply when the legislative bodies of two or more local agencies adopt similar resolutions of application proposing consolidation regardless of whether the districts were formed under the same enabling act. Govt C §56853.

A "dissolution" means the dissolution, disincorporation, extinguishment, and termination of the existence of a district and the cessation of all its corporate powers, except for the purpose of winding up the district's affairs. Govt C §56035. Similarly, a "disincorporation" means the disincorporation, dissolution, extinguishment, and termination of the existence of a city and the cessation of its corporate powers, except for the purpose of winding up the city's affairs. Govt C §56034.

PRACTICE TIP: A resource on the Act is the Guide to Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (revised annually; published by the Assembly Committee on Local Government and available online at www.assembly.ca.gov/acs/newcomframeset.asp?committee=17 (click on Committee Publications).

© The Regents of the University of California

1. Types of Consolidation

§1.169 a. Consolidation of Cities

Two or more cities may consolidate to form a new city. The prior cities are referred to as the "predecessors" and the resulting city is the "successor." Govt C §57475. If the successor is a charter city, the charter will control. If the successor is a general law city, it will be treated as a newly incorporated city. The predecessor cities are dissolved, charters suspended and annulled, and the offices of the city surrendered. Govt C §57475.

© The Regents of the University of California

§1.170 b. Consolidation of Districts

Two or more districts may consolidate to form a new district. The prior districts are the "predecessors" and the resulting district is the "successor." Govt C §57500. The successor district possesses all the powers of the predecessors. Govt C §57500.

For certain types of districts, the LAFCO may, in approving a consolidation or reorganization of districts, increase the number of directors to serve on the board of directors to seven, nine, or 11. See, *e.g.,* Pub Res C §5527.1; Wat C §21552.1.

© The Regents of the University of California

2. Effects of Consolidation

§1.171 a. Property Rights and Debts

Title to the predecessor city's property is vested in the successor city (Govt C §57476), and payment for use of property acquired by a predecessor district may not be required because of the consolidation with other districts. Govt C §57501.

Existing debts of the predecessor city are unaffected, *i.e.,* the successor assumes all rights and liabilities. Govt C §57477. Similarly, the successor district is liable for the principal and interest on bonds, contracts, and liability of the predecessor districts. Govt C §57502.

© The Regents of the University of California

§1.172 b. Civil and Criminal Liability

Most ordinances of the predecessor city are repealed, but no one is discharged from existing criminal or civil liability. Govt C §57478. Ordinances that are not repealed include those that create a vested right, relate to street or other public improvements, or relate to zoning and land use; proceedings under these ordinances continue and are conducted by the successor. Govt C §57479.

© The Regents of the University of California

§1.173 c. Taxation

Property in the consolidated cities may not be taxed to cover liability of any other city contracted for or incurred before the consolidation. Govt C §57481. Instead, there is a separate levy of taxes for pre-consolidation liabilities. Govt C §57482.

© The Regents of the University of California

3. Effects of Dissolution/Disincorporation

§1.174 4. Powers Cease

On and after the effective date, all inhabitants and voters cease to be subject to the jurisdiction of the disincorporated city and have none of the rights or duties of inhabitants or voters of a city. Govt C §57400.

Similarly, all powers of the district cease on the effective date. Govt C §57450. The successor to the district will be either a city or county, depending on where the district boundaries lie, or according to the terms of the dissolution. Govt C §57451. To wind up the district's affairs, the successor has the powers of the predecessor. Govt C §57453.

© The Regents of the University of California

§1.175 a. Debts Must Be Paid

The conducting authority, or the board of supervisors, determines and certifies the indebtedness of the city, the amount in the treasury and the amount of unpaid obligations due the city. Govt C §§57402, 57404. Uncollected taxes are paid to the county treasury. Govt C §57405. A special fund must be set up to settle the affairs of the disincorporated city. Govt C §57407. Warrants for city indebtedness are drawn on the special fund. Govt C §57408. If the funds are insufficient, taxes may be levied only on the area that was part of the disincorporated city. Govt C §§57409-57410, 57419. The county may sue for debts owed to the city. Govt C §57413.

Until a district's bonds are paid off, the successor cannot distribute the revenue-producing enterprise of the district; such revenue is to be used to pay off the debt. See Govt C §§57459-57461. No person can get a refund of taxes or charges paid. Govt C §57454.

© The Regents of the University of California

§1.176 b. Revenues Go to Successor

By ordinance, the board of supervisors may assume control of public utilities previously operated by the city and, if necessary, can levy a special tax for the administration, conduct, and improvement of such utilities. Govt C §§57415-57416. Monies relating to public utilities are placed in a separate fund. Govt C §57417.

Control of the existing and uncollected revenues of a district go to the successor district. Govt C §57452. The successor can continue to levy taxes for payment of debts. Govt C §57458. The money and funds must be used for the benefit of the lands and inhabitants of dissolved district. Govt C §§57462-57463. On distribution of assets, see Govt C §§57456-57457. Money from the asset distribution goes to pay off the bonds and debts of the dissolved district. Govt C §57455.

© The Regents of the University of California

§1.177 c. Public Property Must Be Returned

Before the effective date, all public officers turn over public property to the board of supervisors. Govt C §57401. All money is turned over to the county treasurer. Govt C §57403.

© The Regents of the University of California

§1.178 d. Effects of Reorganization Generally

On and after the effective date of a reorganization (including consolidation, dissolution, and disincorporation), each change of organization must be given the force and effect of a change of organization of that type. Govt C §57550.

© The Regents of the University of California

III. INTERNAL ORGANIZATION OF CITIES

§1.179 A. Forms of Government

In a charter city, the city's charter establishes the form of government for that city. See Govt C §§34450-34462. For example, a decision to utilize a "city manager" form of government typically would be described in a charter.

For a general law city, state law describes the procedures for a city council to establish its form of government. See Govt C §36501. Absent formal action by a city council, the council retains authority over the management of a city. However, "alternate" forms of government are specifically authorized by state law (*e.g.,* "city manager" form of government, see §1.180). General law cities may also, by vote of the people, exercise the option to be governed by a council of from four to nine council members "by" or "from" districts. Govt C §34871.

© The Regents of the University of California

§1.180 1. Council/Manager

The provisions of Govt C §§34851-34859 establish the general law parameters for the council/manager form of city government. On the powers of the city manager, see §1.255. Similar provisions can be described in a city charter, which often contains a prohibition against "councilmanic interference," reinforcing the manager's authority to make decisions without direct interference from elected council members.

© The Regents of the University of California

§1.181 2. Council/Administrator

California general law does not explicitly authorize the council/administrator form of city government. Indeed, the terms "city manager" and "city administrator" are sometimes used interchangeably. However, a city council may "define the powers and duties of the city manager" as it chooses, so presumably a council could limit the authority of its "manager" to administrative duties. Govt C §34852. Adopting such an ordinance would mean that the council would retain the management authority not "defined" for its "administrator."

Nothing precludes a charter city from creating a city administrator position. Charter cities that have chosen such a form of government typically assign to the city administrator the day-to-day operations of the city, but retain for the council significant authority over personnel matters (*e.g.,* hiring and firing of department heads, financial transactions, contracts, and similar matters) that would be within the purview of a manager in the council/manager form of government.

© The Regents of the University of California

§1.182 3. Strong Mayor

The strong mayor form of government is available to charter cities and, as such, must be approved by the voters. As the name implies, the difference between this form of government and the others (see §§1.180-1.181) is the breadth of the mayor's power.

In a strong mayor form of government, the mayor will have the authority to hire and fire the city manager and many of the department heads and may have the authority to present a budget to the city council much as the governor presents a budget to the state legislature. Political power is concentrated in the mayor, who typically will be more involved in the day-to-day management of the city because the office is a full-time job. For an example of the strong mayor form of government, see the City of Oakland Charter §305.

© The Regents of the University of California

B. City Council

§1.183 1. Qualification of Members

The city council judges the qualifications of its members. Govt C §36812. However, the city council's determination is subject to judicial review.

Qualifications differ depending on whether it is a general law city (see §1.12) or a charter city (see §1.13).

© The Regents of the University of California

§1.184 a. General Law Cities

A candidate for city council office must be a registered voter when nomination papers are issued to him or her, and when he or she assumes office, he or she must be a United States citizen 18 years of age or older and a resident of the city at least 15 days before the election. Elec C §321; Govt C §36502(a). When city council members are elected by district (see Govt C §34871), the candidate must also reside in the geographical area making up the district from which he or she is elected.

© The Regents of the University of California

§1.185 b. Charter Cities

City council candidate qualifications are established by charter under Cal Const art XI, §5, the "home rule" provision of the California Constitution. 82 Ops Cal Atty Gen 6, 8 (1999). However, qualifications set by charter are restricted by the "privileges and immunities" clause of the United States Constitution. *Johnson v Hamilton* (1975) 15 C3d 461, 472, 125 CR 129 (durational residency requirement in excess of 30-day prefiling residency violates equal protection).

© The Regents of the University of California

§1.186 2. At-Large or District Elections

A city charter may establish a structure for the election of council members-at-large without regard to where in the city they reside or by geographic district. General law cities elect council members-at-large unless they choose to create district elections, as permitted by Govt C §34871.

Section 34871 also permits a city council to submit to city voters an ordinance that provides for election of council members either "by" districts or "from" districts. A system for electing council members "by" districts requires that council members be elected by the vote of the residents of a geographic district within the city. Govt C §34871. The candidates must be residents of the district. Govt C §34882. A system for electing council members "from" districts provides that all voters of the city cast votes for candidates who reside in specific geographic districts. Govt C §34871. The number of districts must be five, seven, or nine, unless there is an elected mayor, in which case the number is four, six, or eight. Govt C §34871(a)-(d).

© The Regents of the University of California

§1.187 3. Oath of Office

Before commencing any term, a council member must take and subscribe to the oath of office specified in the Constitution. Govt C §1360; Cal Const art XX, §3.

© The Regents of the University of California

§1.188 4. Vacancies and Termination of Office

The entitlement of a public officer to hold office has frequently been contested in quo warranto proceedings. See CCP §§803-811.

PRACTICE TIP: The Attorney General often publishes opinions granting or refusing leave to bring quo warranto proceedings. See, *e.g.,* 79 Ops Cal Atty Gen 21 (1996). Consequently, there is an extensive body of law on the occurrence of vacancies. These authorities are directly applicable to general law cities and can be persuasive authority in charter cities as well. No effort is made to catalogue this body of law here; instead, a few key authorities are cited. A useful way to supplement the listed authorities is to begin with the annotations to Govt C §1770.

By contrast, relatively few statutes govern the filling of vacancies.

PRACTICE TIP: This discussion focuses on council vacancies, but most authorities cited are equally applicable to other appointed and elective positions, including those of city clerk and treasurer.

© The Regents of the University of California

§1.189 a. Vacancy Defined

The provisions of Govt C §1770 set out 12 separate circumstances in which a public office becomes vacant, include death, absence from jurisdiction, conviction of a felony, mental incapacity, resignation, failure to perform official duties, and electoral irregularities. See also Govt C §§36502(a), 36513. These rules may be supplemented by the general definitions of vacancy in *People ex rel Drew v Rodgers* (1897) 118 C 393, 50 P 668 ("A vacancy exists when there is no person lawfully authorized to assume and exercise at present the duties of the office," construing predecessor to Govt C §1770), and *Fields v Fong Eu* (1976) 18 C3d 322, 327, 134 CR 367 ("vacancy is simply a state of being empty, unoccupied, or unfilled, without regard to when or how the condition arose").

NOTE: A vacancy is not created when a council member is called to military service. Mil & V C §395.8. An interim council member may be appointed and the elected council member resumes his seat on return from duty, provided the term of office has not expired, the council member has not been dishonorably discharged, and the council member reports back to the city within 6 months from the discharge date.

© The Regents of the University of California

b. Common Bases for Finding of Vacancy

§1.190 (1) Resignation

An effective resignation creates a vacancy. Govt C §1770(c). To be effective, a resignation should be in writing and filed with the city clerk. Govt C §1750(e).

NOTE: A resignation that is not consistent with these rules may nonetheless be effective under the doctrine of abandonment of office (see §1.192).

A resignation takes effect by its terms and need not be accepted. *Meeker v Reed* (1924) 70 CA 119, 123, 232 P 760. Although a resignation can be withdrawn before it becomes effective, once effective, it may not be withdrawn. *American Fed'n of Teachers v Board of Educ.* (1980) 107 CA3d 829, 840, 166 CR 89. See also *Armistead v State Personnel Bd.* (1978) 22 C3d 198, 149 CR 1 (suggesting same rule).

© The Regents of the University of California

§1.191 (2) Non-residence

A city council member who moves his or her residence outside the city or district from which he or she was elected immediately vacates his or her office. Govt C §§36502(a) (city), 34882 (district). See Govt C §1770(e). See also 72 Ops Cal Atty Gen 63 (1989) (applying rules).

Legal residence is defined as physical presence combined with an intent to remain. *Fenton v Board of Dirs.* (1984) 156 CA3d 1107, 1113, 203 CR 388. A person has a legal residence at all times and retains a prior legal residence until a new residence is established. *Walters v Weed* (1988) 45 C3d 1, 7, 246 CR 5. A number of statutes provide aids to determining residency. See, *e.g.,* Elec C §§2021 (temporary departure or stay does not affect residence), 2031 (homeowner's property tax exemption and renter's credit can create rebuttable presumption of residence); Govt C §244 (rules regarding residency).

© The Regents of the University of California

§1.192 (3) Abandonment

An office may be vacated by acts or words of the officeholder indicating an intent to relinquish the office; this doctrine can be useful to give effect to a technically imperfect resignation (*Walter v Adams* (1952) 110 CA2d 484, 490, 243 P2d 21):

> In order to constitute an abandonment of office, the abandonment must be total, and under such circumstances as clearly to indicate an absolute relinquishment. Moreover, the officer should manifest a clear intent to abandon the office and its duties, although his intentions may be inferred from conduct. If the acts and statements clearly indicate absolute relinquishment, a vacancy is thereby created without the necessity of a judicial determination.

A statutory version of this rule appears in Govt C §36513, which provides 60 days' unexcused absence from council sessions (or 70 days if the council meets once a month) will vacate the office of the absent council member. See Govt C §1770 (other events causing vacancy). The Attorney General has opined failure to discharge the duties of a redevelopment agency member for 3 months in contravention of Govt C §1770(g) does not vacate the city council seat of the absent member. 67 Ops Cal Atty Gen 459 (1984).

© The Regents of the University of California

§1.193 (4) Incompatible Offices and Activities

The common law doctrine of incompatible offices prevents simultaneously holding two public offices if the performance of the duties of either office could adversely affect the other. 80 Ops Cal Atty Gen 74 (1997). The doctrine has been codified in Govt C §1099.

Incompatibility arises if the nature of the jobs' duties potentially places the two jobs in conflict, as when one is subordinate to the other. *People v County of Santa Clara* (1996) 49 CA4th 1471, 1481, 57 CR2d 322. Acceptance of a second office that is incompatible with an office currently held automatically vacates the first office. *People ex rel Chapman v Rapsey* (1940) 16 C2d 636, 644, 107 P2d 388. See also 73 Ops Cal Atty Gen 354 (1990). The statutory prohibition against incompatible activities for non-elected officers and employees can include an incompatible or conflicting employment or office. Govt C §§1126-1127. However, this section is not self-executing and must be implemented through adopted rules. See §§2.175-2.179.

© The Regents of the University of California

§1.194 (5) Accepting Free Transportation

Under Cal Const art XII, §7, "A transportation company may not grant free passes or discounts to anyone holding an office in this state; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office." This proscription applies to all forms of transportation. The Attorney General has provided limiting interpretations of this section. See 85 Ops Cal Atty Gen 40 (2002) (member of board of directors of public transit agency may accept passes for free transportation on agency's buses to perform member's duties of monitoring agency's transportation services); 80 Ops Cal Atty Gen 146 (1997) (constitutional provision does not prohibit accepting ticket earned with "frequent flier" miles); 76 Ops Cal Atty Gen 1 (1993) (Attorney General granted leave to sue mayor to test his right to hold office in view of his acceptance of airline ticket upgrade); 74 Ops Cal Atty Gen 26 (1991) (constitutional provision did not prohibit upgrade to honeymooning official when airline's policy was to upgrade all honeymooners); 67 Ops Cal Atty Gen 81 (1984) (constitutional provision did not prohibit free or discounted pass when it was offered to all members of greater class, *i.e.,* spouses of flight attendants).

© The Regents of the University of California

§1.195 (6) Recall

When a recall petition is filed and certified, and a majority of the voters approve the recall of an officer, the officer's term terminates on appointment of a successor or a special election, as determined by the recall election. See Elec C §11000-11007.

© The Regents of the University of California

§1.196 (7) Conviction

A criminal conviction, including the entry of a nolo contendre plea, may result in an immediate forfeiture of office. See Govt C §§1021, 1770(h), 1770.2; 82 Ops Cal Atty Gen 6 (1999).

© The Regents of the University of California

§1.197 c. Filling Vacancies

Within 30 days of its occurrence, the council must fill a council vacancy by either appointment or a special election; the successor serves until the expiration of the predecessor's term. Govt C §§34902(a), 36512 (same as to elected mayor).

A city may require by ordinance that (1) all vacancies be filled by special election; (2) a vacancy be filled by special election if requested by petition; or (3) officials appointed to fill vacancies may serve only until a special election is held. Govt C §36512(c).

© The Regents of the University of California

§1.198 (1) Limits on the Appointment Power

The general rule is a public agency may not appoint one of its own officers to a vacant position. 23 Ops Cal Atty Gen 75 (1954). See also 73 Ops Cal Atty Gen 357 (1990). This rule is applied to city councils by Govt C §1752, which also includes an exception to expressly authorize a council to fill a vacancy in the office of elected mayor by appointing one of its members.

In addition, a council vacancy may not be filled by appointment if the appointment would result in a majority of the council members having been appointed; in this circumstance, the office must be filled by election. Govt C §36512(d)(1).

© The Regents of the University of California

§1.199 (2) Result of Appointment

An officer appointed to fill a vacancy has all the rights and privileges of the prior officeholder. Govt C §1777.

© The Regents of the University of California

§1.200 5. Challenges to Right to Hold Office

If it appears a person holds a public office illegally, the attorney general, or any person acting by leave of the attorney general, may file an action in *quo warranto* to vacate the office. CCP §§803-811. Such an action is the exclusive remedy in cases when it is available. *Nicolopulos v City of Lawndale* (2001) 91 CA4th 1221, 1225, 111 CR2d 420.

© The Regents of the University of California

§1.201 6. De Facto Officers

A person who has held office without entitlement will likely be deemed a "de facto" officeholder and actions taken with his or her participation will be valid as to third persons. *In re Redevelopment Plan for Bunker Hill Urban Renewal Project 1B of Community Redev. Agency* (1964) 61 C2d 21, 41, 37 CR 74, cert denied sub nom *Babcock v Community Redev. Agency* (1964) 379 US 899, cert denied sub nom *Trautwein v Community Redev. Agency* (1964) 379 US 28; *Oakland Paving Co. v Donovan* (1912) 19 CA 488, 126 P 388. See also *Marine Forests Soc'y v California Coastal Comm'n* (2005) 36 C4th 1, 54, 30 CR3d 30.

© The Regents of the University of California

§1.202 C. Office of Mayor

The mayor of a general law city is usually selected by a vote of the members of the city council. Govt C §36801. However, on a vote of its citizens, a general law city may establish a system for direct election of the mayor by voters. Govt C §§34900-34906.

In a charter city, the charter may determine the procedures for selecting a mayor and such charter provisions override any conflict in general law. See *Rees v Layton* (1970) 6 CA3d 815, 820, 86 CR 268.

The provisions of Govt C §34904 describe the qualifications for an elected mayor.

© The Regents of the University of California

§1.203 1. Establishing/Eliminating the Office of Elected Mayor

The procedures for holding an election to create the position of elected mayor are described in Govt C §§34900-34906. There are provisions regarding the following:

- The form of the ballot measure, including a provision to determine whether the mayor is elected for 2 or 4 years (Govt C §34901);
- The procedures for designating a council seat as the mayor's seat and the filling of that seat by subsequent election (Govt C §34902);
- The issues posed by the mayor's and two other council seats expiring in the same year (Govt C §34906).

A vacancy in the office of elected mayor may be filled by appointment by the council or by election. Govt C §34902(a). A council member may be appointed to a vacancy in the mayor's office despite the general rule against self-appointment. See Govt C §1752(a)-(b); §1.198.

The council may ask the voters to eliminate the office of elected mayor. If the vote is affirmative, the office of elected mayor expires with the term of the incumbent. Govt C §34902(b).

© The Regents of the University of California

2. Features of the Office of Elected Mayor

§1.204 a. Authority

An elected mayor "is a member of the city council and has all the powers and duties of a member of the city council." Govt C §34903. An elected mayor has the same powers as an appointed mayor. See Govt C §§40601-40604.

© The Regents of the University of California

§1.205 b. Salary

An elected mayor may draw a salary in addition to the salary established for members of the council if approved by the electorate or by an ordinance adopted by the council under Govt C §36516.1. See also 89 Ops Cal Atty Gen 159 (2006).

© The Regents of the University of California

§1.206 c. Making Appointments

An elected mayor, "with the approval of the city council, must make all appointments to boards, commissions, and committees unless otherwise specifically provided by statute." Govt C §40605.

© The Regents of the University of California

§1.207 3. Mayor Pro Tempore

The mayor pro tempore is selected by the city council. Govt C §§34905, 36801.

© The Regents of the University of California

D. Compensation and Expenses

§1.208 1. Strict Construction

It is "the settled rule that compensation for official services depends entirely on the law; that statutes relating to such compensation are strictly construed in favor of the government; that a public officer may only collect and retain such compensation as is specifically provided by law, and that any money paid by a governmental agency without authority of law may be recovered from such officer." *County of San Diego v Milotz* (1956) 46 C2d 761, 767, 300 P2d 1. See also *Madden v Riley* (1942) 53 CA2d 814, 822, 128 P2d 602 (same rules apply to expense reimbursements).

An expense must meet four requirements to be reimbursable (65 Ops Cal Atty Gen 517, 521 (1982) (interpreting Govt C §36514.5)):

(1) It must be an expense of a member of the city council;

(2) It must be an "actual" expense;

(3) The expense must have been "incurred in the performance of official duties"; and

(4) It must be a "necessary expense."

Moreover, these statutes authorize but do not require reimbursement; the ultimate decision is made by the council itself. 65 Ops Cal Atty Gen at 523.

NOTE: In addition to the limitations on council compensation, expense reimbursement, and benefits provided by state and federal law, local legislation on these subjects helps reduce or eliminate payments to which an official would otherwise be entitled. 65 Ops Cal Atty Gen 517, 524 (1982). Provisions dealing with these topics may take a variety of forms and include a variety of reimbursable expenses.

© The Regents of the University of California

§1.209 a. Gifts of Public Funds

An unauthorized payment to a public officer can also be challenged as a gift of public funds. Cal Const art XVI, §6. See *Albright v City of S. San Francisco* (1975) 44 CA3d 866, 870, 118 CR 901. Compensation and reimbursement of expenses of local officers and employees is a matter of local concern as to which a city charter may expressly control. Cal Const art XI, §5(b)(4). See also 57 Ops Cal Atty Gen 11 (1974).

© The Regents of the University of California

§1.210 b. Ethics Training

If a city provides any type of compensation or payment of expenses to council members, then all of the council members are required to have 2 hours of specified ethics training. Govt C §§53234-53235. See §2.161.

PRACTICE TIP: For options on obtaining or conducting the training, see the Institute for Local Government website (www.ca-ilg.org).

© The Regents of the University of California

§1.211 2. Compensation

The salary of council members of general law cities is controlled by Govt C §36516(a), which permits a city council to establish by ordinance a salary up to a ceiling determined by the city's population. The electorate may approve a higher salary. Govt C §36516(b). A council member appointed or elected to fill a vacancy is compensated in the same amount as his or her predecessor. Govt C §36515.

A directly elected mayor may receive additional compensation with the consent of the electorate or by ordinance of the city council. Govt C §36516.1.

PRACTICE TIP: Although Govt C §36516 applies to general law cities, a redevelopment agency, housing authority, or community development commission is created by state statute. Thus, an argument can be made that those entities, as opposed to the charter city itself, may still be subject to compensation limits in state statutes.

© The Regents of the University of California

§1.212 a. Salary Adjustments

A salary established by council action may be increased, "but the amount of the increase may not exceed an amount equal to 5 percent for each calendar year from the operative date of the last adjustment of salary." Govt C §36516(c). The Attorney General has opined that the 5-percent increase is non-compounded (5 percent times the number of years since last salary adjustment). 89 Ops Cal Atty Gen 159 (2006).

Any salary increase may take effect only when at least one member of the council commences a new term. Govt C §36516.5. See 54 Ops Cal Atty Gen 112 (1971) (salary increase triggered by increase in census population takes effect following next municipal election). The salary of a council member may not be reduced during his or her term. Govt C §36516.5; 80 Ops Cal Atty Gen 119 (1997).

NOTE: The provisions of Govt C §36516.5 have no application to a charter city.

© The Regents of the University of California

§1.213 b. Compensation for Service on Other Commissions, Committees, Boards, or Authorities

Unless specifically authorized by another statute, a city council may not enact an ordinance providing for compensation to city council members, including compensation for service on a commission, committee, board, or authority, in excess of the limits in Govt C §36516. Govt C §36516(d). If the other statute does not specify the amount of compensation for service on a particular commission, committee, board, or authority, then the maximum compensation must be $150 per month. Govt C §36516(d). The Attorney General has opined that compensation received by a council member for service on commissions, committees, boards, or authorities may not be reduced during his or her term. 89 Ops Cal Atty Gen 159 (2006). See §1.212. In a city with a population less than 200,000 in which the city council designates itself as a redevelopment agency, council members may be compensated for agency service by up to $30 per meeting, up to four meetings per month. Health & S C §33114.5. For cities with a community development commission, the limits on compensation are somewhat different. Health & S C §34130.5.

NOTE: If all members of a city council serve on the board of another agency ex officio, no additional compensation is permitted absent express statutory authorization; if fewer than all council members serve, additional compensation may be permissible. Compare 44 Ops Cal Atty Gen 170 (1964) (before adoption of Health & S C §33114.5, city council could not receive additional compensation for service to redevelopment agency, notwithstanding Health & S C §33114) with 50 Ops Cal Atty Gen 87 (1967) (two of five county supervisors who serve on local agency formation commission may receive additional compensation for that service).

© The Regents of the University of California

§1.214 c. Compensation for Attendance Beyond Certain Meetings

If council members are to be compensated for attending occurrences/events beyond council meetings, meetings of an advisory body, conferences, or organized educational activities, the city council must adopt a compensation policy at a public meeting. Govt C §53232.1(b). An exception applies for those council members receiving a "salary," as defined by the statute. Govt C §53232.1(c).

© The Regents of the University of California

§1.215 3. Expenses

"City council [members] may be reimbursed for actual and necessary expenses incurred in the performance of official duties." Govt C §36514.5. See also Health & S C §33114 (similar authority as to expenses of redevelopment agency members). If a city reimburses council members for such expenses, the city council must adopt a policy at a public meeting on payment of expenses for council members. Govt C §53232.2(b). In addition, if a city provides any type of compensation or payment of expenses to council members, then all of the council members are required to have 2 hours of ethics training every 2 years. Govt C §§53234-53235.

PRACTICE TIP: For model expense policies, see the Institute for Local Government's website (www.ca-ilg.org).

NOTE: Some cities provide equipment to council members, such as fax machines, or provide a telephone calling card, rather than reimburse for these expenses.

© The Regents of the University of California

§1.216 a. Expenses for Meals for Third Parties

The Attorney General has opined that city council members cannot be reimbursed for purchasing meals for third parties, such as constituents, legislators, and private business owners. 85 Ops Cal Atty Gen 210 (2002).

© The Regents of the University of California

§1.217 b. Expenses of Council Spouses

The Attorney General has twice opined the expenses of spouses who accompany public officials in the conduct of their public duties cannot be reimbursed. 75 Ops Cal Atty Gen 20 (1992); 65 Ops Cal Atty Gen 517, 521 (1982). See also *Albright v City of S. San Francisco* (1975) 44 CA3d 866, 869, 118 CR 901 (unauthorized reimbursement is illegal gift).

© The Regents of the University of California

§1.218 c. Flat Expense Allowances

There has been some debate about whether a council may authorize a flat monthly expense allowance for which council members are not required to submit receipts. See Govt Code §1223 (auto allowances); *Citizen Advocates, Inc. v Board of Supervisors* (1983) 146 CA3d 171, 194 CR 61; *Albright v City of S. San Francisco* (1975) 44 CA3d 866, 870, 118 CR 901. However, Govt C §53232.3 requires a council member to submit, within a reasonable period of time as determined by the legislative body, an expense report form with receipts to document expenses incurred. All documents related to reimbursable agency expenditures are public records subject to disclosure under the California Public Records Act (Govt C §§6250-6270).

© The Regents of the University of California

§1.219 4. Benefits

A city may provide health and welfare benefits, such as medical, dental, and life insurance, to members of its city council. Govt C §§53200-53210. "Any amounts paid by a city for retirement, health and welfare, and federal social security benefits" are not subject to the salary limits in the Government Code "provided the same benefits are available and paid by the city for its employees." Govt C §36516(e). See 83 Ops Cal Atty Gen 124 (2000); 89 Ops Cal Atty Gen 107 (2006) (addressing cash in-lieu payments for waived benefits). However, for council members whose first service begins after January 1, 1995, such benefits may not exceed the most generous schedule of benefits being received by any category of non-safety employees. Govt C §53208.5.

NOTE: Although it is beyond the scope of this handbook, federal law provides complex rules governing tax-exempt benefits that limit the degree to which benefits may distinguish between council members and members of staff.

© The Regents of the University of California

§1.220 E. Limitations on the Right to Hold Office

The right to hold public office is not generally characterized as fundamental unless its infringement is coupled with a corresponding infringement on the right to vote. "However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical correlative effect on voters." *Anderson v Celebrezze* (1983) 460 US 780, 786, 75 L Ed 2d 547, 103 S Ct 1564; *Bullock v Carter* (1972) 405 US 134, 143, 31 L Ed 2d 92, 92 S Ct 849 (struck down Ohio's early filing deadline for independent candidates); *Edelstein v City & County of San Francisco* (2002) 29 C4th 164, 175, 126 CR2d 727 (upheld ban on write-in voting in run-off election). Thus, when an elections law discriminates on the basis of some suspect classification or on the basis of wealth or poverty, it is invalid unless justified after it is " 'closely scrutinized' and found reasonably necessary to accomplish legitimate state objectives." 405 US at 144. See *Clements v Fashing* (1982) 457 US 957, 967, 73 L Ed 2d 508, 102 S Ct 2836 (no close scrutiny required and no discrimination found when state law requires certain officeholders to complete terms before running for certain other public offices); *Stiles v Blunt* (8th Cir 1990) 912 F2d 260 (minimum candidacy age requirement was rationally related to legitimate state interest and was not subject to strict scrutiny).

© The Regents of the University of California

§1.221 1. Analyzing Limitations on the Right to Hold Public Office

The California Supreme Court has determined term limitations do not impermissibly infringe on a candidate's right to hold public office or on an individual's right to vote for the candidate of his or her choice. *Legislature of the State v Eu* (1991) 54 C3d 492, 517, 286 CR 283, cert denied (1992) 503 US 919. The court said such limitations serve substantial governmental interests, *i.e.,* discouraging entrenched incumbencies and encouraging public participation in civic affairs. The court also noted the incidental burden placed on the right to hold office or the right to vote was outweighed by those substantial governmental interests.

In analyzing laws that place limitations on the right to hold public office, identify:

- the effect of the limitation on the right to hold office,
- the governmental interest supporting the limitation, and
- whether the law makes distinctions based on suspect classifications (color, gender, wealth).

If the law makes distinctions on the basis of suspect classifications, it will likely be invalidated. If it does not, then it will be upheld if the governmental interest asserted to support the law is substantially furthered by the law, the limitation does not unduly restrict the right to run for office, and preemption does not apply.

© The Regents of the University of California

§1.222 2. Term Limitations in Cities

Term limitations either may limit an elected official's successive terms in office or they may place an absolute limit on the number of terms in office that an elected official may serve. The reported California cases primarily deal with limitations on successive terms in office and pre-date the 1995 amendment to Govt C §36502. See, *e.g., Steinkamp v Teglia* (1989) 210 CA3d 402, 258 CR 265.

The California Supreme Court has upheld an absolute limitation on California legislative terms in office. *Legislature of the State v Eu* (1991) 54 C3d 492, 286 CR 283, cert denied (1992) 503 US 919. See *Bates v Jones* (9th Cir 1997) 131 F3d 843, cert denied (1998) 523 US 1021 (upholding absolute limitation on California legislative terms in office in light of federal Constitution). Further, in *Cawdrey v Redondo Beach* (1993) 15 CA4th 1212, 19 CR2d 179, the appellate court upheld the city charter provision placing an absolute limit on the number of terms a city council member could serve.

© The Regents of the University of California

F. Conduct of Council Members

§1.223 1. Rights and Roles of Council Members

A person elected to a city council plays two roles, *i.e.,* a member of a body elected to represent the city in its entirety or a specific district within the city, and a private resident of the city. The second role is not relinquished when the first role is assumed.

PRACTICE TIP 1: It is important to distinguish between the two roles at all times and to conduct business in one role separately from the other.

The elected council member retains the right to speak as an individual, not as a member of the city council, but must make it very clear when he or she speaks on his or her own behalf and not as a member of the city council. This is because when the council acts, it acts as a whole, not as a group of individuals. Likewise any approved use of city resources, such as city letterhead, is only appropriate if the individual is acting in the role as an elected city council member representing the city or district.

PRACTICE TIP 2: Pay special attention to the laws that prohibit the use of public resources for private purposes, such as campaign activity. See Institute for Local Government, Ethics Law Reference for Local Officials, Principle #2: No Personal Advantages and Perks (2007), available at www.ca-ilg.org.

© The Regents of the University of California

§1.224 2. Public Decorum

The city council may establish rules of order and decorum. Govt C §36813. The court upheld the city's rules of decorum for conduct at council meetings in *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421.

The key to validity of such rules is that any prohibited words or conduct must disrupt, disturb, or otherwise impede the orderly conduct of the meeting. The rules must apply to the conduct and not to the content of the speech. See *Richard v City of Pasadena* (CD Cal 1995) 889 F Supp 384 (emphasizing need for awareness of First Amendment issues and clarity of rules). Further, such rules may not "prohibit public criticism of the policies, procedures, programs or services of the [city] or of the acts or omissions of the legislative body." Govt C §54954.3(c).

© The Regents of the University of California

§1.225 3. Enforcement of Decorum

The city council may designate a sergeant-at-arms of the council who carries out all orders given by the mayor for the purpose of maintaining order and decorum. The council may punish a member for disorderly behavior at a meeting. Govt C §36813. Any person in the audience who willfully engages in disorderly conduct, which disturbs the peace and good order of the meeting, may be removed. Govt C §54957.9. Additionally, any person who willfully disturbs or breaks up any assembly or meeting is guilty of a misdemeanor. Pen C §403. But see *In re Kay* (1970) 1 C3d 930, 942, 83 CR 686 ("activity itself—and not the content of the activity's expression"—must substantially impair effective conduct of meeting; thus, city cannot prohibit arm bands, flags, hand-held signs, buttons, or leafleting). Any person willfully disrupting the meeting, after warning by the presiding officer, may be asked to leave the meeting without violating the Ralph M. Brown Act's requirement for all city council meetings to be open and public. See Govt C §54957.9 (for sanctioned procedures). See also Institute for Local Government, Ethics Law Reference for Local Officials, Principle #3: Transparency (2007), available at www.ca-ilg.org. On open meeting laws, see §§2.36-2.118.

NOTE: Many cities have adopted rules of decorum in some formal manner. Such rules often include a list of those actions that constitute willfully disrupting a council meeting, including addressing the council without first being recognized; repetitiously addressing the same subject; failing to relinquish the podium when directed to do so; and unruly applause, whistles, yells, or raucous demonstrations. Some cities have adopted rules focused more on the behavior of council members toward one another as well as toward the public. These types of rules are more difficult to formalize as well as to enforce.

© The Regents of the University of California

§1.226 4. Censure

Censure is defined as the "formal resolution of a legislative, administrative, professional or other body reprimanding a person, normally one of its own members, for specified conduct." Black's Law Dictionary (1983). The person who is censured is entitled to due process, with notice and an opportunity to respond. *Little v City of North Miami* (11th Cir 1986) 805 F2d 962. See *Richard v City of Pasadena* (CD Cal 1995) 889 F Supp 384, 391 (censuring for conduct versus content of speech). In *Braun v City of Taft* (1984) 154 CA3d 332, 201 CR 654, the court set aside the council's censure of one of its members for release of documents because it determined that the documents released were not confidential. Without any discussion, the court seemed to assume that a city council had authority to censure a member. There was also no discussion of either the nature of the censure action or due process requirements. In *Scott v McDonnell Douglas Corp.* (1974) 37 CA3d 277, 112 CR 609, a city manager brought an action for damages for defamation because a majority of the city council had signed a letter criticizing him, and it was read and distributed at a city council meeting. The court held the letter was one of censure and reprimand and not actionable as defamation given legislative immunity.

PRACTICE TIP: Alternatives to "censure" that do not have disciplinary meaning include "criticize," "disapprove," or "condemn." An expression of council opinion is not disciplinary in nature; the council has free speech authority to express its opinion.

© The Regents of the University of California

§1.227 G. Exercise of Legislative Authority

A city council may exercise its authority through an ordinance, resolution, or minute order (motion). The appropriateness of a given procedure depends on whether there are state statutory provisions and on the effect the action is to have.

The procedure for types of action is usually established by the legislative body. However, such rules are procedural and not mandatory; if they are not followed, the action may still be valid. *City of Pasadena v Paine* (1954) 126 CA2d 93, 96, 271 P2d 577.

© The Regents of the University of California

§1.228 1. Distinction Between Ordinances and Resolutions

In the absence of statutory or charter provisions to the contrary, a legislative act may be either by resolution or ordinance. *Crowe v Boyle* (1920) 184 C 117, 149, 193 P 111. But see *Midway Orchards v County of Butte* (1990) 220 CA3d 765, 774, 269 CR 796 (county resolution not equivalent of ordinance). Thus, a resolution in effect encompasses all actions of the municipal body other than ordinances. McQuillin, *Municipal Corporations* §15.02 (3d ed 1988). The court in *Central Mfg. Dist., Inc. v Board of Supervisors* (1960) 176 CA2d 850, 860, 1 CR 733 noted the difference between a resolution and an ordinance by quoting 35 Cal Jur 2d, §392, p 200.

> An ordinance in its primary and usual sense means a local law. It prescribes a rule of conduct prospective in operation, applicable generally to persons and things subject to the jurisdiction of the city. "Resolution" denotes something less formal. It is the mere expression of the opinion of the legislative body concerning some administrative matter for the disposition of which it provides.

NOTE: When a statute requires a local agency to take legislative action by resolution and the agency is required by its charter to take legislative action by ordinance, the action by ordinance constitutes compliance with the statute. Govt C §50020. Conversely, when a statute requires action by ordinance, passage of a resolution will not suffice. *Pinewood Investors v City of Oxnard* (1982) 133 CA3d 1030, 1038, 184 CR 417 (adoption of sewer fees).

© The Regents of the University of California

§1.229 2. Ordinances

An ordinance generally prescribes some permanent rule of conduct or government that remains in force until the ordinance is repealed. An ordinance may be penal or non-penal in nature. An ordinance is the only mechanism by which a city can impose a fine and/or jail sentence as a penalty for violations. See Govt C §§36900-36901.

© The Regents of the University of California

§1.230 a. Authority

A city may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal Const art XI, §7. A "legislative body may pass ordinances not in conflict with the Constitution and the laws of the State or the United States." Govt C §37100.

© The Regents of the University of California

§1.231 b. Effect

Ordinances involve a command or prohibition and have the force of law in the city for which an ordinance is adopted. *Monterey Club v Superior Court of Los Angeles* (1941) 48 CA2d 131, 147, 119 P2d 349. An ordinance passed by a municipal corporation within the scope of its authority has the same force within its corporate limits as a statute passed by the legislature has throughout the state. *Marculescu v City Planning Comm'n of City & County of San Francisco* (1935) 7 CA2d 371, 373, 46 P2d 308.

© The Regents of the University of California

§1.232 c. Validity

To be valid, an ordinance must be consistent with the general powers and purposes of the municipality. It also must harmonize with the general laws of the state (unless the city is a charter city and the ordinance involves a municipal affair), the charter, and common law principles. *Ferran v City of Palo Alto* (1942) 50 CA2d 374, 378, 122 P2d 965.

An ordinance must be drawn in definite and certain terms so that enforcement is not accomplished without clear guidelines. *In re Hubbard* (1964) 62 C2d 119, 122, 41 CR 393, overruled in part on other grounds by *Bishop v City of San Jose* (1969) 1 C3d 56, 81 CR 465.

© The Regents of the University of California

§1.233 d. Permissible Subjects

A city may enact an ordinance in an area that is within the city's police power authority and that does not conflict with the constitution or the laws of the state or federal governments. Accordingly, a city may adopt an ordinance in areas that affect the health, safety, and welfare of its citizens. *S.D. Myers, Inc. v City & County of San Francisco* (9th Cir 2003) 336 F3d 1174, cert denied (2004) 541 US 936.

NOTE: The city's police power can be applied only within its own territory and is subject to preemption by general state law, but otherwise is as broad as the police power exercisable by the state legislature. *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 140, 130 CR 465. See §§1.15-1.18.

© The Regents of the University of California

§1.234 e. Severability Clauses

Severability clauses protect portions of ordinances that may later be invalidated by a court because of unconstitutionality or other reasons. When a severability clause is included in an ordinance, the valid portion of the ordinance will be upheld if the remaining portion is severable. *City & County of San Francisco v Cooper* (1975) 13 C3d 898, 930, 120 CR 707; *Curtis v Board of Supervisors of Los Angeles County* (1972) 7 C3d 942, 964, 104 CR 297; *EWAP, Inc. v City of Los Angeles* (1979) 97 CA3d 179, 188, 158 CR 579.

Three criteria exist for severability (*Calfarm Ins. Co. v Deukmejian* (1989) 48 C3d 805, 821, 258 CR 161):

- **Grammatical Separability**: Can the invalid provision be removed without affecting the meaning of any other provision?
- **Functional Separability**: Do the remaining provisions retain their utility?
- **Volitional Separability**: Would the legislative body have adopted the ordinance had it foreseen the invalidity of the provision?

© The Regents of the University of California

f. Ordinance Procedure

§1.235 (1) Drafting Ordinances

The city attorney has the responsibility of framing all ordinances. Govt C §41802. The enacting clause of ordinances must be as follows: "The city council of the City of _____ does ordain as follows:" Govt C §36931.

Ordinances are not required to have a title. *People v Norton* (1930) 108 CA Supp 767, 775, 288 P 33; *Trebilcox v City of Sacramento* (1928) 91 CA 257, 264, 266 P 1015; *Ex Parte Snowden* (1910) 12 CA 521, 526, 107 P 724. However, for ease of reference, and to allow for waiver of reading of the entire ordinance for adoption (see §1.236), ordinances should be given a title.

All ordinances must be signed by the mayor and attested by the city clerk. Govt C §36932.

© The Regents of the University of California

§1.236 (2) Adopting Ordinances

With the exception of urgency ordinances, no ordinance may be passed within 5 days of its introduction. Govt C §36934. Two readings are thus required: one to introduce and a second to adopt the ordinance.

Ordinances may only be passed at a regular meeting or at an adjourned regular meeting; except for urgency ordinances, ordinances may not be passed at a special meeting. All ordinances must be read in full either at the time of introduction or at the time of passage, unless a regular motion waiving further reading is adopted by a majority of all council persons present. Govt C §36934.

If an ordinance other than an urgency ordinance is altered after introduction, it may be passed only at a regular or an adjourned regular meeting held at least 5 days after its alteration. However, ordinances in which corrections are made because of typographical or clerical errors are not required to be reintroduced. Govt C §36934.

NOTE: An ordinance passed by a city in violation of Govt C §36934 is invalid or ineffective, regardless of the subject matter. *National Indep. Bus. Alliance v City of Beverly Hills* (1982) 128 CA3d 13, 22, 180 CR 59; *City of Colton v City of Rialto* (1964) 230 CA2d 174, 180, 40 CR 766.

All ordinances require a recorded majority vote of the total membership of the city council. Govt C §36936.

© The Regents of the University of California

g. Effective Date

§1.237 (1) Generally on 31st Day After Adoption

Ordinances take effect on the 31st day after adoption. Govt C §36937.

© The Regents of the University of California

§1.238 (2) Certain Ordinances Take Effect Immediately

The following ordinances take effect immediately (Govt C §65858):

- Ordinances relating to an election;
- Urgency ordinances for the immediate preservation of the public peace, health, or safety;

NOTE: Urgency ordinances must contain an urgency clause stating valid, constitutional, and persuasive facts to justify such a determination and must be passed by a four-fifths vote of the city council. *Parr v Municipal Court* (1971) 3 C3d 861, 868, 92 CR 153, cert denied sub nom *City of Carmel-By-The-Sea v Parr* (1971) 404 US 869 (urgency clause had discriminatory language; operative language was invalidated). However, courts normally will not investigate the truth of facts declared by a city council. *Crown Motors v City of Redding* (1991) 232 CA3d 173, 179, 283 CR 356. If the court finds that the facts do not support an urgency determination, the ordinance would not be an urgency ordinance and would not take effect until 30 days after passage (*i.e.*, second reading). Thus, when an urgency clause was invalidated and there was no second reading, an ordinance was found to be void. *County of Los Angeles v City Council of the City of Lawndale* (1962) 202 CA2d 20, 26, 20 CR 363.

PRACTICE TIP: Adopt an identical "back-up" ordinance by way of the usual procedure (two readings) if there is any doubt regarding the defensibility of the urgency clause. If the urgency clause is successfully challenged, the non-urgency version of the ordinance will have already taken effect. Only actions taken or citations issued during the 30-day "gap" period are then vulnerable to challenge.

- Ordinances on street improvement proceedings;
- Ordinances on taxes for the usual and current expenses of the city;
- Ordinances covered by other provisions of law that prescribe the manner of its passage and adoption; and
- Interim ordinances. (When passed by four-fifths vote, interim ordinances may prohibit any uses that may conflict with contemplated zoning proposal that is being or will be considered or studied soon; such ordinances must be periodically extended but not for more than 2 years.)

All ordinances that take effect immediately should include findings that support the determination the ordinances take effect immediately. See Govt C §36937. Except for urgency ordinances (including interim land use ordinances; see Govt C §65858), ordinances that take effect immediately on adoption still require a 5-day period between introduction and passage. Govt C §36934.

© The Regents of the University of California

§1.239 h. Publication of Ordinance

The city clerk must cause publication of each ordinance within 15 days after passage as follows (Govt C §36933):

- In a newspaper of general circulation published and circulated in the city, or if there is none:
- Posted in at least three public places in the city; or
- Published in a newspaper of general circulation printed and published in the county and circulated in the city.

This requirement may be satisfied by publishing a summary of the proposed ordinance and posting a certified copy of the proposed ordinance in the city clerk's office at least 5 days before the city council meeting at which the ordinance is to be adopted. Within 15 days after adoption of the ordinance, a summary of the ordinance must be published with the names of the council members voting for and against the ordinance. Govt C §36933(c). If a fair and adequate summary is not feasible, the city council may order publication of an advertisement of at least one-quarter page at least 5 days before the city council meeting at which the proposed ordinance is to be adopted, and within 15 days after adoption. The advertisement must indicate the general nature of, and provide information about, the proposed or adopted ordinance. Publication after the ordinance is adopted must include the names of the council members voting for and against the ordinance. Govt C §36933(c).

Failure to publish or post an ordinance, or its summary in substantially the manner and at the time required by Govt C §36933, prevents the ordinance from taking effect or being valid (unless the ordinance becomes effective immediately on adoption as provided in the Government Code).

PRACTICE TIP: Anyone may file with the city clerk, or other person designated by the city council, a request for notice of a specific proposed ordinance or proposed amendments to ordinances. The city must transmit notice to any such person at least 5 days before the council will take action on the proposed ordinance or place the person on a general mailing list for city council agendas. Govt C §36933(d).

© The Regents of the University of California

§1.240 i. Adoption by Reference

The procedures for adopting a code (*i.e.*, ordinances, codes, or parts thereof of another governmental entity) by reference include the following (Govt C §§50022.1-50022.10):

- **First Reading.** After first reading of the title of the adopting ordinance, which includes the title of the code to be incorporated, the city council sets a public hearing.
- **Notice.** Notice of the hearing must be published under Govt C §6066.
- **Action.** After the hearing, the legislative body may amend, adopt, or reject the adopting ordinance, as it does with other ordinances. Govt C §50022.4.
- **Title.** The ordinance's title must include the title of all ordinances being adopted by reference. Govt C §50022.2.
- **Amendments.** The body may adopt any amendments to the code previously adopted by reference in the same manner (by reference), or the body may adopt the amendments in the standard manner, by setting out the entire text of such amendment. Govt C §50022.7.
- **Penalty Clauses.** Penalty clauses must be set out in full. Govt C §50022.4.

NOTE: An exception to the procedures for adoption by reference exists if adoption of the code is expressly required or permitted as a condition of compliance with a state statute. Govt C §50022.2. For example, the Uniform Building, Plumbing, Mechanical, Housing and Electrical codes are required to be adopted by reference by Health & S C §17922 and amendments may be made to the Uniform Codes to reflect local climatic, geological, and topographical conditions. Health & S C §§17958.5, 17958.7. See *Building Indus. Ass'n v City of Livermore* (1996) 45 CA4th 719, 52 CR2d 902 (findings to support amendments must be supported by substantial evidence; court upheld amendments to the Uniform Building Code).

© The Regents of the University of California

§1.241 j. Penalty for Violation of Ordinance

Violation of a city ordinance is a misdemeanor, unless by ordinance it is made an infraction, which may be prosecuted by city authorities in the name of the People of the State of California, or redressed by civil action. Govt C §36900. A city may, by ordinance, authorize the city attorney, at his or her discretion, to charge and prosecute any ordinance violation as either a misdemeanor or an infraction.

The penalties for misdemeanor violations are established in Pen C §19 and penalties for infractions are established in Govt C §36900. See §§12.28-12.65.

As an alternative remedy, a city may make any violation of an ordinance subject to an administrative fine or penalty. Govt C §53069.4. See §§12.25, 12.77-12.80.

© The Regents of the University of California

§1.242 k. Amendment or Repeal of Ordinance

A city's power to legislate, by implication, includes the power to amend or repeal existing legislation. *Blotter v Farrell* (1954) 42 C2d 804, 811, 270 P2d 481. The city council has the power to amend or modify an ordinance and such legislative authority may not be delegated. *Whitmire v City of Eureka* (1972) 29 CA3d 28, 34, 105 CR 185. If an amendment is unconstitutional, then the ordinance stands in its original form. *Sapiro v Frisbie* (1928) 93 CA 299, 312, 270 P 280.

NOTE: Ordinances adopted by initiative may only be amended or repealed by a vote of the people unless the initiative grants the city council that authority. Elec C §9217.

An ordinance may be expressly or impliedly repealed by enacting a subsequent ordinance. See *Blotter v Farrell, supra*. A subsequent ordinance that conflicts with an earlier ordinance so the two cannot stand together is controlling and the earlier ordinance is repealed by implication. *Iscoff v Police Comm'n of City & County of San Francisco* (1963) 222 CA2d 395, 409, 35 CR 189. However, repeals by implication are disfavored and will not be found if it is possible to harmonize the laws by construction. See *Roberts v City of Palmdale* (1993) 5 C4th 363, 379, 20 CR2d 330.

© The Regents of the University of California

§1.243 3. Resolutions

Unlike ordinances, resolutions do not have the force of law within the jurisdiction but are merely expressions of opinion or evidence of a decision made by the body and often relate to the administrative business of the municipality. *Sausalito v County of Marin* (1970) 12 CA3d 550, 565, 90 CR 843.

An ordinance may only be adopted by the legislative body (*i.e.,* city council), but the city council may delegate to subordinate commissions or boards of the city the authority to make certain decisions, which implies delegation of the authority to adopt resolutions to such subordinate bodies. For example, the city council may establish a planning commission by ordinance and that commission may then make decisions on zoning applications (see Govt C §§65100-65101) and adopt a resolution reflecting the action taken.

A resolution may be amended by another resolution or by ordinance.

© The Regents of the University of California

§1.244 a. Resolutions as Ordinances

If a resolution is passed with all the formalities of an ordinance it thereby becomes a legislative act; it is not important whether it is called a resolution or an ordinance. *Associated Home Builders of Greater East Bay, Inc. v Walnut Creek* (1971) 4 C3d 633, 648, 94 CR 630. But see *City of Sausalito v County of Marin* (1970) 12 CA3d 550, 565, 90 CR 843 (when resolution did not meet all requirements of ordinance, resolution was invalid).

© The Regents of the University of California

§1.245 b. Permissible Subjects for Resolutions

Some subjects are specifically authorized by statute as being appropriately addressed by resolution. See, *e.g.,* Veh C §22507 (preferential parking). Payment of money by a city may be done by resolution or order, which must be adopted or made only at a regular meeting or at a special meeting for which the notice specifies the business to be transacted. Govt C §36935. Such resolution or order for payment of money requires a recorded majority vote of the total membership of the city council. Govt C §36936. The rates of taxes to be levied or the amount of revenue required to be raised by taxation must be fixed either by ordinance or resolution. Govt C §36936.1. If such tax rate or amount of revenue is fixed by resolution, the resolution must be published in the same manner and within the same time as ordinances are required to be published. See §1.239.

In addition to these statutory authorized subjects, any decision within the city's police power may be evidenced by resolution unless there is a statutory or other requirement providing otherwise. See *Pollok v San Diego* (1897) 118 C 593, 595, 50 P 769; McQuillin, Municipal Corporations §15.06 (3d rev ed 1988).

© The Regents of the University of California

§1.246 c. Procedure for Adopting Resolutions

The procedures for adopting resolutions are not as strict as the procedures for adopting ordinances. See §§1.235-1.238. For example, resolutions do not require two readings for passage, need not be read in full or even by title, are effective immediately unless otherwise specified, do not need to be in any particular format unless expressly required, and, with the exception of fixing tax rates or revenue amounts, do not require publication. However, like ordinances, all resolutions require a recorded majority vote of the total membership of the city council. Govt C §36936.

The legislative body may establish rules on the procedure to be followed in adopting resolutions, but when such rules are not complied with, that failure is not jurisdictional and does not invalidate an action that is otherwise valid. *City of Pasadena v Paine* (1954) 126 CA2d 93, 96, 271 P2d 577 (resolution valid when read by title only, although rules required full reading).

© The Regents of the University of California

§1.247 d. Effective Date

Resolutions generally become effective immediately on adoption by the city council. However, any resolution that constitutes a legislative act subject to referendum (such as a general plan amendment) does not become effective for 30 days. *Midway Orchards v County of Butte* (1990) 220 CA3d 765, 781, 269 CR 796.

© The Regents of the University of California

§1.248 4. Minute Order or Motion

The minute order or motion is appropriate when

- the action is not of a penal nature or intended to be a local law;
- an ordinance or resolution is not specifically required; or
- a formal document reflecting the body's action is unnecessary.

The only record of such action is in the form of minutes taken of the meeting at which the action is taken.

© The Regents of the University of California

§1.249 H. Appointed Commissions and Boards

A city council has broad authority to appoint boards and commissions as part of the sub-government of the city, unless otherwise limited by city charter or, for general law cities, state law. See Govt C §65100 (planning commission). The powers, duties, and method of appointment should be established by the city council. The authorizing act, whether a resolution or ordinance, should also clearly define the extent of the board or commission's authority and whether the city council's review of board or commission action is de novo or based solely on the record developed by the board or commission.

PRACTICE TIP: Although not legally required, unless specified in the authorizing act, bylaws for the advisory body are often very helpful.

© The Regents of the University of California

§1.250 1. Methods of Selection

A city may adopt reasonable methods of selecting members of its boards and commissions. In cities with elective mayors, however, the mayor, with the approval of the city council, makes all appointments to boards, commissions, and committees unless otherwise specifically provided by statute. Govt C §40605.

Appointments must be discussed and made in open session. See Govt C §54957. See also *Gillespie v San Francisco Pub. Library Comm'n* (1998) 67 CA4th 1165, 79 CR2d 649 (Ralph M. Brown Act establishes that only candidate's actual appointment and corresponding roll call, and not candidate's nomination, need be reported in open session on day of action). On requirements for annual preparation of local appointment list and posting notices of unscheduled vacancies on boards, commissions, or committees, see Govt C §§54970-54975.

© The Regents of the University of California

§1.251 2. Qualifications

A city can adopt criteria for membership on its boards and commissions, but should ensure that the criteria do not discriminate based on sex, race, creed, color, or national or ethnic origins. See Cal Const art I, §8.

A city cannot have unreasonably long residency requirements for membership on city boards and commissions. *Bay Area Women's Coalition v San Francisco* (1978) 78 CA3d 961, 144 CR 591.

© The Regents of the University of California

§1.252 3. Removal

Appointed officers hold office at the pleasure of the city council. Govt C §36506. See *Lumpkin v Brown* (9th Cir 1997) 109 F3d 1498, cert denied (1997) 522 US 995 (removal of human rights commissioner because of his statements condemning homosexuality did not violate his freedom of expression or establishment clause). But see *Hyland v Wonder* (9th Cir 1992) 972 F2d 1129, cert denied (1993) 508 US 908.

PRACTICE TIP: Before removing a commissioner, the local agency should consider whether the commissioner has a liberty interest that might require a name clearing hearing, or First Amendment rights that might be implicated.

© The Regents of the University of California

§1.253 4. Compensation

The city council must fix the compensation of all appointive officers and employees by resolution or ordinance. Govt C §36506.

© The Regents of the University of California

§1.254 5. Delegation of Authority

A city may delegate specific administrative acts to specific administrative officers or boards. The power delegated must be in fact administrative and not legislative (*e.g.,* power to grant a conditional use permit as opposed to a change in zone classification) and the standards that guide the administrative official must be sufficiently definite and certain to ensure the action taken will not be left to the uncontrolled discretion of that official or board. See *County of Riverside v Superior Court (Riverside Sheriff's Ass'n)* (2003) 30 C4th 278, 132 CR2d 713; *Bagley v City of Manhattan Beach* (1976) 18 C3d 22, 132 CR 668; *Kugler v Yocum* (1968) 69 C2d 371, 375, 71 CR 687.

© The Regents of the University of California

I. Officials: Powers and Duties

§1.255 1. City Manager

Under the city manager form of government (Govt C §§34851-34859), the city manager has the power to

- administer the day-to-day affairs of the city,
- hire and fire city employees (except the city attorney), and
- perform such other functions as the council chooses to authorize by ordinance.

The city council can vest the appointment power for the city clerk and city treasurer in the city manager by ordinance. Govt C §34856. The city manager holds office at the pleasure of the city council. Govt C §36506.

© The Regents of the University of California

§1.256 2. City Attorney

The city council may appoint a city attorney. Govt C §36505. The city attorney's duties include framing ordinances and regulations and providing other legal advice, and may include prosecuting misdemeanors with the consent of the district attorney. See Govt C §§41801-41805. "[C]ontrolling law vests wide latitude in city councils to define and control the duties of their city attorneys. This result is consistent with the general principle that an attorney's duties are ordinarily defined and controlled by his client." *Montgomery v Superior Court* (1975) 46 CA3d 657, 670, 121 CR 44.

© The Regents of the University of California

§1.257 3. City Clerk

If the office of city clerk is appointed, the city council makes the appointment unless that power is vested in the city manager. Govt C §34856. If the office is elective, the city clerk must be a resident of the city and registered to vote there. Govt C §36502. The position of elected city clerk may be made appointive on approval of the voters at a regular or special election. See Govt C §§36508-36510.

On duties of city clerk, see Govt C §§40801-40814.

© The Regents of the University of California

§1.258 4. City Treasurer

If the office of city treasurer is appointed, the city council makes the appointment unless it vests this power in the city manager. Govt C §34856. If the office is elective, the city treasurer must be a resident of the city and registered to vote there. Govt C §36502. The position of city treasurer may be made appointive on approval of the voters at a regular or special election. See Govt C §§36508-36510. The compensation of a city treasurer in a general law city may be set by initiative. 84 Ops Cal Atty Gen 13 (2001).

On the duties of city treasurers, see Govt C §§41001-41007, 53630-53683.

© The Regents of the University of California

§1.259 5. Police Chief

"The police department of a city is under the control of the chief of police." Govt C §38630. However, this section may not apply to charter cities, depending on the provisions of the charter. *Berkeley Police Ass'n v City of Berkeley* (1977) 76 CA3d 931, 143 CR 255.

Depending on the structure of the city government, the city council may appoint the chief of police (Govt C §36505), or this power may be vested in the city manager (Govt C §34856). No police chief may be removed by a public agency, or appointing authority, without written notice and an opportunity for an administrative appeal. Govt C §3304.

On the duties of the chief of police, see Govt C §§41601-41612.

© The Regents of the University of California

§1.260 6. Fire Chief

"The fire department is to be under the charge of a chief who shall have had previous training and experience as a fireman [firefighter]." Govt C §38611. Based on the structure of the city government, either the city council or city manager has the power to appoint and dismiss the fire chief. Govt C §§34856, 36505, 38611.

© The Regents of the University of California

2

Open Government and Ethics

I. INTRODUCTION §2.1

II. CONDUCT OF CITY COUNCIL MEETINGS
- A. Quorum and Voting Requirements §2.2
- B. Rules of Procedure and Decorum
  - 1. Role of City Attorney §2.3
  - 2. City Council's Authority to Promulgate Rules of Procedure and Decorum §2.4
  - 3. Procedures for Regular Meetings
    - a. Ralph M. Brown Act Requirements §2.5
    - b. Order of Business §2.6
  - 4. Mayor as Presiding Officer §2.7
    - a. Powers of Presiding Officer §2.8
    - b. Duties of Presiding Officer §2.9
  - 5. Parliamentary Rules of Procedure
    - a. Purpose and Function of Rules §2.10
    - b. Source of Rules §2.11
    - c. Object of Rules §2.12
    - d. Effect of Failure to Follow Rules §2.13
    - e. Judicial Review of Parliamentary Procedures §2.14
  - 6. Rules of Decorum and Their Enforcement §2.15
  - 7. Procedures That Regulate Public Speech
    - a. Right to Testify §2.16
    - b. Permissible Forms of Regulation
      - (1) Reasonable Time, Place, and Manner Regulations §2.17
      - (2) Request to Speak Limitations §2.18
      - (3) Time Limitations §2.19
      - (4) Repetitious or Irrelevant Comment Limitations §2.20
      - (5) Requirement to Set Spokesperson for Groups §2.21
      - (6) Out of Order Enforcement §2.22
    - c. Content-Oriented Regulation
      - (1) No Limitation on Political Speech §2.23
      - (2) May Limit Disruptive Speech §2.24
      - (3) Intra-Council Speech May Not Be Limited §2.25
  - 8. Rules Regulating Public Conduct
    - a. Right to Make Rules §2.26
    - b. Exclusion for Disorderly Conduct §2.27
    - c. Exception for Journalists §2.28
    - d. Readmission §2.29
    - e. Punishment §2.30
- C. Due Process Requirements §2.31
  - 1. Legislative Actions §2.32
  - 2. Quasi-Judicial Actions §2.33
  - 3. Requirement for Public Hearings §2.34
- D. Time and Location of Meetings §2.35

III. OPEN MEETING LAWS
- A. Open and Public Local Government Meetings Required §2.36
- B. Entities and Persons Covered
  - 1. Legislative Bodies §2.37
  - 2. The Statutory Less-Than-a-Quorum Exception §2.38
  - 3. Elected Officials Who Have Not Yet Assumed Office §2.39
- C. What Constitutes a Covered Meeting §2.40
  - 1. Statutory Exemptions
    - a. "Individual Contacts" (Lobbying) §2.41
    - b. Conferences and Seminars §2.42
    - c. Open Community Meetings to Address Local Concerns §2.43
    - d. Other Bodies of the Agency and Other Agencies §2.44

e. Social and Ceremonial Gatherings §2.45
f. Meeting of Standing Committees §2.46
2. Types of Lawful Meetings
a. Regular Meetings §2.47
b. Special Meetings §2.48
c. Emergency Meetings §2.49
d. Adjourned Meetings §2.50
e. Continued Hearings §2.51
f. Teleconferenced Meetings §2.52
g. Extraterritorial Meetings §2.53
3. Prohibited Meetings §2.54
D. Agenda Requirements and Other Procedural Issues
1. Regular Meetings
a. Seventy-Two-Hour Posting Requirement §2.55
b. Required Agenda Contents §2.56
c. Mailing of Agendas §2.57
d. ADA Requirements for Agendas and Agenda Packets §2.58
e. No Action or Discussion of Matters Not on the Agenda §2.59
f. Exceptions to Requirements for Agenda Contents
(1) Brief or Limited Communications §2.60
(2) Emergencies §2.61
(3) Need for Immediate Action §2.62
(4) Items on Agenda for Prior Meetings §2.63
g. Public Comment or Testimony Must Be Allowed §2.64
2. Special Meetings
a. Twenty-Four-Hour Posting and Personal Notice Requirements §2.65
b. No Action or Discussion of Matters Not Covered by Notice §2.66
c. Public Comment or Testimony Must Be Allowed §2.67
3. Emergency Meetings
a. Limited Media Notice and Subsequent Posting Required §2.68
b. Closed Sessions §2.69
4. Adjourned and Continued Meetings
a. Adjournment Procedures §2.70
b. Continuance Procedures §2.71
5. Teleconferenced Meetings §2.72
6. Closed Sessions: Procedures and Safe Harbor Protection §2.73
7. Rights of the Public Who Attend Open Meetings
a. Anonymity of the Public §2.74
b. Audio, Video, and Photographic Recording Rights §2.75
c. Public's Right to Access Documents §2.76
(1) Compliance With ADA §2.77
(2) Tapes Made by the Agency to Assist in Preparation of Minutes or Otherwise §2.78
(3) Exception: Attorney-Client Privileged Written Communications §2.79
d. Public Communication Rights §2.80
e. No Right to Disrupt Meetings §2.81
E. Closed Sessions §2.82
1. Agenda Notice Requirements §2.83
2. Permissible Attendees §2.84
3. Must Announce Intended Subject Matter of the Closed Session in Open Session §2.85
a. Announcement of Real Estate Negotiations §2.86
b. Announcement of Pending Litigation §2.87
c. Announcement of Personnel Sessions on Specific Complaints or Charges §2.88
d. Announcement of Labor Negotiations §2.89
4. Major Reasons for Permissible Closed Sessions
a. To Instruct Negotiators of Real Property Transactions §2.90
b. To Instruct Negotiators Who Are Meeting and Conferring With Represented and Unrepresented Employees §2.91
c. To Discuss "Pending Litigation" With the Agency's Attorney §2.92
(1) What Constitutes "Pending Litigation" §2.93
(2) What Constitutes "Existing Facts and Circumstances" Under Govt C §54956.9(b)(1)-(2) and Related Required Disclosures §2.94
d. To Consider the "Appointment, Employment, Evaluation of Performance, Discipline, or Dismissal of a Public Employee" §2.95
(1) Covered Employees §2.96
(2) Valid Closed Session Employee-Related Topics §2.97

(3) Notice Requirements for Investigation of Employee Complaints §2.98
e. License and Public Security Topics in Closed Sessions §2.99
5. Action and Vote Disclosure in Open Session After the Closed Session
a. Governing Statutes §2.100
b. Contents of the Closed-Session Disclosure Report §2.101
(1) Disclosure Report on Approval of Agreements Concluding Real Estate Negotiations §2.102
(2) Disclosure Report on Approval of Litigation Defense, Appellate Review, or Amicus Curiae Participation §2.103
(3) Disclosure Report on Approval of Initiation of or Intervention in Litigation §2.104
(4) Disclosure Report on Approval of Pending Litigation Settlements §2.105
(5) Disclosure Report on Disposition of Joint Powers Agency Claims §2.106
(6) Disclosure Report on Actions Affecting the Employment Status of Public Employees §2.107
(7) Disclosure Report on Approval of Agreements Concluding Labor Negotiations §2.108
6. Disclosure of Attorney-Client Communications §2.109
7. Minute Book Confidentiality §2.110
F. Ralph M. Brown Act Violations in Closed Sessions §2.111
1. Criminal Prosecution of Member of the Legislative Body Possible §2.112
2. Civil Action Possible; Remedies Available §2.113
a. Judicial Determination and Its Effect on Criminal Prosecution §2.114
b. Opportunity to Cure Claimed Past Violations Required §2.115
c. Costs and Attorney Fees Awarded Unless Unjust §2.116
3. Prohibition on Disclosure of Confidential Information §2.117
G. Other Meeting Requirement References §2.118

IV. ETHICAL CONSIDERATIONS AND CONFLICTS OF INTEREST
A. Political Reform Act of 1974 §2.119
1. Disqualification of Public Officials in the Event of Conflict of Interest §2.120
a. Direct or Indirect Investment in Business Entity §2.121
b. Direct or Indirect Interest in Real Property §2.122
c. Interest in Income Source §2.123
d. Management Position Held in Business Entity §2.124
e. Interest in Gift Source §2.125
2. Disqualifying Conflict of Interest Analyzed Under Eight-Part Test §2.126
a. Must Be Public Official Involved §2.127
b. Must Be Making or Influencing a Governmental Decision §2.128
c. Official Must Have Identifiable Economic Interests §2.129
(1) Business Entities §2.130
(2) Real Property §2.131
(3) Source of Income §2.132
(4) Business Position §2.133
(5) Source of Gifts §2.134
(6) Personal Finances §2.135
d. Relationship of Interest to Governmental Decision §2.136
e. Materiality of Economic Interest Necessary §2.137
f. Foreseeability Analysis Relevant §2.138
g. Exception: Public Generally Affected Also §2.139
h. Exception: Legally Required Participation §2.140
3. Requirements After Disqualification §2.141
4. Local Conflict of Interest Code §2.142
5. Conflict of Interest Statements and Disclosure
a. Who Must File Official Disclosure Statements §2.143
b. Contents of Disclosure Statements §2.144
c. Timing of Disclosure Statements §2.145
(1) Assuming Office Statements §2.146
(2) Annual Statements §2.147
6. Leaving Office Statements §2.148
a. Penalties §2.149
b. Retention §2.150
7. Conflicts of Interests and Campaign Contributions §2.151
a. Definitions and Prohibited Acts §2.152
b. Disqualification and Disclosure Requirements §2.153
8. Gifts and Honoraria Restrictions
a. Honoraria §2.154
b. Gifts §2.155
9. Loan Prohibitions §2.156

10. Mass Mailing Restrictions §2.157
11. Revolving Door Prohibitions §2.158
12. Charitable Fund-Raising Under the Political Reform Act of 1974 §2.159
13. Enforcement of the Political Reform Act §2.160
14. Mandatory Ethics Training §2.161
B. Prohibited Contracts Under Govt C §1090 §2.162
1. When Govt C §1090 Applies §2.163
2. To Whom Govt C §1090 Applies §2.164
3. Contract-Making Broadly Defined §2.165
4. Financial Interest Under Govt C §1090 §2.166
5. Statutory Exceptions: "Remote Interests" and "Non-interests" §2.167
6. The Rule of Necessity §2.168
7. Exception: "Salary" §2.169
8. Exception: Existing Contracts §2.170
9. Reliance on Legal Advice Not a Defense §2.171
10. Applicable Penalties §2.172
11. Statute of Limitations Under Govt C §1090 §2.173
C. Common Law Doctrine Against Conflicts of Interest §2.174
D. Incompatible Activities and Offices
1. Incompatible Activities §2.175
2. Incompatible Offices §2.176
a. "Offices" §2.177
b. Potential for Conflict §2.178
c. Examples of Incompatible Offices §2.179
E. Impermissible Bias §2.180
F. Disclosure Requirements and Prohibited Redevelopment Agency Conflicts
1. Redevelopment Agency Officers and Employees §2.181
2. Redevelopment Commission Members §2.182
3. Acquiring Property From Agency Personnel §2.183
G. Local Incompatible Activity Regulations §2.184
H. City Lobbying Allowed §2.185
1. Lobbying Reporting Requirements §2.186
2. Local Regulation of Lobbying §2.187
I. Ethical Obligations for Government Lawyers §2.188
1. Professional, Situational, Categorical Ethics—Distinguished §2.189
2. Regulation of California Attorneys §2.190
3. State Bar Rules Apply to Government Attorneys §2.191
4. Representing Governmental Entities
a. Cal Rules of Prof Cond 3-600(A): Organization as Client §2.192
b. Cal Rules of Prof Cond 3-600(B): Reporting Illegal Activity §2.193
c. Cal Rules of Prof Cond 3-600(D): Duty Not to Treat Agent as Client or to Promise Confidentiality §2.194
d. Cal Rules of Prof Cond 3-600(E): Joint Representation of Official or Employee and Entity §2.195
5. Cal Rules of Prof Cond 3-310: Conflicts of Interest §2.196
a. Simultaneous Representation of Adverse Interests §2.197
b. Successive Representation of Client With Interest Adverse to That of Former Client §2.198
c. Determining Client in Representation of Quasi-Independent Boards and Officials §2.199
(1) Civil Service Commission or Advisory Bodies §2.200
(2) Attorney General and Sheriff §2.201
d. Ethical Walls to Avoid Conflicts in Public Law Offices §2.202
e. Duty of Confidentiality, Whistle-Blowing §2.203
6. Special Considerations for the Public Sector
a. Public Attorney's Simultaneous Representation of Adverse Interests §2.204
b. Public Attorney's Successive Representation of Adverse Interests §2.205
c. Conflicts in Joint Representation of Employees and the Entity
(1) Duty to Defend §2.206
(2) Generally No Conflict When Punitive Damages Sought §2.207
d. Role of Attorney in Due Process—Improper Combination of Functions §2.208
e. Application of Govt C §1090 and the Political Reform Act of 1974 §2.209
f. City Attorney's Right to Defense and Indemnification §2.210
7. Special Duties for Prosecutors
a. City Attorneys as Prosecutors §2.211
b. Prosecutors Must Maintain Objectivity §2.212
c. City Attorney May Not Threaten Criminal Charges to Obtain Advantage in Civil Dispute §2.213
d. Limitations on Criminal Defense Practice by City Prosecutors §2.214

8. Enhanced Ethical Duty for Public Attorneys
a. Furthering Justice §2.215
b. Statutory Duties §2.216
J. Other References on Ethics and Conflicts §2.217

V. CALIFORNIA PUBLIC RECORDS ACT
A. California Constitution Establishes Public's Right of Access to Information §2.218
1. California Public Records Act §2.219
2. Freedom of Information Act §2.220
3. Other Right to Access Statutes §2.221
B. Inspection Rights Under California Public Records Act §2.222
C. Agencies Covered by the Public Records Act §2.223
D. Records Subject to Inspection Under California Public Records Act §2.224
1. Air Pollution Data Are Public Records §2.225
2. Certain Code Violations Are Public Records §2.226
3. Ballot Measure Information Generally Not a Public Record §2.227
4. Recordings of Public Meetings Are Public Records §2.228
5. E-Mail, Photographs, Photocopies, and Faxes May Be Public Records §2.229
E. Public's Right to Inspect §2.230
F. Requests for Copies or Data Under the California Public Records Act
1. Right to Exact Copy of an Identifiable Record §2.231
2. Public's Right to Assistance From Agency §2.232
3. Request Must Be Focused and Specific §2.233
4. Fees: Direct Cost of Duplication §2.234
5. Time Limits: 10-Day Rule; 14-Day Extension §2.235
6. Notification of Denial: Names and Titles Required §2.236
G. Segregated Records Must Be Made Available §2.237
H. Electronic Format Information §2.238
I. Faster or Greater Access Requirements Possible §2.239
J. Nondisclosure
1. General Exemption Under California Public Records Act §2.240
2. Deliberative Process Privilege Under California Public Records Act §2.241
3. Specific Record Exemptions §2.242
a. Election Documents Exempted §2.243
b. Preliminary Drafts, Notes, and Inter-Agency or Intra-Agency Memoranda May Be Exempted §2.244
c. Litigation Records Exempted §2.245
d. Personnel, Medical, or Similar Records May Be Exempted §2.246
e. Peace Officer Personnel and Citizen Complaints Exempted §2.247
f. Personal Financial Data Required of Licensees Exempted §2.248
g. Arrest Records Exempted §2.249
h. Other Personal Information Subject to Balancing Test §2.250
i. Criminal Investigation Records Exempted §2.251
j. Utility Customer Records May Be Exempted §2.252
k. Concealed Weapons Permits Generally Not Exempted §2.253
l. Additional Statutory Exemptions and Privileges §2.254
m. Trade Secrets May Be Exempted §2.255
n. Architectural and Engineering Plans Generally Exempted §2.256
o. Citizens' Names, Addresses, and Phone Numbers Generally Exempted §2.257
K. Remedies for Improper Withholding of Records §2.258
1. Timing for Pleadings §2.259
2. Disclosure Ordered §2.260
3. In Chambers Review and Order §2.261
a. Review of Order by Writ §2.262
b. Attorney Fees May Be Recovered §2.263
L. Records Retention §2.264
1. Record Defined §2.265
2. Specific State Law Requirements on Record Retention §2.266
3. Specific Federal Law Requirements on Record Retention §2.267
4. Records Destruction §2.268
5. Preservation in Alternative Media §2.269

© The Regents of the University of California

§2.1 I. INTRODUCTION

This chapter deals generally with meetings of public bodies and procedural and ethical aspects related to those meetings. In particular, the chapter details the requirements and procedures related to the conduct of public meetings (see §§2.2-2.35); covers open meeting laws and their impact on meetings, the types of meetings public bodies may conduct, agenda and posting requirements, and Ralph M. Brown Act (Govt C §§54950-54963) considerations (see §2.36-2.118); outlines ethical obligations and mandatory training, regulations of the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014), conflicts of interest, and disqualification and disclosure requirements (see §§2.119-2.217); and, finally, explores the requirements of the California Public Records Act (Public Records Act) (Govt C §§6250-6276.48), particularly examining records covered, disclosure requirements, exemptions, and related permissible record retention and destruction policies (see §§2.218-2.269).

On topics covered by this chapter, including meetings and related procedures, the California Public Records Act and related concerns, and the Political Reform Act of 1974, see generally Advising California Nonprofit Corporations (3d ed Cal CEB 2009); California Administrative Hearing Practice (2d ed Cal CEB 1997); California Administrative Mandamus (3d ed Cal CEB 2003); California Civil Writ Practice (4th ed Cal CEB 2008); and California Government Tort Liability Practice (4th ed Cal CEB 1999).

© The Regents of the University of California

II. CONDUCT OF CITY COUNCIL MEETINGS

§2.2 A. Quorum and Voting Requirements

A majority of the city council constitutes a quorum for transaction of business. Govt C §36810. Resolutions, orders for the payment of money, and all ordinances require a recorded majority vote of the total membership of the city council. Govt C §36936. Some actions, such as the passage of an urgency ordinance or adoption of a resolution of necessity, require a super-majority vote. Govt C §§36937, 65858; CCP §1245.240. Absent the provisions discussed above, a specific charter provision, or some other local law, rule, or regulation dictating otherwise, a majority of the quorum may act on behalf of the city. Under the Political Reform Act of 1974, a member with a financial conflict of interest regarding a matter before the member's board must leave the room while that matter is being discussed, heard, or acted on, so that member should not be counted towards the quorum for that matter. Govt C §87105; 2 Cal Code Regs §18702.5.

PRACTICE TIP: Also consider local procedural rules adopted under Govt C §36813, which may require a majority vote of the total membership of the city council for actions or a super-majority for certain actions.

© The Regents of the University of California

B. Rules of Procedure and Decorum

§2.3 1. Role of City Attorney

The city attorney's role is typically to render advice about the rules of procedure and decorum at city council meetings.

PRACTICE TIP: The city attorney may want to recommend that each city council member read the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963). See Govt C §54952.7 ("A legislative body of a local agency may require a copy of [the Brown Act] be given to each member of the legislative body"). See also Govt C §§53234-53235.2, requiring all local elected officials and legislative body members who receive reimbursements and designated employees to receive training in open government and ethics laws every 2 years.

© The Regents of the University of California

§2.4 2. City Council's Authority to Promulgate Rules of Procedure and Decorum

City meeting procedures are not prescribed by state law, with the exception of requirements contained in the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963). A council may establish rules for the conduct of its proceedings. Govt C §36813. These rules may be enacted by ordinance or by resolution. See *Central Mfg. Dist., Inc. v Board of Supervisors* (1960) 176 CA2d 850, 1 CR 733. The rules must preserve constitutional rights and be reasonable and not arbitrary and capricious. See *Nevens v City of Chino* (1965) 233 CA2d 775, 44 CR 50; *Pasadena v Paine* (1954) 126 CA2d 93, 271 P2d 577.

PRACTICE TIP: Many cities have resolutions or ordinances establishing procedural rules for the conduct of meetings. Some of these procedural rules preclude council members from abstaining in the absence of a legitimate conflict of interest. Although there is some authority for the proposition council members should not abstain without that degree of justification, it is doubtful a council member can be compelled to vote.

© The Regents of the University of California

3. Procedures for Regular Meetings

§2.5 a. Ralph M. Brown Act Requirements

The Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) creates certain minimum procedural requirements for conducting meetings.

NOTE: Application of the Brown Act is not limited to city council meetings. See Govt C §54952. The Brown Act also applies to a variety of committees and advisory boards determined to be "legislative bodies" under the Act. Govt C §54952. Entities covered by the Brown Act include bodies created by a city council or over which a city council retains authority. See, *e.g., Epstein v Hollywood Entertainment Dist. II Bus. Improvement Dist.* (2001) 87 CA4th 862, 104 CR2d 857 (nonprofit corporation formed to administer business improvement district funds subject to the Brown Act). For further discussion, see §2.36.

© The Regents of the University of California

§2.6 b. Order of Business

The order of business generally is divided into three parts: the opening, the business, and the closing.

- **Opening the Meeting.** At the opening, the presiding chair calls the meeting to order. The national anthem, pledge of allegiance, or other cultural ceremonies may follow. The United States Supreme Court has held a non-denominational invocation or, alternatively, a silent meditation of short duration, before the commencement of a regular city council meeting does not violate the establishment clause of the First Amendment. See *Marsh v Chambers* (1983) 463 US 783, 77 L Ed 2d 1019, 103 S Ct 3330; *Marsa v Wernik* (NJ 1981) 430 A2d 888. Allowing sectarian prayer before a city council meeting, however, has been held to be unconstitutional. *Rubin v City of Burbank* (2002) 101 CA4th 1194, 124 CR2d 867, cert denied (2003) 538 US 1034.
- **Business.** The archetypal "business" involves approval of the minutes of the last meeting, proclamations, council member reports, committee reports, staff reports, public hearings, audience communications, specially scheduled business, unfinished business, and new business.
- **Closing.** Meetings close by a motion to adjourn or by order of the chair. A regular city council meeting continues until it is terminated by an order of final adjournment or by operation of the law. See *Ex Parte Mirande* (1887) 73 C 365, 14 P 888.

The city clerk is directed to keep minutes of city council proceedings. Govt C §36814.

© The Regents of the University of California

§2.7 4. Mayor as Presiding Officer

The mayor is the presiding officer at all city council meetings. Govt C §36802. If the mayor is absent or unable to act, the mayor pro tempore serves until the mayor returns or is able to act. Govt C §36802. The mayor pro tempore has all of the powers and duties of the mayor. Govt C §36802.

© The Regents of the University of California

§2.8 a. Powers of Presiding Officer

The powers of the presiding officer are prescribed by state law or by city charters and ordinances, and local rules passed under state law. The presiding officer may refer to rules of parliamentary procedure, such as Robert's Rules of Order, for guidance and supplementation of city council's procedural rules.

The mayor may participate in decision making and make or second any motion and present and discuss any matter as a member of the council. Govt C §36803.

© The Regents of the University of California

§2.9 b. Duties of Presiding Officer

The presiding officer has a duty to adhere to and enforce the procedural law or rules applicable to the city council, keep order, and follow the course of the proceedings. McQuillin, Municipal Corporations §13.21 (3d rev ed 1988). In addition, the mayor or other officer in control of the police force in the city must direct a sufficient number of police officers to attend and keep order at any public meeting in the city at which, in his or her opinion, a breach of the peace may occur. Govt C §38638. In the event a meeting is willfully interrupted by a group of persons so as to render the orderly conduct of such meeting unfeasible, and orderly conduct cannot be restored by the removal of the disruptive individuals, the members of the legislative body conducting the meeting may order the meeting cleared and then continue in session with members of the press remaining unless they participated in the disturbance. Govt C §54957.9. Willfully disturbing a public meeting may result in criminal penalties if the disruptive behavior is not constitutionally protected, substantially impairs the conduct of the meeting, and constitutes a violation of the body's rules or customs. Pen C §403; *In re Kay* (1970) 1 C3d 930, 83 CR 686; *McMahon v Albany Unified Sch. Dist.* (2002) 104 CA4th 1275, 1285, 129 CR2d 184, cert denied (2003) 540 US 824.

© The Regents of the University of California

5. Parliamentary Rules of Procedure

§2.10 a. Purpose and Function of Rules

The purpose of parliamentary rules of procedure is to expedite the transaction of city business in an orderly fashion. See *City of Pasadena v Paine* (1954) 126 CA2d 93, 271 P2d 577. Parliamentary law refers to the rules, laws, or regulations of organizations, governing the orderly, expeditious, and efficient transaction of business at meetings. See Demeter, Demeter's Manual of Parliamentary Law and Procedure 5 (1969) (purpose of parliamentary law is "to transact the assembly's business legally and to control the conduct of its members").

© The Regents of the University of California

§2.11 b. Source of Rules

A city council may adopt and change its own procedural rules. See *Nevens v City of Chino* (1965) 233 CA2d 775, 44 CR 50. However, the procedural rules cannot violate the federal or state constitutions, mandatory charter, or statutory provisions. The city council may also abolish, suspend, modify, or waive its own procedural rules. *City of Pasadena v Paine* (1954) 126 CA2d 93, 271 P2d 577. Many city councils use the latest edition of Robert's Rules of Order as a non-binding guide to the conduct of meetings. Nevertheless, because Robert's Rules of Order does not directly apply to city council meetings, Robert's Rules of Order cannot be strictly followed and should not be formally adopted by the council except as a guide to conduct.

© The Regents of the University of California

§2.12 c. Object of Rules

Motions, orders, and resolutions in a city council meeting are generally subject to the rules of parliamentary law. Most motions are debatable and amendable and may be reconsidered.

© The Regents of the University of California

§2.13 d. Effect of Failure to Follow Rules

Parliamentary rules are procedural only. A city council's failure to follow parliamentary rules will not invalidate an action so long as the requisite number of city council members have agreed to the particular measure. *City of Pasadena v Paine* (1954) 126 CA2d 93, 271 P2d 577.

© The Regents of the University of California

§2.14 e. Judicial Review of Parliamentary Procedures

A city council's action will be presumed to be in conformity with its own rules or parliamentary usage as to procedure. McQuillin, Municipal Corporations §13.42.10 (3d rev ed 1988). Nevertheless, courts are not required to recognize all of the parliamentary rules used by a city council. McQuillin, Municipal Corporations §13.42.10.

PRACTICE TIP: The city attorney may act as the parliamentarian to the city council. The city attorney should check with the mayor to ascertain whether the city attorney is expected to perform this duty, become familiar with the applicable procedures, and consider suggesting the adoption or modification of rules if necessary.

© The Regents of the University of California

§2.15 6. Rules of Decorum and Their Enforcement

The city council may establish rules of order and decorum. Govt C §36813; *Socialist Party v Uhl* (1909) 155 C 776, 103 P 181. These rules govern the following parties:

- Council members should preserve order and decorum while the council is in session. The council may punish a member for disorderly behavior at a meeting. Govt C §36813. However, California law provides little guidance on such punishment and admonitions from the chair and other council members usually suffice.
- City staff should observe the same rules of order and decorum as the city council members.
- Members of the audience are bound by the rules. Any person in the audience who engages in disorderly conduct, which disturbs the peace and good order of the meeting may be punished under the rules of conduct established by the city council and may be removed. Govt C §§36813, 54957.9. However, such rules may not "prohibit public criticism of the policies, procedures, programs or services of the [city] or of the acts or omissions of the legislative body." Govt C §54954.3(c). Additionally, any person who willfully disturbs or breaks up any assembly or meeting is guilty of a misdemeanor. Pen C §403.

PRACTICE TIP: The city attorney should be prepared to advise the council on the balance between the council's right to keep order and individuals' rights to petition their government and exercise freedom of speech.

The city council may designate a sergeant at arms of the council. The sergeant at arms carries out all orders given by the mayor for the purpose of maintaining order and decorum.

© The Regents of the University of California

7. Procedures That Regulate Public Speech

§2.16 a. Right to Testify

The public has a right to address the city council at any meeting on any subject that is within the council's subject matter jurisdiction. Govt C §54954.3(a). Public comment can address issues that a legislative body is permitted to consider in closed session under the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963), such as personnel matters. See *Leventhal v Vista Unified Sch. Dist.* (SD Cal 1997) 973 F Supp 951, 959. The right to express one's views in a public place is fundamental to a free society; however, it is not absolute and is subject to valid regulation. A legislative body may limit public comment to matters that serve the purpose for which the council holds meetings. 78 Ops Cal Atty Gen 224, 226 (1995). This aim is not achieved if public comment addresses items outside of the jurisdiction of the council. 78 Ops Cal Atty Gen 224, 226 (1995).

NOTE: Courts balance the right of the public to address the council with the need to ensure that public comment does not unduly disrupt the orderly conduct of the meeting. The public has the right to testify on all matters within the jurisdiction of the council, but the council may limit speech that is irrelevant to the issue at hand. *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421, 1425.

© The Regents of the University of California

b. Permissible Forms of Regulation

§2.17 (1) Reasonable Time, Place, and Manner Regulations

A city council meeting is a "limited public forum." 78 Ops Cal Atty Gen 224 (1995); *Kindt v Santa Monica Rent Control Bd.* (9th Cir 1995) 67 F3d 266; *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421, 1425; *Leventhal v Vista Unified Sch. Dist.* (SD Cal 1997) 973 F Supp 951. See discussion in §§9.118-9.153.

Nevertheless, it is clear that city councils have authority to limit speech through the imposition of agendas and rules of order and decorum, many of which are plainly contrary to ordinary First Amendment principles. However, the regulations on public comment must be reasonable and not so broad as to constitute "prior restraints." *White v City of Norwalk,* 900 F2d at 1425. For instance, a city council may prohibit a member of the public from speaking on a matter not within the council's subject matter jurisdiction. 78 Ops Cal Atty Gen 224 (1995).

© The Regents of the University of California

§2.18 (2) Request to Speak Limitations

A city council may require members of the public wishing to address the city council to fill out a speaker's card and submit it to the city clerk. *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421, 1425.

© The Regents of the University of California

§2.19 (3) Time Limitations

A city council may regulate the total amount of time on particular issues and for each individual speaker, subject to the requirements of due process in quasi-judicial hearings. Govt C §54954.3(b). See also 75 Ops Cal Atty Gen 89 (1992) (upholding time limit); *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367 (due process requirements). Many cities place a time limit on comments by the public, unless it is otherwise prohibited by law, to ensure all members of the public have an opportunity to speak and the council is able to complete its business. Time limits of 1 to 5 minutes are not unusual. In order to effectively enforce a time limit, the city clerk should monitor the time for each speaker; the mayor should be responsible for enforcing the time limit.

© The Regents of the University of California

§2.20 (4) Repetitious or Irrelevant Comment Limitations

Irrespective of any time limits, the city council may regulate a speaker who is speaking too long, being unduly repetitious, or extending discussion of irrelevancies. A moderator is vested with a great deal of discretion to determine at which point speech becomes unduly repetitious or irrelevant. Attacks against the character or motives of any person may be ruled out of order. See *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421, 1425.

© The Regents of the University of California

§2.21 (5) Requirement to Set Spokesperson for Groups

Some cities take the position that the right to limit testimony on a given subject implies the right to request that a spokesperson be chosen for a group and/or limit the number of such persons addressing the council whenever a group of persons wishes to address the council on the same subject matter. Other cities shorten time limits to accommodate more speakers. Govt C §54954.3.

© The Regents of the University of California

§2.22 (6) Out of Order Enforcement

A city council may rule speakers out of order for cause. A speaker may not be ruled out of order due to the substance of the comments (unless irrelevant to the subject at hand). See *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421, 1425.

© The Regents of the University of California

c. Content-Oriented Regulation

§2.23 (1) No Limitation on Political Speech

A city council may not prohibit public criticism of the policies, procedures, programs, or services of an agency or its acts or omissions. Govt C §54954.3. When a citizen is given the right to speak at a city council meeting, his or her speech is considered political speech. See *Perry Educ. Ass'n v Perry Local Educators' Ass'n* (1983) 460 US 37, 60, 74 L Ed 2d 794, 103 S Ct 948. As such, a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he or she is expressing. *Perry Educ. Ass'n v Perry Local Educators' Ass'n, supra.*

© The Regents of the University of California

§2.24 (2) May Limit Disruptive Speech

"Fighting words" are usually intended as a personal insult to the person addressed, which by their very utterance tend to incite an immediate breach of the peace. *Madison Joint Sch. Dist. v Wisconsin Employment Relations Comm'n* (1976) 429 US 167, 175 n8, 50 L Ed 2d 376, 97 S Ct 421. "Fighting words" are not protected by the First Amendment. *Virginia v Black* (2003) 538 US 343, 359, 155 L Ed 2d 535, 123 S Ct 1536. Offensive language does not necessarily constitute "fighting words." *Cohen v State* (1971) 403 US 15, 29 L Ed 2d 284, 91 S Ct 1780 ("Fuck the Draft").

To limit such speech, it must be "disruptive." By the very nature of a city council meeting, a speaker can become "disruptive" in ways that would not meet the test of actual breach of the peace (*Gooding v Wilson* (1972) 405 US 518, 526, 31 L Ed 2d 408, 92 S Ct 1103) or of "fighting words" likely to provoke immediate combat (see *Chaplinsky v State of New Hampshire* (1942) 315 US 568, 572, 86 L Ed 1031, 62 S Ct 766). Any ordinance regulating speech at council meetings must be narrowly drafted or narrowly construed, so that speech is regulated only when it disturbs or impedes the meeting. *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421, 1425.

© The Regents of the University of California

§2.25 (3) Intra-Council Speech May Not Be Limited

A city council member who addresses the council or engages in debate with it is exercising a right of "pure speech" under the First Amendment. See *Kucinich v Forbes* (ND Ohio 1977) 432 F Supp 1101. A council member may not be suspended for the content of his her speech in the absence of a showing his statements create a clear and present danger to society. *Kucinich v Forbes, supra.* See also *Bond v Floyd* (1966) 385 US 116, 17 L Ed 2d 235, 87 S Ct 339 (refusal of state legislature to seat member because of statements about controversial issue violated his First Amendment rights); *Ammond v McGahn* (D NJ 1975) 390 F Supp 655, rev'd on other grounds (3d Cir 1976) 532 F2d 325. The Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) provides protection for a council member who engages in public criticism of policies, procedures, programs, services of the agency, or acts or omissions of the council. Govt C §54954.3.

© The Regents of the University of California

8. Rules Regulating Public Conduct

§2.26 a. Right to Make Rules

The city council may make reasonable rules to control the manner in which the public participates at its meetings. The council has the absolute right to adopt and enforce rules and regulations necessary to protect its ability to conduct meetings. *Nevens v City of Chino* (1965) 233 CA2d 775, 44 CR 50.

© The Regents of the University of California

§2.27 b. Exclusion for Disorderly Conduct

The city council may exclude or expel all persons from a meeting in which a disturbance has been created that will not allow the meeting to continue unimpeded. Govt C §54957.9. See also *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421, 1425 (certain expression and conduct in connection with city council meetings may be prohibited under "breach of the peace" or "disorderly conduct" ordinances, provided such ordinances are narrowly drafted or narrowly construed). In the event that the meeting is willfully interrupted by groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored, the members may order the meeting room cleared and continue in closed session. Govt C §54957.9.

On disorderly conduct, see Counseling California Corporations (3d ed Cal CEB 2008).

© The Regents of the University of California

§2.28 c. Exception for Journalists

In a disruptive situation, journalists who are not involved in the disturbance must be permitted to attend the continued session. Govt C §54957.9.

© The Regents of the University of California

§2.29 d. Readmission

The city council may establish a procedure for readmitting an individual or individuals not responsible for willfully disturbing the orderly conduct of the meeting. Govt C §54957.9.

© The Regents of the University of California

§2.30 e. Punishment

The city council "may punish a member or other person for disorderly behavior at a meeting." Govt C §36813.

© The Regents of the University of California

§2.31 C. Due Process Requirements

City council action on matters that implicate constitutionally protected property and liberty interests may invoke quasi-judicial fair hearing requirements. Under the Fourteenth Amendment to the United States Constitution, people with an interest at stake in the decision must be accorded due process before a decision is rendered. This typically takes the form of a properly noticed and fairly conducted hearing. Ordinarily, these due process requirements do not apply to purely legislative actions.

For further discussion between the distinction between legislative actions and adjudicatory actions, see California Administrative Mandamus (3d ed Cal CEB 2003).

© The Regents of the University of California

§2.32 1. Legislative Actions

Matters deemed legislative in character, such as adoption of broad policies, general plans, or ordinances of general application, do not require quasi-judicial procedures and are presumed valid. *Associated Home Builders, Inc. v City of Livermore* (1976) 18 C3d 582, 607, 135 CR 41; *Terminal Plaza Corp. v City & County of San Francisco* (1986) 177 CA3d 892, 223 CR 379. Every conceivable finding in support of their validity is presumed to have been relied on in taking the action. Specific findings are not strictly necessary, although in cases potentially infringing on constitutional rights (such as ordinances prohibiting adult bookstores) legislative fact findings are advisable. Unless specified by law, legislative acts need not be preceded by a public hearing. However, the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) requires that the public be permitted to comment on every agenda item before action on the item. Govt C §54954.3(a). Examples of legislative acts include adoption of ordinances, purchases of property, and awarding of contracts.

© The Regents of the University of California

§2.33 2. Quasi-Judicial Actions

Quasi-judicial or "administrative" actions are subject to the due process requirements of the Fourteenth Amendment to the United States Constitution, which provides that a governmental regulation may not deprive a person of life, liberty, or property without due process of law. The procedure employed must be fair and accord those with an interest in the matter a meaningful opportunity to prepare and be heard. Formal rules of evidence are not required. Public hearings are not required unless specified by state law or local ordinance.

The decision-maker must be fair and impartial. *Golden Day Schs. v Department of Educ.* (2000) 83 CA4th 695, 99 CR2d 917 (head of agency making decision may not sit on review board); *Clark v City of Hermosa Beach* (1996) 48 CA4th 1152, 56 CR2d 223, cert denied (1997) 520 US 1167 (explaining basic requisites of due process in context of council's quasi-judicial action on zoning appeal). Due process requires both actual fairness and the appearance of fairness. *Nightlife Partners, Ltd. v City of Beverly Hills* (2003) 108 CA4th 81, 133 CR2d 234 (due process violation when lawyer, advocate for defendant city, later acted as advisor to the judge of administrative appeal). Comments made by an agency member before hearing may constitute evidence of an unacceptable probability of actual bias such that the member could not act as a "reasonably impartial, non-involved reviewer." *Nasha v City of Los Angeles* (2004) 125 CA4th 470, 22 CR3d 772. However, "in the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 741, 88 CR3d 610.

Examples of quasi-judicial actions include issuance of discretionary land use permits, business licenses, civil service grievance hearings, rent control hearings on applications for rent increases or decreases, and other similar actions in which a property interest is at stake and the body is charged with applying legal standards to a specific factual situation. For further discussion, see California Administrative Hearing Practice (2d ed Cal CEB 1997); California Administrative Mandamus (3d ed Cal CEB 2003); California Civil Writ Practice (4th ed Cal CEB 2008); California Land Use Practice (Cal CEB 2006); and California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001).

© The Regents of the University of California

§2.34 3. Requirement for Public Hearings

Some actions must be preceded by a public hearing; they may be legislative (such as a general plan, amendment or zone change) or quasi-judicial (such as a conditional use permit or subdivision map). A public hearing must be properly and timely noticed, though it is difficult to overturn an action on the basis of a notice defect. Govt C §65945.7. If considerations of due process apply, a meaningful opportunity to prepare and be heard before an impartial decision-maker must be accorded. Decision-makers must avoid distractions and pay attention during public hearings.

PRACTICE TIP: If a decision is to be rendered at a separate meeting from the meeting during which the public hearing took place, a council member who was absent during the public hearing should not participate in the decision unless the member has listened to or watched a tape of the public hearing.

© The Regents of the University of California

§2.35 D. Time and Location of Meetings

The Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) requires the legislative body to provide the time and the place of its regular meetings. Furthermore, the legislative body must meet within the boundaries of the local jurisdiction, subject to certain exceptions in Govt C §54954. See §§2.36-2.118.

© The Regents of the University of California

III. OPEN MEETING LAWS

§2.36 A. Open and Public Local Government Meetings Required

"The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal Const art I, §3(b)(1). Statutes, court rules, and other authorities (including those currently in effect) must be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access. Cal Const art I, §3(b)(2). The Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) requires meetings of "legislative bodies" of local public agencies be open and public. Govt C §54953(a).

NOTE: The California Constitutional right to access information was not intended to change any exemptions that existed before its adoption. 87 Ops Cal Atty Gen 181 (2004) (copy of private check obtained by Fair Political Practices Commission through issuance of administrative subpoena during the investigation of complaint was exempt from disclosure under California Public Records Act (Govt C §§6250-6276.48)). See also 88 Ops Cal Atty Gen 16 (2005) (personnel exception set out in Govt C §54957 predates California Constitution's right of access and thus remains in full force and effect); *Sutter's Place Inc. v Superior Court (City of San Jose)* (2008) 161 CA4th 1370, 75 CR3d 9 (deliberative process privilege not eliminated by amendment to California Constitution).

© The Regents of the University of California

B. Entities and Persons Covered

§2.37 1. Legislative Bodies

Legislative bodies must conduct open meetings. The term "legislative body" under the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) means:

- Decision-making bodies of both chartered and general law cities. Govt C §§54951.
- The agency's governing body and any permanent or temporary advisory or decision-making commission, committee, board, or other body created by charter, ordinance, resolution, or formal action of the legislative body. Govt C §54952(a)-(b).
- Standing committees that have either:
- continuing subject matter jurisdiction; or
- a meeting schedule fixed by charter, ordinance, resolution, or other formal action of the legislative body. Govt C §54952(b).
- The governing body of a private corporation, limited liability company, or other entity if either of the following characteristics is found:
- The private entity is created by the elected legislative body to exercise lawfully delegated authority; or
- The private entity receives funds from the local agency and the private entity's governing body includes a member of the legislative body who was appointed by the legislative body. Govt C §54952(c). See also *McKee v Los Angeles Interagency Metro. Police Apprehension Crime Task Force* (2005) 134 CA4th 354, 362, 36 CR3d 47 (board of directors and executive council of entity organized under a memorandum of understanding by a county police chiefs association is legislative body of local agency under either Govt C §54952(a) or (c)); *Epstein v Hollywood Entertainment Dist. II Bus. Improvement Dist.* (2001) 87 CA4th 862, 104 CR2d 857; *International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc.* (1999) 69 CA4th 287, 81 CR2d 456 (expansive reading of what constitutes private corporation subject to the Brown Act).
- Hospital lessees subject to post-1993 leases under Health & S C §32121(p), which exercise any material delegated authority.

© The Regents of the University of California

§2.38 2. The Statutory Less-Than-a-Quorum Exception

The term "legislative body" specifically excludes less-than-a-quorum advisory committees composed solely of members of the legislative body, provided they are not standing committees that have continuing subject matter jurisdiction or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body. Govt C §54952(b). See also *Taxpayers for Livable Communities v City of Malibu* (2005) 126 CA4th 1123, 24 CR3d 493.

NOTE: The statutory less-than-a-quorum exception codifies a version of the "unitary body" rule by limiting the exception to committees "composed solely" of members of one legislative body. *Joiner v City of Sebastopol* (1981) 125 CA3d 799, 178 CR 299.

In order not to qualify as a standing committee, the ad hoc committee should have a defined task and be of limited duration. If the committee membership includes persons other than members of a legislative body, or a quorum of any legislative body, then it is a legislative body. Govt C §54952(b). See also *Frazer v Dixon Unified Sch. Dist.* (1993) 18 CA4th 781, 791, 22 CR2d 641.

© The Regents of the University of California

§2.39 3. Elected Officials Who Have Not Yet Assumed Office

"Member of a legislative body of a local agency" includes elected officials who have not yet assumed office. Govt C §54952.1. An official-elect must "conform his or her conduct" to the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963). Govt C §54952.1. Officials-elect are subject to criminal prosecution for Brown Act violations. Govt C §54960.

NOTE: Government Code §54952.1 was intended to prevent newly elected but not yet installed members of an elected body, who constitute a majority of the body among themselves or in concert with incumbent members, from meeting privately and discussing city business before their installation.

Government Code §54952.1 should not be read to imply that the body increases in size during this in-between period, that the quorum changes, or that not-yet-installed members have any official role in the city government until they are properly installed into office.

© The Regents of the University of California

§2.40 C. What Constitutes a Covered Meeting

A "meeting" means any congregation of a majority of the members of a legislative body at the same time and location to hear, discuss, or deliberate on any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains. Govt C §54952.2(a). A majority of the members of the legislative body must not, outside an open and noticed meeting, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take any action on any item of business that is within the subject matter jurisdiction of the legislative body. Govt C §54952.2(b)(1). However, the prohibition does not prevent an employee or official of a local agency from engaging in separate conversations or communications, outside of an open and noticed meeting, with members of a legislative body in order to answer questions or provide information about a matter, provided that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body. Govt C §54952.2(b)(2) (legislatively superseding footnote 6 to *Wolfe v City of Fremont* (2006) 144 CA4th 533, 50 CR3d 524, which states that the Ralph M. Brown Act (Govt C §§54950-54963) is violated only if the series of meetings by members of the legislative body actually results in a collective concurrence).

PRACTICE TIP: The provisions of Govt C §54952.2 defining "meetings" are inclusive, rather than exclusive, so there is a possibility other forms of meetings may be implied by the courts.

© The Regents of the University of California

1. Statutory Exemptions

§2.41 a. "Individual Contacts" (Lobbying)

Individual contacts or conversations between a member of a legislative body and any other person are permitted, despite open meeting requirements. Govt C §54952.2(c)(1). However, this section does not permit an individual contact to serve as a communications intermediary to develop collective concurrence among a majority on action to be taken by the legislative body. Govt C §54952.2(b)(1). See also *Wolfe v City of Fremont* (2006) 144 CA4th 533, 50 CR3d 524 (legislatively overruled by statute only as to footnote 6).

PRACTICE TIP: The due process-based restrictions on ex parte contacts during consideration of quasi-judicial matters exist independently of the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) and may restrict individual contacts on such matters. See *Clark v City of Hermosa Beach* (1996) 48 CA4th 1152, 56 CR2d 223, cert denied (1997) 520 US 1167; *Safeway Stores, Inc. v City of Burlingame* (1959) 170 CA2d 637, 648, 339 P2d 933.

© The Regents of the University of California

§2.42 b. Conferences and Seminars

Attendance of a majority of the members of a legislative body at a conference or similar gathering is not a meeting subject to the Ralph M. Brown Act (Govt C §§54950-54963) provided that the gathering (Govt C §54952.2(c)(2)):

- is open to the public;
- involves a discussion of issues of general interest to the public or to public agencies of the type represented by the legislative body; and
- a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the local agency.

The requirement that a participant or registrant pay a fee to attend the conference or seminar does not defeat the exemption, and nothing in the exemption should be construed to allow members of the public free admission. Govt C §54952.2(c)(2).

© The Regents of the University of California

§2.43 c. Open Community Meetings to Address Local Concerns

Some meetings are excluded from open meeting laws. The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, may be excluded. The exclusion applies provided a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency. Govt C §54952.2(c)(3).

PRACTICE TIP: Members of a legislative body in attendance at an open community meeting should exercise caution to avoid collectively voicing the views of a quorum on matters within the city's jurisdiction.

© The Regents of the University of California

§2.44 d. Other Bodies of the Agency and Other Agencies

The attendance of a majority of the members of a legislative body at an open and noticed meeting of any other elected or appointed body of the local agency, or of another local agency, may be excluded from open meeting laws. The exclusion applies provided a majority of members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body, other than as part of the scheduled meeting. See Govt C §54952.2(c)(4).

© The Regents of the University of California

§2.45 e. Social and Ceremonial Gatherings

The attendance of a majority of the members at a purely social or ceremonial occasion may be excluded from open meeting laws. The exclusion applies so long as a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency. See Govt C §54952.2(c)(5).

© The Regents of the University of California

§2.46 f. Meeting of Standing Committees

The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body may be excluded from open meeting laws. The exclusion applies provided that the members of the legislative body who are not members of the standing committee attend only as observers. Govt C §54952.2(c)(6) (legislatively overruling the Attorney General opinion at 79 Ops Cal Atty Gen 69 (1996)). See also Govt C §54952.2(b). The phrase "only as observers" means the attending members may be physically present at the meeting but may not participate in the proceedings or sit in their usual places on the dais. 81 Ops Cal Atty Gen 156 (1998).

© The Regents of the University of California

2. Types of Lawful Meetings

§2.47 a. Regular Meetings

Each legislative body except advisory committees and standing committees must take formal action to establish a time and place for holding regular meetings. Meetings of advisory committees or standing committees for which an agenda is posted 72 hours in advance of the meeting are considered to be regular meetings for all purposes under the Ralph M. Brown Act (Govt C §§54950-54963), even if the committee does not have a regular meeting schedule. Govt C §54954(a).

© The Regents of the University of California

§2.48 b. Special Meetings

A special meeting may be called by the presiding officer of the legislative body (usually the mayor or mayor pro tem) or by a majority of the members of the legislative body. Govt C §54956.

© The Regents of the University of California

§2.49 c. Emergency Meetings

Emergency meetings may be called in "emergency situations." An emergency situation exists when a majority of the members of the legislative body determines a "work stoppage, crippling activity or other activity" or a "crippling disaster, mass destruction, terrorist act, or threatened terrorist activity" has occurred that severely impairs or threatens to impair the public health or safety. Govt C §54956.5.

© The Regents of the University of California

§2.50 d. Adjourned Meetings

Any regular or special meeting, or any adjourned regular or special meeting, may be adjourned to a time and place specified in the order of adjournment. Govt C §54955.

© The Regents of the University of California

§2.51 e. Continued Hearings

Any hearing may be continued to any subsequent meeting. The time and place when the hearing will resume must be announced at the time of the continuance. Govt C §§54955-54955.1.

© The Regents of the University of California

§2.52 f. Teleconferenced Meetings

Teleconferencing, through either audio or video means of electronic transmission, or both, may be used to conduct a meeting of a legislative body. Govt C §54953(b). At least a quorum of the members of the legislative body must participate from locations within the local agency's jurisdictional boundaries. Govt C §54953(b)(3). Teleconferenced meetings must comply with all of the following requirements (Govt C §54953(b)-(c)):

- The meeting must comply in all other respects with the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) and is in all respects the same as a meeting where the members are all physically present;
- All votes taken during a teleconferenced meeting must be by roll call and no action may be taken by secret ballot (whether preliminary or final);
- Agendas must be posted at all teleconference locations, and the notice and agenda of the meeting must identify each teleconference location;
- Each teleconference location must be accessible to the public and the public must have the same rights to address the body as if physically present;
- Teleconferenced meetings must be conducted "in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body" (Govt C §54953(b)(3)); and
- A quorum of the body must participate from a location within the territorial boundaries of the jurisdiction.

PRACTICE TIP: The Brown Act does not address whether persons other than members of the legislative body may participate in a meeting via teleconference.

© The Regents of the University of California

§2.53 g. Extraterritorial Meetings

Regular and special meetings may be held outside a local agency's jurisdictional boundaries only to:

- Comply with state or federal law or court order, or attend a judicial or administrative proceeding to which the local agency is a party. Govt C §54954(b)(1).
- Inspect real or personal property that cannot be conveniently brought within the boundaries of the territory over which the local agency exercises jurisdiction, provided that the topic of the meeting is limited to items directly related to that real or personal property. Govt C §54954(b)(2).
- Participate in meetings or discussions of multiagency significance that are outside the boundaries of a local agency's jurisdiction. However, any meeting or discussion held pursuant to this subdivision must take place within the jurisdiction of one of the participating local agencies and be noticed by all participating agencies as provided for in this chapter. Govt C §54954(b)(3).
- Meet in the closest meeting facility, if the local agency has no meeting facility within the boundaries of the territory over which the local agency exercises jurisdiction, or at the principal office of the local agency if that office is located outside the territory over which the agency exercises jurisdiction. Govt C §54954(b)(4).
- Meet with elected or appointed officials of the United States or the State of California when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction. Govt C §54954(b)(5).
- Meet outside their immediate jurisdiction if the meeting takes place in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility. Govt C §54954(b)(6).
- Visit the office of the local agency's legal counsel for a closed session on pending litigation held pursuant to Govt C §54956.9, when to do so would reduce legal fees or costs. Govt C §54954(b)(7).

PRACTICE TIP: "Team building" city council retreats outside the city's jurisdiction are not permitted. See *Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors* (1968) 263 CA2d 41, 69 CR 480.

© The Regents of the University of California

§2.54 3. Prohibited Meetings

Except during an open, noticed, and public meeting, the Ralph M. Brown Act specifically prohibits use of a series of communications, of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body. Govt C §54952.2(b)(1); *Stockton Newspapers, Inc. v Redevelopment Agency* (1985) 171 CA3d 95, 214 CR 561. See also 65 Ops Cal Atty Gen 63 (1982); 63 Ops Cal Atty Gen 820 (1980). Substantive staff briefings are permitted to answer questions and provide information so long as staff does not attempt to develop a collective concurrence among the legislative body, or share comments among a majority of the legislative body. Govt C §54952.2(b). See also 65 Ops Cal Atty Gen 63, 66 (1982) (private citizen lobbying elected officials is not barred by seriatim meeting rule).

PRACTICE TIP: Substantive staff briefings are permissible if conducted in accordance with Govt C §54952.2(b)(2), which allows separate conversations or communications outside of a meeting with members of a legislative body to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.

NOTE: Although the language of Govt C §6252.2(b)(1) does not expressly prohibit nonpublic communications, directly or indirectly through intermediaries, to discuss, deliberate, or take action on an item of business during an open meeting, those communications create at least the appearance of impropriety. Therefore, nonpublic communications during an open public meeting should be discouraged absent the clear existence of a privilege, *e.g.,* attorney-client or attorney work product protection).

© The Regents of the University of California

D. Agenda Requirements and Other Procedural Issues

1. Regular Meetings

§2.55 a. Seventy-Two-Hour Posting Requirement

Regular meeting agendas must be posted at least 72 hours before the meeting in a location that is freely accessible to the public. Govt C §54954.2(a). Weekend hours may be included to satisfy this requirement, but the agenda must be accessible for the entire 72-hour period. 78 Ops Cal Atty Gen 327 (1995). The agenda may be posted on a touch-screen electronic kiosk that is accessible without charge to the public in lieu of posting a paper copy of the agenda on a bulletin board. 88 Ops Cal Atty Gen 218 (2005).

© The Regents of the University of California

§2.56 b. Required Agenda Contents

The agenda must specify the time and location of the meeting and a "brief general description" of each item of business to be transacted or discussed. Govt C §54954.2(a). The agenda must designate and provide the address of a location where members of the public may inspect the agenda and any associated writings, such as staff reports. Govt C §54957.5. The agenda must also contain information on how a person may request a disability accommodation to participate in a meeting. Govt C §54954.2(a)(1).

PRACTICE TIP: Agenda item descriptions "generally" need not exceed 20 words in length. Govt C §54954.2(a). Agenda descriptions should give enough information to permit a person to make an informed decision about whether they want to attend or participate in a discussion on an issue. For example, a listing should say more than simply "staff report." Similarly, the listing should not say "zone change" when the action is more than that (*e.g.,* it includes vacating an entire street). See *Carlson v Paradise Unified Sch. Dist.* (1971) 18 CA3d 196, 95 CR 650. Also, agenda descriptions should not be misleading, *e.g.,* a proposed "elimination of a service or department" should not be listed as a reorganization. 18 CA3d at 200.

There are no reported cases on how the 20-word standard on agenda items is to be interpreted. See Govt C §54954.2(a). It appears that the "generally" applicable 20-word standard may not justify failure to include each formal action item connected with a particular subject. The more cautious practice is to list each formal action connected with a particular item of business (*e.g.,* title of both a development agreement ordinance and related general plan amendment resolution) regardless of the length of the overall listing.

The agenda should contain a notice stating that, on request, the agenda and the documents in the agenda packet can be made available to persons with a disability. Many cities request receiving this notice in advance (from 1-5 days) to allow them to make the appropriate arrangements. Such arrangements include providing listening devices, making an audio recording, or providing documents in large print.

Closed-session business must be identified on the agenda. Govt C §54954.2(a). See also Govt C §54954.5. Government Code §54954.5 sets forth "safe harbor" closed session agenda descriptions.

© The Regents of the University of California

§2.57 c. Mailing of Agendas

On written request, agencies must mail agendas or agenda packets, or both, to any person at such time as the agenda is posted or distributed to the legislative body, whichever comes first. The agency may charge a fee to recover the cost of providing this service. Govt C §54954.1.

PRACTICE TIP: If an agenda item refers to bulky reports or documents that are not included with the agenda packet, the agenda should indicate where those materials are available for pre-meeting review.

© The Regents of the University of California

§2.58 d. ADA Requirements for Agendas and Agenda Packets

On request, the agendas and agenda packets must be made available in appropriate alternative formats to persons with a disability, as required by §202 of the Americans with Disabilities Act of 1990 (ADA) (42 USC §§12101-12213) and the implementing federal rules and regulations. Govt C §54954.2(a). See §2.57.

© The Regents of the University of California

§2.59 e. No Action or Discussion of Matters Not on the Agenda

Except as provided in Govt C §54954.2(a)-(b), no action or discussion may occur with respect to any item not appearing on the posted agenda. Govt C §54954.2(a)- (b).

© The Regents of the University of California

f. Exceptions to Requirements for Agenda Contents

§2.60 (1) Brief or Limited Communications

Limited questions, requests, and responses on matters not appearing on the posted agenda are allowed under Govt C §54954.2(a) as follows:

- Brief responses by members of the legislative body and staff to statements or questions posed by the public;
- Questions for clarification;
- References to staff or other resources for factual information;
- Requests to staff to report back on an issue at a subsequent meeting;
- Requests to agendize a matter of business for some future meeting; and
- Brief announcements by members of the body or staff and brief reports on their activities.

PRACTICE TIP: Responses, reports, and directions to staff should be brief and not entail lengthy discussion. If there is disagreement over whether to place a matter on a future agenda or whether to have staff return with a report, the matter should be put to an immediate vote without discussion. Note that the provisions allowing individual members of the body to give direction to staff do not override the city's procedural rules governing the authority of individual members to give such directions. Govt C §54954.2(a).

© The Regents of the University of California

§2.61 (2) Emergencies

Discussion and action on an item not appearing on the posted agenda may occur if a defined statutory emergency situation is determined to exist by a majority vote of the legislative body. Govt C §54954.2(b)(1). See also Govt C §54956.5.

© The Regents of the University of California

§2.62 (3) Need for Immediate Action

Discussion and action on an item not appearing on the posted agenda may occur if immediate action is necessary. This necessity is determined if the legislative body establishes by a two-thirds vote of the members of the legislative body present at the meeting (or a unanimous vote if less than two-thirds of the members are present) that both of the following requirements exist (Govt C §54954.2(b)(2); see also *Cohan v City of Thousand Oaks* (1994) 30 CA4th 547, 35 CR2d 782):

- The need exists to take action immediately; and
- The need for action came to the attention of the agency after the agenda was posted.

PRACTICE TIP: Government Code §54954.2(b)(2) requires both (1) the need for immediate action, and (2) that the need for action "came to the attention of the local agency" after the agenda was posted. In this context, "local agency" probably does not mean the same thing as "legislative body." Matters for which the need to take action was known to staff before the agenda was posted, but that were not known to the legislative body, probably should not be discussed or acted on under this exception.

© The Regents of the University of California

§2.63 (4) Items on Agenda for Prior Meetings

Discussion and action on an item not appearing on the posted agenda may occur if the item was posted for a prior meeting that occurred not more than 5 days earlier and the item was continued. Govt C §54954.2(b)(3).

© The Regents of the University of California

§2.64 g. Public Comment or Testimony Must Be Allowed

Every agenda for a regular meeting must provide an opportunity for members of the public to address the legislative body on any item of interest to the public that is within the legislative body's subject matter jurisdiction. The public must also be allowed to comment on a specific item of business before or when it is considered by the legislative body. Govt C §54954.3(a).

When a general public comment period was provided at a prior meeting of the legislative body for an item of business, and the item of business is continued for one or more sessions, there is no requirement to allow an additional public comment period. *Chaffee v San Francisco Library Comm'n* (2004) 115 CA4th 461, 9 CR3d 336. The legislative body is not required to allow members of the public to address it on whether to place an item on the agenda. Govt C §54954.3(a). See also *Coalition of Labor, Agriculture & Business v County of Santa Barbara Bd. of Supervisors* (2005) 129 CA4th 205, 28 CR3d 198. The legislative body cannot prohibit public criticism of the policies, procedures, programs, or services of the agency or the acts or omissions of the legislative body. Govt C §54954.3(c).

PRACTICE TIP: For the purposes of First Amendment analysis, public meetings of legislative bodies have been found to be "limited" public fora, and attempts to restrict the content of such speech must be narrowly tailored to serve a compelling interest. *Leventhal v Vista Unified Sch. Dist.* (SD Cal 1997) 973 F Supp 951; *Baca v Moreno Valley Unified Sch. Dist.* (CD Cal 1996) 936 F Supp 719.

© The Regents of the University of California

2. Special Meetings

§2.65 a. Twenty-Four-Hour Posting and Personal Notice Requirements

At least 24 hours before the meeting, a notice that contains the time and place for the meeting, with a statement of the business to be transacted and an opportunity for the public to address the legislative body on that item, must be posted in a location freely accessible to the public. The notice must be delivered personally or by any other means to all members of the legislative body (unless waived in writing before the meeting) and to any newspaper, radio, or television station that has requested notice in writing, and received at least 24 hours before the time of the meeting. Govt C §54956.

Special meeting notice requirements apply even if the entire meeting is conducted in closed session.

For forms and discussions of special meetings in the context of California nonprofit corporations, see Advising California Nonprofit Corporations (3d ed Cal CEB 2009).

© The Regents of the University of California

§2.66 b. No Action or Discussion of Matters Not Covered by Notice

Only business listed on the special meeting notice can be discussed or transacted at a special meeting. Govt C §54956.

PRACTICE TIP: The agenda posting exceptions in Govt C §54952.2(b)(1)- (3) do not apply to special meetings. If a matter is not listed, there cannot be discussion or action on it. But see *Boyle v City of Redondo Beach* (1999) 70 CA4th 1109, 83 CR2d 164, which can be read to hold that the addition of an item of business to a special meeting agenda does not violate Govt C §54956 if no action is taken. The court also held that conferring with and giving direction to staff did not constitute "action taken" for Ralph M. Brown Act (Govt C §§54950-54963) purposes, and therefore there was no remedy for a violation. Nevertheless, it is advisable not to add items of business to special meeting agendas.

© The Regents of the University of California

§2.67 c. Public Comment or Testimony Must Be Allowed

The public must be given an opportunity to address the legislative body before or during consideration of any matter described in the special meeting notice. Govt C §54954.3.

© The Regents of the University of California

3. Emergency Meetings

§2.68 a. Limited Media Notice and Subsequent Posting Required

No written notice or posting is required for an emergency meeting in an emergency situation. Govt C §54956.5(b)(1). Nevertheless, each newspaper and radio or television station requesting notice of special meetings must be given telephone notice at least 1 hour before the meeting. However, in the case of a dire emergency with consequences so immediate and significant that providing the 1-hour notice may endanger the public health or safety, or both, as determined by the legislative body, the notification need not be provided until at or near the time that the presiding officer or designee notifies members of the legislative body. If telephone services are not functioning, the notice requirements are deemed waived, but the legislative body must give newspapers, radio stations, and television stations notice as soon as possible after the meeting. The notice must contain the fact of the holding of the emergency meeting, the purpose of the meeting, and the action taken at the meeting. Govt C §54956.5(b)(2). All special meeting requirements, other than 24-hour notice, apply. Govt C §54956.5(d).

As soon as possible after the meeting, the local agency must post, in a public place for 10 days, a copy of the minutes, a list of persons notified or attempted to be notified, a copy of the roll call vote, and any actions taken at the meeting. Govt C §54956.5(e).

For forms and discussions of emergency meetings in the context of California nonprofit corporations, see Advising California Nonprofit Corporations (3d ed Cal CEB 2009).

© The Regents of the University of California

§2.69 b. Closed Sessions

The legislative body may meet in closed session under Govt C §54957(a) regarding matters posing a threat to the security of public buildings or essential public services. The members must agree to a closed session by a two-thirds vote of the members of the legislative body present, or if less than two-thirds of the members are present, then by a unanimous vote of the members present. Govt C §54956.5(c).

© The Regents of the University of California

4. Adjourned and Continued Meetings

§2.70 a. Adjournment Procedures

Any regular or special meeting may be adjourned, and an adjournment may be ordered if less than a quorum attends. If no members attend, the clerk or secretary may declare the meeting adjourned to a stated time and place. In that case, written notice of the adjournment must be given in the same manner as notice of special meetings as provided in Govt C §54956 (see §2.65); in all cases, notice of adjournment must be posted on or near the door of the meeting room within 24 hours of the adjournment. Govt C §54955.

© The Regents of the University of California

§2.71 b. Continuance Procedures

If a hearing is continued, the time and place when the hearing will resume must be announced at the time of the continuance. Written notice of the continuance must be given in the same manner as notice of adjourned meetings under Govt C §54955, unless the hearing is continued to a time less than 24 hours after the order of continuance, in which case notice of the continuance must be posted immediately following the meeting at which the order of continuance was made. Govt C §54955.1.

© The Regents of the University of California

§2.72 5. Teleconferenced Meetings

Teleconferencing may be used in connection with meeting, but the agenda must specify each teleconferencing location and must be posted at each meeting site. Govt C §54953(b)(3). Each teleconferencing location must be open and accessible to the public and the public must have the opportunity to address the legislative body directly from each teleconference location. During the teleconference, at least a quorum of the members of the legislative body must participate from within the body's jurisdiction. Govt C §54953(b)(3). All votes taken during a teleconferenced meeting must be by roll call. Govt C §54953(b)(2). See §2.52.

© The Regents of the University of California

§2.73 6. Closed Sessions: Procedures and Safe Harbor Protection

Closed sessions must appear on regular meeting agendas (as well as special meeting notices). Govt C §54954.2(a). The Ralph M. Brown Act has specific language that may be used for closed session agenda descriptions. Govt C §54954.5. Substantial compliance with the statutory language creates a kind of "safe harbor" against allegations that the closed session agenda description was inadequate (as a "brief general" description) under Govt C §54954.2. Specific agenda language is provided in Govt C §54954.5 for the following kinds of closed sessions:

- License or permit determinations (Govt C §54956.7);
- Conference with real property negotiator (Govt C §54956.8);
- Conference with legal counsel—existing litigation (Govt C §54956.9);
- Conference with legal counsel—anticipated litigation (Govt C §54956.9);
- Liability claims (joint powers agency claims) (Govt C §54956.95);
- Threat to public services or facilities (Govt C §54957);
- Public employee appointment (Govt C §54957);
- Public employment (Govt C §54957);
- Public employee performance evaluation (Govt C §54957);
- Public employee discipline, dismissal, or release (Govt C §54957);
- Conference with labor negotiator (Govt C §54957.6);
- Case review or planning (multijurisdictional drug law enforcement agency) (Govt C §54957.8);
- Report involving trade secret (Health & S C §§1461, 32106, 32155; Govt C §§37606, 37624.3);
- Hearings (Health & S C §§1461, 32106, 32155; Govt C §§37606, 37624.3);
- Charge or complaint involving information protected by federal law (Govt C §54956.86);
- Conferences involving joint powers agency (Govt C §54956.96); and
- Audit by Bureau of State Audits (Govt C §54956.75).

PRACTICE TIP 1: For closed-session meetings regarding *anticipated litigation,* based on a significant exposure to litigation, the safe harbor language in Govt C §54954.5 must be supplemented with a public statement, either in the agenda or in an oral announcement, before going into closed session. That public statement must, if the facts and circumstances are known to a potential plaintiff, disclose the "existing facts and circumstances" justifying an opinion that there is significant exposure to litigation. Govt C §54956.9(b)(3)(A)-(B). The facts and circumstances may either be included in the agenda notice or announced at the meeting before considering the agenda item. Also, if the closed session is based on the receipt of a claim, the claim itself must be made available for inspection. Govt C §§54956.9(b)(3)(C), 54957.5.

PRACTICE TIP 2: For closed-session meetings regarding *existing litigation,* the safe harbor language requires the disclosure of the case name unless the legislative body states to do so "would jeopardize service of process or existing settlement negotiations." Govt C §54956.9.

Even though use of the safe harbor language is not mandatory, substantial compliance is strongly advisable. See *Moreno v City of King* (2005) 127 CA4th 17, 25 CR3d 29. "Substantial compliance" is usually interpreted to mean compliance with each of the statutory requirements. See*, e.g., Hall v City of Los Angeles* (1941) 19 C2d 198, 120 P2d 13. This means the only flexibility likely to be found in the safe harbor language is with the form of the agenda, rather than its contents. Likewise, it is certainly possible litigants will argue the "safe harbor" is actually the legislature's view of the minimum agenda notice required for closed sessions.

Before holding a pending litigation closed session, the legislative body must state on the agenda or publicly announce which subdivision of Govt C §54956.9 authorizes the session.

On closed sessions, see §§2.82-2.110.

© The Regents of the University of California

7. Rights of the Public Who Attend Open Meetings

§2.74 a. Anonymity of the Public

The public cannot be required to give names or sign a register as a condition of attendance. Govt C §54953.3.

PRACTICE TIP: It is unclear whether members of the public can be required to provide their name, address, or other information as a condition to participating in (as opposed to attending) a meeting. If such information is relevant to issues presented by the subject matter of a public hearing or evidentiary proceeding, it probably can be required (*e.g.,* a speaker's address may bear on the credibility or weight of the speaker's testimony). On the other hand, it seems less likely such information can be required as a prerequisite to addressing the legislative body during oral communications on general matters within the subject matter of the agency. Govt C §54954.3(b).

Many cities do ask for names and addresses during oral communications in order to facilitate staff responses or the preparation of minutes. This practice is certainly allowable if it is identified as being voluntary. Govt C §54954.3(b). However, cities should consider the privacy implications of recording and publishing personally identifying information.

© The Regents of the University of California

§2.75 b. Audio, Video, and Photographic Recording Rights

Any person may record a meeting by audio or videotape, or by still or motion picture camera, unless the legislative body makes a reasonable finding the recording cannot continue because noise, illumination, or disruption of a view constitutes disruption of the proceedings. Govt C §54953.5.

PRACTICE TIP: Radio and television broadcasting (as opposed to recording) of meetings is permitted as a matter of right, provided the equipment is silent and does not require auxiliary lighting. Govt C §6091. See also Govt C §54953.6 (broadcasting must be permitted as long as it does not disrupt the proceedings). But see 38 Ops Cal Atty Gen 52 (1961).

© The Regents of the University of California

§2.76 c. Public's Right to Access Documents

Agendas and other nonexempt documents distributed by any person to a majority of the legislative body in connection with any matter subject to discussion at a public meeting item are public records that must be made available to the public "without delay." Govt C §54957.5. Documents related to an open session agenda item that are distributed to the legislative body less than 72 hours before the meeting must be made available for public inspection, at the location specified on the agenda, at the same time the writing is distributed to a majority of the legislative body. Govt C §54957.5(b)(1). If the agency distributes material prepared by it (including consultants) or a member of the legislative body during a meeting, copies of the material must be available for public inspection at the meeting. Govt C §54957.5(c). Materials prepared by some other person and distributed during a meeting must be made available after the meeting. Govt C §54957.5(c).

PRACTICE TIP 1: Agenda and other related materials become public records and must be made available upon request "without delay." Govt C §54957.5(a). This language is probably aimed at (and probably forbids) the practice of withholding completed and final agenda materials until distribution of the agenda packet to the legislative body. The practical problem created is significant; elected and appointed officials are not in a position to give complete, accurate responses to inquiries from the public and press before they have in hand any relevant agenda materials.

PRACTICE TIP 2: Because any document distributed to a majority of the legislative body must be disclosed, letters delivered directly to a majority of council members must be available for public review. Council members appear to have the responsibility to inform city staff of correspondence received outside of city channels. This is particularly important in light of the requirement that all documents given to a majority of the legislative body less than 72 hours before a meeting must also be immediately available to the public. Govt C §54957.5(b)(1).

© The Regents of the University of California

§2.77 (1) Compliance With ADA

On request, such documents must be made available in alternative formats appropriate for a person with a disability, as required by §202 of the Americans with Disabilities Act of 1990 (ADA) and the implementing federal rules and regulations. Govt C §54957.5(b).

© The Regents of the University of California

§2.78 (2) Tapes Made by the Agency to Assist in Preparation of Minutes or Otherwise

Any tape or film record of a meeting made by or at the direction of the agency is a public record that must be retained and made available to the public for at least 30 days. Govt C §54953.5(b). The agency must provide to the public, without charge, equipment to review the record.

PRACTICE TIP: City attorneys must also be aware of the mandatory duty to prepare and retain a record of land use hearings on written request made before the date of the hearing. Govt C §65804. This section expressly applies to chartered cities.

© The Regents of the University of California

§2.79 (3) Exception: Attorney-Client Privileged Written Communications

A written legal opinion distributed to members of a legislative body is not a public meeting document. *Roberts v City of Palmdale* (1993) 5 C4th 363, 20 CR2d 330 (city attorney's confidential written letter to members of the city council was not a meeting document, even though it responded to an eight-page letter submitted to the city council at a public hearing).

© The Regents of the University of California

§2.80 d. Public Communication Rights

At all regular meetings, the public must have the opportunity to address the legislative body, before or during its deliberations, on matters within the subject matter jurisdiction of the agency, unless the matter has been heard in committee, has not substantially changed, and the public had the opportunity to speak to the committee. Govt C §54954.3(a). This includes criticism of the policies and programs of the agency and the acts and omissions of the legislative body. Govt C §54954.3(c); *Baca v Moreno Valley Unified Sch. Dist.* (CD Cal 1996) 936 F Supp 719 (rule prohibiting criticism of school district employees by name during open board meetings violates First Amendment). See also 78 Ops Cal Atty Gen 224 (1995) (for a discussion of limiting speakers to the subject matter jurisdiction of the agency).

Reasonable regulations, including but not limited to time restrictions on issues and speakers, are allowed. Govt C §54954.3(b). See also *Chaffee v San Francisco Pub. Library Comm'n* (2005) 134 CA4th 109, 36 CR3d 1 (public entities are allowed to exercise reasonable discretion in departing from normal time limits); *Kindt v Santa Monica Rent Control Bd.* (9th Cir 1995) 67 F3d 266 (upholding time limits). Limitations on speech must be reasonable and viewpoint neutral. *Kindt v Santa Monica Rent Control Bd., supra.* At all special meetings, the public must have the opportunity to speak to the matter under consideration before or during any consideration of the matter. Govt C §54954.3.

PRACTICE TIP 1: Because members of the public must be allowed to comment on any matter before or during deliberations on that matter, if a closed session is scheduled on the agenda before the general opportunity for public comment, then members of the public should be given the opportunity to comment on the closed session agenda before the body goes into closed session. Also, if the body uses a consent calendar for routine items of business and does not allow members of the public to remove those items from the consent calendar for discussion, and the consent calendar is scheduled before the general opportunity for public comment, then a general audience comment period must precede action on the consent calendar to ensure that the public has an opportunity to comment on any item on the calendar before action is taken.

PRACTICE TIP 2: Do not interpret the phrase, "within the subject matter jurisdiction of the legislative body," too narrowly. Cities have expansive authority under the police power to regulate in myriad subject matter areas. The fact that a city has not yet created a particular regulation, or may have no intention of doing so, does not limit the public's right to address these areas.

© The Regents of the University of California

§2.81 e. No Right to Disrupt Meetings

A portion or all of the public may be removed if "willful" disruption makes conducting the meeting "unfeasible." The press may remain unless it participates in the disruption. If the room is cleared, the legislative body cannot consider anything not on the agenda. Govt C §54957.9. See also *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421.

© The Regents of the University of California

§2.82 E. Closed Sessions

Closed sessions (sometimes archaically referred to as "executive sessions") are meetings conducted in private without the attendance of the public or press. They are permitted for specified purposes as part of a regular or special meeting, and during an emergency meeting, under certain circumstances. Govt C §54956.5; 43 Ops Cal Atty Gen 79 (1964).

© The Regents of the University of California

§2.83 1. Agenda Notice Requirements

Regular meeting agendas and special meeting notices must include a description of the matters to be discussed in closed session. Govt C §§54954.2, 54956. Closed session agenda descriptions may follow a prescribed statutory format; substantial compliance with this format creates a "safe harbor" against challenges to the adequacy of the notice. Govt C §54954.5. See §2.73.

© The Regents of the University of California

§2.84 2. Permissible Attendees

Attendance of a closed session should be limited to those actually necessary to advise or take direction from the body given the specifically permitted purpose of the session. This may include the body's legal counsel, senior management staff, experts, negotiators, or consultants. Third parties not serving as agents of the body cannot attend, with the exception of witnesses in the event of a closed session to hear charges or complaints. Govt C §54957. For example, a closed session cannot be used as a vehicle for a private negotiating session between the entire body and an adverse party. *Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors* (1968) 263 CA2d 41, 69 CR 480. However, the Attorney General has opined that a county retirement board may permit an applicant and his or her representative to participate as an interested party or advocate if the board believes that they would have an official or essential role to play in the closed session. 88 Ops Cal Atty Gen 16 (2005). In addition, the Attorney General has ruled that an alternate member of a body may not attend a closed session of the body if the regular member is present and participating in the session. 82 Ops Cal Atty Gen 29 (1999).

© The Regents of the University of California

§2.85 3. Must Announce Intended Subject Matter of the Closed Session in Open Session

Before conducting any closed session, the legislative body must announce in open session the items to be discussed. Govt C §54957.7(a). The disclosure may be a simple reference to the agenda item number or letter. The required announcements may be made at the location announced in the agenda for the closed session, as long as the public is allowed to be present at that location for the purpose of hearing the announcements. Govt C §54957.7(c).

NOTE: Closed sessions are prohibited except as "expressly authorized." Govt C §54962. also Govt C §54956.9 (there is no implied attorney-client privilege basis for closed sessions).

© The Regents of the University of California

§2.86 a. Announcement of Real Estate Negotiations

Before conducting any real estate negotiations closed session, the legislative body must hold an open session during which it identifies the property that the negotiation may concern, the identity of the agency's negotiator(s), and the persons with whom the local agency negotiator may negotiate. Govt C §54956.8.

© The Regents of the University of California

§2.87 b. Announcement of Pending Litigation

Before holding a pending litigation closed session, the legislative body must state on the agenda or announce publicly which subdivision of Govt C §54956.9 authorizes the closed session. If Govt C §54956.9(a) is the authority (existing litigation on file), the case must be identified by title or otherwise, unless to do so would jeopardize service of process or settlement negotiations. Govt C §54956.9.

© The Regents of the University of California

§2.88 c. Announcement of Personnel Sessions on Specific Complaints or Charges

Before conducting any closed session on specific complaints or charges brought against an employee, the affected employee must be delivered at least 24 hours' written notice of his or her right to have the charges heard in open session. Govt C §54957. Failure to deliver the notice renders any disciplinary or other action "null and void."

© The Regents of the University of California

§2.89 d. Announcement of Labor Negotiations

Before conducting any closed session to give direction to the agency's labor negotiators, the legislative body must hold an open session during which it identifies the agency's designated negotiators attending the closed session. Govt C §54957.6.

PRACTICE TIP: All of the specific information noted above may be provided on the face of the agenda, so the oral announcement at the beginning of the closed session may be limited to a reference to the agenda. Govt C §54957.7(a). This practice may require more work to prepare the agenda, but it eliminates both time-consuming announcements and the problem of inadvertent omissions at the meeting.

© The Regents of the University of California

4. Major Reasons for Permissible Closed Sessions

§2.90 a. To Instruct Negotiators of Real Property Transactions

The legislative body may conduct closed sessions to instruct real property negotiators about relevant transactions for which they are responsible. Govt C §54956.8. Such discussions about real property transactions should be limited to giving instructions to negotiators on a particularized and realistically anticipated transaction. *Shapiro v San Diego City Council* (2002) 96 CA4th 904, 117 CR2d 631.

© The Regents of the University of California

§2.91 b. To Instruct Negotiators Who Are Meeting and Conferring With Represented and Unrepresented Employees

The legislative body may conduct closed sessions to instruct negotiators about employee issues. The term "employee" includes officers and independent contractors who function as officers or employees. Govt C §54957.6. Government Code §54957.6 expressly allows "discussion of an agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative." The legislative body may give direction to its negotiator regarding the compensation of unrepresented individuals, including senior management employees, under this section, but may not negotiate directly with unrepresented individuals in closed session nor take final action on compensation of unrepresented individuals in closed session (unlike final approval of contracts with represented employees, which may occur in closed session).

© The Regents of the University of California

§2.92 c. To Discuss "Pending Litigation" With the Agency's Attorney

Closed sessions are permitted to confer with, or to receive advice from, legal counsel regarding pending litigation when discussion in open session would prejudice the agency's position in the litigation. Govt C §54956.9. However, a local agency may not meet in closed session with legal counsel for another local agency when the other agency is not a party to the lawsuit. *Shapiro v Board of Directors* (2005) 134 CA4th 170, 185, 35 CR3d 826. Whether to settle a lawsuit is a permissible subject. 75 Ops Cal Atty Gen 14 (1992). The legislative body may not decide on or adopt in closed session a settlement that accomplishes or provides for action for which a public hearing is required by law, without such a hearing. *Trancas Prop. Owners Ass'n v City of Malibu* (2006) 138 CA4th 172, 187, 41 CR3d 200.

PRACTICE TIP: City attorneys may wish to (1) document their reasoning and justification for pending litigation closed sessions in a written attorney memorandum, and (2) create a contemporaneous, permanent record of the legislative body's voting tally. Confidential minutes may be kept by "a clerk or other officer or employee of the local agency" under Govt C §54957.2 (preferably, someone other than the city attorney).

© The Regents of the University of California

§2.93 (1) What Constitutes "Pending Litigation"

Litigation includes court actions (including eminent domain proceedings, regardless of Govt C §54956.8) and adjudicatory proceedings before an administrative agency, hearing officer, or arbitrator. Govt C §54956.9. Litigation is deemed pending in four situations:

(1) Litigation has been formally initiated (Govt C §54956.9(a));

(2) There is significant exposure to litigation in the opinion of the legislative body on the advice of legal counsel, based on "existing facts and circumstances" (Govt C §54956.9(b)(1));

(3) Based on "existing facts and circumstances," the legislative body is meeting only to decide whether there is significant exposure to litigation that would authorize a closed session under Govt C §54956.9(b)(1) (Govt C §54956.9(b)(2)); or

(4) The legislative body has decided, or is deciding, whether to initiate litigation (Govt C §54956.9(c)).

© The Regents of the University of California

§2.94 (2) What Constitutes "Existing Facts and Circumstances" Under Govt C §54956.9(b)(1)-(2) and Related Required Disclosures

Five exclusive situations justify an opinion that there is significant exposure to litigation. Govt C §54956.9(b)(3). For the purposes of these situations, significant exposure to officers or employees of the agency, whether or not arising from within the course and scope of office or employment, is deemed significant exposure for the agency. The five situations and whether the attendant facts and circumstances must be disclosed are:

(1) Facts and circumstances that might result in litigation against the agency but which the agency believes are not yet known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed. Govt C §54956.9(b)(3)(A).

(2) Facts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the agency and that are known to a potential plaintiff or plaintiffs, which facts or circumstances must be publicly stated on the agenda or announced. Govt C §54956.9(b)(3)(B).

(3) The receipt of a claim under the California Tort Claims Act (Govt C §§810-998.3) or some other written communication from a potential plaintiff threatening litigation, which claim or communication must be available for public inspection under Govt C §54957.5. Govt C §54956.9(b)(3)(C).

(4) A statement made by a person in an open and public meeting threatening litigation made on a specific matter within the responsibility of the legislative body. Govt C §54956.9(b)(3)(D).

PRACTICE TIP: While there is no specific disclosure requirement for such public threats, the better practice is to identify them on the agenda when feasible.

(5) A statement threatening litigation made by a person outside an open and public meeting made on a specific matter within the responsibility of the legislative body, provided the official or employee of the local agency receiving knowledge of the threat makes a contemporaneous or other record of the statement before the meeting, which record must be available for public inspection. Govt C §54957.5.

NOTE: The records so created need not identify the alleged victim of unlawful or tortious sexual conduct or anyone making the threat on their behalf, or identify a public employee who is the alleged perpetrator of any unlawful or tortious conduct on which a threat of litigation is based, unless the identity of the person has been publicly disclosed. Govt C §54956.9(b)(3)(E).

© The Regents of the University of California

§2.95 d. To Consider the "Appointment, Employment, Evaluation of Performance, Discipline, or Dismissal of a Public Employee"

Closed sessions are permitted to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee. Govt C §54957(b)(1). See also *Morrow v Los Angeles Unified Sch. Dist.* (2007) 149 CA4th 1424, 57 CR3d 885 (personnel exception).

© The Regents of the University of California

§2.96 (1) Covered Employees

The "employees" covered do not include elected officials or members of the legislative body. Govt C §54957. Independent contractors are now covered provided they are functioning as officers or employees. Govt C §54957(b)(4).

© The Regents of the University of California

§2.97 (2) Valid Closed Session Employee-Related Topics

Personnel matters discussed in closed session under Govt C §54957 must relate to specific individuals. See *Santa Clara Fed'n of Teachers v Governing Bd.* (1981) 116 CA3d 831, 846, 172 CR 312.

Government Code §54957 expressly bars "discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline." Govt C §54957(b)(4). Compensation of represented employees and individual, unrepresented employees, including senior management, however, may be addressed in a closed session conducted under Govt C §54957.6 in order to give direction to the body's negotiator, but negotiations may not take place directly with unrepresented individuals in closed session, and final action may not be taken in closed session on compensation of unrepresented individuals (unlike final approval of contracts with represented employees, which may occur in closed session).

PRACTICE TIP 1: Although discipline and dismissal actions are permissible subjects for a closed session under the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963), consideration should be given to whether the body possesses the authority to address these issues, or whether that authority resides elsewhere (*e.g.,* in the city manager). If a body possesses the authority to address the issue, it does not necessarily have authority to make the final decision in order to convene a closed session. Subordinate legislative bodies that function in a purely advisory capacity may convene a closed session under Govt C §54957. See *Gillespie v San Francisco Pub. Library Comm'n* (1998) 67 CA4th 1165, 79 CR2d 649; 80 Ops Cal Atty Gen 308 (1997).

Complaints against employees may be heard in closed session, unless the employee requests a public hearing. Govt C §54957(b)(1). Consideration of a performance evaluation does not constitute the hearing of charges or complaints even though negative aspects of performance are considered. See *Fischer v Los Angeles Unified Sch. Dist.* (1999) 70 CA4th 87, 82 CR2d 452, and *Furtado v Sierra Community College* (1998) 68 CA4th 876, 80 CR2d 589, which hold that the notice requirement only applies if the proceeding is adjudicative in character. *Furtado* further holds that a body may take disciplinary action following review of an adverse performance evaluation even if the posted agenda does not list disciplinary action. The safer practice, however, is to take the disciplinary action at a subsequent meeting when it is properly agendized. See also *Duval v Board of Trustees* (2001) 93 CA4th 902, 113 CR2d 517 (a broad reading of Govt C §54957 pertaining to employee evaluations, holding in part that a legislative body may develop the evaluation criteria and form in closed session and that compliance with the safe harbor notice is sufficient).

PRACTICE TIP 2: After hearing complaints and charges in open session at the request of the employee or in closed session, the legislative body may exclude the employee and deliberate and take action in closed session. See *Bollinger v San Diego Civil Serv. Comm'n* (1999) 71 CA4th 568, 84 CR2d 27.

© The Regents of the University of California

§2.98 (3) Notice Requirements for Investigation of Employee Complaints

The employee must be given 24 hours' written notice of his or her right to a public hearing of the charges. Govt C §54957(b)(2). Failure to give this notice renders any closed-session disciplinary action "null and void." The 24-hour notice requirement applies only if the body considers specific charges or complaints against an employee. See *Bell v Vista Unified Sch. Dist.* (2000) 82 CA4th 672, 98 CR2d 263, holding that a school board violated the Ralph M. Brown Act (Govt C §§54950-54963) when it failed to provide a coach with the required 24-hour notice before conducting a closed session in which it considered complaints about the coach contained in a state athletic federation report and on which it relied in terminating the coach's employment. See also *Morrison v Housing Auth. of City of Los Angeles Bd. of Comm'rs* (2003) 107 CA4th 860, 132 CR2d 453, holding that authority's board of commissioners conducted a hearing when they rejected officer's findings of fact, and thus former employee was entitled to notice of right to have complaint held in open session; and board's failure to give notice rendered decision null and void, even though actual decision was made at a later meeting.

© The Regents of the University of California

§2.99 e. License and Public Security Topics in Closed Sessions

The legislative body may conduct closed sessions to resolve the following specific issues:

- To consider license applications by persons with criminal records. Govt C §54956.7.
- To meet with law enforcement about public security. Govt C §54957.

© The Regents of the University of California

5. Action and Vote Disclosure in Open Session After the Closed Session

§2.100 a. Governing Statutes

After any closed session, the legislative body must reconvene in open session and make a public report of specified actions and the vote or abstention of every member present. Govt C §54957.7(b). The reports may be made orally or in writing. Govt C §54957.1(b).

PRACTICE TIP: The interrelationship of Govt C §§54957.1 and 54957.7 is neither totally consistent nor entirely logical. Govt C §54957.7(b) apparently requires the legislative body to reconvene in open session after a closed session even if no disclosure is required under Govt C §54957.1.

© The Regents of the University of California

§2.101 b. Contents of the Closed-Session Disclosure Report

Closed-session disclosure is required in one of two forms—either an oral or written public report made during the same meeting as the closed session or disclosure on inquiry thereafter. The required reports or disclosures are specified in Govt C §54957.1. These reporting and disclosure statements are the minimum requirements; cities may choose to provide more information when it would not harm the city's interests.

© The Regents of the University of California

§2.102 (1) Disclosure Report on Approval of Agreements Concluding Real Estate Negotiations

Agreements concluding real estate negotiations must be reported after the agreement is final. Govt C §54957.1(a)(1).

If *city action finalizes the agreement*, the disclosure report must include (Govt C §54957.1(a)(1)(A)):

- The approval action;
- The voting tally; and
- The substance of the agreement.

The disclosure report must be made after the closed session, in open session, during the same meeting.

If the *other party must finalize the agreement*, the disclosure report is not required. Govt C §54957.1(a)(1)(B). On inquiry by any person, however, the legislative body must disclose (see Govt C §54957.1(a)(1)(B)):

- The approval action;
- The voting tally; and
- The substance of the agreement.

The disclosure report must be made on inquiry by any person, as soon as the other party has informed the city of its approval. Govt C §54957.1(a)(1)(B).

© The Regents of the University of California

§2.103 (2) Disclosure Report on Approval of Litigation Defense, Appellate Review, or Amicus Curiae Participation

If the legislative body approves a litigation defense, appellate review, or amicus curiae participation, the disclosure report must include (Govt C §54957.1(a)(2)):

- The approval action;
- The adverse parties (if known);
- The substance of the litigation; and
- The voting tally.

The disclosure report must be made after the closed session, in open session, during the same meeting. Govt C §54957.1(a)(2).

© The Regents of the University of California

§2.104 (3) Disclosure Report on Approval of Initiation of or Intervention in Litigation

If the legislative body approves initiation of or intervention in litigation, a disclosure report must be made. Before the action has been commenced, the disclosure report must include advice that direction to initiate or intervene in an action has been given. The disclosure report must be made after the closed session, in open session, during the same meeting. Govt C §54957.1(a)(2).

After the approved action is formally commenced, and only on inquiry, and provided that *disclosure would not jeopardize* the city's ability to serve process or to conclude existing settlement negotiations to the city's advantage, the disclosure report must include (Govt C §54957.1(a)(2)):

- The approval action;
- The voting tally;
- The defendant(s); and
- Other particulars, presumably including the substance of the litigation.

As noted, the disclosure report must be made only on inquiry by any person. See Govt C §54957.1(a)(2).

PRACTICE TIP: The delayed disclosure provisions pose a significant administrative burden, as well as a recordkeeping requirement. Written closed-session reports may be the simplest means of keeping track of closed-session actions and voting records. City attorneys should confer with the city clerk to make arrangements for proper closed-session recordkeeping. One recordkeeping option is to maintain a minute book under Govt C §54957.2.

If, after the approved action is formally commenced, it is determined that *disclosure would jeopardize* the city's ability to serve process or to conclude existing settlement negotiations to the city's advantage, no disclosure is required until process has been served or settlement negotiations have been concluded. Thereafter, the report must disclose the following on inquiry by any person (Govt C §54957.1(a)(2)):

- The approval action;
- The voting tally;
- The defendant(s); and
- Other particulars, presumably including the substance of the litigation.

© The Regents of the University of California

§2.105 (4) Disclosure Report on Approval of Pending Litigation Settlements

Pending litigation settlements are to be reported after the settlement is final. Govt C §54957.1(a)(3). If city action finalizes a *signed* settlement offer, the disclosure report must include (Govt C §54957.1(a)(3)(A)):

- The acceptance action;
- The voting tally; and
- The substance of the agreement.

The report must be made after the closed session, in open session, during the same meeting.

If the *other party or a court must finalize* the litigation settlement, no disclosure report is required**.** Govt C §54957.1(a)(3)(B). On inquiry by any person, however, a report must disclose:

- The fact of the approval action;
- The voting tally; and
- The substance of the agreement.

The report must be made only on inquiry by any person, and as soon as the settlement becomes final. Govt C §54957.1(a)(3).

© The Regents of the University of California

§2.106 (5) Disclosure Report on Disposition of Joint Powers Agency Claims

If the legislative body decides joint powers agency claims, the disclosure report must include:

- The voting tally;
- The name of the claimant;
- The name of the local agency claimed against;
- The substance of the claim; and
- The monetary amount approved for payment and agreed on by the claimant, if any.

The disclosure report must be made "as soon as [disposition of the claim is] reached." The statute does not specify whether an open session report must be made or whether disclosure on inquiry is sufficient. See Govt C §54957.1(a)(4).

© The Regents of the University of California

§2.107 (6) Disclosure Report on Actions Affecting the Employment Status of Public Employees

If the legislative body takes action that affects the employment status of public employees, a disclosure report must be made including (Govt C §54957.1(a)(5)):

- A description of any action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee;
- The voting tally; and
- The title of the position involved.

The disclosure report may be deferred if a dismissal or nonrenewal of an employment contract is subject to *further administrative remedies*. The report must be deferred until the first public meeting following the exhaustion of administrative remedies.

For all other employment actions, the disclosure report must be made after the closed session, in open session, during the same meeting. Govt C §54957.1(a)(5). When the legislative body meets in a closed session to consider the proposed dismissal of a public employee, however, but ultimately rejects that proposal and retains the employee, the legislative body is not thereafter required to publicly report its decision or the vote or abstention of each member. 89 Ops Cal Atty Gen 110 (2006).

© The Regents of the University of California

§2.108 (7) Disclosure Report on Approval of Agreements Concluding Labor Negotiations

When a legislative body approves agreements concluding labor negotiations, a disclosure report must be made including:

- The item approved;
- The voting tally; and
- The other party to the agreement.

The disclosure report must be made after the agreement is final and has been accepted or ratified by the other party. The statute does not specify whether an open-session report must be made or whether disclosure on inquiry is sufficient. Govt C §54957.1(a)(6).

© The Regents of the University of California

§2.109 6. Disclosure of Attorney-Client Communications

The Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) is the exclusive regulation on conducting closed sessions. Govt C §54956.9. The holder of the attorney-client privilege is the legislative body and the privilege can only be waived by a majority of the body. See *Roberts v City of Palmdale* (1993) 5 C4th 363, 373, 20 CR2d 330. In addition, disclosure of confidential information acquired at closed session is prohibited, unless authorized by the legislative body. See §§2.79, 2.203, 2.254 on prohibition of disclosure of confidential information.

PRACTICE TIP: Not all communications during closed session are protected by the attorney-client privilege merely because legal counsel is present. See *North Pacifica, LLC v City of Pacifica* (ND Cal 2003) 274 F Supp 2d 1118 (attorney-client privilege protects communications with city attorney at closed session of city council about condition imposed on approval of development project only to extent any particular communication was related primarily to seeking of legal advice; to extent communications merely went to substantive decision making, communications would not be privileged). The confidentiality that the Brown Act grants to closed-session communications is not recognized under federal law. *North Pacifica, LLC v City of Pacifica, supra*.

© The Regents of the University of California

§2.110 7. Minute Book Confidentiality

The city council may, by ordinance or resolution, require a clerk or other employee to attend each closed session and keep a record of topics discussed and decisions made at the meeting. A minute book or other record is not a public record but is available to a court if a Ralph M. Brown Act violation is alleged. Govt C §54957.2(a); *County of Los Angeles v Superior Court* (2005) 130 CA4th 1099, 30 CR3d 708.

© The Regents of the University of California

§2.111 F. Ralph M. Brown Act Violations in Closed Sessions

As a general matter, Ralph M. Brown Act (Govt C §§54950-54963) violations may be avoided if caution is taken to:

- Avoid substantive discussions about matters that are not on the agenda. When in doubt, notice further discussion for a subsequent meeting.
- Be certain that a specific statutory exception applies before a closed session is permitted. Closed sessions cannot be held just because an issue is sensitive, controversial, or unlawful.

© The Regents of the University of California

§2.112 1. Criminal Prosecution of Member of the Legislative Body Possible

A member who attends a meeting of his or her legislative body when a violation of the Ralph M. Brown Act (Brown Act) occurs is guilty of a misdemeanor if the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under the Brown Act. Govt C §54959.

© The Regents of the University of California

§2.113 2. Civil Action Possible; Remedies Available

The district attorney or any interested person may also bring a civil action for a Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) violation, but only after the city has been given the opportunity to cure the violation. The district attorney or any interested person may sue either to prevent violations or to have past actions declared null and void. Tape recording of closed sessions can now be ordered as a remedy for a violation. Govt C §54960(c). Any citizen of the State of California is an "interested person" within the meaning of Govt C §54960 for purposes of having standing to bring a lawsuit under this section. See *McKee v Orange Unified Sch. Dist.* (2003) 110 CA4th 1310, 2 CR3d 774. One remedy is to compel the legislative body to record its sessions. See *Shapiro v San Diego City Council* (2002) 96 CA4th 904, 117 CR2d 631 (court grants injunctive relief for "future" violations based on past conduct). See also Govt C §§54960(a), 54960.1. But see *Boyle v City of Redondo Beach* (1999) 70 CA4th 1109, 83 CR2d 164 (despite failure to properly notice an item, no Brown Act violation occurred because there was no action on the item).

© The Regents of the University of California

§2.114 a. Judicial Determination and Its Effect on Criminal Prosecution

The district attorney or any interested person may likewise commence an action by mandamus or injunction in order to obtain a judicial determination that an action taken in closed session under specified sections is null and void. Govt C §54960.1.

The injunctive relief provisions of the Ralph M. Brown Act (Govt C §§54950-54963) are not available to deter the district attorney from investigating or prosecuting alleged violations. See *Ingram v Flippo* (1999) 74 CA4th 1280, 89 CR2d 60.

© The Regents of the University of California

§2.115 b. Opportunity to Cure Claimed Past Violations Required

The party who alleges a violation must make a written demand to the legislative body to cure or correct the violation within 30 days of an open session when a violative action was taken and within 90 days of any other alleged violation. Govt C §54960.1(b), (c)(1). The legislative body may still cure or correct the defect and have the action dismissed with prejudice. Govt C §54960.1(e).

PRACTICE TIP: As one approach to cure and correct a challenged action, a city council might consider the challenged action in a subsequent, duly agendized open-session meeting. Note that when a noticed hearing to consider an employee performance evaluation is transformed into a hearing to consider "complaints or charges" against the employee, the new hearing triggers employee noticing requirements and the opportunity for the employee to respond. However, the cure provisions do not apply to a violation of Govt C §54957(b)(2) because the action would have been declared null and void. See *Moreno v City of King* (2005) 127 CA4th 17, 25 CR3d 29.

© The Regents of the University of California

§2.116 c. Costs and Attorney Fees Awarded Unless Unjust

A court may award a plaintiff court costs and reasonable attorney fees when it finds a violation of the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963). The court has discretion to deny fees only if the defendant shows special circumstances exist that would make such an award unjust. See Govt C §54960.5. The absence of special circumstances mandates a fee award. See *Los Angeles Times Communications v Los Angeles County Bd. of Supervisors* (2003) 112 CA4th 1313, 5 CR3d 776, in which the court discussed instances in which special circumstances were found to justify a denial of a fee award, including, but not limited to, outrageous conduct on the part of plaintiff, and situations in which a defendant is powerless to provide the remedy sought by plaintiff. *Los Angeles Times Communications v Los Angeles County Bd. of Supervisors, supra*, citing *Society of Prof. Journalists v Briggs* (D Utah 1988) 687 F Supp 1521, 1524. Unlike other cases when the defendant's willingness to settle played an important role in the court making a finding that special circumstances existed, in the *Los Angeles Times* case, the Los Angeles County Board of Supervisors resisted appellants' legal challenge, forcing the matter to trial and judgment, rather than acknowledging the Brown Act violations and agreeing not to repeat such actions. Such resistance to admit and remedy a violation played a part in the court finding an absence of special circumstances and granting appellants their attorney fees.

© The Regents of the University of California

§2.117 3. Prohibition on Disclosure of Confidential Information

Disclosure of confidential information acquired at a closed session is prohibited, unless the legislative body authorizes disclosure. Govt C §54963(a). The local agency may enforce this prohibition by seeking injunctive relief to prevent disclosure, disciplinary action against an employee who has willfully disclosed confidential information, or referral of a member of the legislative body who has disclosed confidential information to the grand jury. Govt C §54963(c). A city may not enact an ordinance making it a misdemeanor to disclose information discussed in closed session. 76 Ops Cal Atty Gen 289 (1993).

© The Regents of the University of California

§2.118 G. Other Meeting Requirement References

Statutes relevant to meeting requirements for legislative bodies are:

- Bagley-Keene Open Meeting Act, Govt C §§11120-11132 (covering "state bodies").
- Grumsky Burton Open Meeting Law, Govt C §§9027-9031 (legislature).

Publications relevant to meeting requirements for legislative bodies:

- Office of the California Attorney General, Civil Division, Open Meeting Laws. (Contact the Public Inquiry Unit, Office of the Attorney General, 1515 K Street, P.O. Box 944255, Sacramento, California 94244-2550; telephone (916) 322-3360; website www.caag.state.ca.us).
- Open and Public III, A User's Guide to the Ralph M. Brown Act (Contact the League of California Cities, 1400 K Street, Sacramento, California 95814; telephone (916) 658-8257; website www.cacities.org).
- Allison & Newton, Reporter's Handbook on Media Law (1991) (Contact the California Newspaper Publishers Association, 1311 I Street, Suite 200, Sacramento, California 95814; telephone (916) 443-5991).
- League of California Cities, *The Public's Right to Know: Providing Advice Under the Brown Act and Public Records Act* (Continuing Education Seminar Materials, February 1994) (Contact the League of California Cities, 1400 K Street, Sacramento, California 95814; telephone (916) 658-8257; website www.cacities.org).
- California Administrative Hearing Practice (2d ed Cal CEB 1997).
- California Administrative Mandamus (3d ed Cal CEB 2003).
- California Civil Writ Practice (4th ed Cal CEB 2008).

© The Regents of the University of California

IV. ETHICAL CONSIDERATIONS AND CONFLICTS OF INTEREST

§2.119 A. Political Reform Act of 1974

The Political Reform Act of 1974 (PRA) (Govt C §§81000-91014) addresses the financial conflicts of interests of public officials (see Govt C §82048 (defining public officials)) through disclosure of financial interests and prohibitions on participation in the making of decisions in which the official knows or has reason to know he or she has a financial interest. The Fair Political Practices Commission (FPPC) has also adopted regulations implementing the PRA (2 Cal Code Regs §§18110-18997) and issues formal opinions and advice letters on the application of the PRA to particular situations. The FPPC maintains a website at www.fppc.ca.gov that contains the PRA forms, regulations, opinions, and advice letter summaries. Copies of advice letters are available on Lexis and Westlaw.

PRACTICE TIP: FPPC staff consultants and attorneys are available to give informal telephone advice at (866) 275-3772. However, the immunities against FPPC enforcement for reliance on FPPC advice only apply to written opinions, not telephonic opinions. Govt C §83314. See also 2 Cal Code Regs §18329(c)(3).

On ethical considerations and conflict of interest issues, see generally Advising California Nonprofit Corporations (3d ed Cal CEB 2009) and California Administrative Hearing Practice (2d ed Cal CEB 1997).

© The Regents of the University of California

§2.120 1. Disqualification of Public Officials in the Event of Conflict of Interest

Public officials are prohibited from making, participating in, or in any way attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. Govt C §87100. See also 2 Cal Code Regs §§18700, 18702-18702.4.

An official has a conflicting financial interest "if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family," (Govt C §87103) or on a specified interest in any relevant business entity, real property, or income or gift source. The specified financial interests that trigger a disqualifying conflict of interest are detailed below. See §§2.121-2.125.

© The Regents of the University of California

§2.121 a. Direct or Indirect Investment in Business Entity

An official will be disqualified from acting on any matter related to any business entity in which the official has a direct or indirect investment worth $2000 or more. 2 Cal Code Regs §18703.1.

© The Regents of the University of California

§2.122 b. Direct or Indirect Interest in Real Property

An official will be disqualified from acting on any matter related to any real property in which the public official has a direct or indirect interest worth $2000 or more. Govt C §82033 (definition of "interest in real property"), 82035 (definition of "jurisdiction"). See also 2 Cal Code Regs §18703.2.

© The Regents of the University of California

§2.123 c. Interest in Income Source

An official will be disqualified from acting on any matter related to any source of income (other than gifts or certain loans from a commercial lending institution) aggregating $500 or more provided to, received by, or promised to the public official within 12 months before the time the decision is being made. Govt C §82030 (definition of "income"). See also 2 Cal Code Regs §18703.3. Campaign contributions do not constitute income, as income is defined in the PRA. Govt C §82030(b)(1). Salary and reimbursement for expenses received from a governmental agency is also exempt from the definition of "income." Govt C §82030(b)(2).

© The Regents of the University of California

§2.124 d. Management Position Held in Business Entity

An official will be disqualified from acting on any matter related to any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. 2 Cal Code Regs §§18703.1, 18703.3.

© The Regents of the University of California

§2.125 e. Interest in Gift Source

As of January 1, 2009, an official will be disqualified from acting on any matter related to any source of a gift or gifts totaling $420 or more provided to, received by, or promised to the public official within 12 months before the time when the decision is being made. Govt C §82028 (definition of "gift"); 2 Cal Code Regs §§18703.4, 18940-18961. The amount of the value of gifts specified by this subdivision is adjusted biennially by the Fair Political Practices Commission (FPPC), effective January 1 of every odd-numbered year. Govt C §89503(f). See also 2 Cal Code Regs §18940.2.

© The Regents of the University of California

§2.126 2. Disqualifying Conflict of Interest Analyzed Under Eight-Part Test

To determine whether a given individual has a disqualifying conflict of interest under the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014), proceed with an eight-part analysis. 2 Cal Code Regs §18700. See §§2.127-2.140.

© The Regents of the University of California

§2.127 a. Must Be Public Official Involved

Determine whether the individual is a "public official." Govt C §87100. A "public official" is defined as any member, officer, employee, or consultant of a state or local government agency. Govt C §82048(a). See also 2 Cal Code Regs §18701. The terms "officer" and "employee" are not defined by the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014) or the Fair Political Practices Commission (FPPC). The term "member" applies to all members of all boards or commissions with decision-making authority, whether salaried or unsalaried, public members or elected. See 2 Cal Code Regs §18701(a)(1). Members of advisory bodies whose advice is generally followed are also regulated by the PRA. See 2 Cal Code Regs §18701(a)(1)(A)(iii). The term "consultant" applies to individuals delegated specified decision-making authority or who perform the duties of an officer or employee of a government agency. See 2 Cal Code Regs §18701(a)(2). If the individual is not a public official, there is no conflict of interest under the PRA.

© The Regents of the University of California

§2.128 b. Must Be Making or Influencing a Governmental Decision

Determine whether the public official is making or participating in decisions, or is using or attempting to use his or her official position to influence a governmental decision. Govt C §87100. See also 2 Cal Code Regs §§18700, 18702-18702.4. If not, then there is no conflict of interest under the PRA. Actions that are solely ministerial, secretarial, manual, or clerical do not constitute participation in decision making. 2 Cal Code Regs §18702.4(a)(1). Participation with regard to a public official's own compensation or terms of employment is also excepted. 2 Cal Code Regs §18702.4(a)(3). Under certain circumstances, an official may appear before his or her agency in the same manner as any other member of the general public to represent his or her personal interests. 2 Cal Code Regs §18702.4.

© The Regents of the University of California

§2.129 c. Official Must Have Identifiable Economic Interests

Determine whether the public official has an economic interest potentially affected by the governmental decision. Govt C §87103; 2 Cal Code Regs §§18703-18703.5. The Political Reform Act of 1974 (PRA) (Govt C §§81000-91014) regulates six types of economic interests (Govt C §87103(a)-(e)):

- Investments in business entities (see §2.130);
- Interests in real property (see §2.131);
- Sources of income (see §2.132);
- Sources of gifts, including gifts from agents or intermediaries (see §2.134);
- Positions with business organizations (see §2.133); and
- Personal finances of the official and the official's immediate family (see §2.135).

© The Regents of the University of California

§2.130 (1) Business Entities

Any business entity in which the official has a direct or indirect investment worth $2000 or more is considered an economic interest. Govt C §87103(a). See Govt C §82005 (definition of "business entity"), §82034 (definition of "investment"), §82035 (defining "jurisdiction"). See also 2 Cal Code Regs §18703.1 (defining economic interest in business entities). An indirect investment includes "any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse and dependent children own directly, indirectly or beneficially a ten percent interest or greater." Govt C §87103. See also *Metropolitan Water Dist. v Fair Political Practices Comm'n* (1977) 73 CA3d 650, 141 CR 8; *Commission on Cal. State Gov't Org. & Econ. v Fair Political Practices Comm'n* (1977) 75 CA3d 716, 142 CR 468; *Witt v Morrow* (1977) 70 CA3d 817, 139 CR 161. A business entity that is a parent or subsidiary, or is otherwise related to a business entity in which the official has an investment, is also included as an economic interest. See 2 Cal Code Regs §18703.1(c).

© The Regents of the University of California

§2.131 (2) Real Property

Any real property in which the public official has a direct or indirect interest worth $2000 or more constitutes an economic interest. Govt C §87103(b). See Govt C §82033 (defining "interest in real property"), §82035 (defining when realty is within a jurisdiction); see also 2 Cal Code Regs §18703.2 (defining economic interest in real property). The $2000 threshold is based on fair market value of the property. See Govt C §82033. The real property interest includes equity, option, or leasehold interests (*e.g.,* ownership, mortgages, deeds of trust, options to buy, or joint tenancies) located in, or within two miles of, the geographical jurisdiction of the official's agency (*e.g.,* the city boundaries). Govt C §§82033, 82035. An interest of a tenant in a periodic tenancy of 1 month or less is not an "interest in real property" for the purposes of the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014). 2 Cal Code Regs §18233. Indirect interests in real property include any investment or interest owned by the spouse or dependent child of the public official, by an agent on behalf of the public official, or by a business entity or trust in which the official, the official's agents, spouse, or dependent children own directly, indirectly, or beneficially a 10-percent or greater interest. Govt C §87103.

© The Regents of the University of California

§2.132 (3) Source of Income

Any source of income (other than gifts or certain loans from a commercial lending institution) aggregating $500 or more provided to, received by, or promised to the public official within 12 months prior to the time the decision is being made is considered an economic interest. Govt C §87103(c). See Govt C §82030 (defining "income"); see also 2 Cal Code Regs §18703.3 (defining economic interest in a source of income). A conflict can arise if the governmental decision will increase or decrease the source of income by the threshold amount. See 2 Cal Code Regs §18705.3 (economic interests in persons who are sources of income). Exemptions from the definition of "income" include campaign contributions, governmental salary and reimbursement for expenses, certain income from former employers or nonprofit organizations, informational materials, inheritances, dividends and interest, alimony, and certain loans and indebtedness. Govt C §82030(b); see also 2 Cal Code Regs §18703.3. Special rules apply analyzing "Sources of Commission Income to Brokers, Agents and Salespersons." 2 Cal Code Regs §18703.3(c).

© The Regents of the University of California

§2.133 (4) Business Position

Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management is considered an economic interest. Govt C §87103(d); 2 Cal Code Regs §18703.1(b).

© The Regents of the University of California

§2.134 (5) Source of Gifts

As of January 1, 2009, any source of a gift or gifts totaling $420 or more provided to, received by, or promised to the public official within 12 months prior to the time when the decision is being made is considered an economic interest. 2 Cal Code Regs §18703.4. See Govt C §82028 (definition of "gift"); 2 Cal Code Regs §§18704.1, 18940-18961 (guide to gift regulation). The amount of the value of gifts specified by this subdivision is adjusted upward by the Fair Political Practices Commission (FPPC), effective January 1 of every odd-numbered year. Govt C §89503(f); 2 Cal Code Regs §18940.2.

© The Regents of the University of California

§2.135 (6) Personal Finances

A public official has an economic interest in the official's personal finances and those of the official's immediate family. 2 Cal Code Regs §18703.5. A governmental decision will affect the official's personal finances if the decision will result in an increase or decrease in the personal expenses, income, assets, or liabilities of the official, or of his or her immediate family. 2 Cal Code Regs §18703.5. The term "immediate family" means spouses and dependent children. Govt C §82029. The term "spouse" includes "registered domestic partners recognized by state law". 2 Cal Code Regs §18229.

© The Regents of the University of California

§2.136 d. Relationship of Interest to Governmental Decision

For each of the public official's economic interests, determine whether that interest is directly or indirectly involved in the governmental decision. Govt C §87103. See also 2 Cal Code Regs §§18704-18704.5 (regulations guiding determination of whether there is direct or indirect involvement).

© The Regents of the University of California

§2.137 e. Materiality of Economic Interest Necessary

For each of the public official's direct and indirect economic interests potentially affected by the governmental decision, determine whether the effect on the interest is material. Govt C §87103; 2 Cal Code Regs. §18704. See §2.136. The "materiality" standards are defined in 2 Cal Code Regs §§18705-18705.5 for each type of financial interest. The standards vary based on whether an economic interest is directly or indirectly involved in the decision. In general, materiality is presumed when the public official's economic interest is directly involved. See 2 Cal Code Regs §18705(a).

© The Regents of the University of California

§2.138 f. Foreseeability Analysis Relevant

Determine whether it is reasonably foreseeable (meaning substantially likely) that one or more of the materiality standards applicable to the public official's direct or indirect economic interest will be met as a result of the governmental decision. 2 Cal Code Regs §18706. The concept of foreseeability hinges on the specific facts of each individual case. Although certainty is not required, an effect on an economic interest that is merely a remote possibility is not reasonably foreseeable and thus not material. See *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 991, 242 CR 272.

PRACTICE TIP 1: In evaluating the materiality of the effect of a decision on a *business entity* in which an official has an interest, it may be necessary to have a current list of Fortune 500 companies. That list is available through the Fair Political Practices Commission (FPPC) website at www.fppc.ca.gov.

PRACTICE TIP 2: In determining if an official's *real property interest* may require disqualification, determine how far that real property interest is from the property that is the subject of the decision. If any part of the official's property is within 500 feet of the subject property, the official's property is considered to be directly involved in the decision and the decision is presumed to have a material financial effect on that real property interest. 2 Cal Code Regs §§18704.2, 18705.2(a). The materiality presumption can be rebutted, however, by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the official's real property or any effect on certain terms and conditions of the official's leasehold interest. 2 Cal Code Regs §18705.2(a), (b).

PRACTICE TIP 3: An official may have *several different economic interests* that should be analyzed to determine if disqualification is necessary on a particular decision. For example, an official who owns a business may have four different economic interests: an investment interest in the business, a source of income from the business, a business position, and a real property interest in the property (either leasehold or ownership) on which the business is located.

© The Regents of the University of California

§2.139 g. Exception: Public Generally Affected Also

Notwithstanding a determination that the reasonably foreseeable financial effect of a governmental decision on a public official's economic interests is material, a public official does not have a disqualifying conflict of interest in the governmental decision if the official can establish that the governmental decision will affect the public official's economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. 2 Cal Code Regs §§18707-18707.10. The term "public generally" refers to a significant segment of the public. See 2 Cal Code Regs §§18707, 18707.1. To determine if the effect of a decision is indistinguishable from the effect on the public generally, a four-step analysis is applied. 2 Cal Code Regs §18707(b). However, a different analysis is applied to certain governmental decisions and circumstances such as ones involving rates and assessments (2 Cal Code Regs §18707.2); certain appointed board members (2 Cal Code Regs §18707.4); customers of retail business owners (2 Cal Code Regs §18707.5); states of emergency (2 Cal Code Regs §18707.6); industries, trades, or professions (2 Cal Code Regs §18707.7); residential properties (2 Cal Code Regs §18707.9); and small jurisdictions (2 Cal Code Regs §18707.10).

© The Regents of the University of California

§2.140 h. Exception: Legally Required Participation

The Political Reform Act of 1974 (Govt C §§81000-91014) does not prevent any public official from making or participating in a governmental decision to the extent the official's participation is "legally required" for the action or decision to be made. Govt C §87101. See also 2 Cal Code Regs §18708. The exception applies only if there is no reasonable alternative manner of decision making, and the public official involved must act in order for a decision to be made. 2 Cal Code Regs §18708(a). The fact that an official's vote is needed to break a tie or to create a quorum to act if another member without a conflict is absent, however, does not make the vote "legally required." Govt C §87101. See also 58 Ops Cal Atty Gen 670 (1975); 2 Cal Code Regs §18708. A quorum for "legally required participation" is the minimum number of members needed to approve the item of business. 2 Cal Code Regs §18708(c)(3), (d). A random means of selection may be used to select the officials needed for the quorum. Once selected, an official remains selected for the duration of the proceedings in all related matters until his or her participation is no longer legally required. 2 Cal Code Regs §18708(c)(3).

PRACTICE TIP: If a conflict exists, consider whether the decision in which the public official has a financial interest may be segmented into separate decisions using the Fair Political Practices Commission's four-part test. See 2 Cal Code Regs §18709. The conflicted public official must still leave the room during discussion and decision making on the segmented decision. Govt C §87105(a)(3); 2 Cal Code Regs §18702.5(b)(3).

© The Regents of the University of California

§2.141 3. Requirements After Disqualification

A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his or her economic interests, unless that effect is not distinguishable from the effect on the public generally. Govt C §§87100, 87103. See also 2 Cal Code Regs §18700. See §§2.120-2.139. An official who has a disqualifying conflict of interest is not counted towards achieving a quorum on a particular vote. 2 Cal Code Regs §18700(c)-(d). See also 59 Ops Cal Atty Gen 604 (1976). An official who has a conflict must, immediately before consideration of the decision (see Govt C §87105):

- Publicly identify in detail the financial interest that causes the conflict (except that he or she need not disclose the street address of a residence);
- Recuse himself or herself from discussing and voting on the matter; and
- Leave the room until after the decision has been made, unless the matter is on the portion of the agenda reserved for uncontested matters (generally understood to mean the consent calendar). Govt C §87105; see also 2 Cal Code Regs §18702.5(b)(3).

During a closed session of the agency, a disqualified official must not be present when the governmental decision on which he or she is disqualified is considered and the official must not obtain or review any nonpublic information about the governmental decision. 2 Cal Code Regs §§18702.1(c), 18702.5(c). The only exception to the official's required absence is that the official may speak on a matter as a member of the general public during the period for public participation about a matter related to his or her personal interests. Govt C §87105. See also 2 Cal Code Regs §18702.4(b)(1). In this situation, an official's "personal interests" for participation include, but are not limited to (2 Cal Code Regs §18702.4(b)(1)):

- An interest in real property that is wholly owned by the official or members of his or her immediate family;
- A business wholly owned by the official or members of his or her immediate family; or
- A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise direction and control.

© The Regents of the University of California

§2.142 4. Local Conflict of Interest Code

Under the Political Reform Act, every city must adopt a local conflict of interest code. Govt C §§87300-87313; see also 2 Cal Code Regs §18730. This code must specifically enumerate positions which involve making or participating in decisions that may foreseeably have a material effect on any financial interest. Govt C §§82019, 87302, (defining such persons as "designated employees"); 2 Cal Code Regs §18219 (including consultants and employees in newly created positions in the definition of designated employees). This code must be reviewed every 2 years and amended when circumstances change, such as when new positions are created or duties of existing positions change. Govt C §§87306, 87306.5. The code must be consistent with the minimum requirements of the Political Reform Act. See Govt C §87302; 2 Cal Code Regs §18730.

PRACTICE TIP: 2 Cal Code Regs §18730 can be adopted by reference to form the core of a local conflict of interest code. 2 Cal Code Regs §18730(a).

© The Regents of the University of California

5. Conflict of Interest Statements and Disclosure

§2.143 a. Who Must File Official Disclosure Statements

Mayors, city council members, planning commissioners, city managers, city attorneys, city treasurers and other officials who manage public investments, and candidates for those offices at any election must file conflict of interest disclosure statements using the official Fair Political Practices Commission (FPPC) form Statement of Economic Interests (FPPC Form 700), located online at www.fppc.ca.gov/Pdf/Int99-00.pdf. Govt C §§87200, 87202-87203. In addition, employees and consultants designated as filers by the city's own conflict of interest code (designated employees) must file Statements of Economic Interest. Govt C §87302. See also 2 Cal Code Regs §18730. An employee in a newly created position that is not yet listed in the agency's conflict of interest code is nevertheless a designated employee who must file an interim disclosure. 2 Cal Code Regs §§18219, 18734(a).

© The Regents of the University of California

§2.144 b. Contents of Disclosure Statements

The statement must disclose the filer's sources of income and interests in real property, except the filer's primary residence. Govt C §§87203, 87206-87207. The public official must disclose specified types of investments, interests in real property and businesses, income, gifts, and loans. See Govt C §§87103, 87206-87207. A filer must also disclose the income and real property interests held by his or her spouse, dependent children, and immediate family. Govt C §87103. See §2.131.

© The Regents of the University of California

§2.145 c. Timing of Disclosure Statements

Officials must file various statements on the occurrence of certain triggering events and dates:

- Upon assuming office (see §2.146);
- Annually while holding office or a designated position (see §2.147); and
- Upon leaving office or a designated position (see §2.148).

Any person who resigns from office within 12 months of appointment need not file an assuming or leaving office statement of economic interests so long as that person did not make or participate in governmental decisions and did not receive any compensation. 2 Cal Code Regs §18730(b)(5.5). It has been the authors' experience that the filer may amend a disclosure statement at any time, and that amending an incorrect or incomplete statement may be considered evidence of good faith.

© The Regents of the University of California

§2.146 (1) Assuming Office Statements

Appointed and elected officials specified in Govt C §87200 and code filers must file an "assuming office statement" listing the required economic interests within 30 days after assuming office. Govt C §§87202, 87302; 2 Cal Code Regs §18722(a).

© The Regents of the University of California

§2.147 (2) Annual Statements

Thereafter, an annual "statement of economic interests" must be filed no later than April 1. Govt C §87203. See also 2 Cal Code Regs §§18723(b)(2), 18732. If an office is assumed between October 1 and December 31, and an assuming office statement is completed, an annual statement of economic interests need not be filed until 1 year later than would otherwise be required. 2 Cal Code Regs §§18723(c), 18732(a).

© The Regents of the University of California

§2.148 6. Leaving Office Statements

The officeholder must file his or her last disclosure statement within 30 days after leaving office. Govt C §87204. See also 2 Cal Code Regs §18722(b). If a person leaves office specified in Govt C §87200 between January 1 and the filing deadline for his or her annual Statement of Economic Interests, the leaving office statement may serve as the person's annual statement, so long as the person notifies the filing officer in writing. 2 Cal Code Regs §§18723(d), 18732(b).

© The Regents of the University of California

§2.149 a. Penalties

All reports and statements filed under the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014) must be signed under penalty of perjury and verified by the filer, indicating that all reasonable diligence was used in its preparation and that to the best of his or her knowledge, it is true and complete. Govt C §81004.

© The Regents of the University of California

§2.150 b. Retention

Original statements of economic interest must be retained by the officer with whom they are filed for at least 7 years. Govt C §81009.

© The Regents of the University of California

§2.151 7. Conflicts of Interests and Campaign Contributions

Campaign contributions do not constitute income under the Political Reform Act of 1974. Govt C §82030(b)(1). However, the effect of an officer's acceptance, solicitation, or direction of contributions may require disclosure, or even disqualification, depending on (Govt C §84308; 2 Cal Code Regs §18438.1):

- The amount of the contribution and the time of the contribution in relation to a proceeding before the agency;
- Whether the members of the legislative body are directly elected by the voters; and
- Whether the official in question was elected by the voters or appointed to office.

© The Regents of the University of California

§2.152 a. Definitions and Prohibited Acts

The solicitation, making, and acceptance of campaign contributions greater than $250 by a covered officer triggers certain disclosure requirements and disqualifications. Govt C §84308.

The following are important definitions in analyzing the impact of a campaign contribution:

- *Covered officer:* A "covered officer" means any officer appointed to a city board or commission as well as alternates and candidates, but does not include city council members who are directly elected by the voters except when they serve as voting members of another board, commission, or agency. Govt C §84308(a)(3)-(4). See also 2 Cal Code Regs §18438.1.
- *Party:* A "party" is any applicant or subject of a covered proceeding. Govt C §84308(a)(1).
- *Agent:* An "agent" is any person who represents a party in a covered proceeding. 2 Cal Code Regs §18438.3.
- *Participant:* A "participant" is any person who is not a party to a covered proceeding, but who actively supports or opposes a particular decision in the proceeding. Govt C §84308(a)(2). See also 2 Cal Code Regs §18438.4.
- *Covered proceeding:* A "covered proceeding" is an item for business before an agency involving a license, permit, or other entitlements for use. Govt C §84308(a)(5), (b). See also 2 Cal Code Regs §18438.2.

These acts are prohibited:

- *Covered officers* are prohibited from receiving, soliciting, and directing campaign contributions of more than $250 from a party or participant during the pendency of a covered proceeding and for 3 months thereafter. Govt C §84308(b)-(c). See also 2 Cal Code Regs §§18438.5-18438.6.
- A *party and its agents* are prohibited from making any contribution of more than $250 to a covered officer during the pendency of the covered proceeding and for 3 months thereafter. Govt C §84308(d). A party is presumed to have a financial interest in the proceeding, but the prohibition directed at the participant only applies when the officer knows or has reason to know the participant has a financial interest. Govt C §84308(b). See also 2 Cal Code Regs §18438.7. To determine whether the threshold of more than $250 for triggering the contribution prohibition or disqualification requirement has been reached, contributions made within the preceding 12 months from parties or participants are aggregated with those of their agents. 2 Cal Code Regs §18438.3(b).

© The Regents of the University of California

§2.153 b. Disqualification and Disclosure Requirements

Covered officers must disqualify themselves from participating in the proceeding if they received contributions of more than $250 during the previous 12 months from a party or a financially interested participant. Govt C §84308(c). If a covered officer returns the contribution (or that portion which is over $250) within certain time limits, disqualification is not required. Govt C §84308(c).

Disclosure requirements are:

- Before any decision, any *covered officer* who has received a contribution of more than $250 within the preceding 12 months from a party or participant must disclose that fact on the proceeding's record. Govt C §84308(c). See also 2 Cal Code Regs §18438.8(a). An officer is permitted to participate in the proceeding if the officer returns the contribution within 30 days from the date he or she knows, or should have known, about the contribution and the proceeding. Govt C §84308(c).
- At the time *parties* initiate proceedings, they must list all contributions of more than $250 to covered officials within the previous 12 months. Govt C §84308(d). See also 2 Cal Code Regs §18438.8(b).

© The Regents of the University of California

8. Gifts and Honoraria Restrictions

§2.154 a. Honoraria

No local elected officeholder, candidate for local elected office, or designated employee may accept any honorarium. Govt C §89502. "Honorarium" means a payment in consideration for a speech given (or other form of oral presentation), article published, or attendance at any public or private conference, meeting, or like gathering. Govt C §89501(a). An honorarium does not include earned income for personal services that are customarily provided in connection with the practice of a bona fide business or profession, unless the sole or predominate activity of the business or profession is making speeches. Govt C §89501(b)(1). See also 2 Cal Code Regs §§18930-18933. The limitations on honoraria do not apply if, within 30 days of the receipt of the honorarium, it is returned unused, donated to the general fund of the agency in question, or donated to charity under certain circumstances. Govt C §89501(b)(2); 2 Cal Code Regs §§18932.5, 18933.

© The Regents of the University of California

§2.155 b. Gifts

No local elected officeholder, candidate for local elected office, or designated employee of a local agency may accept any gift or gifts from a single source aggregating in excess of $420 in any calendar year. Govt C §89503. See also 2 Cal Code Regs §18940.2. Gifts worth $50 or more must be reported on a statement of economic interest. Govt C §87207. Gifts are ordinarily valued based on their fair market value on the date they are received or promised to the recipient. 2 Cal Code Regs §§18941(a), 18946-18946.6. The Fair Political Practices Commission (FPPC) is required to adjust the gift limit biennially to reflect changes to the Consumer Price Index. Govt C §89503(f). See also 2 Cal Code Regs §18940.2. "Gifts" generally include any payment to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value, unless the rebate or discount is being offered to the general public in the regular course of business. Govt C §82028. See also 2 Cal Code Regs §18940-18950.4. A gift can take many forms, including money, food, beverages, lodging, entertainment, goods, services, passes, or tickets. 2 Cal Code Regs §18940-18950.4. A gift may be reportable whether it is made by an outside donor or by the official's own agency. See 2 Cal Code Regs §18944.3. Within the meaning of the Political Reform Act of 1974 (Govt C §§81000-91014), gifts generally do not include information material, gifts that are returned or donated to a charity within 30 days without being claimed as a tax deduction, gifts from certain family members, campaign contributions, inheritances, personalized plaques or trophies with a value of less than $250, hospitality (including food, beverages, and lodging) provided by an individual in his or her home, and presents exchanged between the official and an individual other than a lobbyist on holidays, birthdays, or similar occasions provided that the presents exchanged are not substantially disproportionate in value. Govt C §82028. See also 2 Cal Code Regs §18942; 2 Cal Code Regs §§18940-18950.4 (FPPC regulations applicable to gifts and travel). Gifts may be exempt from regulation if unused and returned within 30 days to the donor or donated to a government agency or 501(c)(3) nonprofit entity, so long as a charitable tax deduction is not taken. Govt C §82028(b)(2); 2 Cal Code Regs §18943. Gifts may be reportable even when they are received indirectly. A gift to a city official's immediate family is a reportable gift if it confers a clear personal benefit on the official, or if the gift is made by a donor who has been directly involved in a governmental decision in which the official has or will participate in the prior 12-month period. 2 Cal Code Regs §18944. A gift received by an employee from a non-agency source in an agency's employee raffle may be a reportable gift. 2 Cal Code Regs §18944.4. Intermediaries of gifts have an obligation to disclose the identity of the actual donor to the recipient. 2 Cal Code Regs §18945.3. Gifts of tickets or passes to events are regulated by 2 Cal Code Regs §18944.1, which in some circumstances requires both the city's ticket and pass gift policy and individual gifts to be posted to the city's website.

© The Regents of the University of California

§2.156 9. Loan Prohibitions

Public officials may not receive any personal loan aggregating more than $250 from any officer, employee, member, or consultant of, or from anyone who contracts with or is under the control of, the public official's governmental agencies. Loans made, or offered in writing, before January 1, 1998, are exempt from the prohibition. Govt C §87460. In addition, elected officials may not aggregate more than $500 from a single lender unless certain terms of the loan are specified in writing. Govt C §87461. Under certain circumstances, a personal loan that is not being repaid or is being repaid below certain amounts may become a gift to the official who received it. Govt C §87462.

© The Regents of the University of California

§2.157 10. Mass Mailing Restrictions

The sender of a mass mailing of 200 or more substantially similar pieces of mail sent at private expense and for a political purpose must place the name and address of the committee or candidate on the outside of the envelope. Govt C §§82041.5, 84305; see also 2 Cal Code Regs §18435. The sender is the candidate or committee who pays for the largest portion of expenditures attributable to the mailing. 2 Cal Code Regs §18435(b).

Mass mailings of 200 or more substantially similar pieces of mail in a single calendar month sent at public expense are subject to strict regulation. For example, the mailing may not contain the name, signature, or picture of an elected official affiliated with the agency except as part of a standard letterhead. Govt C §89001; 2 Cal Code Regs §18901. This restriction is inapplicable to a variety of items, such as press releases sent to members of the media, legal notices, telephone directories, agendas, and business cards. 2 Cal Code Regs §18901(b).

Local agencies are prohibited from sending campaign-related mailings. 2 Cal Code Regs §18901.1. The regulation prohibits sending at public expense, during the course of an election, more than 200 substantially similar items, such as a writing, videotape, or button that either (a) expressly advocates the election or defeat of a clearly identified candidate, or the qualification, passage or defeat of a clearly identified measure; or (b) unambiguously urges a particular result in an election. See Govt C §§8314, 54964, 82041.5, 89001; 2 Cal Code Regs §18901.1; see also *Stanson v Mott* (1976) 17 C3d 206, 130 CR 697 (distinguishing informational communication from campaign activities with respect to public agency's ability to spend public funds in connection with ballot measure election); *Vargas v City of Salinas* (2009) 46 C4th 1, 92 CR3d 286 (upholding *Stanson* and "style, tenor and timing" test to distinguish informational from campaign communications); Pen C §424 (embezzlement and falsification of accounts).

An item unambiguously urges a particular result in an election if it (a) is clearly campaign material or a campaign activity, such as a bumper sticker, billboard, door-to-door canvassing, or mass media advertising; or (b) can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose considering the style, tenor, and timing of the communication. See 2 Cal Code Regs §18901.1(c). A payment of public monies by a local agency or its agent made in connection with such a communication may also be considered a contribution under Govt C §82015 or an independent expenditure under Govt C §82031. See 2 Cal Code Regs §18420.1.

© The Regents of the University of California

§2.158 11. Revolving Door Prohibitions

Local elected officials, chief administrative officers, and city managers are prohibited from appearing before or communicating with their former agency for compensation in an attempt to influence legislative or administrative action or matters involving a permit, license, grant, or contract, or the sale or purchase of goods or property for 1 year after leaving that position. Govt C §87406.3. Local regulations may establish stricter (but not more lenient) revolving door standards than Govt C §87406.3. Govt C §87406.3(c).

© The Regents of the University of California

§2.159 12. Charitable Fund-Raising Under the Political Reform Act of 1974

Elected officials who solicit or behest contributions for principally a legislative, governmental, or charitable purpose equal to or exceeding $5000 in the aggregate from the same source in the same calendar year are subject to special disclosure requirements under the Political Reform Act of 1974. Govt C §82015(b)(2)(B)(iii). Within 30 days following the date on which the contribution or contributions equal or exceed $5000, the official must file a report with his or her agency that contains (Govt C §82015(b)(2)(B)(iii)):

- the name of and address of the contributor;
- the amount of the contribution;
- the date or dates on which the contribution(s) were made;
- the name and address of the contribution recipient; a brief description of the goods or services provided or purchased, if any; and
- a description of the specific purpose or event for which the contribution or contributions were made.

Once the $5000 aggregate threshold from a single source has been reached for a calendar year, all contributions for the calendar year made by that source must be disclosed within 30 days after the date the threshold was reached or the contribution was made, whichever occurs later. Within 30 days after receipt of such reports, local agencies must forward copies to the officer with whom elected officers of that agency file their campaign statements. Govt C §82015(b)(2)(B)(iii).

© The Regents of the University of California

§2.160 13. Enforcement of the Political Reform Act

The California Attorney General, the Fair Political Practices Commission (FPPC), and local district attorneys are empowered to enforce the Political Reform Act of 1974 (PRA) through criminal sanctions, civil liability, civil penalties, and administrative sanctions. Govt C §§83115-83124, 91000-91014.

- **Criminal Enforcement.** Generally, criminal violations of the PRA are prosecuted as misdemeanors. Govt C §91000. However, under certain circumstances, felony charges may be brought. Govt C §91002. A person convicted of violating the Act cannot be a candidate for elective office or act as a lobbyist for 4 years following the conviction. Govt C §91002.
- **Civil Enforcement.** Civil prosecution may be pursued by various persons, including residents of the jurisdiction, depending on the circumstances. Govt C §91004. Although the penalties for violations of various provisions of the PRA vary, civil penalties are generally based on the amount of money or value of a gift or contribution not reported. Penalties can be as high as $10,000 or three times the amount not reported, whichever is greater. Govt C §§89521, 91000. Other remedies available include injunctive relief, voiding of a governmental decision, civil damages, and attorney's fees. Govt C §§91003-91005, 91012.
- **Administrative Penalties.** The FPPC may levy administrative penalties after a hearing or by stipulation. Govt C §§83115-83124. Administrative penalties include a $5000 fine per violation, cease and desist orders, and orders to file reports. Govt C §83116.
- **Mitigating Factors/Immunity.** Because good faith is relevant in determining criminal and civil liability (Govt C §91001(c)), it is particularly important that affected individuals seek advice from their city attorney or the FPPC, or both, whenever a potential problem appears. However, only a formal written advice letter from the FPPC will confer immunity from liability under the PRA. Govt C §83114. City attorneys' liability for providing incorrect advice to local officials has been limited and clarified by regulatory provisions. Govt C §83116.5; 2 Cal Code Regs §18316.5.
- **Statute of Limitations.** The statute of limitations for civil and criminal enforcement actions is 4 years from the date of violation; and for administrative actions brought by the FPPC, 5 years from the date of violation. Govt C §§91000(c), 91000.5, 91011(b).

© The Regents of the University of California

§2.161 14. Mandatory Ethics Training

State law (AB 1234) imposes mandatory ethics training requirements on all local elected officials, legislative bodies eligible to receive reimbursements, and employees designated by the legislative body. Govt C §§53234-53235. Each local agency official must receive 2 hours training in ethics within the first year of service. Thereafter, those officials must receive 2 hours of training every 2 years. Govt C §§53235, 53235.1(b). The statute lists topics to be covered. Govt C §§53234-53235. Certified lobbyists are also required to complete an ethics orientation course. See Govt C §§8956, 86103, 86106; 2 Cal Code Regs §18603.1.

© The Regents of the University of California

§2.162 B. Prohibited Contracts Under Govt C §1090

City officers and employees may not have financial interests in contracts made by them or by any board or body of which they are members. Govt C §1090. Section 1090 was enacted before the Political Reform Act of 1974 (PRA) (Govt C §§6250-6276.48) and reflects the common law prohibition against self-dealing. See *Lexin v Superior Court* (2010) 47 C4th 1050, 103 CR3d 767; *City of Oakland v California Constr. Co.* (1940) 15 C2d 573, 576, 104 P2d 30; *Berka v Woodward* (1899) 125 C 119, 57 P 777; *Stockton Plumbing & Supply Co. v Wheeler* (1924) 68 CA 592, 597, 229 P 1020. Government Code section 1090 has been described as embodying the principle that the "duties of public office demand the absolute loyalty and undivided allegiance" of the office holder. *County of San Bernardino v Walsh* (2007) 158 CA4th 533, 550, 69 CR3d 848.

PRACTICE TIP: Section 1090 is liberally interpreted to prohibit any form of self dealing. *Thomson v Call* (1985) 38 C3d 633, 647, 214 CR 139, cert denied (1986) 474 US 1057. Extreme caution is warranted when providing advice on Section 1090 because of the severe consequences of a violation, and because reliance upon the advice of an attorney is not a defense. Govt C §1097; *People v Honig* (1996) 48 CA4th 289, 347, 55 CR2d 555.

Section 1090 was not repealed by the enactment of the PRA. See *City of Vernon v Central Basin Mun. Water Dist.* (1999) 69 CA4th 508, 81 CR2d 650; 59 Ops Cal Atty Gen 604, 617 (1976). In any situation, a person must act in a manner that satisfies the requirements of both the PRA and Section 1090. Govt C §81013; 59 Ops Cal Atty Gen 604, 617 (1976). Consequently, if a member of a body or board that authorizes a contract has a financial interest in the contract, the member may avoid a violation of the PRA by disclosure of the interest and abstention from participation in the decision, but disclosure and abstention will not avoid a violation of Section 1090, unless the member's financial interest is a "remote" or "non-interest" under narrow exceptions. See §2.167.

© The Regents of the University of California

§2.163 1. When Govt C §1090 Applies

The provisions of Govt C §1090 apply in two basic situations. First, if the financially interested city officer or city employee is a member of a board or other body that actually approves or executes the contract (*e.g.,* a city council), the potential conflict prohibits the city from entering into the proposed contract, regardless of whether or not the officer participates in or abstains from the actual decision. See *Thomson v Call* (1985) 38 C3d 633, 649, 214 CR 139, cert denied (1986) 474 US 1057. Second, if a staff or advisory board member has a financial interest in a contract with the city, there is a conflict only if that staff or advisory board member actually participates in making the contract. See *Fraser-Yamor Agency, Inc. v County of Del Norte* (1977) 68 CA3d 201, 137 CR 118; 82 Ops Cal Atty Gen 126, 129 (1999). In either case, if such a contract is made, the city may void it. Govt C §1092. Moreover, the agency may bring an action to disgorge any profit made by the financially interested official, in addition to receiving restitution for any payments made by the agency. *County of San Bernardino v Walsh* (2007) 158 CA4th 533, 69 CR3d 848.

© The Regents of the University of California

§2.164 2. To Whom Govt C §1090 Applies

Virtually all board members, officers, employees, and consultants of a public entity are considered public officials under Govt C §1090. See *Thomson v Call* (1985) 38 C3d 633, 214 CR 139, cert denied (1986) 474 US 1057 (council member); *California Hous. Fin. Agency v Hanover/Cal. Mgmt. & Accounting Ctr., Inc.* (2007) 148 CA4th 682, 692, 56 CR3d 92 (attorney whose official capacity carries the potential to exert "considerable" influence over the contracting decisions of public agency is "employee" under Section 1090, regardless of whether he or she would be considered independent contractor under common law tort principles); *Campagna v City of Sanger* (1996) 42 CA4th 533, 49 CR2d 676, and 70 Ops Cal Atty Gen 271 (1987) (contract city attorney); *City Council v McKinley* (1978) 80 CA3d 204, 145 CR 461 (parks and recreation board member); *People v Vallerga* (1977) 67 CA3d 847, 136 CR 429 (county employee); *Millbrae Ass'n for Residential Survival v City of Millbrae* (1968) 262 CA2d 222, 69 CR 251 (advisory board member); *Schaefer v Berinstein* (1956) 140 CA2d 278, 295 P2d 113 (person in advisory position to contracting agency); 46 Ops Cal Atty Gen 74 (1965) (consultant).

© The Regents of the University of California

§2.165 3. Contract-Making Broadly Defined

Government Code §1090 forbids a financially interested public official from any participation in the making of a contract, including preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids and subsequent modifications to a contract and "follow-on" contracts. See *Stigall v City of Taft* (1962) 58 C2d 565, 25 CR 441; *City of Imperial Beach v Bailey* (1980) 103 CA3d 191, 162 CR 663; *City Council v McKinley* (1978) 80 CA3d 204, 212, 145 CR 461; *People v Sobel* (1974) 40 CA3d 1046, 115 CR 532; *Millbrae Ass'n for Residential Survival v City of Millbrae* (1968) 262 CA2d 222, 69 CR 251; 81 Ops Cal Atty Gen 134 (1998). However, participation in a statutorily mandated process in connection with the sale of property through eminent domain is not subject to §1090. See *Santa Clara Valley Water Dist. v Gross* (1988) 200 CA3d 1363, 1369, 246 CR 580. Section 1090 may also be applied to prohibit a former public official from benefiting from a contract after the official leaves office. *Stigall v City of Taft* (1962) 58 C2d 565, 25 CR 441; *City Council v McKinley* (1978) 80 CA3d 204, 212, 145 CR 461; 81 Ops Cal Atty Gen 134 (1998). But see 66 Ops Cal Atty Gen 156 (1988); 63 Ops Cal Atty Gen 868 (1980); 63 Ops Cal Atty Gen 19 (1980). On the other hand, the courts have rejected extending §1090 liability to those who merely aid and abet the violator. *D'Amato v Superior Court* (2008) 167 CA4th 861, 84 CR3d 497.

© The Regents of the University of California

§2.166 4. Financial Interest Under Govt C §1090

The financial interest of the public official may be either a direct or indirect interest. See *Thomson v Call* (1985) 38 C3d 633, 214 CR 139, cert denied (1986) 474 US 1057 (a complex multiparty transaction); *People v Deysher* (1934) 2 C2d 141, 146, 40 P2d 259 (a "devious and winding chain" of indirect interests); *People v Honig* (1996) 48 CA4th 289, 55 CR2d 555 (interest need not be direct or material); *Fraser-Yamor Agency, Inc. v County of Del Norte* (1977) 68 CA3d 201, 137 CR 118 (shareholder insulated from contract payments); *People v Vallerga* (1977) 67 CA3d 847, 136 CR 429 (contingent payment); *People v Sobel* (1974) 40 CA3d 1046, 115 CR 532 (primary shareholder in contracting party); *People v Watson* (1971) 15 CA3d 28, 92 CR 860 (debtor-creditor relationship); *Nielsen v Richards* (1925) 75 CA 680, 243 P 697 (spousal property); 86 Ops Cal Atty Gen 133 (2003) (council member's law firm providing pro bono services to the city); 69 Ops Cal Atty Gen 255 (1986) (spousal property); 66 Ops Cal Atty Gen 376 (1983) (public officers to receive commissions); 58 Ops Cal Atty Gen 670 (1975) (public official is employee of contract provider).

© The Regents of the University of California

§2.167 5. Statutory Exceptions: "Remote Interests" and "Non-interests"

Statutorily defined "remote" interests in a contract do not create a conflict if the officer or employee publicly discloses his or her financial interest, abstains from influencing or attempting to influence any member of the body in the making of the contract, the interest is noted in the body's official records, and the legislative body authorizes the contract in good faith by a sufficient vote without counting the vote of the party with the remote interest. Govt C §1091; see also Gov't Code §§1091.1-1091.4, 1091.5(a)(4). These sections contain a long list of remote financial interests that have developed iteratively over the years in response to court decisions and the Attorney General's opinions.

Government Code §1091.5 lists circumstances that are considered "non-interests" and therefore not subject to the prohibition of Govt C §1090. Each of these sections applies only in limited, highly particularized situations. Some non-interests under §1091.5 do not require disclosure or disqualification.

PRACTICE TIP 1: The remote interest and non-interest statutes are frequently amended and should be consulted each time the city attorney provides advice under §1090.

PRACTICE TIP 2: Care should be given to analyze and determine whether there are multiple financial interests involved in the same transaction.

© The Regents of the University of California

§2.168 6. The Rule of Necessity

The common law rule of necessity provides another exception to Govt C §1090 and ensures that essential government functions are performed even if a conflict of interest exists. The rule of necessity provides that a governmental agency may acquire essential goods or services despite a conflict of interest. *Eldridge v Sierra View Local Hosp. Dist.* (1990) 224 CA3d 311, 321, 273 CR 654. In nonprocurement situations, it permits a public officer to carry out the essential duties despite a conflict of interest when the officer is the only one who may legally act. 224 CA3d at 321; see also 88 Ops Cal Atty Gen 106 (2005).

The rule of necessity is rarely applied, such as "in extreme cases of emergency, or where no alternative source of supply of goods or services existed." 59 Ops Cal Atty Gen 604, 619, n 18 (1976). Although a city council's approval of the renewal, sale, assignment, or transfer of cable television franchise held by a city council member constitutes the making of a contract, the contract might not be prohibited if the rule of necessity could be applied under a particular set of circumstances. 76 Ops Cal Atty Gen 118 (1993); see also 88 Ops Cal Atty Gen 106 (2005).

© The Regents of the University of California

§2.169 7. Exception: "Salary"

The receipt of salary, per diem, or reimbursement for expenses from a government entity is a non-interest "unless the contract directly involves the department of the government entity that employs the officer or employee." Govt C §1091.5(a)(9).

© The Regents of the University of California

§2.170 8. Exception: Existing Contracts

Government Code §1090 is not violated if a public official has an interest in a contract that has been entered into before the official assumes office, and the contract may continue in force until its expiration. However, the pre-existing contract cannot be amended, extended, or renegotiated, and it is unclear whether it may be assigned, if such assignment requires the consent of the legislative body. See *City of Imperial Beach v Bailey* (1980) 103 CA3d 191, 162 CR 663. See also 76 Ops Cal Atty Gen 118 (1993).

© The Regents of the University of California

§2.171 9. Reliance on Legal Advice Not a Defense

Even good faith reliance on the advice of the city attorney that one's conduct is legal will not constitute a defense to a Govt C §1090 violation. See *People v Chacon* (2007) 40 C4th 558, 53 CR3d 876. Nor can an official convicted of violating Govt C §1090 maintain a legal malpractice action against such government attorney. *Chapman v Superior Court* (2005) 130 CA4th 261, 29 CR3d 852.

© The Regents of the University of California

§2.172 10. Applicable Penalties

The maximum penalty for a willful violation of Govt C §1090 is a felony conviction with a maximum fine of $1000 or imprisonment in the state prison and the official is "forever disqualified from holding any office in this state." Govt C §1097. Also, a contract made in violation of Section 1090 is void and payment prohibited. Govt C §§1092, 1095. See also *Thomson v Call* (1985) 38 C3d 633, 214 CR 139, cert denied (1986) 474 US 1057. Moreover, the agency may bring an action to disgorge any profit made by the financially interested official. *County of San Bernardino v Walsh* (2007) 158 CA4th 533, 69 CR3d 848.

PRACTICE TIP: No city employee, including the city attorney, should participate on behalf of the city in making that employee's own contract with the city. If the city requires legal advice on the city attorney's contract, the city attorney cannot provide it. As to contract city attorneys, see 2 Cal Code Regs §18700(d)(3); the Fair Political Practices Commission's McEwen Advice Letter No. I 92 481 and the Eckis Advice Letter No. A 93 270; *People v Gnass* (2002) 101 CA4th 1271, 125 CR2d 225; *Campagna v City of Sanger* (1996) 42 CA4th 533, 49 CR2d 676. These authorities consider the application of the Political Reform Act of 1974 (Govt C §§81000-91014) to a contract city attorney participating in the making of his or her contract with the city and participation in city decisions that could affect the amount of fees paid to that contract attorney.

© The Regents of the University of California

§2.173 11. Statute of Limitations Under Govt C §1090

The statute of limitations for a criminal prosecution under Govt C §1090 is 3 years and is tolled until the crime is discovered. Pen C §§801, 803(c). The courts interpret "discovery" to require reasonable diligence by persons or agencies with a legal duty to report and investigate crimes. See *People v Zamora* (1976) 18 C3d 538, 572, 134 CR 784. See also *People v Honig* (1996) 48 CA4th 289, 55 CR2d 555; *People v Kronemyer* (1987) 189 CA3d 314, 340, 234 CR 442. An action by a city to avoid a contract based on a violation of §1090 must be commenced within 4 years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation. Govt C §1092(b).

PRACTICE TIP: The 4-year statute of limitations in Govt C §1092(b) to avoid a contract for a violation of §1090 appears to supersede *Brandenburg v Eureka Redev. Agency* (2007) 152 CA4th 1350, 62 CR3d 339 (§1090 challenge to the approval of a development and disposition agreement is subject to 1-year statute of limitations applicable to actions on a "statute for a penalty or forfeiture"). See Stats 2007, ch 68 (adding Govt C §1092(b)).

© The Regents of the University of California

§2.174 C. Common Law Doctrine Against Conflicts of Interest

The common law doctrine against conflicts of interest is the judicial expression of the public policy against public officials using their official positions for private benefit. See *Terry v Bender* (1956) 143 CA2d 198, 206, 300 P2d 119. This doctrine has been primarily applied to require a public official to abstain from participation in cases when the public official's private financial interest may conflict with his or her official duties. 64 Ops Cal Atty Gen 795, 797 (1981). By virtue of holding public office, an elected official is impliedly bound to exercise the powers conferred on him or her with disinterested skill, zeal, and diligence and primarily for the benefit of the public. See *Noble v City of Palo Alto* (1928) 89 CA 47, 51, 264 P 529. An elected official bears a fiduciary duty to exercise the powers of office for the benefit of the public and is not permitted to use those powers for the benefit of private interest. See *Nussbaum v Weeks* (1989) 214 CA3d 1589, 1597, 263 CR 360. Violation of the common law duty to avoid conflicts of interest can constitute official misconduct and result in a loss of office. Govt C §§3060-3-74; *Nussbaum v Weeks, supra*.

The Common Law Doctrine survived the enactment of the Political Reform Act of 1974 (Govt C §§81000-91014). See *Clark v City of Hermosa Beach* (1996) 48 CA4th 1152, 1171, 56 CR2d 223, cert denied (1997) 520 US 1167. However, a more recent court decision indicates a reluctance to find a violation of the common law doctrine against conflicts of interest when statutory conflict of interest laws are not violated. See *BreakZone Billiards v City of Torrance* (2000) 81 CA4th 1205, 1233, 97 CR2d 467.

© The Regents of the University of California

D. Incompatible Activities and Offices

§2.175 1. Incompatible Activities

A non-elected local agency officer or employee may not engage in any employment, activity, or enterprise for compensation that is inconsistent, incompatible, or in conflict with his or her duties as a local agency officer or employee. Govt C §1126(a)-(b); *Mazzola v City & County of San Francisco* (1980) 112 CA3d 141, 169 CR 127; 70 Ops Cal Atty Gen 271 (1987). A local agency must adopt rules on incompatible activities and include provisions to give notice of the determination of prohibited activities, of any disciplinary action to be taken for engaging in prohibited activities, and for the appeal of such determination and application. Govt C §1126(c).

PRACTICE TIP: Notice of the incompatible activity can be achieved by adopting a policy identifying those activities. However, if a particular activity is not covered, but later found to be incompatible, a notice of determination should be given to the employee along with an opportunity to conform before discipline is considered.

© The Regents of the University of California

§2.176 2. Incompatible Offices

Under the traditional common law rule, a public officer who is appointed or elected to another public office and enters the duties of the second office automatically vacates the first office if the two offices are incompatible. See *People ex rel Chapman v Rapsey* (1940) 16 C2d 636, 644, 107 P2d 388. Offices are incompatible, in the absence of statutes suggesting a contrary result, if any significant clash of duties exists between the two offices, if the dual office holdings would be improper for reasons of public policy, or if either officer exercises a supervisory, auditory, or removal power over the other. 16 C2d at 640; 38 Ops Cal Atty Gen 113 (1961). Although the common law doctrine of incompatible offices is in Govt C §1099, an uncodified provision provides the statute was not intended to expand or narrow the common law and also that courts be guided by already developed precedent in interpreting this provision. Govt C §1099. See also Stats 2005, ch 254, §§1-2 (SB 274).

© The Regents of the University of California

§2.177 a. "Offices"

The common law rule applies only to offices. Govt C §1099(c). Courts usually first determine whether the positions are offices and, second, whether they are compatible. See 90 Ops Cal Atty Gen 24 (2007); 56 Ops Cal Atty Gen 556, 557 (1973); 40 Ops Cal Atty Gen 238, 239 (1962). The most general characteristic of a public officer is that a public duty is delegated and entrusted to him or her as an agent, the performance of which is an exercise of a part of the governmental functions of the particular unit for which he or she, as agent, is acting. See *Spreckels v Graham* (1924) 194 C 516, 529, 228 P 1040; *Coulter v Pool* (1921) 187 C 181, 187, 201 P 120; 56 Ops Cal Atty Gen 557, 558 (1973). A position as an "employee" or advisory board member is not necessarily a position as an "officer" for purposes of incompatibility. Govt C §1099(c)-(d); 83 Ops Cal Atty Gen 153 (2000); 73 Ops Cal Atty Gen 191 (1990) (a schoolteacher is an employee, not an officer).

© The Regents of the University of California

§2.178 b. Potential for Conflict

For the second part of the analysis, the court considers whether the offices are incompatible. It is enough if there is a potential for a significant clash between the two offices at some point in the future. See 64 Ops Cal Atty Gen 288 (1981). So long as some of the principal or important duties of the offices are in conflict, then the offices are incompatible. See *People ex rel Deputy Sheriff's Ass'n of Santa Clara County v County of Santa Clara* (1996) 49 CA4th 1471, 1481, 57 CR2d 322. See also *People ex rel Chapman v Rapsey* (1940) 16 C2d 636, 107 P2d 388.

© The Regents of the University of California

§2.179 c. Examples of Incompatible Offices

Some examples of incompatible offices are:

- Offices of city council member and director of water reclamation district wholly encompassing the city; see 91 Ops Cal Atty Gen 25 (2008);
- Offices of city council member and county planning commissioner; see 63 Ops Cal Atty Gen 607 (1980);
- Offices of city council member and school board member; see 65 Ops Cal Atty Gen 606 (1982);
- Offices of city planning commissioner and county planning commissioner; see 66 Ops Cal Atty Gen 293 (1983);
- Offices of deputy sheriff and county supervisor, see 68 Ops Cal Atty Gen 7 (1985); and
- Water district and city council member; see 82 Ops Cal Atty Gen 74 (1999).

PRACTICE TIP: There is no prohibition on spouses serving on a city council or on a council and an appointed commission. See *Kimura v Roberts* (1979) 89 CA3d 871, 152 CR 569, which suggests this might present a conflict of interest, but the case may be read in a number of ways and should not be regarded as dispositive of this issue.

© The Regents of the University of California

§2.180 E. Impermissible Bias

Due process requires in a quasi-judicial proceeding the decision-maker be fair and impartial. A personal interest or involvement in the outcome of a matter, or with any participants, that is unrelated to the merits requires disqualification. See *City of Fairfield v Superior Court* (1975) 14 C3d 768, 122 CR 543. See also *Mennig v City Council* (1978) 86 CA3d 341, 150 CR 207. This rule does not preclude holding opinions, philosophies, or strong feelings about issues or specific projects; it also does not proscribe expression of views about matters of importance in the community, particularly during an election campaign. See *City of Fairfield v Superior Court* (1975) 14 C3d 768, 122 CR 543. However, it does preclude participation by even a reasonably impartial non-involved decision-maker who has been demonstrated to have an unacceptable probability of actual bias such as through prejudgment. See *Nasha v City of Los Angeles* (2004) 125 CA4th 470, 22 CR3d 772. See also *Cohan v City of Thousand Oaks* (1994) 30 CA4th 547, 35 CR2d 782. However, in the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 741, 88 CR3d 610. Moreover, a council member who receives campaign contributions from an applicant that seeks a quasi-judicial land use decision from the city or who is the appellant that brings the matter before the city council for review is not automatically disqualified from participating due to bias or prejudgment of adjudicative facts. See *BreakZone Billiards v City of Torrance* (2000) 81 CA4th 1205, 1235, 97 CR2d 467.

© The Regents of the University of California

F. Disclosure Requirements and Prohibited Redevelopment Agency Conflicts

§2.181 1. Redevelopment Agency Officers and Employees

Officers and employees of a redevelopment agency are required to disclose any property owned, and direct or indirect financial interests in any property, within the redevelopment project area. The disclosure must be made in writing to the city and the redevelopment agency, and entered in their respective minutes. Health & S C §33130(a).

Officers and employees of a redevelopment agency are generally prohibited from acquiring any interest in property included within that redevelopment project area if the officer or employee is required to participate in formulating or approving plans or policies for the redevelopment project. Health & S C §§33130, 33130.5; *Old Town Dev. Corp. v Urban Renewal Agency of the City of Monterey* (1967) 249 CA2d 313, 326, 57 CR 426. However, an exception allows an officer or employee to acquire a property interest within the project area for the purpose of participating as an owner or reentering into business under Health & S C §33130, when the officer or employee owned a substantially equal interest to that being acquired for the 3 years before the selection of the project area. Health & S C §33130(b). Another exception allows an officer or employee to purchase or lease property in the project area if the redevelopment agency has completed certification of the improvements to the property or have certified that no work needs to be done. Health & S C §33130.5. If one of the exceptions applies, immediate disclosure of the property interest is required and failure to do so constitutes misconduct in office. Health & S C §§33130(a), 33130.5.

PRACTICE TIP: If a city has a redevelopment plan, new council members and commissioners participating in redevelopment plans or policies should be advised of the above prohibition when they take office. If they own any property interest within a redevelopment project area when they take office, such interest should be disclosed and entered into the minutes of both the city council and the redevelopment agency. Health & S C §§33130(a), 33201(b)(1).

© The Regents of the University of California

§2.182 2. Redevelopment Commission Members

Any member of a community redevelopment commission is prohibited from acquiring any interest in property located within the redevelopment project area. Health & S C §33201. A member who owns or has any direct or indirect financial interest in any property within a project area must immediately make a written disclosure of that interest to the legislative body. Health & S C §33201.

© The Regents of the University of California

§2.183 3. Acquiring Property From Agency Personnel

"An agency shall not acquire from any of its members or officers any property or interest in property except through eminent domain proceedings." Health & S C §33393.

© The Regents of the University of California

§2.184 G. Local Incompatible Activity Regulations

Many local jurisdictions have charter provisions and other legislative or administrative provisions related to ethics, conflicts, campaign financing, and incompatibility of office. If the provisions affect employees, these rules are to include a provision for giving notice of prohibited activity, disciplinary action if employees engage in prohibited activity, and a procedure for employees to appeal a determination of the violation. Govt C §1126; *Long Beach Police Officers Ass'n v City of Long Beach* (1988) 46 C3d 736, 250 CR 869.

© The Regents of the University of California

§2.185 H. City Lobbying Allowed

Cities have specific statutory authority to participate in lobbying. Govt C §50023. See also *Lehane v City & County of San Francisco* (1972) 30 CA3d 1051, 106 CR 918, appeal dismissed (1973) 410 US 962, 35 L Ed 2d 698, 93 S Ct 1445 (upholding San Francisco's contributions to the League of California Cities under Govt C §50023).

© The Regents of the University of California

§2.186 1. Lobbying Reporting Requirements

State and local agencies are required to file periodic reports that describe lobbying efforts, including dues paid to organizations that expend $15,000, or more than 10 percent of their total expenditures, to influence legislative or administrative actions. Govt C §§86115-86116, 86116.5.

© The Regents of the University of California

§2.187 2. Local Regulation of Lobbying

Cities have limited authority to control and register lobbyists appearing on behalf of clients before boards or agencies of that city. The registration of lobbyists is, of necessity, restricted by other state laws that control particular areas. See, *e.g., Baron v City of Los Angeles* (1970) 2 C3d 535, 86 CR 673 (power of the city to register and regulate lobbyists limited to those areas where there is no preemption by other regulatory measures).

On revolving door prohibition of former agency personnel, see §2.158

© The Regents of the University of California

§2.188 I. Ethical Obligations for Government Lawyers

The following sections of this handbook (see §§2.189-2.216) deal with professional obligations of lawyers under the California Rules of Professional Conduct and related sections of the California Business and Professions Code regulating lawyers. It does not discuss ethical obligations faced by all lawyers in private practice or by public lawyers with personal financial or other interests adverse to their clients. It also briefly discusses related but distinct constitutional due process and conflict of interest standards as they apply to government lawyers. The League of California Cities has also published a guidebook, Practicing Ethics: A Handbook for Municipal Lawyers (2004), which provides a more focused and expanded discussion of a public lawyer's professional ethical issues. (Contact the League of California Cities, 1400 K Street, Sacramento, California 95814, telephone (916) 658-8257; website www.cacities.org.) In addition, the City Attorney's Department for the League of California Cities has adopted the Ethical Principles for City Attorneys, available at www.cacities.org/attorneys.

© The Regents of the University of California

§2.189 1. Professional, Situational, Categorical Ethics—Distinguished

The professional ethical standards imposed on lawyers discussed in this handbook are only a partial answer to ethical dilemmas. Professional ethical laws and rules are created to provide a society's members a common level of cooperation and are often the result of compromise. They do not address categorical ethics. Professional and situational ethics likely rely on a given set of facts as a foundation to rationalize an action and involve a determination of what is right or wrong depending on the circumstances. Categorical ethics, by contrast, involve that which is right or wrong in some absolute sense. Situational or professional ethics do not necessarily tell that society's members whether they are conforming to a categorical ethical standard. The discussion of categorical ethics is beyond the scope of this handbook. For a brief bibliography of sources discussing categorical ethics see §2.217.

© The Regents of the University of California

§2.190 2. Regulation of California Attorneys

In California, lawyers are regulated by both the California State Legislature and the California Supreme Court under California Rules of Professional Conduct promulgated by the California State Bar Board of Governors and approved by the Court. See State Bar Act (Bus & P C §§6000-6238); Bus & P C §6076. "In the field of attorney-client conduct … the judiciary and the Legislature are in some sense partners in regulation." *Santa Clara County Counsel Attorneys' Ass'n v Woodside* (1994) 7 C4th 525, 543, 28 CR2d 617, overruled on other grounds by *Coachella Valley Mosquito & Vector Control Dist. v California Pub. Employment Relations Bd.* (2005) 35 C4th 1072, 29 CR3d 234. Courts can apply standards higher than the minimum set by the Legislature. *Santa Clara County Counsel Attorneys' Ass'n,* 7 C4th 525, 544. Not all duties of attorneys are described in the California Rules of Professional Conduct. *Santa Clara County Counsel Attorneys' Ass'n,* 7 C4th at 544. The ABA Model Code is not applicable in California; it is only applicable to jurisdictions, unlike California, that have specifically adopted its provisions. California courts do look to the ABA Model Code for guidance when California does not have a rule directly addressing an issue. See *State Compensation Ins. Fund v WPS, Inc.* (1999) 70 CA4th 644, 655, 82 CR2d 799. See also Cal Rules of Prof Cond 1-100 (noting that members may look to rules and standards promulgated by other bar associations). California courts also refer to cases from other jurisdictions when interpreting sections of the ABA Model Code that are analogous to particular California Rules of Professional Conduct.

© The Regents of the University of California

§2.191 3. State Bar Rules Apply to Government Attorneys

The California Rules of Professional Conduct apply to public lawyers. See *People ex rel Deukmejian v Brown* (1981) 29 C3d 150, 157, 172 CR 478.

PRACTICE TIP: The State Bar's compendium on professional responsibility is a helpful looseleaf, two-volume binder. It contains the current rules and ethics opinions of the Bar and of local bar associations. Its index includes a heading for "government lawyers," which is further broken down into particular subjects pertaining to government lawyers. Relevant case law is organized under this index in a useful way.

© The Regents of the University of California

4. Representing Governmental Entities

§2.192 a. Cal Rules of Prof Cond 3-600(A): Organization as Client

California Rules of Professional Conduct 3-600 governs the ethical obligations of a lawyer who represents an entity rather than a natural person. The client in such a representation is the entity itself as embodied in the "highest authorized officer, employee, body or constituent overseeing the particular engagement." Cal Rules of Prof Cond 3-600(A). Thus, for the city attorney, the city itself, and not any individual public official, is the client. See *Ward v Superior Court* (1977) 70 CA3d 23, 32, 138 CR 532 (county counsel's client is County of Los Angeles and not county assessor in his individual capacity and thus county counsel was not disqualified from representing the county in a suit brought against it by county tax assessor). State Bar Ethics Opinion No. 2001-156 concluded the city was the client and that a city attorney could advise both the mayor and city council about the legality of an ordinance even though the mayor and the council had antagonistic positions and the council had the power to adopt the ordinance and the mayor had the power to veto it.

PRACTICE TIP: The rule that the city itself is the client helps obviate the need for city attorney disqualification merely because council members are at odds with one another over an issue, or the council and manager have a dispute. The highest official or body with the requisite authority is ascertained by a review of the organic law applicable to the city or other client entity. For most cities, this is usually the city council. There can be instances in which the public lawyer has more than one client. When the government attorney has more than one client whose interests are adverse as to the same matter, the attorney is disqualified under Cal Rules of Prof Cond 3-310 from representing either client, absent informed written consent. See §§2.197-2.198, 2.202.

© The Regents of the University of California

§2.193 b. Cal Rules of Prof Cond 3-600(B): Reporting Illegal Activity

Under Cal Rules of Prof Cond 3-600(B), an entity's lawyer who becomes aware of the conduct of an entity's agent that may be or is a violation of law "reasonably imputable to the organization" or "is likely to result in substantial injury to the organization," may take the matter to the "highest internal authority within the organization." No confidential information may be disclosed beyond the organization, unless it is to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, but only after the attorney has exhausted all options to convince the client not to commit the criminal act. See Cal Rules of Prof Cond 3-600; Bus & P C §6068(e)(2). The attorney also retains the right and duty to resign employment, if appropriate. See Cal Rules of Prof Cond 3-600(C), 3-700.

PRACTICE TIP 1: Be sure that the matter being reported is a failure to cure a legal problem or to advise of a substantial legal risk, not a failure to resolve a policy problem in the way the city attorney believes is best. The city attorney's obligation is to provide all legal options available and to advise of any legal risk. The official receiving that advice has the right to make policy decisions, based on the legal options provided and legal risk entailed.

PRACTICE TIP 2: Although not clearly established in the California Rules of Professional Conduct, or by case law, many city attorneys believe that an obligation likely exists to report significant wrongdoing to the highest body in the client entity, when the lower level officials fail to take the recommended corrective action.

© The Regents of the University of California

§2.194 c. Cal Rules of Prof Cond 3-600(D): Duty Not to Treat Agent as Client or to Promise Confidentiality

Under Cal Rules of Prof Cond 3-600(D), whenever the government attorney becomes aware that an official's interest may be adverse to that of the client entity, the attorney must explain to the official that he or she represents the client entity and not the individual official and must not mislead the official into thinking that information provided by the official will be withheld from the organization.

PRACTICE TIP 1: Make clear from the outset that the city attorney's duty runs to the city itself and the entire council, rather than to an individual elected official or city employee. Some city attorneys provide standing memoranda to their councils explaining this principle.

PRACTICE TIP 2: When giving advice to an individual council member, make it clear that advice is provided to the council member in his or her official capacity and that the advice is subject to disclosure to the entire council. A city attorney should consider sharing any advice given to an individual council member on matters that could invalidate the city council's action (for example, issues related to preemption or the constitutionality of a particular action) with the entire council.

© The Regents of the University of California

§2.195 d. Cal Rules of Prof Cond 3-600(E): Joint Representation of Official or Employee and Entity

California Rules of Professional Conduct 3-600(E) requires the consent of the entity before the entity's lawyer undertakes to represent the entity and its official or employee. However, the California Tort Claims Act imposes a duty to defend and indemnify public officials. Govt C §995. Although this statutory obligation, in effect, embodies consent to employee representation by operation of law, these areas of joint representation can create Cal Rules of Prof Cond 3-310 conflicts of interest. See §§2.196-2.203.

PRACTICE TIP: Evaluating the facts behind the case and the representation are critical to determining whether the agency and the employee or official may be represented by the same counsel. Such situations may involve cumis counsel, *Lybarger* concerns, and other joint counsel issues when the parties may have disparate interests. See *Lybarger v City of Los Angeles* (1985) 40 C3d 822, 221 CR 529. See also §4.294 on *Lybarger* warnings and §13.143 on Cumis counsel and duty to defend.

© The Regents of the University of California

§2.196 5. Cal Rules of Prof Cond 3-310: Conflicts of Interest

California Rules of Professional Conduct 3-310 governs conflicts of interest. The rule itself applies broadly to a wide range of possibly conflicting interests, including personal, business, or other interests of the lawyer that are adverse to those of the client. The following sections of this handbook (see §§2.197-2.198) only examine conflicts of interest caused by the simultaneous or successive representation of clients whose interests are adverse to one another. Such conflicts of interests involving adverse clients generally fall into two categories: (1) simultaneous representation of adverse interests and (2) successive representation of adverse interests.

© The Regents of the University of California

§2.197 a. Simultaneous Representation of Adverse Interests

The simultaneous representation of adverse interests arises when two or more clients who are concurrently represented by the same lawyer, firm, or office, are adverse to one another, in either the same or a different matter. Such simultaneous representation as to the very same matter is per se prohibited because it violates the duty (and client's expectation) of loyalty and notwithstanding the language of Cal Rules of Prof Cond 3-310, clients cannot give informed written consent. See *Flatt v Superior Court (Daniel)* (1994) 9 C4th 275, 284, 36 CR2d 537. Simultaneous representation as to different matters is permitted by Cal Rules of Prof Cond 3-310, provided the parties each execute informed written consents. See also §2.204.

© The Regents of the University of California

§2.198 b. Successive Representation of Client With Interest Adverse to That of Former Client

This issue arises when the representation of a current client creates an adverse relationship with a former client. Such successive representation is prohibited if there is a substantial relationship between the current matter and the prior representation. If there is a substantial relationship, the majority opinion presumes the lawyer acquired confidential information and the subsequent adverse representation is barred without the prior client's informed written consent. In addition, under the rule of vicarious disqualification, not only the lawyer who represented the former client, but also his or her entire office, is also disqualified. The major ethical concern in such cases of successive representation is violation of the duty of confidentiality. See *Flatt v Superior Court (Daniel)* (1994) 9 C4th 275, 283, 36 CR2d 537. However, this is only a presumption that can be rebutted if an attorney or firm resisting the disqualification can show that a conflict does not exist, that the disqualification creates a hardship to the new client, or that the presumed conflict is being abused as an improper tactical maneuver. In those situations, courts have declined to order vicarious disqualification of a firm if the challenged attorney is unlikely to have acquired confidential information from the former client. See *Rhaburn v Superior Court* (2006) 140 CA4th 1566, 1575, 45 CR3d 464. The California Supreme Court upheld the vicarious disqualification of the entire San Francisco City Attorney's Office when the lead attorney had a conflict. *City & County of San Francisco v Cobra Solutions, Inc.* (2006) 38 C4th 839, 43 CR3d 771. See §2.205. The California Supreme Court revisited public law office disqualification in *In re Charlisse C. v Shadonna C.* (2008) 45 C4th 145, 84 CR3d 597. Reflecting a more pragmatic view, the court held that "ethical screening might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney's supervision." 45 C4th at 165 (quoting *City & County of San Francisco v Cobra Solutions, Inc.* (2006) 38 C4th 839, 850, 43 CR3d 771).

© The Regents of the University of California

§2.199 c. Determining Client in Representation of Quasi-Independent Boards and Officials

The client is the entity itself as embodied in the "highest authorized officer, employee, body or constituent overseeing the particular engagement." Cal Rules of Prof Cond 3-600(A). See also §2.192. When evaluating conflicts of interests in the representation of an advisory body, it is essential for the attorney to determine whether the advisory body is an agent of the entity, or a separate entity and therefore an independent client.

© The Regents of the University of California

§2.200 (1) Civil Service Commission or Advisory Bodies

In *Civil Serv. Comm'n v Superior Court* (1984) 163 CA3d 70, 209 CR 159, county counsel representing the civil service commission was disqualified under Cal Rules of Prof Cond 3-310 from representing the county board of supervisors in a suit against the commission because the entities were separate and county counsel could not represent both agencies in the same matter. On the other hand, a Project Advisory Board with purely advisory powers was found not to be a separate client of the city attorney and thus not entitled to independent counsel. *North Hollywood Project Area Comm. v City of Los Angeles* (1998) 61 CA4th 719, 71 CR2d 675.

© The Regents of the University of California

§2.201 (2) Attorney General and Sheriff

California Rules of Professional Conduct 3-310 prohibited the Attorney General from suing a client department on a matter on which he advised that department. *People ex rel Deukmejian v Brown* (1981) 29 C3d 150, 172 CR 478. An independently elected sheriff may become a client separate from the county entitled to separate representation. See 80 Ops Cal Atty Gen 127 (1997), in which the Attorney General advised that when a county counsel takes a position in favor of the interests of the county board of supervisors and adverse to the interests of the sheriff, a conflict of interest may exist that entitles the sheriff to separate legal representation in that matter by independent counsel, at the agency's expense.

© The Regents of the University of California

§2.202 d. Ethical Walls to Avoid Conflicts in Public Law Offices

Devices employed to screen lawyers in separate branches of publicly funded law offices from one another have been allowed for the representation of clients with adverse interests. See cases discussed in *People v Christian* (1996) 41 CA4th 986, 997, 48 CR2d 867. See also *City & County of San Francisco v Cobra Solutions, Inc.* (2006) 38 C4th 839, 43 CR3d 771. Subject to an ethical wall, the county counsel's office may simultaneously represent both the public guardian in the conservatorship proceeding and the county in a petition to declare the conservatee's child a ward of the court. *In re Lee G.* (1991) 1 CA4th 17, 1 CR2d 375 (separate matters being handled by different divisions and different attorneys).

PRACTICE TIP: Agreeing in advance how to resolve conflicts can avoid problems when the conflict arises. See, *e.g., Elliott v McFarland Unified Sch. Dist.* (1985) 165 CA3d 562, 571, 211 CR 802, in which two school districts entered into a joint powers agreement and the agency thus created was represented by one of their counsel. The districts agreed that if a conflict of interest arose, that counsel could continue to represent his own district and the other district would obtain its own counsel. Thus, the other school district had granted informed written consent to the successive adverse representation by the school district counsel of his own district.

Informed written consent is an option to avoid a conflict, but it must be based on the circumstances actually contemplated by the consent granted. If the consent was not informed or circumstances change so that consent is vitiated, the waiver is not effective.

© The Regents of the University of California

§2.203 e. Duty of Confidentiality, Whistle-Blowing

Separate and distinct from the attorney-client privilege are lawyers' ethical duties to maintain their clients' confidences. Bus & P C §6068. Neither the attorney-client privilege, codified in Evid C §954, nor the ethical duty to protect client confidences under Bus & P C §6068 are subordinated to the whistle-blowing provisions of California law. 84 Ops Cal Atty Gen 71 (2001). To the extent the whistle-blowing may prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, Cal Rules of Prof Cond 3-100 and Bus & P C §6068(e)(2) would permit, but not require, disclosure of confidential information after the attorney exhausts attempts to convince the client not to commit the criminal act. In light of the public nature of most information in a public entity and the recognition, in other contexts, that public lawyers have special duties to the public, lawyer whistle-blowing may be permissible when the information is not confidential. In some very limited instances, there may be a statutory duty to report wrongdoing. Govt C §1096 (imposing a duty on any officer involved with payments on contracts to report violations of Govt C §1090 to district attorney).

© The Regents of the University of California

6. Special Considerations for the Public Sector

§2.204 a. Public Attorney's Simultaneous Representation of Adverse Interests

The general rule is that "a public attorney, acting solely and conscientiously in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area." *In re Lee G.* (1991) 1 CA4th 17, 29, 1 CR2d 375. "The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement ought to be forbidden categorically." *Castro v Los Angeles County Bd. of Supervisors* (1991) 232 CA3d 1432, 1444, 284 CR 154. See also *In re Lee G.,* 1 CA4th at 29. See §2.197.

© The Regents of the University of California

§2.205 b. Public Attorney's Successive Representation of Adverse Interests

In *City of Santa Barbara v Superior Court (Stenson)* (2004) 122 CA4th 17, 18 CR3d 403, the Santa Barbara city attorney's office hired a new deputy city attorney from a private law firm. That law firm had been currently representing a private, adverse party in litigation against the city. While at that private firm, the new deputy had provided legal services to the firm's client on the same litigation. The court approved the use of an "ethical wall" to permit the city attorney's office to continue to represent the city. In making its decision not to disqualify the entire city attorney's office, the court considered the added costs that a client disqualification can cause, the right of a client to select counsel, the effectiveness of a city attorney's office to carry out its duties, the ability of private and public law offices to hire experienced lawyers, and whether use of an ethical screen would be likely to erode public confidence in the administration of justice, the integrity or the bar, and the professionalism of the city attorney's office.

In *City & County of San Francisco v Cobra Solutions, Inc.* (2006) 38 C4th 839, 43 CR3d 771, the San Francisco city attorney's office prosecuted a case that was adverse to a former client of the elected city attorney. The city attorney was screened from all involvement in the case and the chief assistant city attorney and deputy city attorneys litigated the case. Nonetheless, the California Supreme Court upheld the disqualification of the entire office, imputing the city attorney's conflict to the whole office on the rationale that attorneys, working together and practicing law in a professional association, share each other's and their clients' confidential information. *City of Santa Barbara* was distinguished because the attorney who was subject to ethical screening was simply one of the attorneys in the government office, not the city attorney under whom and at whose pleasure all deputy city attorneys serve. The California Supreme Court reserved judgment on the question of whether ethical screening might suffice to shield a senior supervising attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney's supervision. *City & County of San Francisco v Cobra Solutions, Inc.,* 38 C4th at 853. See §2.198. The California Supreme Court revisited public law office disqualification in *In re Charlisse C. v Shadonna C.* (2008) 45 C4th 145, 84 CR3d 597. Reflecting a more pragmatic view, the court held that "ethical screening might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney's supervision." 45 C4th at 165 (quoting *City & County of San Francisco v Cobra Solutions, Inc.,* 38 C4th at 850).

© The Regents of the University of California

c. Conflicts in Joint Representation of Employees and the Entity

§2.206 (1) Duty to Defend

Conflicts of interest can arise in the joint representation of employees and the city. For example, conflicts can occur when the city is considering disciplinary action against the employee at the same time as it is contemplating representing the employee in a civil action arising out of the conduct. In that situation, the agency should retain separate legal representation for the employee, with a reservation of rights for the payment of such services if warranted. Nevertheless, there are also times when the agency can simply deny the employee a separate defense when the city offered a joint defense. See *City of Huntington Beach v Petersen Law Firm* (2002) 95 CA4th 562, 115 CR2d 568.

PRACTICE TIP 1: Whenever an employee is potentially subject to discipline for the same acts as the ones at issue in the suit, there will always be a conflict of interest under Cal Rules of Prof Cond 3-310 because the interests of the entity and the individual are adverse to one another, and the same lawyer simply may not represent both. In a large city attorney's law office, it may be possible to employ screening devices to wall off the lawyers prosecuting the disciplinary matter from the lawyers handling the tort suit, but screening has been employed in very limited circumstances and may not be found to satisfy the prohibitions imposed by Cal Rules of Prof Cond 3-310.

PRACTICE TIP 2: For a more detailed discussion of the issues presented by the joint defense of the entity and its employees and officials, review Albuquerque, *Joint Defense of Suits Brought Against Public Entities and Their Employees: Are Conflicts of Interest Manufactured or Real?* (on file with the League of California Cities, and available at www.cacities.org).

© The Regents of the University of California

§2.207 (2) Generally No Conflict When Punitive Damages Sought

The mere fact that punitive damages are sought is not sufficient to require separate representation, even if the agency advises the employee it will not pay punitive damages on behalf of the employee. See *Laws v County of San Diego* (1990) 219 CA3d 189, 198, 267 CR 921 (noting that obligation of public entity to defend and indemnify employee is governed by statute). A city had no duty to reimburse a city council member for retaining a private lawyer to defend her in a suit brought against her in her official capacity, when the council member refused to agree to the city's condition that she cooperate in her defense and allow the city to control the defense. See *DeGrassi v City of Glendora* (9th Cir 2000) 207 F3d 636.

© The Regents of the University of California

§2.208 d. Role of Attorney in Due Process—Improper Combination of Functions

Different constituent elements of an entity may need to be represented by two or more separate lawyers in order to protect the due process rights of the individual who is subject to the quasi-judicial administrative procedure in question. See *Nightlife Partners, Ltd. v City of Beverly Hills* (2003) 108 CA4th 81, 133 CR2d 234 (city violated due process rights of land use applicant when the lawyer advising hearing officer was lower level decision-maker whose decision was on appeal); *Howitt v Superior Court* (1992) 3 CA4th 1575, 5 CR2d 196 (county counsel's office must establish that its attorney who advised county's appeals board was completely segregated from attorney representing the department that terminated the employee, or else county counsel would be disqualified from advising county appeals board; the role of advocate is inconsistent with role of neutral decision-maker); *Walker v City of Berkeley* (9th Cir 1991) 951 F2d 182 (when jury determined that city attorney advising city manager on post-termination appeal was decision-maker and that attorney also represented city in arguing that suit filed by employee during the pendency of administrative appeal was premature, city violated employee's right to neutral decision-maker, because attorney's role as advocate for city was inconsistent with role of neutral decision-maker). In another case, due process was violated when a lawyer who regularly advised a personnel board appeared before the board as an advocate in an unrelated matter, even though the board was advised by a separate lawyer in that matter. *Quintero v City of Santa Ana* (2003) 114 CA4th 810, 7 CR3d 896. The court reasoned that the ongoing relationship of the lawyer as adviser to the board is likely to make the board defer to the position asserted by the lawyer in his advocacy role in the new matter, notwithstanding the fact that the Board has a separate legal adviser as to that matter. *Quintero v City of Santa Ana, supra.* Most recently, the California Supreme Court has held that in the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. *Morongo Band of Mission Indians v State Water Resources Control Bd.* (2009) 45 C4th 731, 741, 88 CR3d 610.

PRACTICE TIP: The 2005 and 2009 ad hoc Due Process Committees of the City Attorney's Department have published two guides on interpreting and implementing these cases. The 2009 Ad Hoc Due Process Committee Report and the 2003 Municipal Law Institute symposium paper on *Demystifying Due Process* shed light on this issue (both documents are on file with the League of California Cities at www.cacities.org).

© The Regents of the University of California

§2.209 e. Application of Govt C §1090 and the Political Reform Act of 1974

A city attorney who was also counsel for a joint powers agency (JPA) that included his city, violated Govt C §1090 and the Political Reform Act of 1974 (Govt C §§81000-91014) because he had an undisclosed fee-splitting arrangement with bond counsel who issued bonds for the JPA. See *Campagna v City of Sanger* (1996) 42 CA4th 533, 49 CR2d 676. Counsel are not precluded from negotiating compensation outside their regular city attorney's duties for additional work on matters, but in this case the contract was with the outside counsel and not the city. See also 46 Ops Cal Atty Gen 74 (1965) (the attorney general analyzes hypothetical situations for possible conflicts of interest). See 66 Ops Cal Atty Gen 376 (1983), deciding that a city may not enter into an employment contract with its city attorney, a city administrator, a redevelopment agency counsel, a redevelopment agency consultant, or a redevelopment agency financial officer and compensate them with a percentage of the increase in assessed value of parcels of property within the city's boundaries. The official involvement of such persons in contracts that may increase the assessed value of parcels violates Govt C §1090.

© The Regents of the University of California

§2.210 f. City Attorney's Right to Defense and Indemnification

The city attorney is a public official who is entitled to defense and indemnification as to suits concerning acts or omissions arising out of the course and scope of the city attorney's employment. See *Fireman's Fund Ins. Co. v City of Turlock* (1985) 170 CA3d 988, 216 CR 796, disapproved on other grounds by *Vandenberg v Superior Court* (1999) 21 C4th 815, 88 CR2d 366. When charges are filed with the State Bar against a public lawyer, which constitutes the initiation of an administrative proceeding, the public entity has no duty to provide the public lawyer with a defense, but has the discretion to do so. Govt C §995.6, which requires city to determine if the alleged act or omission in question arose out of scope of the employment, that such defense would be in the best interest of the entity, and that employee acted, or failed to act, in good faith, without actual malice, and in the apparent interests of the entity.

PRACTICE TIP: The public lawyer is acting in his or her capacity as an employee when making a request for representation in an administrative proceeding, and thus should so advise the entity and recommend it seek legal advice from independent counsel on the legality or propriety of providing the public lawyer with representation.

© The Regents of the University of California

7. Special Duties for Prosecutors

§2.211 a. City Attorneys as Prosecutors

Many city attorneys also act as criminal prosecutors. Violations of municipal codes are misdemeanors or infractions. Govt C §36900. Crimes are defined to include infractions under Pen C §16. Accordingly, city attorneys involved in enforcement of their city's municipal code by filing charges as misdemeanors or infractions are subject to the special duties imposed on prosecutors. California Rules of Professional Conduct 5-110 prohibits the filing of criminal charges when the prosecuting attorney knows or should know that the charges are not supported by probable cause. If a prosecuting attorney discovers the lack of probable cause, the attorney must notify the court in which the charges are pending.

© The Regents of the University of California

§2.212 b. Prosecutors Must Maintain Objectivity

Prosecutors are subject to special limitations designed to avoid any appearance of partisanship and to maintain an appearance of objectivity. See *People v Conner* (1983) 34 C3d 141, 193 CR 148, in which court held that when criminal defendant was accused of shooting deputy sheriff and narrowly missing deputy district attorney, entire district attorney's office should be recused from prosecuting the case. But see *Trujillo v Superior Court* (1983) 148 CA3d 368, 196 CR 4, in which deputy district attorney was victim of crime committed when he became involved with fleeing defendant who had just been convicted of a crime. No recusal of the office was required because injuries were minor, district attorney's office was very large and a different division was prosecuting the case. *Trujillo v Superior Court, supra*. Absent a direct connection to the defendant or to the actual charge being prosecuted, the California Supreme Court has been reluctant to mandate recusal. See *Haraguchi v Superior Court* (2008) 43 C4th 706, 76 CR3d 250 (prosecutor's publication of novel about fictional sexual assault case did not warrant recusal from actual sexual assault case). See also *People v Superior Court (Humberto S.)* (2008) 43 C4th 737, 76 CR3d 276 (prosecutor's request for a guardian ad litem to protect a minor's medical records in a sexual abuse case did not warrant recusal because the zealous assertion of legal arguments did not create a conflict); *Hollywood v Superior Court* (2008) 43 C4th 721, 76 CR3d 264, cert denied (2008) __ US __, 172 L Ed 2d 327, 129 S Ct 458 (prosecutor's release of information in a kidnapping and murder case to make a movie based on the defendant's alleged life and crimes, although negligent and subject to sanctions, did not warrant recusal because the actions did not influence the case and were intended to lead to the defendant's capture). A similar duty has been deemed to exist in civil enforcement actions such as the abatement of nuisances. On civil enforcement actions, see generally §§12.2-12.27.

PRACTICE TIP: For other principles applicable to criminal proceedings, review Albuquerque, *City Attorney Ethical Issues and Related Addenda* (on file with the League of California Cities, and available at www.cacities.org).

© The Regents of the University of California

§2.213 c. City Attorney May Not Threaten Criminal Charges to Obtain Advantage in Civil Dispute

A lawyer may not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. Cal Rules of Prof Cond 5-100.

© The Regents of the University of California

§2.214 d. Limitations on Criminal Defense Practice by City Prosecutors

Government Code §41805 allows a city attorney and his or her firm to represent criminal defendants in cases other than violations of city ordinances, as long as the city attorney has been expressly relieved of all prosecutorial responsibilities on the city's behalf and the accused has been expressly informed of the defense counsel's role as city attorney and has waived any conflict created by his attorney's position as a city attorney. See *People v Rhodes* (1974) 12 C3d 180, 115 CR 235. A city is not precluded from limiting or prohibiting the private practice of any attorney it employs. In *People v Pendleton* (1979) 25 C3d 371, 158 CR 343, the city attorney failed to comply with Govt C §41805 because he was not expressly relieved of the duty of prosecuting municipal code violations and yet was engaged in defending a criminal defendant for violations of state law. Moreover, the criminal defendant had not been expressly advised of and waived any potential conflict. Nevertheless, the court found that, because the city attorney did not, in fact, prosecute city crimes and had aggressively represented the criminal defendant, there was no prejudice to the criminal defendant as a result of the city attorney's failure to comply with Govt C §41805 and thus the conviction of the criminal defendant would not be reversed.

© The Regents of the University of California

8. Enhanced Ethical Duty for Public Attorneys

§2.215 a. Furthering Justice

The courts have enunciated the principle that public lawyers have special ethical obligations to further justice. In *People ex rel Clancy v Superior Court* (1985) 39 C3d 740, 745, 218 CR 24, a private attorney retained by a city under a contingent fee arrangement to prosecute civil nuisance abatement actions was ordered disqualified, in the interests of justice, because his personal stake in the actions was inconsistent with the neutrality required of a government lawyer when prosecuting a nuisance abatement action. The court relied on former Ethical Consideration (EC) 7-14, published in a prior version of the ABA Model Code, and held that the heightened ethical responsibilities of government lawyers apply irrespective of whether they are prosecuting criminal actions or representing the government in a civil action. (Former EC 7-14 provided: "A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.") See also *City & County of San Francisco v Philip Morris, Inc.* (ND Cal 1997) 957 F Supp 1130, 1135 (tort action against tobacco companies may proceed on a contingent fee basis, especially when city attorney was also co-counsel and controlled the litigation). See also *In re City of San Diego* (9th Cir 2008) 291 Fed Appx 798 (private tort action by city acting as a private property owner, and not as sovereign, may proceed on contingent fee basis). Former EC 7-14 was partially the basis for a holding that a city attorney in a condemnation case committed misconduct. The city attorney had claimed there was no need for airport parking (a claimed highest and best use of the condemned property), even though the attorney knew that his condemnor city had itself determined there was a need for airport parking. *City of Los Angeles v Decker* (1977) 18 C3d 860, 871, 135 CR 647.

© The Regents of the University of California

§2.216 b. Statutory Duties

Statutes may, however, impose a duty on city attorneys that they owe directly to the public. Elec C §§9203 and 9280 on preparation of a title and summary for initiatives and an impartial analysis of ballot measures. See *Widders v Furchtenicht* (2008) 167 CA4th 769, 84 CR3d 428, in which court found the relief of city attorney of duty to prepare ballot titles and summaries for two initiative measures and the direction to city council to exercise its judgment to craft and adopt laws relating to chain stores and affordable housing as measures to be an improper exercise of initiative power. It has been held that a similar duty imposed on the Attorney General for state initiatives is a ministerial one that must be performed even when the Attorney General intends to sue to invalidate the measure. See *Amador Valley Joint Union High Sch. Dist. v State Bd. of Equalization* (1978) 22 C3d 208, 243, 149 CR 239. See also *Schmitz v Younger* (1978) 21 C3d 90, 92, 145 CR 517.

© The Regents of the University of California

§2.217 J. Other References on Ethics and Conflicts

The following is a list of references covering ethical considerations and conflict of interest issues:

- League of California Cities, City Attorney's Department. Ethical Principles for City Attorneys (adopted 2005) (see www.cacities.org/attorneys).
- California Attorney General's Office. Conflicts of Interest (2004). Write to Public Inquiry Unit, Office of the Attorney General, P.O. Box 944255, Sacramento, CA 94244-2550; telephone (916) 322-3360; website: www.caag.state.ca.us.
- Fair Political Practices Commission Bulletin, published quarterly. Write to Fair Political Practices Commission, 428 J Street, Suite 800, Sacramento, CA 95814; telephone (916) 322-5901 or (866) ASK-FPPC (275-3772) to be placed on mailing list; website: www.fppc.ca.gov.
- Institute for Local Government. Ethics Law Reference for Local Officials (2007) (see www.ca-ilg.org).
- Josephson, Michael. Making Ethical Decisions (2002). Available from the Josephson Institute at http://josephsoninstitute.org/MED/index.html.
- League of California Cities. Practicing Ethics: A Handbook for Municipal Lawyers (2004). (Contact the League of California Cities, 1400 K Street, Sacramento, California 95814; telephone (916) 658-8257); website www.cacities.org.)
- Advising California Nonprofit Corporations (3d ed Cal CEB 2009).
- California Administrative Hearing Practice (2d ed Cal CEB 1997).
- California Civil Procedure Before Trial (4th ed Cal CEB 2004).

© The Regents of the University of California

V. CALIFORNIA PUBLIC RECORDS ACT

§2.218 A. California Constitution Establishes Public's Right of Access to Information

California Constitution Article I, §3 states "the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Moreover, statutes, court rules, and other authorities must be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. Cal Const art I, §3 Furthermore, that the government has the burden of proof to show a record should not be disclosed. Cal Const art I, §3. Nevertheless, the Constitutional right to access documents does not affect the right of privacy or modify any of the statutory or case law in existence when the article became effective, including the California Public Records Act (Public Records Act) (Govt C §§6250-6276.48). Cal Const art I, §3. See *BRV, Inc. v Superior Court* (2006) 143 CA4th 742, 49 CR3d 519. See also 87 Ops Cal Atty Gen 181 (2004) (copy of a private check obtained by the Fair Political Practices Commission through issuance of an administrative subpoena during the investigation of a complaint was exempt from disclosure under the Public Records Act).

© The Regents of the University of California

§2.219 1. California Public Records Act

Combined with the California Constitution, the California Public Records Act (Govt C §§6250-6276.48) ensures the public's right to inspect public records. When it adopted the Act, the legislature found and declared that access to information about the conduct of the people's business is a fundamental and necessary right of every person in the state. Govt C §6250. The general policy of the Act favors disclosure and a refusal to disclose information must be justified by the specific exceptions enumerated in the Act. *Cook v Craig* (1976) 55 CA3d 773, 781, 127 CR 712; *State ex rel Division of Indus. Safety v Superior Court of Los Angeles County* (1974) 43 CA3d 778, 783, 117 CR 726.

© The Regents of the University of California

§2.220 2. Freedom of Information Act

The federal Freedom of Information Act (FOIA), on which the California Public Records Act (Public Records Act) was modeled, gives the public the right of access to information held by federal agencies. See generally 5 USC §§552-559; *Black Panther Party v Kehoe* (1974) 42 CA3d 645, 652, 117 CR 106. But see *Williams v Superior Court* (1993) 5 C4th 337, 19 CR2d 882, in which court declined to use "parallel construction" with FOIA in interpreting Govt C §6254(f), because the Public Records Act did not incorporate FOIA criteria and both statutes have been substantially revised.

© The Regents of the University of California

§2.221 3. Other Right to Access Statutes

A number of statutes and decisions independent of the California Public Records Act either grant or restrict the right to inspect particular public records. See*, e.g.,* Pen C §1534 (documents and records relating to issuance of search warrant); Pen C §1203.05 (records of probation officer); Health & S C §§19850-19853 (building plans); *Smith v Paul* (1959) 174 CA2d 744, 345 P2d 546 (architect's plans); *Runyon v Board of Prison Terms & Paroles of the State* (1938) 26 CA2d 183, 79 P2d 101 (documents in possession of parole board). The legislature has attempted, at Govt C §§6275-6276.48, to alphabetically list other statutes that create exemptions to the disclosure of public records. Although extensive, this list is not all inclusive, and it is intended to be used to assist in identifying those other statutes.

© The Regents of the University of California

§2.222 B. Inspection Rights Under California Public Records Act

Under the California Public Records Act, public records are ordinarily open to inspection at all times during the office hours of the state or local agency in which they are kept. Govt C §6253(a).

© The Regents of the University of California

§2.223 C. Agencies Covered by the Public Records Act

"State agency" is defined by the California Public Records Act (Public Records Act) to mean every state office, officer, department, division, bureau, board, and commission or other state agency, except those agencies provided for in the articles of the California Constitution relating to the legislative and judicial departments. A "local agency" includes a county, city, city and county, school district, municipal corporation, district, political subdivision, or any board, commission, or agency thereof. Govt C §6252(a), (f). See also Cal Const art IV. Under the Public Records Act, a "local agency" also includes any entity deemed to be a "legislative body" within the meaning of the Ralph M. Brown Act. Govt C §§6252(a), 54952(c)-(d). An owner's association under contract with a city to administer or implement activities and improvements specified in a management district plan must also comply with the Public Records Act. Str & H C §36614.5.

© The Regents of the University of California

§2.224 D. Records Subject to Inspection Under California Public Records Act

"Public records" that are subject generally to inspection and copying include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. Govt C §6252(g).

© The Regents of the University of California

§2.225 1. Air Pollution Data Are Public Records

Specified air pollution data are public records. See Govt C §6254.7. But see *Masonite Corp. v County of Mendocino Air Quality Mgmt. Dist.* (1996) 42 CA4th 436, 49 CR2d 639 (manufacturer's emission factors used to calculate emission data are trade secrets that need not be disclosed).

© The Regents of the University of California

§2.226 2. Certain Code Violations Are Public Records

Designated housing and building code violations are public records. Govt C §6254.7(c).

© The Regents of the University of California

§2.227 3. Ballot Measure Information Generally Not a Public Record

Initiative, referendum, and recall petitions, and all memoranda prepared by the election officials when examining such petitions indicating which registered voters signed particular petitions are not considered public records and cannot be inspected except by the public officer or public employees who have the duty of receiving, examining, or preserving such petitions, or who are responsible for the preparation of such memoranda. Govt C §6253.5. However, if such a petition is found to be insufficient, then the petition is subject to inspection by the proponents of the petition and their designated representatives, to determine which signatures were disqualified and the reasons for such disqualification. With court approval, city attorneys and the Fair Political Practices Commission are permitted to examine these materials. Govt C §6253.5.

© The Regents of the University of California

§2.228 4. Recordings of Public Meetings Are Public Records

Any tape or film record of a meeting made by or at the direction of a local agency is a public record that must be retained and made available to the public for at least 30 days. The agency must provide to the public, without charge, equipment to review the record. Govt C §54953.5(b).

© The Regents of the University of California

§2.229 5. E-Mail, Photographs, Photocopies, and Faxes May Be Public Records

The manner or medium in which a record is stored is irrelevant for purposes of defining a public record under the California Public Records Act. If the information in an e-mail would be retained and used if it were in a non-electronic format, the e-mail should be similarly treated. E-mail, photographs, photocopies, and facsimile transmissions are public records if (Govt C §6252(e), (g)):

- They contain information relating to the conduct of the public's business; and
- They are prepared, owned, used, or retained by the agency.

PRACTICE TIP: Cities should draft policies that govern the use and retention of e-mail and clarify whether it is the agency's policy to retain or discard e-mail. Special duties to preserve electronically stored information arise out of the Federal Rules of Civil Procedure and state e-discovery laws. See Fed R Civ P 26(f)(3), 34(a)-(b); CCP 2031.280; Cal Rules of Ct 3.724(8).

© The Regents of the University of California

§2.230 E. Public's Right to Inspect

Every person has a right to inspect any such record, except as otherwise provided in the California Public Records Act (Public Records Act). Govt C §6253(a). The subject of the particular records sought does not, because he or she is personally affected, have any greater right than any other person to examine the records. See *Los Angeles Police Dep't v Superior Court* (1977) 65 CA3d 661, 135 CR 575. Likewise, a subject person has no right under the Public Records Act to prevent disclosure of the record to any other person. *Los Angeles Police Dep't v Superior Court, supra.*

News organizations do not have any greater right than other individual citizens to inspect or receive copies of public records. *Board of Trustees of Cal. State Univ. v Superior Court* (2005) 132 CA4th 889, 896, 34 CR3d 82. A public agency is authorized to seek disclosure of public records in the possession of another public agency. *Los Angeles Unified Sch. Dist. v Superior Court* (2007) 151 CA4th 759, 60 CR3d 445 (city attorney for one agency is a person under the Public Records Act authorized to request public documents). A city may not allow another party to control the disclosure of information that is otherwise subject to inspection under the Public Records Act. Govt C §6253.3.

The right to inspect is not necessarily the same as the right of a litigant to obtain documents through discovery. See *State ex rel Division of Indus. Safety v Superior Court of Los Angeles County* (1974) 43 CA3d 778, 117 CR 726. Exemptions in the Public Records Act do not determine whether records are privileged in pending litigation so as to defeat a party's right to discovery. See *Marylander v Superior Court* (2000) 81 CA4th 1119, 97 CR2d 439. A court hearing a Public Records Act request is not bound by prior discovery rulings unless all of the collateral estoppel factors are present. See *County of Los Angeles v Superior Court (Axelrad)* (2000) 82 CA4th 819, 98 CR2d 564.

PRACTICE TIP: Simply because a matter is in litigation does not mean that otherwise disclosable documents may only be obtained through discovery. A litigant may avail itself of the right to access under the Public Records Act to the same extent as any other person. Often it is easier to provide documents this way than through discovery. Also, a document that is disclosable before litigation is filed does not become exempt from disclosure by virtue of litigation. See 71 Ops Cal Atty Gen 235 (1988). But see *County of Los Angeles v Superior Court* (1993) 18 CA4th 588, 22 CR2d 409 (court construed Govt C §6254(f) as only requiring disclosure of contemporaneous information in arrest records, noting section should not be interpreted to circumvent court rulings denying discovery sought under Evid C §§1043 and 1045 (*Pitchess* motions)). Conversely, access to a document under the Public Records Act does not mean that the document will be admissible in litigation.

© The Regents of the University of California

F. Requests for Copies or Data Under the California Public Records Act

§2.231 1. Right to Exact Copy of an Identifiable Record

Unless an exemption applies, a state or local agency must comply with requests for copies of public records that reasonably describe an identifiable record by promptly making the record available for inspection and by providing a copy. Govt C §6253(b). The state or local agency may charge a fee for copies which covers only the direct costs of duplication. *North County Parents Org. for Children with Special Needs v Deptartment of Educ.* (1994) 23 CA4th 144, 28 CR2d 359. An exact copy of the record must be provided unless it is impracticable to do so. Govt C §6253(b). See also *Rosenthal v Hansen* (1973) 34 CA3d 754, 110 CR 257 (word "impracticable" in former Govt C §6256 modifies the words "exact copy" and does not apply to question of furnishing copies). An agency is not required to respond to requests that are unduly burdensome. *State Bd. of Equalization v. Superior Court* (1992) 10 CA4th 1177, 13 CR2d 342.

PRACTICE TIP: One possible response to a records request that could consume substantial time and resources to locate and review records is to help the requestor make a more focused request. Govt C §6253.1.

© The Regents of the University of California

§2.232 2. Public's Right to Assistance From Agency

Agencies must provide reasonable assistance to persons in locating public records. Govt C §6253.1(a)(2). See also *State Bd. of Equalization v Superior Court* (1992) 10 CA4th 1177, 1192, 13 CR2d 342. First, agencies must assist in identifying records responsive to the request or its purpose. Govt C §6253.1(a)(1). Second, agencies must describe the information technology and the physical location in which the records exist. Govt C §6253.1(a)(2). Third, agencies must provide suggestions for overcoming any practical basis for denial of records access. Govt C §6253.1(a)(3). The obligation to assist a requestor does not apply if the city makes the requested records available under Govt C §6253, makes available an index of its records, or determines the records are exempt under Govt C §6254. Govt C §6253.1(d). A city is also relieved of its obligation to assist the requestor if the requestor fails to provide additional clarifying information in response to the city's reasonable efforts to identify the requested information. Govt C §6253.1(b). Cities are not required to create new records in response to a request. *Rosenthal v Hansen* (1973) 34 CA3d 754, 110 CR 257.

PRACTICE TIP 1: The identity of the person making the request, and the reason for the request, cannot be used as a basis to withhold a record. See *Connell v Superior Court (InterSource, Inc.)* (1997) 56 CA4th 601, 65 CR2d 738. This prohibition may create a tension between the city's obligation to assist a requestor and a possible perception that the city is impermissibly requiring the requestor's identity as a condition to the record's release. Caution is urged when assisting requestors to avoid misunderstandings.

PRACTICE TIP 2: Although it is not obligated to do so, a city can fulfill its production obligations by producing an index of its records. See *Haynie v Superior Court* (2001) 26 C4th 1061, 1074, 112 CR2d 80.

© The Regents of the University of California

§2.233 3. Request Must Be Focused and Specific

The request for public records must be focused and specific. See *Rogers v Superior Court* (1993) 19 CA4th 469, 481, 23 CR2d 412. See also *State Bd. of Equalization v Superior Court* (1992) 10 CA4th 1177, 1192, 13 CR2d 342. However, requestors do not need to precisely identify the record sought. See *California First Amendment Coalition v Superior Court* (1998) 67 CA4th 159, 165, 78 CR2d 847. Also, requests do not need to be in writing. See *Los Angeles Times v Alameda Corridor Transp. Auth.* (2001) 88 CA4th 1381, 107 CR2d 29.

© The Regents of the University of California

§2.234 4. Fees: Direct Cost of Duplication

An agency must promptly make copies of requested records available on payment of fees reimbursing the agency for the direct costs of duplication, or a statutory fee, if applicable. Govt C §6253(b). See also *North County Parents Org. for Children With Special Needs v Department of Educ.* (1994) 23 CA4th 144, 28 CR2d 359. The cost of copying may not include personnel time retrieving, inspecting, or handling the file from which the copy is extracted; it only covers "the cost of running the copy machine, and conceivably also the expense of the person operating it." 23 CA4th at 148.

Some statutes specify a precise reproduction cost. For example, charges for reproducing disclosure statements required by the Political Reform Act cannot exceed 10 cents per page, except that an agency may charge an additional $5 fee for retrieving records that are 5 or more years old. Govt C §81008. Note that under certain circumstances, an agency can recover all costs associated with retrieving electronic data. See §2.238.

© The Regents of the University of California

§2.235 5. Time Limits: 10-Day Rule; 14-Day Extension

Within 10 days after receiving a request for copies of records, an agency must determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency. Govt C §6253(c). The agency must determine whether the records are disclosable. If records are partially or wholly nondisclosable, the agency must notify the person making the request of the determination, the decision-maker's identity, and the reasons for the determination. Govt C §6253(c). An agency must also inform the persons seeking records when any wholly or partially disclosable records will be made available. Govt C §6253(c). The 10-day time limit may be extended if "unusual circumstances," as described in Govt C §6253(c), are found to exist. The agency executive or designee must give written notice to the person making the request, providing the reasons for the extension and the date on which a determination is expected to be made. The extension must not be more than 14 days. Govt C §6253(c).

PRACTICE TIP: Watch for shorter time periods for production established by statute. For example, the Statement of Economic Interests (FPPC Form 700) and various campaign statements and filings required by the Political Reform Act of 1974 (Govt C §§81000-91014) are required to be made available to the public as soon as practicable, and in no event later than the second business day following their receipt. Govt C §81008.

© The Regents of the University of California

§2.236 6. Notification of Denial: Names and Titles Required

Any notification of denial of any request for records must, in addition to the reasons for the denial, state the names and titles or positions of each person responsible for the denial. Govt C §§6253(d), 6255(b). An agency may not delay or obstruct the inspection or copying of public records. Govt C §6253(d).

PRACTICE TIP: Under some circumstances, persons seeking records may opt to use photocopying services rather than pay an agency's duplication fee. Original documents should not leave the agency's offices, and photocopying under such circumstances should be supervised to ensure that documents remain undamaged and under the agency's control.

© The Regents of the University of California

§2.237 G. Segregated Records Must Be Made Available

Any reasonably segregable portion of a record must be available for inspection by any person requesting the record after deletion (redaction) of the portions that are exempted by law. Govt C §6253(a). The Political Reform Act of 1974 (Govt C §§81000-91014) does not require the agency to create a "privilege log" or list that identifies specific records being withheld. *Haynie v Superior Court* (2001) 26 C4th 1061, 112 CR2d 80.

© The Regents of the University of California

§2.238 H. Electronic Format Information

Information that constitutes an identifiable public record not otherwise exempt from disclosure that is in an electronic format must be made available in an electronic format when requested. Govt C §6253.9(a). Under specific circumstances, the requestor bears the cost of programming and computer services necessary to produce a record not otherwise readily produced. Govt C §6253.9(b). The information does not need to be released in the electronic form in which it is held if its release would jeopardize or compromise the security or integrity of the original record or any proprietary software in which it is maintained. Govt C §6253.9. See also 88 Ops Cal Atty Gen 153 (2005). When requested, a city must also provide the record in an alternative electronic format used by the city. Govt C §6253.9(e).

© The Regents of the University of California

§2.239 I. Faster or Greater Access Requirements Possible

Except as provided by law, an agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards created by the California Public Records Act. Govt C §6253(e).

© The Regents of the University of California

J. Nondisclosure

§2.240 1. General Exemption Under California Public Records Act

An agency must justify withholding any record by demonstrating the record is expressly exempt under the California Public Records Act (Govt C §§6250-6276.48) or that on the facts of the particular case the public interest in nondisclosure clearly outweighs the public interest served by disclosure. Govt C §6255. The public interest in disclosure will be balanced against the agency's justification for maintaining the confidentiality of the record. See *California State Univ., Fresno Ass'n, Inc. v Superior Court* (2001) 90 CA4th 810, 108 CR2d 870 (names and address and license agreements of persons who purchased luxury suites at the California State University's arena are disclosable public records because public interest in disclosure clearly outweighs privacy concerns of persons who purchased suites). To justify nondisclosure, the agency must "demonstrate a clear overbalance on the side of confidentiality." *Michaelis, Montanari & Johnson v Superior Court* (2006) 38 C4th 1065, 1071, 44 CR3d 663 (agency may withhold records relating to bids for public contract while agency negotiates with winning bidder, but later must disclose records to allow reasonable time for public input before making a final award).

The burden of proof is on the public agency. See *CBS Broadcasting Inc. v Superior Court* (2001) 91 CA4th 892, 110 CR2d 889 (identity of individuals granted criminal conviction exemptions at licensed daycare facilities considered a matter of public record when the Department of Social Services failed to show that public's interest in nondisclosure clearly outweighed public interest in disclosure). See also *New York Times Co. v Superior Court* (1990) 218 CA3d 1579, 268 CR 21; *Braun v City of Taft* (1984) 154 CA3d 332, 201 CR 654. The motive or interest of the records requester is "generally" irrelevant under the Govt C §6255 balancing test. See *Connell v Superior Court (InterSource, Inc.)* (1997) 56 CA4th 601, 65 CR2d 738 (a commercial entity using information for strictly commercial purposes is sufficient public interest).

© The Regents of the University of California

§2.241 2. Deliberative Process Privilege Under California Public Records Act

The deliberative process privilege is largely a product of cases interpreting the federal Freedom of Information Act (FOIA) and has been included in the "catchall" exemption in Govt C §6255. See *Times Mirror Co. v Superior Court* (1991) 53 C3d 1325, 283 CR 893. The deliberative process privilege originated as a common law privilege that attached to confidential intra-agency advisory opinions, a privilege that was later codified in the FOIA. The deliberative process privilege is applicable to requests for records made under the California Public Records Act (Govt C §§6250-6277). *Times Mirror Co. v Superior Court, supra*. The deliberative process privilege protects materials reflecting deliberative or decision-making processes.

The key question of whether an official may invoke the deliberative process privilege depends on whether disclosure of the requested materials would expose the agency's decision-making process in such a way as to discourage candid discussion within an agency and thus undermine the agency's ability to perform its functions. This privilege is designed to protect materials reflecting deliberative or policymaking processes and not purely factual, investigative matters. See *Sutter's Place Inc. v Superior Court (City of San Jose)* (2008) 161 CA4th 1370, 75 CR3d 9. See also *Wilson v Superior Court* (1996) 51 CA4th 1136, 59 CR2d 537; *Rogers v Superior Court* (1993) 19 CA4th 469, 23 CR2d 412. This privilege gives chief executives the freedom to think out loud, which enables the testing of ideas and debating of policy and personalities uninhibited by the danger of tentative but rejected thoughts becoming subjects of public discussion. See *Wilson v Superior Court* (1996) 51 CA4th 1136, 59 CR2d 537. See also *California First Amendment Coalition v Superior Court* (1998) 67 CA4th 159, 78 CR2d 847. It is grounded in the unromantic reality of politics and rests on the understanding that if the public and the decision-making executive were entitled to precisely the same information, neither would likely receive it. See *Wilson v Superior Court* (1996) 51 CA4th 1136, 59 CR2d 537.

The privilege is not absolute. It applies only if the public interest in nondisclosure clearly outweighs the public interest in disclosure. See *Marylander v Superior Court* (2000) 81 CA4th 1119, 97 CR2d 439.

© The Regents of the University of California

§2.242 3. Specific Record Exemptions

Certain records are expressly declared exempt from the disclosure requirements of the California Public Records Act. Govt C §§6253.5-6253.6, 6254-6254.1, 6254.3-6254.4, 6254.6-6254.7, 6254.9-6254.11. The most commonly raised exemptions are discussed in §§2.243-2.257.

© The Regents of the University of California

§2.243 a. Election Documents Exempted

Referendum, initiative, and recall petitions may not be reviewed by anyone other than the city clerk and the proponents (not even the city attorney) in the absence of a court order. Govt C §6254.4. Government Code §6254.4 prohibits the disclosure of voter registration information such as address, telephone number, e-mail address, precinct number, and voter identification number except to certain specified individuals identified in Elec C §2194. Nomination papers must be made available for inspection, but they cannot be copied by the public. Elec C §17100.

© The Regents of the University of California

§2.244 b. Preliminary Drafts, Notes, and Inter-Agency or Intra-Agency Memoranda May Be Exempted

If preliminary drafts, notes, and inter-agency or intra-agency memoranda are not retained by the agency in the ordinary course of business and if the public interest in nondisclosure outweighs the interest in disclosure, these documents are exempt from disclosure. Govt C §6254(a). This is not an absolute, unqualified exemption.

© The Regents of the University of California

§2.245 c. Litigation Records Exempted

Records pertaining to pending litigation, until the litigation is finally adjudicated or settled, are exempt from disclosure. Govt C §6254(b). The exemption was primarily designed to prevent a litigant opposing the government from using the California Public Records Act (Public Records Act) (Govt C §§6250-6277) to accomplish earlier or greater access to pending litigation or tort claims than would otherwise be allowed by the rules of discovery. See *Board of Trustees of Cal. State Univ. v Superior Court* (2005) 132 CA4th 889, 897, 34 CR3d 82. See also *Poway Unified Sch. Dist. v Superior Court (Copely Press)* (1998) 62 CA4th 1496, 1504, 73 CR2d 777.

This exemption applies only if the document was specifically prepared for use in litigation; it does not permit the retroactive classification of documents that are normally disclosable under the Public Records Act simply because litigation has been initiated. See 71 Ops Cal Atty Gen 235 (1988). See also *City of Hemet v Superior Court* (1995) 37 CA4th 1411, 1417, 44 CR2d 532. A government claim is not exempt from disclosure under Govt C §6254(b). See *Poway Unified Sch. Dist. v Superior Court (Copley Press), supra*. See also *Board of Trustees of Cal. State Univ. v Superior Court, supra* (depositions also not exempt from disclosure).

Once litigation is concluded, the documents are subject to disclosure. See *City of Los Angeles v Superior Court* (1996) 41 CA4th 1083, 49 CR2d 35 (deposition transcripts may be privileged during pendency of litigation, but are subject to release under the Public Records Act after litigation is concluded). See also *Board of Trustees of Cal. State Univ. v Superior Court, supra* (deponent has no expectation of privacy because deposition transcript is publicly available under CCP §2025.570).

© The Regents of the University of California

§2.246 d. Personnel, Medical, or Similar Records May Be Exempted

Personnel, medical, or similar personal records are exempt from disclosure only if disclosure would constitute an unwarranted invasion of privacy. Govt C §6254(c); *BRV, Inc. v Superior Court* (2006) 143 CA4th 742, 49 CR3d 519 (despite confidentiality agreement between agency and employee, public's interest in disclosure requires agency to disclose redacted report detailing investigation into school superintendent's alleged misconduct). This exception covers personal information about employees (evaluations, Social Security numbers, home addresses, medical history, and so on), but does not exempt employees' salary ranges or performance bonuses. See *Braun v City of Taft* (1984) 154 CA3d 332, 201 CR 654; 68 Ops Cal Atty Gen 73 (1985). The California Public Records Act (Public Records Act) does not require the release of Social Security numbers, which must be redacted from a record before it is disclosed. Govt C §6254.9.

The California Supreme Court has determined that the names and salaries of public employees, including peace officers who earn $100,000 or more per year, are subject to public disclosure under the Public Records Act. See *International Fed'n of Prof. & Tech. Eng'rs v Superior Court* (2007) 42 C4th 319, 64 CR3d 693. Notably, public officials have a significantly reduced expectation of privacy in matters related to their public employment than other public employees. *BRV, Inc. v Superior Court* (2006) 143 CA4th 742, 758, 49 CR3d 519 (investigation report about a school superintendent's alleged misconduct is subject to disclosure under Public Records Act). Further, the Peace Officers Standards and Training records of officers' names, employing agencies, and dates of employment are subject to disclosure under the Public Records Act and are not confidential under Pen C §832.7. *Commission on Peace Officer Standards & Training v Superior Court* (2007) 42 C4th 278, 64 CR3d 661. Likewise, employment contracts with public officials or employees are not exempt from production. Govt C §6254.8.

© The Regents of the University of California

§2.247 e. Peace Officer Personnel and Citizen Complaints Exempted

Peace officer personnel records and records of citizens complaints against law enforcement personnel are made confidential by Pen C §832.7 and are not subject to disclosure except by discovery under Evid C §§1043 and 1046. Confidentiality provided by these more specific provisions is incorporated into the California Public Records Act (Public Records Act) through Govt C §6254(k), which provides that disclosure is not required for public records that are exempt from disclosure under federal or state law. See *City of Hemet v Superior Court* (1995) 37 CA4th 1411, 44 CR2d 532. However, police officers do not have a private right of action for damages for an agency's unauthorized release of their confidential personnel files in violation of these statutory procedures. See *Rosales v City of Los Angeles* (2000) 82 CA4th 419, 98 CR2d 144. Also, a peace officer's salary is not exempt from disclosure. *International Fed'n of Prof. & Tech. Eng'rs v Superior Court* (2007) 42 C4th 319, 64 CR3d 693, disapproving of *City of Los Angeles v Superior Court (Williamson)* (2003) 111 CA4th 883, 3 CR3d 915. Absent unique circumstances, such as when a peace officer's anonymity is essential to his or her safety, the names and salaries of peace officers are subject to disclosure under the Public Records Act. *Commission on Peace Officer Standards & Training v Superior Court* (2007) 42 C4th 278, 64 CR3d 661.

© The Regents of the University of California

§2.248 f. Personal Financial Data Required of Licensees Exempted

Personal financial data required by a licensing agency from its licensees is exempt from disclosure. Govt C §6254(n). This exemption does not include financial data supplied by a city's franchisee to justify a rate increase. See *San Gabriel Tribune v Superior Court* (1983) 143 CA3d 762, 192 CR 415.

© The Regents of the University of California

§2.249 g. Arrest Records Exempted

Government Code §6254(f)(3) prevents commercial exploitation of arrest records and limit access to addresses of arrestees and most crime victims by making it a crime to use them for commercial purposes. These addresses are private unless they are requested by a private investigator or for scholarly, journalistic, political, or governmental purposes. When the person making the request submits a sworn declaration that the request is made for a journalistic purpose, the agency may not require that the requester present additional evidence that he or she is a journalist. 89 Ops Cal Atty Gen 97 (2006). Government Code §6254(f)(3) is not subject to a facial challenge as an abridgment of the right to engage in speech, but is simply a law regulating access to information in the government's hands. See *Los Angeles Police Dep't v United Reporting Publ'g Corp.* (1999) 528 US 32, 145 L Ed 2d 451, 120 S Ct 483.

© The Regents of the University of California

§2.250 h. Other Personal Information Subject to Balancing Test

Questions often arise on whether a city must disclose personal information obtained from citizens in the course of regulatory activities. Govt C §6255. Examples include addresses and telephone numbers of permit parkers and tenants in rent-controlled units. The public agency bears the burden of proving the release of this information constitutes an unwarranted invasion of privacy and disclosure serves no valid purpose. *New York Times Co. v Superior Court* (1990) 218 CA3d 1579, 268 CR 21. An agency must be mindful of the right of individuals to privacy, particularly when personal information is recorded in government files. See *CBS, Inc. v Block* (1986) 42 C3d 646, 230 CR 362 (right to privacy in public record is no less important than right to disclosure). See also *Rackauckas v Superior Court* (2002) 104 CA4th 169, 176, 128 CR2d 234 (court must consider individual's privacy in uncharged police report because release of information could be "ruinous to personal reputations, careers, or relationships if released to the general public in unvarnished form"). The home address and telephone number of an elected or appointed official cannot be posted on the Internet without the written permission of that individual. Govt C §6254.21.

PRACTICE TIP: Counsel should add a caveat to permit forms and other similar documents stating that the city cannot guarantee information on the form will be exempt from disclosure under the California Public Records Act (Govt C §§6250-6276.48).

© The Regents of the University of California

§2.251 i. Criminal Investigation Records Exempted

Investigation records of state and local police and other law enforcement agencies are exempt from disclosure under Govt C §6254(f). The courts have distinguished between the exemption that applies to "investigatory records" and the exemption for "investigatory files." See *Haynie v Superior Court* (2001) 26 C4th 1061, 1069, 112 CR2d 80. The exemption for "investigatory records" applies to records of investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred. 26 C4th 1061, 1071. If a violation is detected, the exemption also extends to records of investigations conducted for the purpose of uncovering information surrounding the commission of the violation and its agency. 26 C4th at 1071. The exemption for "investigatory files" applies to records contained in investigation files once the prospect of enforcement proceedings becomes concrete and definite. 26 C4th at 1069. The "investigatory file" exemption protects information because of its inclusion in an investigatory file, whether or not the information is exempt based on its content. 26 C4th at 1069.

The exemption from disclosure for these records under Govt C §6254(f) extends indefinitely, even after the investigation is closed. See *Williams v Superior Court* (1993) 5 C4th 337, 19 CR2d 882. Post-investigative closing reports containing investigators' opinions, thoughts, and conclusions on potential criminal misconduct are also exempt from disclosure. See *Rackauckas v Superior Court* (2002) 104 CA4th 169, 128 CR2d 234. However, certain information, such as the names of witnesses and descriptions of property must be disclosed unless such disclosure would endanger the witness or investigation.

© The Regents of the University of California

§2.252 j. Utility Customer Records May Be Exempted

The disclosure of the name, credit history, utility usage data, home address, or telephone number of utility customers of local agencies generally is not required under Govt C §6254.16. Nevertheless, the information may be disclosed if (Govt C §6254.16):

- Information is requested by an agent of the customer, another governmental agency, or a law enforcement agency;
- A customer misuse of services determination has been made;
- The customer is an elected or appointed official with authority to determine utility usage policies; or
- The public interest in disclosure of the information clearly outweighs the public interest in nondisclosure.

© The Regents of the University of California

§2.253 k. Concealed Weapons Permits Generally Not Exempted

Applications for concealed weapons permits and the permits themselves are public records and must be provided to a requestor. *CBS, Inc. v Block* (1986) 42 C3d 646, 230 CR 362. However, certain portions of these records are exempt from disclosure, including home addresses and telephone numbers of peace officers, judges, and others as described in Govt C §6254(u). In addition, certain other information may be redacted from the records.

© The Regents of the University of California

§2.254 I. Additional Statutory Exemptions and Privileges

Additional exemptions, including privileged communications under the Evidence Code, are found in other statutes. These exemptions are referred to in Govt C §6254(k). These statutory exemptions and privileges are found in Govt C §§6275-6276.48. The statutes listed are not to be considered all-inclusive and the listing does not create the exemption. Requestors and public agencies must review the specific statutes to determine the extent to which the statute, in light of the circumstances surrounding the requests, exempts public records from disclosure. Govt C §6275.

PRACTICE TIP: Various attorney-client and attorney work product privileges also find their genesis in statute and may be asserted as a basis of exemption. Evid C §§952, 954 (attorney-client communications); Evid C §§952, 954 and CCP §2018.030 (attorney work product protection); Evid C §1552 (privileged communications).

© The Regents of the University of California

§2.255 m. Trade Secrets May Be Exempted

Provisions exempting the disclosure of specific trade secrets are found in the list of statutory exemptions at Govt C §6276.44. The only specific provisions in the California Public Records Act itself are found in Govt C §§6254.2 (pesticide safety and efficacy data) and 6254.7(d)-(e) (which define a trade secret and contain two exceptions relating to air pollution emission data and standardized testing). However, trade secrets as defined in the Uniform Trade Secrets Act (CC §§3426-3426.11) may be privileged, as recognized in CC §3426.7(c). The trade secrets privilege contained in Evid C §§1060-1063 may also exempt trade secrets submitted to a public agency from disclosure under Govt C §6254(k).

© The Regents of the University of California

§2.256 n. Architectural and Engineering Plans Generally Exempted

Architectural plans are copyrighted under CC §980, and the compulsory filing of them as required by an ordinance does not give others the right to use them. See *Smith v Paul* (1959) 174 CA2d 744, 345 P2d 546. Health & Safety Code §§19850-19853 require a city building department to maintain the building plans for every building in the city, with certain exceptions, and states that they are open for inspection as a public record. However, copying of the plans is prohibited unless written permission is requested from the professional who prepared them and also obtained from the current owner of the building. Further, the person requesting the plans must file an affidavit containing certain specified statements. Health & S C §19851(c).

© The Regents of the University of California

§2.257 o. Citizens' Names, Addresses, and Phone Numbers Generally Exempted

The California State Legislature has, over time, amended the California Public Records Act (Public Records Act) (Govt C §§6250-6277) to protect the names, addresses, and phone numbers of citizens. For example, the addition of Govt C §6254.4 prohibits the disclosure of home addresses, telephone numbers, and e-mail addresses submitted for voter registration purposes. Similarly, the Public Records Act now exempts from disclosure the home address and telephone number of various public officials, including peace officers and judges, who apply for concealed weapon permits (Govt C §6254(u)(2)-(3)); and utility customers of local agencies (Govt C §6254.16). It also restricts posting such information of various public officials on the Internet (Govt C §6254.21). The courts have also moved to permit the exemption of personal information such as names and addresses of persons who make noise complaints. *City of San Jose v Superior Court* (1999) 74 CA4th 1008, 88 CR2d 552 (disclosure of information would have had chilling effect on future complaints). However, absent unique circumstances, such as when a peace officer's anonymity is essential to his or her safety, the names of peace officers are subject to disclosure under the Public Records Act. *Commission on Peace Officer Standards & Training v Superior Court* (2007) 42 C4th 278, 64 CR3d 661.

Although no appellate cases have determined whether the names, addresses, telephone numbers, and e-mail addresses of applicants for permits are exempt from disclosure, the balancing test in Govt C §6255 suggests nondisclosure of such personal information, especially when persons are required to obtain such permits from the agency. A distinction could be made for persons voluntarily submitting applications to an agency, such as applicants for appointed positions, because the person need not apply if he or she does not wish such information to be released.

© The Regents of the University of California

§2.258 K. Remedies for Improper Withholding of Records

Any person may institute proceedings for injunctive or declaratory relief in any court to enforce his or her right to inspect or receive a copy of any public record or class of public records under the California Public Records Act. Govt C §6258. Government Code §§6258-6259 provide the exclusive procedure for litigating a public agency's obligation to comply with a public record request. See *Filarsky v Superior Court* (2002) 28 C4th 419, 121 CR2d 844. A public agency may not circumvent Govt C §§6258-6259 by denying an individual's public record request and then initiating declaratory relief proceedings against that individual for the sole purpose of determining the agency's obligation to disclose records under the Public Records Act.

© The Regents of the University of California

§2.259 1. Timing for Pleadings

The times for responsive pleadings and for hearings in such proceedings must be set by the judge of the court with the object of securing a decision as to such matters at the earliest possible time. Govt C §6258.

© The Regents of the University of California

§2.260 2. Disclosure Ordered

Whenever it is made to appear by verified petition to the superior court of the county when the records or some part of the records are situated that certain public records within the coverage of the California Public Records Act (Public Records Act) are being improperly withheld from a member of the public, the court must order the officer or person charged with withholding the records to disclose them or show cause why nondisclosure is appropriate. Govt C §6259(a). A court generally will not order disclosure of an otherwise exempt document as a remedy for the agency's failure to comply with the timing requirements specified in the Public Records Act, which are discussed in §2.235. See *Michaelis, Montanari & Johnson v Superior Court* (2006) 38 C4th 1065, 1072, 44 CR3d 663.

© The Regents of the University of California

§2.261 3. In Chambers Review and Order

The court may examine the records in camera if permitted under Evid C §915(b), which allows such review. Govt C §6259; Evid C §915(a)-(b).

If the court finds that the public official's decision to refuse disclosure is not justified under the California Public Records Act (Govt C §§6250-6276.48), the court must order the official to make the records public. If the court determines that the public official was justified in refusing to make the records public, the court must return the records to the official without disclosing their content with an order supporting the decision refusing disclosure. Govt C §6259(b).

© The Regents of the University of California

§2.262 a. Review of Order by Writ

Government Code §6259(c) makes a petition for extraordinary writ the exclusive mode of appellate review for California Public Records Act actions, and this statute does not violate state constitutional provisions granting courts of appeal the power to review final judgments in all proceedings. See *Powers v City of Richmond* (1995) 10 C4th 85, 40 CR2d 839 (finding constitution does not specify the form of appellate review). An award of sanctions in a public records case is appealable under CCP §904.1. See *Butt v City of Richmond* (1996) 44 CA4th 925, 52 CR2d 232.

© The Regents of the University of California

§2.263 b. Attorney Fees May Be Recovered

A prevailing plaintiff in litigation filed under the California Public Records Act (Public Records Act) is entitled to recover costs and reasonable attorney fees from the state or local agency. Govt C §6259(d). The party who prevails under the Public Records Act in an action that is the functional equivalent of a proceeding to compel production under the Public Records Act is a prevailing "plaintiff" and thus entitled to recover costs and attorney fees, even if that party is not denominated as a plaintiff in the action. See *Fontana Police Dep't. v Villegas-Banuelos* (1999) 74 CA4th 1249, 88 CR2d 641. A prevailing party who has been denied attorney fees under the Public Records Act may appeal that denial and is not required to file an extraordinary writ. See *Los Angeles Times v Alameda Corridor Transp. Auth.* (2001) 88 CA4th 1381, 107 CR2d 29.

The costs and fees do not become a personal obligation of the interested public official. If an agency makes a timely effort to respond to a party's vague document request, a plaintiff will not be awarded attorney fees as the prevailing party in litigation resulting in the issuance of a writ. See *Motorola Communication & Electronics, Inc. v State Dep't. of Gen. Servs.* (1997) 55 CA4th 1340, 64 CR2d 477. However, if the court finds that plaintiff's case is clearly frivolous, the state or local agency is entitled to costs and reasonable attorney fees. Govt C §6259(d). See also *Belth v Garamendi* (1991) 232 CA3d 896, 283 CR 829.

PRACTICE TIP: Entering into a settlement agreement under which an agency agrees to comply with the Public Records Act may lead to a finding that the requestor was the prevailing party and subject the agency to attorney fees. See *Galbiso v Orosi Pub. Util. Dist.* (2008) 167 CA4th 1063, 84 CR3d 788.

© The Regents of the University of California

§2.264 L. Records Retention

Retention of public records is governed by the provisions of Govt C §§34090-34090.8. Destruction of records is prohibited unless in compliance with these sections. Generally, records must be retained for a minimum of 2 years. Govt C §34090. Some records must be retained indefinitely (Govt C §34090):

- Records affecting title to real property;
- Records required to be kept by the state;
- Court records and the minutes; and,
- Ordinances and resolutions of any city legislative body.

© The Regents of the University of California

§2.265 1. Record Defined

For the purposes of record retention, there is no statutory definition of a "record" as is the case in the California Public Records Act. Govt C §6252(e). However, the attorney general defines a record as any writing or recording of an event or information that is kept in the custody of a public officer, either because a law requires it to be kept or because it is necessary or convenient to the discharge of the public officer's duties, and was made or retained for the purpose of preserving its information content for future reference. See 64 Ops Cal Atty Gen 317, 326 (1981).

© The Regents of the University of California

§2.266 2. Specific State Law Requirements on Record Retention

Various state laws require retention longer than 2 years. See*, e.g.,* Pen C §832.5(b) (requiring retention of citizen complaints against police personnel for 5 years). See also Lab C §§1174, 1197.5. Other record retention requirements are found in various sections of the Unemployment Insurance Code and the California Occupational Safety and Health Act (Lab C §§6300-9104). See also Advising California Employers §9.117 (2d ed Cal CEB 1996) (table of selected personnel records retention requirements); Patterson, Public Employer's Compliance Review 98-99 (checklist on records retention; available for purchase from the League of California Cities, 1400 K Street, Sacramento, California 95814; telephone (916) 658-8257; website www.cacities.org).

© The Regents of the University of California

§2.267 3. Specific Federal Law Requirements on Record Retention

Various federal laws require retention of documents, mainly dealing with labor and personnel. See*, e.g.,* 29 USC §§201-219 (Fair Labor Standards Act); 26 USC §§3301-3310 (Federal Unemployment Tax Act); 29 USC §§1001-1461, generally (Employee Retirement Income Security Act of 1974 (ERISA)); 42 USC §§2000a-2000h-6 (Civil Rights Act of 1964); 29 USC §§621-634 (Age Discrimination in Employment Act); 29 USC §206 (Fair Labor Standards Act of 1938). In some instances, these statutes require retention of records for as long as 4 years.

© The Regents of the University of California

§2.268 4. Records Destruction

Records that have been retained for the requisite period may be destroyed after following the procedure described in Govt C §34090. Destruction must be approved by the city attorney and the city council. Government Code §34090.6 governs destruction of telephone and radio communication recordings (100 days, with approval), and Govt C §34090.7 allows for local agencies to develop procedures for destruction of duplicate records.

© The Regents of the University of California

§2.269 5. Preservation in Alternative Media

The California Government Code addresses the procedures for reproducing records on film, optical disk or any other trusted medium and then destroying public records. Govt C §34090.5. The procedures of that section should be followed strictly. The procedures are described in an Attorney General's opinion. See 57 Ops Cal Atty Gen 307 (1974). The procedures include (57 Ops Cal Atty Gen 307 (1974)):

- Two copies must be made, one to be kept in a safe place;
- Originals may be destroyed after reproduction; and
- A suitable reading device must be provided to the public for access and disclosure.

See also Evid C §1551 (admissibility of microfilmed records).

PRACTICE TIP 1: Two years should be considered an absolute floor for retention guidelines, and certain documents should be kept longer. Consider the statute of limitations for legal actions that may involve the documents, especially claims involving minors, employees and contracts. Many employee records should be kept indefinitely. Many records should be kept a minimum of 4 years and perhaps up to 10 years, for statute of limitations purposes Using electronic or photographic storage media is one way to cope with space limitations.

PRACTICE TIP 2: Every city should have a record retention schedule approved by the city council that sets forth every type of document retained by the city and the prescribed period of retention. Many cities have adopted detailed record retention manuals, which, in addition to prescribing a time schedule, address the process for reviewing and approving requests for records destruction. Cities that have not adopted such a manual may wish to ask their city clerks to see which ones may serve as models.

© The Regents of the University of California

3

Elections

I. INTRODUCTION §3.1

II. ELECTION PROCEDURES
- A. The Elections Official §3.2
- B. Types of Elections
  - 1. Regular Elections
    - a. Definition §3.3
    - b. Regular Election Dates §3.4
  - 2. Special Elections §3.5
  - 3. Municipal Elections
    - a. Legal Framework §3.6
    - b. General Municipal Election Dates §3.7
    - c. Consolidation of Elections §3.8
    - d. Publishing/Posting Notice of Municipal Election
      - (1) Newspaper Notice §3.9
      - (2) Notice Content §3.10
      - (3) Posting When There Is No Newspaper §3.11
    - e. Publishing List of Nominees §3.12
    - f. Publishing List of Polling Places and Precinct Board Members §3.13
    - g. Publishing Synopsis of Measures §3.14
  - 4. Nomination of Candidates
    - a. Nomination Papers §3.15
    - b. Needed Signatures §3.16
    - c. Filing Fees §3.17
    - d. Circulators §3.18
  - 5. Conduct of Elections
    - a. Pre-Election Day Procedures §3.19
    - b. Election Day Procedures at the Polling Place §3.20
  - 6. Canvass of the Vote and Declaration of Results
    - a. Basic Procedure §3.21
    - b. Location of Count §3.22
    - c. Vote-by-Mail Ballots §3.23
    - d. What Is Counted §3.24
    - e. Provisional Ballots §3.25
    - f. Certification of Results §3.26
    - g. Recordation and Oath §3.27
  - 7. Recount of Votes §3.28
- C. Methods of Election
  - 1. At-Large §3.29
  - 2. District Election System §3.30
    - a. By Districts §3.31
    - b. From Districts §3.32

III. CANDIDATE QUALIFICATIONS
- A. Residency Requirement §3.33
- B. Qualifications for Particular Office
  - 1. Qualifications for Elected Mayor §3.34
  - 2. Qualifications for Council Member, Clerk, or Treasurer §3.35
- C. Term Limits §3.36

IV. BALLOTS
- A. Ballot Content §3.37
  - 1. Headings §3.38
  - 2. Candidates' Names §3.39
    - a. Name Changes §3.40
    - b. Candidates With Similar Names §3.41
    - c. Designation of Status §3.42

3. Voter Instructions §3.43
4. Order of Offices, Names, and Initiatives §3.44
B. Other Ballot Rules
1. Translations §3.45
2. Political Affiliation §3.46
3. Blank Spaces in the Ballot §3.47
4. Stubs and Numbering of Ballots §3.48
5. Terms of Office §3.49
6. Proposed Initiatives §3.50
7. Polling Stations §3.51
C. Voters' Pamphlets
1. Candidates' Statements §3.52
2. Arguments on City Measures
a. City Attorney's Impartial Analysis §3.53
b. Ballot Arguments §3.54
c. Multiple Arguments §3.55
d. Rebuttal Arguments §3.56
e. Public Examination and Challenge §3.57
D. Sample Ballots §3.58
E. Mailed Ballot Elections
1. Conduct of Municipal Mailed Ballot Election §3.59
2. Small City Mailed Ballot Election Authorization §3.60
3. Mailed Ballot Election Dates §3.61

V. VOTERS AND THE VOTING RIGHTS ACT
A. Voter Qualifications
1. California Constitutional Provisions §3.62
2. Determination of Residence and Domicile §3.63
3. Ex-Felons' Right to Vote §3.64
B. Federal Voting Rights Act
1. Original Requirements §3.65
2. Amendments
a. 1982 Amendments §3.66
b. Language Minority Amendments §3.67
3. Challenges to Elections Under the Federal Voting Rights Act
a. Challenges to At-Large Elections §3.68
b. Challenges to District Elections §3.69
(1) Intentional Discrimination—Fourteenth Amendment §3.70
(2) Unintentional Dilution—§2 of the Federal Voting Rights Act §3.71
C. National Voter Registration Act §3.72
D. Help America Vote Act §3.73
E. California Voting Rights Act
1. Scope and Effect §3.74
2. Challenges to Elections Under the California Voting Rights Act
a. What Constitutes Violation §3.75
b. Burden of Proof §3.76
c. Action for Violation §3.77
F. Restrictions on Right to Vote
a. When Subject to Strict Scrutiny §3.78
b. When Subject to Rational Basis Test §3.79

VI. INITIATIVES AND REFERENDA §3.80
A. Statutory Provisions Applicable To Cities
1. Initiatives §3.81
a. Petition for Proposed Initiative §3.82
(1) Notice of Intent to Circulate Petition §3.83
(2) Circulating Petition §3.84
(3) Filing Petition §3.85
b. City Council Action on Petition
(1) Council Options §3.86
(2) City Council May Request Impartial Analysis §3.87
(3) City Council May Refer Petition for Report §3.88
c. Timing of Election §3.89
(1) Special Election §3.90
(2) Regular Election §3.91

d. Adoption of Initiative §3.92
e. Conflicting Initiatives §3.93
2. Referenda (Ordinances) §3.94
a. Petition for Proposed Referenda §3.95
(1) Circulating Petition §3.96
(2) Filing Petition §3.97
b. City Council Action on Petition §3.98
(1) Effect of Repeal §3.99
(2) Election on Ordinance §3.100
c. Effective Date of Ordinances §3.101
B. Applicability to Charter Cities §3.102
C. Limitations on Use of Initiative and Referendum
1. Constitutional Limitations
a. Limitations on Initiatives
(1) Single-Subject Rule §3.103
(2) Naming Individuals or Corporations to Governmental Positions §3.104
b. Limitations on Referenda §3.105
2. Judicial Limitations on Initiatives and Referenda
a. Only Apply to Legislative Acts §3.106
(1) Examples of Legislative Acts §3.107
(2) Examples of Adjudicatory Acts §3.108
b. Cannot Direct Council to Perform Legislative Act §3.109
c. Cannot Relate to Matters Committed to Council §3.110
d. Cannot Impair Essential Government Functions §3.111
e. Cannot Regulate Preempted Matters §3.112
f. Cannot Be Arbitrary and Discriminatory §3.113
g. Must Be Consistent With the General Plan §3.114
h. Must Be Consistent With State and Federal Constitutional Requirements §3.115
3. City's Choices When It Believes Initiative or Referendum Is Unlawful §3.116
a. Refuse to Prepare Title and Summary §3.117
b. Refuse To Place Measure on Ballot §3.118
c. Place Measure on Ballot §3.119
D. Procedural Exemptions
1. Notice and Hearing §3.120
2. California Environmental Quality Act (CEQA) §3.121
3. Housing Limitation Findings §3.122
E. Judicial Review §3.123

VII. ELECTION CONTESTS §3.124
A. Contests at General Elections
1. Who May Contest a Local Election §3.125
2. Grounds for Contest §3.126
3. Statement of Contest
a. Form §3.127
b. Timing §3.128
c. Amendment §3.129
4. Pretrial Proceedings §3.130
5. Answer §3.131
6. Trial
a. Court Powers §3.132
b. Evidence §3.133
c. Determination and Judgment §3.134
d. Costs §3.135
7. Review §3.136
8. Contests on Ballot Measures §3.137
B. Contests at Primary Elections
1. General Requirements
a. Affidavit §3.138
b. Grounds for Annulment or Set-Aside §3.139
c. Costs §3.140
2. Contests Involving a Simple Recount §3.141
a. Procedures §3.142
b. Defendant Appearance §3.143
c. Recounts §3.144
d. Judgment §3.145

3. Contests Other Than Those Involving a Simple Recount §3.146
a. Procedures §3.147
b. Hearing and Judgment §3.148

VIII. RECALL §3.149
A. Starting the Process
1. Limitations on Recall §3.150
2. Notice of Intention to Recall §3.151
a. Contents of Notice §3.152
b. Filing of Notice §3.153
c. Publication of Notice §3.154
3. Answer to Recall Statement §3.155
B. Recall Petition
1. Form and Contents §3.156
2. Filing Proposed Petition
a. Proponent Obligations §3.157
b. City Clerk Obligations §3.158
c. Signatures §3.159
C. Collecting Signatures
1. Number of Days to Obtain Signatures §3.160
2. Number of Qualified Signatures §3.161
3. Withdrawal of Signatures §3.162
D. Filing and Examination of Petition
1. Submission for Filing and Acceptance §3.163
2. Petition Examination §3.164
3. Certification of Examination Results §3.165
E. Recall Election
1. Timing §3.166
2. Recall Ballot §3.167
3. Sample Ballot and Ballot Information §3.168
4. Election Procedures §3.169
5. Declaration of Results §3.170
F. Successor Candidate
1. Nominations §3.171
2. Election §3.172
3. Failure to Qualify §3.173
G. Filling Vacancies by Appointment
1. Vacancy Before Petition Filing §3.174
2. Vacancy Occurring After Petition Filing §3.175

IX. CAMPAIGN REGULATIONS
A. Contribution Limits—Constitutional Issues §3.176
1. Organizational Contribution Limits §3.177
a. Ballot Measure Contribution Bans §3.178
b. Corporate Candidate Contribution Bans §3.179
2. Dollar Amount of Contribution Limits §3.180
3. Limits on Contributions to Committees Making Independent Expenditures §3.181
B. Expenditure Limits—Constitutional Issues §3.182
1. Independent Expenditure Limits §3.183
2. Organization Expenditure Limits §3.184
3. Candidate's Personal Funds §3.185
C. Political Reform Act Campaign Regulations §3.186
1. Propositions 68, 73, and 208 §3.187
2. Proposition 208 Invalidated and Repealed §3.188
3. Proposition 34 §3.189
D. Political Reform Act Disclosure Requirements §3.190
1. Constitutional Issues
a. Interests Infringed §3.191
b. Heightened Scrutiny §3.192
c. Governmental Interests §3.193
2. When Disclosure Statements Are Required §3.194
a. Reporting Late Contributions §3.195
b. Reporting Independent Expenditures §3.196
c. Pre-Election Statements §3.197
3. Contents of Disclosure Statements §3.198

a. Identifying Contributors, Lenders, and Recipients §3.199
b. Disclosure of Advertisement Funding Sources
(1) Mass Mailing Restrictions §3.200
(2) Ballot Measure Campaign Advertisements §3.201
(3) Paid Spokespeople §3.202
E. Political Reform Act Contribution Limits §3.203
F. Political Reform Act Enforcement
1. Criminal Penalties §3.204
2. Civil Sanctions §3.205
3. Administrative Sanctions §3.206
4. Injunctive Relief §3.207
G. Local Regulations §3.208
1. Authority for More Stringent Requirements §3.209
2. Public Monies for Candidates in Municipal Elections §3.210
H. City Participation in Ballot Measures
1. Prohibited Expenditures to Support or Defeat a Ballot Measure §3.211
a. Statutory Prohibition §3.212
b. Equal Protection Issues §3.213
2. Permissible Public Expenditures
a. Informational Expenses §3.214
b. Opinions of Local Legislative Bodies §3.215
c. Voter Registration Expenses §3.216
3. Lobbying
a. Lobbying Permitted §3.217
b. Lobbyist Registration and Reporting Requirements §3.218
c. Distinguishing Between Lobbying and Campaigning §3.219
4. Drafting Ballot Measures
a. Municipal Drafting Permitted §3.220
b. Drafting Does Not Constitute Campaigning §3.221
c. Collecting Signatures Likely Impermissible §3.222
5. Analyzing City Ballot Measures
a. Impartial Analysis by City Attorney §3.223
b. Remedy for Imperfect Analyses §3.224

© The Regents of the University of California

§3.1 I. INTRODUCTION

In California, general law cities are obligated to conduct general and special municipal elections in accordance with the California Elections Code. See Elec C §§10101-10312. Charter cities may establish their own rules and regulations for elections, depending on their charter provisions. Cal Const art XI, §5(b); *People v Hill* (1899) 125 C 16, 20.

Other statutes in other codes also bear on the election process. For example, the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Govt C §§56000-57550) contains a number of statutes pertaining to when elections must be called in the event of annexations, incorporations, and reorganizations.

PRACTICE TIP: For other resources on election issues, see Martin & Chapman Co., Municipal Election Handbook (resource for research relating to election problems); League of California Cities, The City Clerk's Handbook (2004) (overview of election process); and Campaign Disclosure Information Manuals, available from Fair Political Practices Commission at www.fppc.ca.gov (containing annual schedules for filing campaign reports, summary of recent legislative changes, and campaign provisions of Political Reform Act for elected state and local officers). County Registrars often have local compliance guidelines and tips. On lobbying issues, see Advising California Nonprofit Corporations (3d ed Cal CEB 2009).

© The Regents of the University of California

II. ELECTION PROCEDURES

§3.2 A. The Elections Official

The city clerk is the elections official unless the city council designates another person. See Elec C §320. The city council, by resolution, may request the board of supervisors to permit the county clerk to render specified elections services to the city. See Elec C §10002.

© The Regents of the University of California

B. Types of Elections

1. Regular Elections

§3.3 a. Definition

A "regular election" is "an election, the specific time for the holding of which is prescribed by law." Elec C §348.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.4 b. Regular Election Dates

§3.4 b. Regular Election Dates

The regular election dates each year are (Elec C §1000):

- The second Tuesday of April in each even-numbered year;
- The first Tuesday after the first Monday in March of each odd-numbered year;
- The first Tuesday after the first Monday in June of each year;
- The first Tuesday after the first Monday in November of each year; and
- The first Tuesday in February of each year evenly divisible by the number four.

© The Regents of the University of California

§3.5 2. Special Elections

Special elections must be held on one of the established regular election dates unless the election falls within one of the exceptions in Elec C §1003. See Elec C §1002. The city council must issue a proclamation or a resolution calling the special election. Elec C §12001.

© The Regents of the University of California

3. Municipal Elections

§3.6 a. Legal Framework

The general provisions governing municipal elections are in Elec C §§10100-10312. Other topics covered elsewhere include: absentee or vote-by-mail voting (see Elec C §300); recalls (see Elec C §§11000-11386); initiatives and referenda (see Elec C §§9200-9247); ballots (see Elec C §§13000-13317); conduct of elections (see Elec C §§14000-14003); and election contests (see Elec C §§16000-16940).

© The Regents of the University of California

§3.7 b. General Municipal Election Dates

General municipal elections normally are held the second Tuesday in April of even-numbered years or on the first Tuesday after the first Monday in March of odd-numbered years. Govt C §36503; Elec C §1301. Subject to the approval of the county board of supervisors, a city council may enact an ordinance requiring its general municipal election to be held on the first Tuesday after the first Monday of March in each odd-numbered year, on the second Tuesday of April in each year, on the same day as the statewide direct primary, the day of the statewide general election, or the day of the school district elections. Elec C §1301. No term of office may be increased or decreased by more than 12 months as a result of the adoption of such an ordinance. Elec C §10403.5(b).

© The Regents of the University of California

§3.8 c. Consolidation of Elections

A city may consolidate its election with that of another governmental entity to be held on the same day, in the same territory, or in territory that is in part the same. See Elec C §§10400-10418.

© The Regents of the University of California

d. Publishing/Posting Notice of Municipal Election

§3.9 (1) Newspaper Notice

Not earlier than the 127th nor later than the 113th day before any municipal election to fill offices, the city elections official must publish a notice of election at least once in a newspaper of general circulation. Elec C §12101.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.10 (2) Notice Content

§3.10 (2) Notice Content

The notice must be entitled "Notice of Election" and must contain a statement of (Elec C §12101(a)):

- the time of the election; and
- the office to be filled, specifying full term or short term, as the case may be).

See Elec C §12102 (for format of notice of election).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.11 (3) Posting When There Is No Newspaper

§3.11 (3) Posting When There Is No Newspaper

If there is no newspaper of general circulation published and circulated in the city, the notice must be typewritten and copies posted conspicuously within the time prescribed in at least three public places in the city. Elec C §12101.

© The Regents of the University of California

§3.12 e. Publishing List of Nominees

When the municipal election is held to fill offices, the city clerk must publish the list of nominees with the respective offices for which they have been nominated not later than 1 week before the election in a newspaper of general circulation. See Elec C §12110. If there is no newspaper of general circulation published and circulated in the city, the list must be posted within the prescribed time in at least three public places in the city. See Elec C §12110 (form of list).

NOTE: If no one or only one person has been nominated, the elections official submits a certificate of these facts to the city council and after publication or posting of notice, the city council may either appoint the person who has been nominated, appoint any eligible elector if no one is nominated, or hold the election. Elec C §10229.

© The Regents of the University of California

§3.13 f. Publishing List of Polling Places and Precinct Board Members

Not later than 1 week before any election, the city clerk must publish a list of the polling places in the same manner as that used for publication of the notice of election. Elec C §12105. See §§3.9-3.11. Not less than 1 week before the election, the city clerk must also post a list of all current polling places in each precinct and a list of precinct board members appointed by the 15th day before the election. Not later than 28 days after the election, the city clerk must post an updated list of precinct board members who actually served on election duty. These lists must also be posted on the city clerk's official website. Elec C §12105.5.

© The Regents of the University of California

§3.14 g. Publishing Synopsis of Measures

In a municipal election on any measure, the city clerk must publish a synopsis of the measure in the manner provided for publication of the list of nominees (see §3.12) and in the form provided for in Elec C §12111.

A city council has the power to submit to the electorate such delegable measures as it determines appropriate. See Elec C §306. When such matters are submitted to the electorate, they are deemed adopted or rejected based on the result of the election.

The city council may also submit "advisory measures" for the electorate. Elec C §9603. Such measures are advisory only and do not bind the council in the legal sense. The topics for advisory measures include almost any relevant topic, clearly labeled as such, as prescribed by the California Elections Code.

© The Regents of the University of California

4. Nomination of Candidates

§3.15 a. Nomination Papers

Not earlier than the 113th day nor later than on the 88th day before the election, voters may nominate a candidate by signing a nomination paper. See CC §10; Elec C §10220; Govt C §6800 (for computation of time).

NOTE: If an incumbent officer of a city fails to file nomination papers by the close of business hours on the 88th day before the election, the filing period is extended 5 days until. the close of business hours on the 83rd day for voters to nominate candidates other than the incumbent for the incumbent's elective office. Elec C §10225.

On the form and other substantive requirements of the nomination papers, see Elec C §§10221-10228.

© The Regents of the University of California

§3.16 b. Needed Signatures

The number of signatures needed for nomination of a candidate depends on the population of the city. No voter may sign more than one nomination paper for the same office. Each council position is a separate office. Elec C §10220.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.17 c. Filing Fees

§3.17 c. Filing Fees

A nomination paper filing fee may be imposed by ordinance; the fee may not exceed $25.00. Elec C §10228.

© The Regents of the University of California

§3.18 d. Circulators

Any person registered to vote at the election and qualified to vote for the elective office of the city for which the nomination is made may circulate a nomination paper. Only one person may circulate each nomination paper. Elec C §10220. Election Code §§10221-10228 describe the form and other substantive requirements of the nomination papers and affidavit of circulator.

© The Regents of the University of California

5. Conduct of Elections

§3.19 a. Pre-Election Day Procedures

At least 29 days before the election, the city clerk must (Elec C §12286(a)):

- Establish a convenient number of election precincts for the city;
- Define the precinct boundaries;
- Designate a polling place for each precinct;
- Appoint a precinct board to be in charge of the election in each precinct (board consists of at least one inspector, one judge, and two clerks); and
- Notify each precinct board member of their appointment and the location of the precinct where they will serve.

See Elec C §§12302-12304. The city elections official is generally responsible for procuring all necessary supplies and equipment, such as ballots, voting booths, and the ballot box. See Elec C §§10240, 14100-14113.

© The Regents of the University of California

§3.20 b. Election Day Procedures at the Polling Place

Each polling place must be open during the period determined by the city council and specified in the notice of election, but not less than eight consecutive hours. Elec C §10242. A majority of the members of the precinct board must be present at the polling place while it is open. Elec C §10243. For other specific procedures, see Elec C §§14210-14443.

© The Regents of the University of California

6. Canvass of the Vote and Declaration of Results

§3.21 a. Basic Procedure

For basic procedures on canvassing (counting) of the vote and declaring the results of an election, see generally Elec C §§15000-15702. A canvass is the public process of collecting, processing, and tallying ballots in an election. Elec C §§335.5, 353.5.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.22 b. Location of Count

§3.22 b. Location of Count

Votes are generally to be counted at the precinct (Elec C §10260); however, votes may be counted at a central counting place provided notice is given. See Elec C §12109. See also Elec C §§15150-15290.

© The Regents of the University of California

§3.23 c. Vote-by-Mail Ballots

The city elections official or a canvassing board appointed by the city elections official must count the votes cast by vote-by-mail voters. The canvass must be conducted in the manner prescribed in Elec C §§15100-15376.

NOTE: In 2007 the terminology of the Elections Code was changed throughout to rename "absentee" voters as "vote-by-mail" voters.

© The Regents of the University of California

§3.24 d. What Is Counted

Any name written in on a ballot, including a reasonable facsimile of the spelling of such a name, must be counted unless specifically prohibited. Elec C §§10103, 15340-15342. See 2 Cal Code Regs §§20101-20105 (instructions relating to canvassing incomplete write-in votes, *e.g.,* no office is indicated or is incorrect, or name is incomplete or misspelled).

© The Regents of the University of California

§3.25 e. Provisional Ballots

The use and verification of provisional ballots are governed by Elec C §14310. Some election officials separate "provisional" or irregular ballots from the marked ballots to be counted, and do not count these "provisional" ballots unless either the election contest is very close or a candidate calls for a recount. Practices appear to vary between election officials in different counties regarding these provisional ballots. Election Code §14310(c), however, requires the elections official to examine all provisional ballots cast during the official canvass to determine the voter's eligibility. If the ballot meets certain criteria, the vote must be counted. The federal Help America Vote Act of 2002 (HAVA) includes similar requirements for elections that include federal offices. HAVA requires provisional ballots in elections for federal office be transmitted to the appropriate election official for "prompt verification." 42 USC §15482(a)(3). If the election official determines the voter is eligible to vote, the provisional ballot "shall be counted as a vote in that election in accordance with State law." 42 USC §15482(a)(4).

Both California and federal law require that the election official establish a free-access system that any person who casts a provisional ballot may use to determine whether their provisional ballot was counted and, if not, the reason(s) why. Elec C §14310(d); 42 USC §15482(a)(5). When federal offices are included on the ballot, HAVA requires the election official provide written information to the voter on how to access such a system at the time the voter casts a provisional ballot. 42 USC §15482(a)(5).

PRACTICE TIP: It is customary in many counties for the city council to request the county election official to perform the official canvass of the votes, especially if the municipal election has been consolidated with statewide elections.

© The Regents of the University of California

§3.26 f. Certification of Results

The elections official must canvass the votes and certify the results by the fourth Friday after the election; if the election was consolidated, the city elections official certifies the results to the city council no later than the fourth Friday following presentation of the 28-day canvass of returns by the county election official. Elec C §10262.

On completion of the canvass of votes, the city council adopts a resolution reciting the election and results. Elec C §§10263-10264 (matters to be addressed in resolution). The city council must declare the results and install the new officers no later than the fourth Friday after the election; however, in consolidated elections, the city council must meet to declare the results at the next regularly scheduled city council meeting, or a special meeting called for this purpose, following the presentation of the 28-day canvass from the county elections official.

© The Regents of the University of California

§3.27 g. Recordation and Oath

Once the election results are declared, the city elections official must enter in its records a statement of the results containing the information in Elec C §10264. Thereafter, the city elections official must deliver a certificate of election to each person elected and administer the oath of office to each elected official. Elec C §10265.

© The Regents of the University of California

§3.28 7. Recount of Votes

Recounts arise by being:

- Ordered by the elections official,
- Requested by a voter, or
- Ordered by a court by way of a request from the county board of supervisors or grand jury.

See Elec C §§15600-15640.

NOTE: When a voting system is used, there is a mandatory public manual recount of a sampling of votes cast. See Elec C §15360; *County of San Diego v Bowen* (2008) 166 CA4th 501, 82 CR3d 818 (finding "post-election manual tally requirements" do not exceed Secretary of State's authority under Elec C §15360).

A recount requestor may choose to have paper ballots recounted manually and have electronic ballots recounted electronically. See *Nguyen v Nguyen* (2008) 158 CA4th 1636, 1654, 70 CR3d 753; Elec C §15627.

© The Regents of the University of California

C. Methods of Election

§3.29 1. At-Large

In an at-large election, voters may vote for any candidate on the ballot.

© The Regents of the University of California

§3.30 2. District Election System

A system of electing the city council by or from districts must be established by ordinance, and approved by the voters. The ordinance may be a city council-initiated measure, or an initiative. Govt C §34871.

© The Regents of the University of California

§3.31 a. By Districts

A municipal or special election may be held "by district," in five, seven, or nine districts, meaning the "election of members of the legislative body by voters of the district alone." Govt C §34871.

© The Regents of the University of California

§3.32 b. From Districts

A municipal or special election may be held "from districts," in five, seven, or nine districts, which means "election of members of the legislative body who are residents of the district from which they are elected by the voters of the entire city." Govt C §34871.

© The Regents of the University of California

III. CANDIDATE QUALIFICATIONS

§3.33 A. Residency Requirement

A candidate for a municipal legislative body must maintain a legal residence or domicile within the city or, if elected by or from a district, be a resident of the geographical area comprising the district from which he or she is elected. Govt C §34882. See 87 Ops Cal Atty Gen 30 (2004). The candidate must have been a registered voter of the city at the time nomination papers are issued. Govt C §34882. See also Elec C §§201, 349.

© The Regents of the University of California

B. Qualifications for Particular Office

§3.34 1. Qualifications for Elected Mayor

To hold office as elected mayor, a person must, at the time he or she assumes office, be an elector of the city and be a registered voter of the city at the time nomination papers were issued. Govt C §34904.

NOTE: An "elector" is any person who is a United States citizen at least 18 years of age and a resident of an election precinct at least 15 days before an election. Cal Const art II, §2; Elec C §321. A voter is an elector who is registered as such. See Elec C §359.

© The Regents of the University of California

§3.35 2. Qualifications for Council Member, Clerk, or Treasurer

To hold the office of council member, clerk, or treasurer, a person must be an elector of the city at the time of assuming office and a registered voter at the time nomination papers are issued. If a candidate moves his or her residence to a place outside the city limits or ceases to be an elector, the office held by that person immediately becomes vacant. Govt C §36502.

NOTE: An "elector" is any person who is a United States citizen at least 18 years of age and a resident of an election precinct at least 15 days before an election. Cal Const art II, §2; Elec C §321. A voter is an elector who is registered as such. See Elec C §359.

© The Regents of the University of California

§3.36 C. Term Limits

General law and charter cities may limit the number of terms that may be served by members of the city council and/or an elected mayor. A term limit measure must be approved by the voters at a regular municipal election as either an initiative measure or a measure proposed by the city council. If approved, a term limit measure applies prospectively only. Govt C §36502(b).

NOTE: Term limit measures in charter cities in effect before January 1, 1996, were not preempted and remain in effect. Govt C §36502(b). See *Cawdrey v City of Redondo Beach* (1993) 15 CA4th 1212, 19 CR2d 179.

On limitations on the right to hold office, including term limits, see §§1.220-1.222.

© The Regents of the University of California

IV. BALLOTS

§3.37 A. Ballot Content

The ballot must contain the following information (Elec C §13103):

- Title of office;
- Names of all qualified candidates; and
- Titles and summaries of measures submitted to voters.

© The Regents of the University of California

§3.38 1. Headings

In heavy-faced gothic, capital type, of at least 30 point, the words "OFFICIAL BALLOT" must appear on the top of the ballot. The ballot must designate (Elec C §13203):

- whether it is a partisan or non-partisan election,
- the number of the United States Congressional, state senate, and assembly district involved,
- the name of the county where the ballot is voted, and
- the date of the election.

If two or more officers are to be elected for the same office for different terms, the term for each office, including the words "Full Term" or "Short Term" if applicable, must appear as part of the title of the office. Elec C §13220. See Elec C §§13215-13219 (rules on ballot stubs and ballot number).

© The Regents of the University of California

§3.39 2. Candidates' Names

Candidates' names must be printed on the ballot, without indentation, in roman capital, boldface type not smaller than eight-point, between light lines or rules at least three-eighths of an inch apart but not more than one-half inch apart. Elec C §13211.

© The Regents of the University of California

§3.40 a. Name Changes

If a candidate's name changes within 1 year of any election, that "new" name may not appear on the ballot unless the name change resulted from marriage or court order. Elec C §13104.

© The Regents of the University of California

§3.41 b. Candidates With Similar Names

If a candidate for office believes another person with a similar name has or will file a nomination paper for the same office, the candidate may request the city clerk issue the candidate a number. Elec C §13118(a). That number will be printed beside the candidate's name as a distinguishing mark. Elec C §13118(b). If two or more candidates have the same name and a statement is filed, the elections official must place a warning on the ballot, sample ballot, ballot pamphlet, and other official mailings. See Elec C §13118(d).

© The Regents of the University of California

§3.42 c. Designation of Status

At the candidate's option, his or her name printed on the ballot may be followed by a designation of status (elective office held, "incumbent," or no more than three words describing the candidate's current principal profession). See Elec C §§13107, 13107.5 (allowing "community volunteer" as valid principal profession); *Rubin v City of Santa Monica* (9th Cir 2002) 308 F3d 1008.

© The Regents of the University of California

§3.43 3. Voter Instructions

The California Elections Code provides very specific language that must be included in the instructions to voters appearing on the ballot and stub. See Elec C §§13204, 13210, 13216. These sections and the statutory updates should be consulted during the preparation of any ballot.

© The Regents of the University of California

§3.44 4. Order of Offices, Names, and Initiatives

The California Elections Code determines the order in which office and candidates' names appear on the ballot. See Elec C §§13109, 13111. The order of candidates' names is determined by random alphabet drawing. Elec C §§13112-13114. See *Bradley v Perrodin* (2003) 106 CA4th 1153, 131 CR2d 402 (randomized alphabet drawing from primary election should be used for subsequent runoff election).

The appropriate format for designating and numbering all state and local ballot measures appears in Elec C §13116.

© The Regents of the University of California

B. Other Ballot Rules

§3.45 1. Translations

Whenever the federal Voting Rights Act of 1965 (FVRA) (42 USC §1973) requires a foreign language translation of the ballot, the translation must be placed to the right of the voting square. Elec C §13209. A number of California counties are "covered jurisdictions" under the Voting Rights Act; the Justice Department has determined, based on census data, those jurisdictions subject to the minority language assistance provisions of §203 of the Voting Rights Act, as well as which languages must be translated. However, not all cities in these counties are required to translate municipal election ballots into all of the languages used in the county ballots. On the Voting Rights Act, see §§3.65-3.71.

PRACTICE TIP: The best sources of information on which languages city ballots must use are the city clerk and county registrar.

© The Regents of the University of California

§3.46 2. Political Affiliation

A candidate may be identified by party affiliation when the party is qualified to participate in an election. Elec C §13105. When candidates allege participation in a party that is not so qualified and the candidates have thus been designated as "independent" on the ballot, their challenges to have the non-qualified party affiliations placed on the ballot with their names have repeatedly failed. See Elec C §13105; *Libertarian Party v Eu* (1980) 28 C3d 535, 170 CR 25; *Peace & Freedom Party v Shelley* (2004) 114 CA4th 1237, 8 CR3d 497; *Socialist Workers Party v March Fong Eu* (9th Cir 1978) 591 F2d 1252.

Identification of party affiliation in local government elections is prohibited because judicial, school, county, and municipal offices are nonpartisan offices. Elec C §334.

© The Regents of the University of California

§3.47 3. Blank Spaces in the Ballot

Ballots must have as many blank spaces under the designation of the office as the number of candidates to be elected to office. Elec C §13212.

© The Regents of the University of California

§3.48 4. Stubs and Numbering of Ballots

There are statutorily prescribed rules regarding the stubs of the ballot as well as the ballot number. See Elec C §§13215, 13219 (technical ballot requirements).

© The Regents of the University of California

§3.49 5. Terms of Office

If two or more officers are to be elected for the same office for different terms, the term for each candidate must appear as part of the title of the office. Elec C §13220.

© The Regents of the University of California

§3.50 6. Proposed Initiatives

The California Elections Code prescribes the form of the ballot to be used for initiative measures and referendum measures. Elec C §§13119 (initiative measures), 13120 (referendum measures).

The length of ballot measures is limited to 75 words or less. Elec C §§9051, 13247.

© The Regents of the University of California

§3.51 7. Polling Stations

An election official may ban photography and videotaping at a polling station, which is a nonpublic forum under the First Amendment. *Poniktera v Seiler* (2010) 181 CA4th 121, 104 CR3d 291.

© The Regents of the University of California

C. Voters' Pamphlets

§3.52 1. Candidates' Statements

Each candidate for non-partisan office is entitled to submit a candidate's statement to be included in a voter's pamphlet distributed to all registered voters in the appropriate geographical area. The contents of this statement and the rules governing its distribution are in Elec C §§13307-13312.

Candidates' statements must be limited to a recitation of the candidates' own personal background and qualifications, and cannot make reference to other candidates or to another candidate's qualifications, character, or activities. Elec C §13308. Candidates' statements are mailed to voters along with a sample ballot and notice of election. Elec C §13307. See also Elec C §13313 (availability of candidates' statements for inspection). The statements must be kept confidential until the expiration of the filing deadline. Elec C §13311.

© The Regents of the University of California

2. Arguments on City Measures

§3.53 a. City Attorney's Impartial Analysis

Whenever a city measure qualifies for a place on the ballot, the city attorney, on direction of the city council, must prepare an impartial analysis of the measure showing the effect of the measure on existing law and the operation of the measure. This analysis is limited to 500 words, and, unlike the ballot title and summary prepared by the city attorney, may discuss the legality or constitutionality of the measure (although many city attorneys decline to do so for the analysis to appear as neutral as possible). Elec C §9280. See *King v Lewis* (1990) 219 CA3d 552, 268 CR 277.

© The Regents of the University of California

§3.54 b. Ballot Arguments

The city council, any council member, or any registered voter or combination of voters may file a written argument for or against any city measure that must be distributed to voters along with each sample ballot. The argument cannot exceed 300 words. Elec C §9282. See *Huntington Beach City Council v Superior Court* (2002) 94 CA4th 1417, 115 CR2d 439 (holding that Elec C §9282 should be liberally construed).

The ballot argument must be accompanied by the names and signatures of the authors to be accepted. Elec C §9283. In non-consolidated elections, the city clerk must set the deadline for submittal of arguments as 14 days from the date of calling the election. Elec C §9286. Charter cities may have different provisions governing arguments. Elec C §9281.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.55 c. Multiple Arguments

§3.55 c. Multiple Arguments

If more than one argument is submitted for or against any measure, the city clerk must select only one argument based on the following priority (Elec C §9287):

- The city council, or any member or members of the council authorized by the city council;
- The bona fide sponsor of the measure;
- Bona fide associations of citizens; and
- Individual voters eligible to vote on the measure.

Arguments may be signed by up to five persons. Elec C §9283. Persons signing a ballot argument may identify themselves by both name and affiliation. Council members may identify themselves as such with or without the consent of the council.

© The Regents of the University of California

§3.56 d. Rebuttal Arguments

Rebuttal arguments of no more than 250 words may be submitted for city measures if the city council has adopted a resolution permitting rebuttal. Rebuttal arguments can be written by the author of the argument or the author may authorize, in writing, any other person to prepare, submit, or sign the rebuttal argument. Elec C §9285.

© The Regents of the University of California

§3.57 e. Public Examination and Challenge

The city clerk must make a copy of the election materials available for public review for a period of 10 days immediately following the filing deadline for submission of these materials. Elec C §§9295(a), 13313(a). During this period any voter in the city may seek a writ of mandate or injunction to have election materials amended or deleted. Elec C §§9295(b)(1), 13313(b)(1). A writ of mandate will issue only on a clear and convincing showing the material in question is false, misleading, or inconsistent with the requirements of state law and the issuance of the writ or injunction will not substantially interfere with the printing or distribution of the election materials. See Elec C §§9295(b)(2), 13313(b)(2); *Horneff v City & County of San Francisco* (2003) 110 CA4th 814, 2 CR3d 79.

PRACTICE TIP: The city clerk should be advised to perform a prima facie examination of voter pamphlet material when submitted. Initiative, referendum, and recall law is clear: procedurally defective petitions should not be accepted for filing or certified for placement on the ballot. See *Myers v Patterson* (1987) 196 CA3d 130, 136, 241 CR 751. The law is not so clear about whether the city may refuse to accept voter pamphlet material that is procedurally defective on its face (*e.g.,* a candidate's statement that attacks another candidate in violation of Elec C §13307). Alternatives for the city attorney include rejection or redaction, but the more cautious approach is to accept the defective material and institute a mandamus action to amend or delete the material. See Elec C §13313; *Clark v Burleigh* (1992) 4 C4th 474, 14 CR2d 455. See also §§13.2-13.27 (on mandamus actions). If the clerk can persuade the candidate to eliminate the defect at the counter before the material is accepted for filing, litigation may be avoided.

© The Regents of the University of California

§3.58 D. Sample Ballots

The elections official must mail a sample ballot not more than 40 or less than 21 days before each election to each voter who is registered at least 29 days before the election. The sample ballot must be identical to the official ballot for that election and must be in the form described in Elec C §13303.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/ E. Mailed Ballot Elections/§3.59 1. Conduct of Municipal Mailed Ballot Election

E. Mailed Ballot Elections

§3.59 1. Conduct of Municipal Mailed Ballot Election

The conditions under which a mailed ballot election may be conducted are in Elec C §4000. That statute provides that any local, special, or consolidated election may be conducted wholly by mail provided that all of the following conditions apply:

- The governing body of the local agency authorizes the use of mailed ballots for the election;
- The election is held on an established mailed ballot election date under Elec C §1500;
- The election is one of the following:
- An election in which no more than 1000 registered voters are eligible to participate;
- An election on a measure or measures restricted to the imposition of special taxes, expenditure limitation overrides, or both, in a city or other agency with 5000 or fewer registered voters;
- An election or assessment ballot proceeding required or authorized by Proposition 218; or
- Certain specified water issues (as listed in Elec C §4000).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.60 2. Small City Mailed Ballot Election Authorization

§3.60 2. Small City Mailed Ballot Election Authorization

Election Code §4004 authorizes a "small city" (a city with a population of 100,000 or less, as determined by the State Department of Finance) to conduct an all-mailed ballot election, subject to the following conditions:

- The city council of the small city authorizes, by resolution, the use of the mailed ballots for the election;
- The election is a special election to fill a vacancy in the city council;
- The election is not held on the same date as a statewide primary or general election;
- The election is not consolidated with any other election; and
- The return of the voted mailed ballots is subject to the same rules that otherwise apply to vote by mail ballots (see Elec C §3017).

© The Regents of the University of California

§3.61 3. Mailed Ballot Election Dates

Election Code §1500 establishes the following mailed ballot election dates:

- The first Tuesday after the first Monday in May of each year;
- The first Tuesday after the first Monday in March of each even-numbered year;
- The last Tuesday in August of each year.

© The Regents of the University of California

V. VOTERS AND THE VOTING RIGHTS ACT

A. Voter Qualifications

§3.62 1. California Constitutional Provisions

Under the California Constitution, a voter must be (Cal Const art II, §2):

- a United States citizen,
- at least 18 years of age, and
- a resident of California.

The legislature must define residence and provide for registration and free elections. Cal Const art II, §3.

© The Regents of the University of California

§3.63 2. Determination of Residence and Domicile

Residence for purpose of voting means a person's domicile. Elec C §349(a). Domicile is defined as that place where (Elec C §349(b))

- his or her habitation is fixed,
- he or she intends to remain, and
- he or she intends to return after an absence.

At a given time, a person may only have one domicile. Elec C §349(b). See also Elec C §§2020-2035; *Walters v Weed* (1988) 45 C3d 1, 8, 246 CR 5; *Collier v Menzel* (1985) 176 CA3d 24, 31, 221 CR 110.

© The Regents of the University of California

§3.64 3. Ex-Felons' Right to Vote

Persons imprisoned or on parole for the conviction of a felony are disqualified from voting. Cal Const art II, §4; Elec C §2201(c); *League of Women Voters of Cal. v McPherson* (2006) 145 CA4th 1469, 52 CR3d 585. Persons on felony probation, however, are not disqualified. 145 CA4th at 1475.

© The Regents of the University of California

B. Federal Voting Rights Act

§3.65 1. Original Requirements

Section 2 of the Federal Voting Rights Act (FVRA) (42 USC §1973) applies nationwide. As originally enacted (see Pub L 89-110, 79 Stat 437), it prohibited voting qualifications or prerequisites to voting, and standards, practices, or procedures by any state or political subdivision to deny or abridge the right of a citizen to vote on account of race or color. The FVRA required proof that the challenged electoral scheme was intentionally designed or maintained for a discriminatory purpose. *City of Mobile v Bolden* (1980) 446 US 55, 62, 64 L Ed 2d 47, 100 S Ct 1490. Section 5 of the FVRA is a special temporary provision that freezes election practices or procedures in certain states and political subdivisions until the new procedures have been reviewed and approved ("precleared") by either the United States Attorney General or the United States District Court for the District of Columbia. See 42 USC §1973c, Pub L 89-110 §5, 79 Stat 437. Covered states and political subdivisions are identified by a formula contained in §4 of the FVRA. In California, four counties are covered: Kings, Merced, Monterey, and Yuba, but the State itself is not covered. All political subdivisions subject to the FVRA may seek to "bail out" from the preclearance requirements of FVRA §5 by establishing compliance with a series of provisions in 42 USC §1973b(a)(1)(A)-(F). *Northwest Austin Mun. Util. Dist. Number One v Holder* (2009) ___ US ___, 174 L Ed 2d 140, 129 S Ct 2504.

© The Regents of the University of California

2. Amendments

§3.66 a. 1982 Amendments

In 1982, Congress amended §2 of the Federal Voting Rights Act (FVRA) (42 USC §1973) to make it a violation when, based on the totality of the circumstances, a plaintiff shows the electoral process leading to nomination or election is not equally open to participation by a class of protected citizens. 42 USC §1973(b). The rationale is that the members of the protected class have less opportunity to participate in the process and elect representatives of their choice. The report of the Senate Committee on the Judiciary on these amendments (S Rep No. 97-417, 97th Cong, 2d Sess (1982), p. 28) listed the following non-exclusive factors for courts to consider when determining if, under the totality of the circumstances, a challenged electoral practice resulted in a violation of §2 of the FVRA:

- The history of official voting-related discrimination in the state or political subdivision;
- The extent to which voting in the elections of the state or political subdivision is racially polarized;
- The extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
- The exclusion of members of the minority group from candidate slating processes;
- The extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
- The use of overt or subtle racial appeals in political campaigns; and
- The extent to which members of the minority group have been elected to public office in the jurisdiction.

© The Regents of the University of California

§3.67 b. Language Minority Amendments

The language minority provisions require that when a covered state or political subdivision "provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language." 42 USC §1973b(f)(4). See also §203 of the Federal Voting Rights Act (FVRA) (42 USC §1973). Congress adopted the language minority provisions in 1975, extended them in 1982, 1992, and 2006, extending through 2032. The State of California and numerous California counties are covered.

NOTE: The minority language requirement does not apply to recall or initiative petitions initiated, circulated, and paid for by private proponents. *Padilla v Lever* (9th Cir 2006) 463 F3d 1046, 1051; *In re Monterey Initiative & Referendum Cases* (ND Cal, May 17, 2007, Nos. 06-1407, 06-1730, 06-2369, 06-2202) 2007 US Dist Lexis 39557 (refusing to alter judgment that referendum petition privately initiated, drafted, and circulated is not subject to minority language requirements).

PRACTICE TIP: To determine whether a jurisdiction is covered and, if so, which language(s) must be used, see 67 Fed Reg 48871 (July 26, 2002) at www.usdoj.gov/crt/voting/sec_203/fedreg_July.html. Additionally, the website for the United States Department of Justice, Civil Rights Division, Voting Section (www.usdoj.gov/crt/voting/sec_203/activ_203.htm) contains practical guidelines for election officials to comply with the language minority requirements.

© The Regents of the University of California

3. Challenges to Elections Under the Federal Voting Rights Act

§3.68 a. Challenges to At-Large Elections

Cities with at-large electoral systems have been challenged under §2 of the Federal Voting Rights Act (42 USC §1973(b)) on the premise that the at-large system dilutes minority voting strength. A facially neutral act or process, such as an "at-large" system, can be shown to violate §2 if a plaintiff establishes all the following *Gingles* preconditions (*Thornburg v Gingles* (1986) 478 US 30, 49, 92 L Ed 2d 25, 106 S Ct 2752):

- The minority group harmed is sufficiently large and geographically compact to constitute a majority in a single-member district;
- The minority group is politically cohesive; and
- The majority group votes as a bloc to enable it to usually defeat the minority group's preferred candidates.

NOTE: When a city is integrated, it may be more difficult to show the requisite size and compactness of the minority group (see *Romero v City of Pomona* (9th Cir 1989) 883 F2d 1418, 1426, overruled on other grounds in *Townsend v Holman Consulting Corp.* (9th Cir 1990) 914 F2d 1136) and if the group's numbers are too low, the court may deny the claim. See *Skorepa v City of Chula Vista* (SD Cal 1989) 723 F Supp 1384. Showing cohesiveness of the minority group may be problematic when the claim shows two minority groups joining together; if the groups' votes cancel one another out, the cohesiveness is not met. See *Romero v City of Pomona, supra*.

In addition to these three threshold "preconditions," the plaintiff must also prove that, under the totality of the circumstances, the "at-large" electoral system is not equally open to participation by a class of protected citizens in that they have less opportunity to participate in the electoral process and elect representatives of their choice.

© The Regents of the University of California

§3.69 b. Challenges to District Elections

Electing council members by district raises two potential issues: principles of equal protection under the Fourteenth Amendment and §2 of the Federal Voting Rights Act (42 USC §1973(b)). In adjusting district lines to satisfy the former, the requirements of the latter must be considered. The Fourteenth Amendment can be violated when districts are not reasonably equal in population or through gerrymandering; §2 can be violated by packing minority voters into districts in excess of the number needed to elect a candidate of choice or dividing their numbers among districts to dilute their voting strength.

© The Regents of the University of California

§3.70 (1) Intentional Discrimination—Fourteenth Amendment

With regard to the requirements of reasonably equal population, decisions involving congressional districting, which is based on US Const art I, §2, the United States Supreme Court has prescribed a rule of equality "as nearly as is practicable." *Wesberry v Sanders* (1964) 376 US 1, 7, 11 L Ed 2d 481, 84 S Ct 526. By contrast, state and local apportionment is guided by the dictates of the equal protection clause; for such jurisdictions, the constitutional mandate, enunciated first in *Reynolds v Sims* (1964) 377 US 533, 579, 12 L Ed 2d 506, 84 S Ct 1362*,* has been "substantial equality." In *Silver v Reagan* (1967) 67 C2d 452, 458, 62 CR 424, the California Supreme Court recognized, however, that deviations from equality "cannot be presumed valid but must be justified by a specific showing that a permissible state policy is thereby promoted."

When the court finds intentional discrimination against minority voters in drawing district lines, the *Gingles* preconditions (see §3.68) need not be proven. *Garza v County of Los Angeles* (9th Cir 1990) 918 F2d 763, 771. Intent to preserve incumbency can constitute intentional vote dilution when the means to that end is to divide minority groups among districts to dilute their voting strength. A reapportionment plan that creates an unusually shaped district to take in minority neighborhoods that are otherwise geographically separated may violate the equal protection clause of the Fourteenth Amendment. Such a plan may be "irrational on its face" and understood only as an effort to segregate voters into separate voting districts based on race. *Shaw v Reno* (1993) 509 US 630, 645, 125 L Ed 2d 511, 113 S Ct 2816. However, it need not be shown that the redistricting plan is bizarre on its face to establish an equal protection violation; although the shape of the district may be persuasive evidence, other evidence may be used to show that race was a predominate motivating factor for redistricting and a violation of equal protection. *Miller v Johnson* (1995) 515 US 900, 913, 132 L Ed 2d 762, 115 S Ct 2475.

When district lines are drawn with race as a predominant factor, the validity of the district is subject to a strict scrutiny standard of review that can be met by demonstrating the existence of a compelling state interest in ameliorating the effects of racially polarized voting attributable to the state's history of discrimination against minorities in electoral processes. The required showing of past discrimination must be specific. In addition, a state is not entitled to draw district lines solely to ensure continued electoral success to a particular minority group. Rather, the Federal Voting Rights Act (FVRA) (42 USC §1973) mandates that the minority group's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the state's actions. *Bush v Vera* (1996) 517 US 952, 976, 135 L Ed 2d 248, 116 S Ct 1941; *Shaw v Hunt* (1996) 517 US 899, 914, 135 L Ed 2d 207, 116 S Ct 1894.

© The Regents of the University of California

§3.71 (2) Unintentional Dilution—§2 of the Federal Voting Rights Act

When there is no intentional discrimination, the *Gingles* preconditions (see §3.68) must be established and discrimination proven under the totality of the circumstances. *Growe v Emison* (1993) 507 US 25, 41, 122 L Ed 2d 388, 113 S Ct 1075 (*Gingles* factors apply to claim for dilution of minority voting strength). See also *Voinovich v Quilter* (1993) 507 US 146, 157, 122 L Ed 2d 500, 113 S Ct 1149. If the *Gingles* preconditions are not met, there is no prohibition against concentrating minority voters in a district. 507 US at 155.

© The Regents of the University of California

§3.72 C. National Voter Registration Act

Congress enacted the National Voter Registration Act (42 USC §§1973gg-1973gg-10) in 1993, commonly known as the Motor Voter Act. In addition to a state's provisions for voter registration, the Motor Voter Act requires states to provide the opportunity to register to vote for federal elections:

- At the same time voters apply for or renew a driver's license;
- At all public assistance offices and offices providing state-funded services to persons with disabilities; and
- By mail using mail-in forms.

The Motor Voter Act requires notification to all applicants of whether or not their voter registration applications were accepted. It also requires states to maintain accurate and current voter registration lists, and establishes safeguards for these lists and the right to vote. 42 USC §1973gg-6. The Motor Voter Act is enforced by the Department of Justice through a civil action in federal court to enforce its requirements. 42 USC §1973gg-9.

© The Regents of the University of California

§3.73 D. Help America Vote Act

The Help America Vote Act of 2002 (HAVA) (42 USC §§15301-15545)

- creates a new federal agency for election administration information,
- provides funds to states to improve election administration and replace outdated voting systems, and
- creates minimum standards for election administration.

HAVA is enforced by the United States Attorney General. For HAVA requirements on provisional ballots, see §3.25.

© The Regents of the University of California

E. California Voting Rights Act

§3.74 1. Scope and Effect

The California Voting Rights Act (CVRA) (Elec C §§14025-14032), enacted in 2002, applies only to (Elec C §§14026(a), 14027)

- "At-large" electoral systems (in which each member of the governing board is elected by all of the voters in the jurisdiction),
- Electoral systems with an "at large" component, and
- "From-district" electoral systems (in which each member of the governing board must reside within a particular district, but is elected by all of the voters in the jurisdiction).

The CVRA is broader than the Federal Voting Rights Act in that the CVRA prohibits both at-large elections that prevent minority members from electing their chosen candidates, as well as elections that impair the ability of minority voters to influence elections. The CVRA states that it was enacted to implement the equal protection and voting rights provisions of the California Constitution. Elec C §14031. Its constitutionality has been upheld against a facial challenge. *Sanchez v City of Modesto* (2006) 145 CA4th 660, 51 CR3d 821, cert denied (2007) 552 US 974.

© The Regents of the University of California

2. Challenges to Elections Under the California Voting Rights Act

§3.75 a. What Constitutes Violation

An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement or the rights of voters who are members of a protected class. Elec C §14027. A violation of the California Voting Rights Act (CVRA) (Elec C §§14025-14032) is established if it is shown that racially polarized voting occurs in elections for members of the governing body or in elections incorporating other electoral choices by the voters of the political subdivision. Elec C §14028(a). The methodologies for estimating group voting behavior that may be used to prove that elections are characterized by racially polarized voting are those approved in federal cases enforcing the Federal Voting Rights Act (FVRA). Elec C §14026(e). See §§3.68-3.71.

NOTE: The CVRA defines "protected class" as a class of voters who are members of a race, color, or language minority group, as referenced and defined in the FVRA (Elec C §14026(d)) and "racially polarized voting" as voting in which there is a difference, as defined in case law under the FVRA, in the choice of candidates or other electoral choices preferred by voters in a protected class, as compared to the rest of the electorate.

© The Regents of the University of California

§3.76 b. Burden of Proof

Unlike the Federal Voting Rights Act (FVRA) (42 USC §1973), the California Voting Rights Act (CVRA) does not require a plaintiff to prove at the liability stage of litigation that the minority group is sufficiently large and geographically compact to form a majority in a single member district. Elec C §14028(c). The CVRA also does not include the FVRA requirement for a plaintiff-proved discrimination under the "totality of the circumstances" test. Instead, a violation of the CVRA may be established by showing that racially polarized voting occurs in elections for members of the governing body. Elec C §14026(e). In this regard, one circumstance that may be considered in determining a CVRA violation is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body that is the subject of the CVRA challenge. Elec C §14028(a)-(b).

The following factors are probative, but not necessary, to establish a violation of the CVRA (Elec C §14028(e)):

- History of discrimination;
- Use of electoral devices or other practices/procedures that may enhance the dilutive effects of at-large elections;
- Denial of access to processes that determine which groups of candidates will receive financial or other support in a given election;
- Extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health; and
- Use of overt or subtle racial appeals in political campaigns.

Like the FVRA, the CVRA does not require proof of intent on the part of either voters or elected officials to establish a violation. Elec C §14028(d).

© The Regents of the University of California

§3.77 c. Action for Violation

Any voter who is a member of a protected class and who resides in a political subdivision where a violation of the California Voting Rights Act (CVRA) is alleged may file an action in the superior court in which the political subdivision is located. Elec C §14032.

If it finds a violation of the CVRA, the court must implement "appropriate" remedies, including the imposition of district-based elections tailored to remedy the violation. Elec C §14029.

NOTE: Although the fact that members of a protected class are not geographically compact or concentrated does not support a violation of the CVRA (see §3.76), it may be a factor in determining an appropriate remedy. Elec C §14028(c).

A successful CVRA plaintiff (other than a governmental entity) is entitled to reasonable attorney fees and litigation expenses, including, but not limited to, expert witness fees and expenses. A prevailing defendant, by contrast, is not entitled to recover any costs unless the court finds the action to have been frivolous, unreasonable, or without foundation. Elec C §14030.

© The Regents of the University of California

F. Restrictions on Right to Vote

§3.78 a. When Subject to Strict Scrutiny

The right to vote is a fundamental right. *Wesberry v Sanders* (1964) 376 US 1, 17, 11 L Ed 2d 481, 84 S Ct 526. The principle of "one-person, one-vote" is firmly grounded in the Fifth Amendment of the United States Constitution. *Reynolds v Sims* (1964) 377 US 533, 562, 12 L Ed 2d 506, 84 S Ct 1362. When a law impinges on the right to vote of a person qualified to do so, it will ordinarily be subject to strict judicial scrutiny. Under this very severe standard, a discriminatory law will not be given effect unless its classification bears a close relation to promoting a compelling state interest, is necessary to achieve the government's goal, and is narrowly drawn to achieve the goal by the least restrictive means possible. *Board of Supervisors v Local Agency Formation Comm'n* (1992) 3 C4th 903, 913, 13 CR2d 245, cert denied (1993) 507 US 988. In general, absent a special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the public agency can demonstrate that the classification serves a compelling interest. *Hill v Stone* (1975) 421 US 289, 44 L Ed 2d 172, 95 S Ct 1637.

© The Regents of the University of California

§3.79 b. When Subject to Rational Basis Test

The mere fact that a state law touches on the right to vote does not necessarily require the application of strict scrutiny. *Burdick v Takushi* (1992) 504 US 428, 119 L Ed 2d 245, 112 S Ct 2059. Restricting the franchise to residents is subject to a rational basis test. *Neilson v City of Cal. City* (2005) 133 CA4th 1296, 35 CR3d 453, cert denied (2006) 549 US 816 (rational basis test satisfied, because City could have determined that the residents are most knowledgeable and interested in all aspects of local affairs).

The rational basis test also applies to a restriction when a special-purpose unit of government is involved and that unit performs functions affecting a definable group of constituents. Under these circumstances, voting power may be apportioned to give greater influence to the citizens most affected by the agency's functions without violating equal protection guarantees, as long as the resulting classification is reasonably related to the statutory objective. *Southern Cal. Rapid Transit Dist. v Bolen* (1992) 1 C4th 654, 3 CR2d 843. See also *Board of Supervisors v Local Agency Formation Comm'n* (1992) 3 C4th 903, 13 CR2d 245, cert denied (1993) 507 US 988. However, apportioning voting power in such a manner is never mandatory. *Foothill-DeAnza Community College Dist. v Emerich* (2007) 158 CA4th 11, 19, 69 CR3d 678; *Neilson v California City, supra* (landowner vote not required to impose property tax).

© The Regents of the University of California

§3.80 VI. INITIATIVES AND REFERENDA

California Constitution article II, §§8-11 provide the basis for the powers of initiative and referenda in California.

- Initiative is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." See Cal Const art II, §8(a).
- Referendum is "the power of the electors to approve or reject statutes or parts of statutes, except urgency statutes, statutes calling elections and statutes providing for tax levies or appropriations for usual current expenses of the state." Cal Const art II, §9(a).

"Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide." Cal Const art II, §11(a). "This section generally does not affect a city having a charter." But see Cal Const art II, §11(b)-(c).

NOTE: Initiatives, referenda, and recall petitions, as well as any memoranda prepared by the elections official in examining the petitions, are not public records. Disclosure of such documents is limited to the clerk, the proponent, and specified law enforcement officials. Govt C §6253.5. Petitions must be retained by the clerk for 8 months after certification of the election results. Elec C §17200.

© The Regents of the University of California

A. Statutory Provisions Applicable To Cities

§3.81 1. Initiatives

The statutory procedures for city initiatives are found in Elec C §§9200-9226. These sections frequently refer to "ordinances," but in fact the initiative power is applicable to all city legislative acts regardless of the form.

NOTE: The distinction between a legislative act and an administrative act is important in this context; only legislative acts are subject to the power of initiative. On legislative acts, see §§3.106-3.107.

© The Regents of the University of California

§3.82 a. Petition for Proposed Initiative

A proposed initiative may be submitted to the legislative body of the city by a petition filed with the clerk after being signed by not less than the required number of votes. The petition may be in separate sections, as long as each section complies with all the requirements. The first page of each section must contain the title of the petition and the text of the initiative. Elec C §9201; *Mervyn's v Reyes* (1998) 69 CA4th 93, 81 CR2d 148.

© The Regents of the University of California

§3.83 (1) Notice of Intent to Circulate Petition

The initiative process is begun by the filing of a notice of intent to circulate petition with the city clerk together with text of the initiative. Elec C §9202. A notice of intent that does not contain the name(s) of the proponent(s) of the initiative must be rejected by the city clerk. 83 Ops Cal Atty Gen 139 (2000).

The city attorney must provide an impartial and non-argumentative ballot title and summary, in fewer than 500 words, within 15 days of the filing of the notice of intent. Elec C §9203.

PRACTICE TIP: The city attorney should simply summarize what the initiative says; analysis should not be included in the summary. On completion, the ballot title and summary should be provided promptly to the filer.

Preparation of the ballot title and summary is a ministerial act, and the documents must be prepared even if the city attorney believes the initiative to be illegal. *Schmitz v Younger* (1978) 21 C3d 90, 145 CR 517; *Widders v Furchtenicht* (2008) 167 CA4th 769, 84 CR3d 428 (city attorney properly obtained prior judicial authorization before preparing title and summary of initiative that appeared to be illegal). Any elector of the city may seek a writ of mandate to amend the ballot title or summary if either is false, misleading, or inconsistent with the requirements of Elec C §9204. Elec C §9204; *San Francisco Forty-Niners v Nishioka (Comstock)* (1999) 75 CA4th 637, 89 CR2d 388.

PRACTICE TIP 1: Compliance with statutory requirements is the responsibility of the initiative proponent. It is not the responsibility of the city attorney to advise the proponent or correct the proponent's errors. Even if the city has provided input on the statutory requirements, the city is unlikely to be estopped later from rejecting a petition if the input is incorrect. See *Creighton v Reviczky* (1985) 171 CA3d 1225, 217 CR 834.

PRACTICE TIP 2: The city attorney and city clerk should use the time before the petition is filed with the signatures affixed to review all of the statutory requirements for initiatives and the text of the initiative. This enables the attorney and clerk to anticipate and prepare to address any potential problems that may arise when the petition is filed. The city clerk should be prepared to reject the petition if the statutory requirements are not met.

PRACTICE TIP 3: The city attorney should prepare a checklist of the statutory requirements for such petitions to give to the city clerk to use in reviewing the petition.

A notice of intention and the title and summary of the proposed initiative must be published or posted. Elec C §9205.

© The Regents of the University of California

§3.84 (2) Circulating Petition

After publication or posting the notice of intention and the title and summary of the proposed measure (see §3.83), the proponents may circulate the petitions among the registered voters of the city. Elec C §9207.

Each section of the petition must have a declaration of the person soliciting the signatures attached. For required declaration form, see Elec C §§9022, 9209. *Buckley v American Constitutional Law Found., Inc.* (1999) 525 US 182, 142 L Ed 2d 599, 119 S Ct 636. Circulators need not declare that they are voters or are qualified to register as voters of the city. See *Preserve Shorecliff Homeowners v City of San Clemente* (2008) 158 CA4th 1427, 71 CR3d 332 (concluding city residency requirement of Elec C §§9209 and 9238(c) violates First Amendment's free-speech guarantee).

NOTE: Any circulator who intentionally either misrepresents or makes false statements on the contents, purpose, or effect of the petition is guilty of a misdemeanor. Elec C §18600. Allegations of misrepresentation or false statements do not affect the clerk's duty to accept the petition and count the signatures. *San Francisco Forty-Niners v Nishioka (Comstock)* (1999) 75 CA4th 637, 89 CR2d 388. The petition must be signed and circulated in accordance with Elec C §§100-106, 9207-9209. Physical interference with the circulation of a petition is a criminal offense (Elec C §§18620, 18630, 18631), but petition opponents are not prohibited from urging prospective signers not to sign the petition.

Any voter who has signed a petition may withdraw his or her signature by filing a written request with the elections officer before the date that the petition is filed. Elec C §9602. The voter's written request does not need an attached declaration from the circulator of the petition. Elec C §§104, 9602.

© The Regents of the University of California

§3.85 (3) Filing Petition

Signatures and sections must be secured, and the petition and all sections filed within 180 days of the receipt of the title and summary. Elec C §9208. All sections of the petition must be filed at one time by the proponents or persons authorized in writing by the proponents. Elec C §9210.

Signatures lacking the signer's full residential address must not be counted as valid (*Mapstead v Anchundo* (1998) 63 CA4th 246, 268, 73 CR2d 602), but invalidated signatures do not affect the validity of the other valid signatures on the particular section of the petition. Elec C §105. A petition lacking the dates of circulation or the declarant's signature must also be rejected. See Elec C §18600; *Albert v Jamieson* (1954) 124 CA2d 298, 268 P2d 542.

© The Regents of the University of California

b. City Council Action on Petition

§3.86 (1) Council Options

If the petition qualifies, the city council must either (Elec C §§9214-9215)

- adopt it without change, or
- submit the proposal to the voters.

If the petition measure is lawful and procedurally in compliance with law, the city has a ministerial duty to place the measure on the ballot if the council declines to adopt the initiative.

NOTE: The city council may on its own submit an initiative for voter approval without a petition. Elec C §9222.

City councils cannot refuse to put an initiative on the ballot because of perceived unlawfulness of the initiative's subject matter. See *Save Stanislaus Area Farm Econ. v Board of Supervisors* (1993) 13 CA4th 141, 16 CR2d 408 (registrar must put on ballot duly qualified initiative that complies with formal requirements for submitting initiative). If the city believes the initiative is substantively unlawful, it can take the matter to court for declaratory relief or mandamus to remove the initiative from the ballot. See *Save Stanislaus Area Farm Econ., supra*; *Yost v Thomas* (1984) 36 C3d 561, 205 CR 801 (criticizing city for rejecting referendum); *Schmitz v Younger* (1978) 21 C3d 90, 145 CR 517 (Attorney General had no authority to refuse to prepare title and summary for state initiative that he thought violated single-subject rule). But see *Widders v Furchtenicht* (2008) 167 CA4th 769, 84 CR3d 428 (city attorney properly obtained prior judicial authorization before preparing title and summary of initiative that appeared to be illegal). Nor should the clerk consider extrinsic evidence in determining compliance with the statutory procedural requirements. *Alliance for a Better Downtown Millbrae v Wade* (2003) 108 CA4th 123, 133 CR2d 249.

PRACTICE TIP: The city clerk should perform an initial review of submitted materials and not accept for filing any document that, on its face, does not comply with the statutory procedural requirements. See *Myers v Patterson* (1987) 196 CA3d 130, 241 CR 751 (registrar has duty to reject initiative petition when it did not have requisite notice of intent).

© The Regents of the University of California

§3.87 (2) City Council May Request Impartial Analysis

When directed by the city council, the attorney must prepare an impartial analysis on an initiative. The analysis must not exceed 500 words. The analysis should explain the effect of the initiative on existing law and its operation. Elec C §9280. The analysis should be drafted in plain, clear, and objective language. If the city attorney believes the measure may be unlawful, the analysis may indicate that the initiative has potential legal problems. See *King v Lewis* (1990) 219 CA3d 552, 268 CR 277.

© The Regents of the University of California

§3.88 (3) City Council May Refer Petition for Report

The city council may refer the petition to any city agency or agencies for their reports on fiscal impacts, general and specific plan consistency, various land use issues, and "any other matters." Elec C §9212.

PRACTICE TIP: The report must be presented no later than 30 days after the elections official certifies the sufficiency of the petition. Thirty days may not be long enough to ask the city council if a report is desired, see what topics should be included, prepare the report, and properly notice the report on an agenda. Depending on the magnitude of issues, it may be prudent to seek city council direction on the report *before* the petition is determined to be sufficient to provide enough lead-time. In addition, the timing to get the initiative on the ballot may be a factor because it could add 30 more days to city council action to either adopt the initiative or call for an election.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.89 c. Timing of Election

§3.89 c. Timing of Election

The timing of the election depends on the number of signatures on the petition.

© The Regents of the University of California

§3.90 (1) Special Election

If the petition contains the signatures of at least 15 percent of the registered voters (or, if a city has 1000 or fewer registered voters, the signatures of 25 percent or 100 voters, whichever is less) and expressly requests a special election, the council must call a special election. Elec C §9214.

The special election must be held not fewer than 88 nor more than 103 days after the date of the order of elections. Elec C §§1405, 9214. However, when it is legally possible, the special election may be held on the same date as an election occurring wholly or partially within the same territory if the petition qualifies within 180 days before that election (Elec C §1404(a)(1)), and the special election may be held on the same date as the statewide general election if the petition qualifies during the period between the primary and general election in the same year (Elec C §1405(a)(2)).

The city council is not required to, but may, call a special election even if the initiative does not otherwise qualify for a special election. Elec C §§9215(b), 10201.

© The Regents of the University of California

§3.91 (2) Regular Election

If the petition contains the signatures of at least 10 percent of the registered voters (or, if a city has 1000 or fewer registered voters, the signatures of 25 percent or 100 voters, whichever is less), or at least 15 percent of the registered voters for a charter amendment (Elec C §9255), the council must place the initiative on the ballot at the next regular election held not fewer than 88 days after the date of the order of election. Elec C §§1405, 9215.

NOTE: Under Proposition 218 (Cal Const art XIIIC, §3), a measure for the repeal or reduction of a tax, assessment, fee, or charge qualifies if the petition contains the signatures of at least 5 percent of the votes cast in the city for all candidates for governor in the immediately proceeding gubernatorial election. An election for the purpose of imposing a "general tax" must be consolidated with a regularly scheduled general election for members of the city council, except in cases of emergency declared by a unanimous vote of the council. Cal Const art XIIIC, §2(b).

© The Regents of the University of California

§3.92 d. Adoption of Initiative

A majority vote is required to adopt an initiative, except for those that establish, increase, or extend a "special tax," which require a two-thirds vote of the electorate for passage. Cal Const art XIIIC, §2(d); Govt C §53722.

If an initiative is adopted by vote of the city council without submission to the voters, or adopted by the voters, it can only be repealed or amended by the voters (unless its language provides otherwise). Elec C §9217; *Mobilepark West Homeowners Ass'n v Escondido Mobilepark West* (1995) 35 CA4th 32, 41 CR2d 393 (city council-adopted ordinance purporting to clarify and implement existing rent control initiative declared invalid).

© The Regents of the University of California

§3.93 e. Conflicting Initiatives

When two or more conflicting initiatives pass, the one receiving the highest number of affirmative votes controls. Elec C §9221. Initiatives "conflict" if they present themselves as conflicting, or if each creates a comprehensive regulatory scheme relating to the same subject. *Taxpayers to Limit Campaign Spending v Fair Political Practices Comm'n* (1990) 51 C3d 744, 274 CR 787.

PRACTICE TIP: To avoid disputes regarding whether two initiatives compete when a city council places a competing measure on the ballot, the council's measure should contain a "poison pill" explicitly providing that it is in conflict with any other measure on the subject, and that none of the others will take effect if the council's measure receives the most votes. See *Concerned Citizens v City of Carlsbad* (1988) 204 CA3d 937, 251 CR 583.

© The Regents of the University of California

§3.94 2. Referenda (Ordinances)

The statutory procedures for city referenda are in Elec C §§9235-9247. As with initiatives, sections on referenda frequently use the word "ordinance." The referendum power, however, is applicable to all legislative acts regardless of the form (*i.e.,* ordinance or resolution). On legislative acts, see §§3.106-3.107.

© The Regents of the University of California

§3.95 a. Petition for Proposed Referenda

The referendum petition must be in a form prescribed by statute and each section must have a declaration of the circulator attached. The declaration must include a statement the circulator is a voter or is qualified to be a voter in California. Elec C §§102, 104, 9238. See *San Francisco Forty-Niners v Nishioka (Comstock)* (1999) 75 CA4th 637, 89 CR2d 388 (suggesting that referendum petition that contains objectively inaccurate information and calculated untruths that substantially mislead and misinform reasonable voter would be unlawful under Elec C §18600). On circulating the petition, see §3.96.

Each section of a referendum petition must contain the identifying number or title of the ordinance that is subject to the referendum. Elec C §9238. If the number and title are included, any error in either may render the petition invalid. See *Hebard v Bybee* (1998) 65 CA4th 1331, 77 CR2d 352.

The text of any ordinance or resolution for which a referendum is sought must be attached to the petition. Elec C §9238. See *Defend Bayview Hunters Point Comm. v City & County of San Francisco* (2008) 167 CA4th 846, 858, 84 CR3d 486 (finding referendum petition to overturn development plan fatally defective when petition failed to include copy of redevelopment plan); *Nelson v Carlson* (1993) 17 CA4th 732, 21 CR2d 485 (finding petition to amend general plan fatally defective because entire general plan was not attached to petition). But see *We Care—Santa Paula v Herrera* (2006) 139 CA4th 387, 42 CR3d 577 (full text of general plan unnecessary for initiative adding new language rather than amending existing language).

© The Regents of the University of California

§3.96 (1) Circulating Petition

A person who is a voter or qualified to vote may circulate a petition. Elec C §102; *Buckley v American Constitutional Law Found., Inc.* (1999) 525 US 182, 142 L Ed 2d 599, 119 S Ct 636 (finding Colorado statute requiring circulators be registered voters violates First Amendment free speech guarantee, as voter registration requirement drastically reduced number of available circulators without justification); 82 Ops Cal Atty Gen 250 (1999). The circulator, however, does not need to be a resident of the city. See *Preserve Shorecliff Homeowners v City of San Clemente* (2008) 158 CA4th 1427, 71 CR3d 332 (concluding city residency requirement of Elec C §§9209 and 9238(c) violates First Amendment free speech guarantee); 82 Ops Cal Atty Gen 250 (1999).

© The Regents of the University of California

§3.97 (2) Filing Petition

Petitions are filed with the city clerk, who must determine the number of signatures and certify the results. Elec C §§9239-9240. Petitions must be filed during normal office hours as posted. Elec C §9242. Petition signatures must also meet the requirements of Elec C §§100-106. But see *Malick v Athenour* (1995) 37 CA4th 1120, 44 CR2d 281.

NOTE: A petition protesting the adoption of an ordinance must be submitted within 30 days after the adopted referendum is attested by the city clerk and signed by not less than 10 percent of the registered voters (or, if the city has 1000 or fewer registered voters, the signatures of 25 percent or 100 voters are required). Elec C §9237. The submission of such a petition suspends the effective date of the ordinance. Elec C §9237.

© The Regents of the University of California

§3.98 b. City Council Action on Petition

If a valid petition containing the requisite number of signatures is timely submitted, the city council must either (Elec C §9241):

- repeal the entire ordinance, or
- submit the ordinance to a vote.

© The Regents of the University of California

§3.99 (1) Effect of Repeal

If the city council repeals the ordinance, the same or similar ordinance cannot be again enacted for 1 year from the date of the repeal. Elec C §9241.

© The Regents of the University of California

§3.100 (2) Election on Ordinance

If not repealed, the council must submit the ordinance to the voters at the next regular municipal election (if it occurs within not fewer than 88 days), or, if there is no regular election within that time, at a special election called not fewer than 88 days after the order of the city council. Elec C §9241. Election procedures are the same as those for initiatives. See Elec C §§9217-9225, 9243.

To become effective, the ordinance must be approved by a majority vote. If not approved by a majority vote, the same or similar ordinance cannot be again enacted for 1 year from the date of the election. Elec C §9241.

© The Regents of the University of California

§3.101 c. Effective Date of Ordinances

Ordinances are effective 30 days after adoption except for those relating to an election, urgency ordinances, street improvement proceedings, and ordinances governed by particular provisions of state law prescribing the manner of their passage and adoption. Elec C §9235.

© The Regents of the University of California

§3.102 B. Applicability to Charter Cities

Consistent with the state constitutional provisions, the statutory schemes for initiative and referendum "do not apply to cities having a charter adopted under section 3 of Article XI of the California Constitution, and having in their charters any provision for the direct initiation of ordinances by the voters …" Elec C §9247. Charter cities, however, may not diminish referendum powers reserved by the California Constitution. *Rubalcava v Martinez* (2007) 158 CA4th 563, 571, 70 CR3d 225.

NOTE: The requirements for initiatives to change the charter itself are slightly different from the requirements for initiative ordinances. Elec C §9255.

© The Regents of the University of California

C. Limitations on Use of Initiative and Referendum

1. Constitutional Limitations

a. Limitations on Initiatives

§3.103 (1) Single-Subject Rule

"An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Cal Const art II, §8(d). An initiative measure will not violate the single-subject rule if, despite its varied collateral effects, all of its parts are "reasonably germane" to each other. See *Amador Valley Joint Union High Sch. Dist. v State Bd. of Equalization* (1978) 22 C3d 208, 149 CR 239; *San Mateo County Coastal Landowners' Ass'n v County of San Mateo* (1995) 38 CA4th 523, 45 CR2d 117. Election Code §9218 prohibits voting on ordinances with the same subject matter within any 12-month period at a special election.

NOTE: The single-subject rule does not apply to city council-initiated ballot measures. See *Hernandez v County of Los Angeles* (2008) 167 CA4th 12, 18, 84 CR3d 10.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.104 (2) Naming Individuals or Corporations to Governmental Positions

§3.104 (2) Naming Individuals or Corporations to Governmental Positions

An initiative that names an individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, does not have any effect. Cal Const art II, §12. Such a measure may not be submitted to the voters. *Pala Band of Mission Indians v Board of Supervisors* (1997) 54 CA4th 565, 63 CR2d 148 (applies to local initiatives).

© The Regents of the University of California

§3.105 b. Limitations on Referenda

The referendum power does not extend to any of the following (Cal Const art II, §9(a)):

- urgency statutes under Govt C §§36934, 36937, 65858 (interim land use ordinances),
- statutes calling elections, and
- statutes providing for tax levies or appropriations for usual current state expenses.

See also *City of Westminster v County of Orange* (1988) 204 CA3d 623, 251 CR 511. But see *Rossi v Brown* (1995) 9 C4th 688, 38 CR2d 363 (initiative repealing charter city's utility tax is not referendum on tax measure and not prohibited by charter and constitutional provisions); *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 45 CR2d 207 (applying *Rossi* to initiative subjecting all new local taxes proposed by local legislative body to condition of prior voter approval). See also Cal Const art XIIIC (Proposition 218) (expressly authorizing use of initiatives and referenda for purpose of reducing taxes).

© The Regents of the University of California

2. Judicial Limitations on Initiatives and Referenda

§3.106 a. Only Apply to Legislative Acts

Initiatives and referenda may only be applied to legislative acts. *DeVita v County of Napa* (1995) 9 C4th 763, 38 CR2d 699. Legislative acts generally involve the formulation of rules to be applied in all future cases, whereas adjudicatory acts generally involve the application of a fixed rule to a specific set of existing facts.

© The Regents of the University of California

§3.107 (1) Examples of Legislative Acts

- Zoning and rezoning ordinances (see *Arnel Dev. Co. v City of Costa Mesa* (1980) 28 C3d 511, 169 CR 904; *Associated Home Builders, Inc. v City of Livermore* (1976) 18 C3d 582, 135 CR 41).
- General and specific plans (see *DeVita v County of Napa* (1995) 9 C4th 763, 38 CR2d 699; *Nelson v Carlson* (1993) 17 CA4th 732, 21 CR2d 485; *Midway Orchards v County of Butte* (1990) 220 CA3d 765, 269 CR 796).
- Road abandonments (see *Heist v County of Colusa* (1984) 163 CA3d 841, 213 CR 278).
- Development agreements adopted under Govt C §§65864, 65867.5.
- Local coastal programs (see *San Mateo County Coastal Landowners' Ass'n v County of San Mateo* (1995) 38 CA4th 523, 45 CR2d 117).
- Fixing of compensation of local officials (see *Bagley v City of Manhattan Beach* (1976) 18 C3d 22, 132 CR 668; 84 Ops Cal Atty Gen 13 (2001)).

© The Regents of the University of California

§3.108 (2) Examples of Adjudicatory Acts

- Conditional use permits (see *Wiltshire v Superior Court* (1985) 172 CA3d 296, 218 CR 199).
- Variances (see Topanga Ass'n for a Scenic Community v County of Los Angeles (1974) 11 C3d 506, 113 CR 836).
- Planned unit development permits (see *Fishman v City of Palo Alto* (1978) 86 CA3d 506, 150 CR 326).
- Subdivision map approvals (see *Horn v County of Ventura* (1979) 24 C3d 605, 156 CR 718).
- Employee discipline and appeals.
- Matter subject to review under CCP §1094.5.

© The Regents of the University of California

§3.109 b. Cannot Direct Council to Perform Legislative Act

An initiative measure is invalid if, instead of itself being a legislative act, it directs the city council to perform a legislative act. See *Marblehead v City of San Clemente* (1991) 226 CA3d 1504, 277 CR 550 (invalidating initiative that directed city council to revise plan and zoning ordinances to reflect concepts expressed in measure); *Widders v Furchtenicht* (2008) 167 CA4th 769, 784, 84 CR3d 428 (city attorney properly obtained prior judicial authorization before preparing title and summary of initiative that appeared to be illegal).

© The Regents of the University of California

§3.110 c. Cannot Relate to Matters Committed to Council

Courts have held the electorate may not exercise the power of initiative or referendum on matters that the legislature has committed to the discretion of the city council. *Committee of Seven Thousand v Superior Court* (1988) 45 C3d 491, 247 CR 362; *Mitchell v Walker* (1956) 140 CA2d 239, 295 P2d 90, overruled on other grounds in *Kugler v Yocum* (1968) 69 C2d 371, 71 CR 687.

© The Regents of the University of California

§3.111 d. Cannot Impair Essential Government Functions

Courts have also said the power of initiative and referendum does not extend to "essential government functions." See *City of Atascadero v Daly* (1982) 135 CA3d 466, 185 CR 228 (impairment of fiscal management abilities); *Simpson v Hite* (1950) 36 C2d 125, 222 P2d 225 (siting courthouse); *Newsom v Board of Supervisors* (1928) 205 C 262, 270 P 676 (franchising authority).

© The Regents of the University of California

§3.112 e. Cannot Regulate Preempted Matters

An initiative may not regulate matters that have been preempted by the state. See, *e.g., Voters for Responsible Retirement v Board of Supervisors* (1994) 8 C4th 765, 35 CR2d 814; *Wiltshire v Superior Court* (1985) 172 CA3d 296, 218 CR 199 (solid waste management); *Bruce v City of Alameda* (1985) 166 CA3d 18, 212 CR 304 (subsidized rental housing); *Redevelopment Agency v City of Berkeley* (1978) 80 CA3d 158, 169, 143 CR 633 (redevelopment).

NOTE: The city council, when functioning as an agency of the state, is beyond the reach of a municipal initiative or referendum unless the state explicitly reserved such right under the relevant circumstances. See *Jahr v Casebeer* (1999) 70 CA4th 1250, 83 CR2d 172.

© The Regents of the University of California

§3.113 f. Cannot Be Arbitrary and Discriminatory

An initiative that constitutes arbitrary and discriminatory regulation is not within the proper exercise of the city's police power and is thus invalid. *Arnel Dev. Co. v City of Costa Mesa* (1981) 126 CA3d 330, 178 CR 723.

© The Regents of the University of California

§3.114 g. Must Be Consistent With the General Plan

Initiatives and referenda must be consistent with the city's general plan (*Lesher Communications, Inc. v City of Walnut Creek* (1990) 52 C3d 531, 277 CR 1; *deBottari v City Council of Norco* (1985) 171 CA3d 1204, 217 CR 790 (zoning ordinance referendum petition), although the charters of some cities may not require the same consistency. See *Garat v City of Riverside* (1991) 2 CA4th 259, 3 CR2d 504, disapproved on other grounds in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804.

On general plan requirements, see §§10.16-10.83.

© The Regents of the University of California

§3.115 h. Must Be Consistent With State and Federal Constitutional Requirements

An initiative is subject to constitutional requirements like any other statute. *Rossi v Brown* (1995) 9 C4th 688, 38 CR2d 363. See *Hawn v County of Ventura* (1977) 73 CA3d 1009, 141 CR 111 (court invalidated initiative that discriminated between voters in city and voters in county as violative of equal protection). See also *Citizens for Responsible Behavior v Superior Court* (1991) 1 CA4th 1013, 2 CR2d 648 (anti-gay rights initiative).

© The Regents of the University of California

§3.116 3. City's Choices When It Believes Initiative or Referendum Is Unlawful

If the city believes an initiative or referendum is unlawful (as opposed to procedurally defective), the city may take one of the three actions discussed in §§3.117-3.119.

© The Regents of the University of California

§3.117 a. Refuse to Prepare Title and Summary

The city attorney may refuse to prepare the title and summary, seek a declaration that the proposed initiative is unconstitutional, and seek relief from the duty to prepare a title and summary. See *Widders v Furchtenicht* (2008) 167 CA4th 769, 84 CR3d 428 (city attorney properly obtained prior judicial authorization before preparing title and summary of initiative that appeared to be illegal); *Jahr v Casebeer* (1999) 70 CA4th 1250, 83 CR2d 172.

© The Regents of the University of California

§3.118 b. Refuse To Place Measure on Ballot

The city council may refuse to place the measure on the ballot. The initiative proponents then may file a mandamus action against which the city will defend. The court may uphold the refusal (see *City of Irvine v Irvine Citizens Against Overdevelopment* (1994) 25 CA4th 868, 30 CR2d 797 (pre-election challenge to referendum petition that was inconsistent with city's general plan upheld); *Citizens for Responsible Behavior v Superior Court* (1991) 1 CA4th 1013, 2 CR2d 648) (anti-gay rights initiative)), or order the measure placed on the ballot, subject to a later (separate) suit after the election if the measure is adopted.

NOTE: This approach was repudiated in *Save Stanislaus Area Farm Econ. v Board of Supervisors* (1993) 13 CA4th 141, 16 CR2d 408 (registrar must put duly qualified initiative that complies with formal requirement for submitting initiative ballot). See *Schmitz v Younger* (1978) 21 C3d 90, 145 CR 517 (Attorney General had no authority to refuse to prepare title and summary for state initiative that he thought violated single-subject rule).

PRACTICE TIP: In any pre-election review, courts much prefer to defer ruling on an initiative or referendum's validity until after the election. On judicial review, see §3.123.

© The Regents of the University of California

§3.119 c. Place Measure on Ballot

If the city council decides to place the measure on the ballot, if may then take one of the following three actions:

(1) Direct the city attorney to file an action to remove the measure from the ballot. See *Yost v Thomas* (1984) 36 C3d 561, 205 CR 801 (criticizing city for rejecting referendum and noting only courts can decide such difficult matters); *Save Stanislaus Area Farm Econ. v Board of Supervisors* (1993) 13 CA4th 141, 16 CR2d 408; *City of Atascadero v Daly* (1982) 135 CA3d 466, 185 CR 228 (city's declaratory relief action on initiative requiring voter approval of any revenue-raising measure).

(2) Defend the validity of the measure once adopted. See *Arnel Dev. Co. v City of Costa Mesa* (1980) 28 C3d 511, 514 n3, 169 CR 904.

NOTE: The notion that a city has a duty to defend the validity of initiative measures passed by its electorate has been questioned. See *City of Burbank v Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 CA4th 465, 6 CR3d 367. Should the city choose to defend the measure, it may be more difficult for the city attorney to do so if the city attorney's ballot measure analysis said the measure was unlawful.

(3) File a post-election challenge seeking a judicial determination of the validity of the measure. See *City of Burbank v Burbank-Glendale-Pasadena Airport Auth.* (2003) 113 CA4th 465, 6 CR3d 367 (court upheld post-election challenge to initiative filed by city, despite fact that city had not earlier brought pre-election challenge to that measure).

© The Regents of the University of California

D. Procedural Exemptions

§3.120 1. Notice and Hearing

Notice and hearing requirements generally do not apply to the enactment of initiatives. *Associated Home Builders, Inc. v City of Livermore* (1976) 18 C3d 582, 135 CR 41.

© The Regents of the University of California

§3.121 2. California Environmental Quality Act (CEQA)

"The submittal of proposals to a vote of people of the state or of a particular community" is not considered a "project" under California Environmental Quality Act (CEQA) (Pub Res C §§21000-21178). 14 Cal Code Regs §15378(b)3. Thus, environmental review of initiatives is not required under CEQA before putting a voter-initiated measure on the ballot. See *Stein v City of Santa Monica* (1980) 110 CA3d 458, 168 CR 39 (codified by CEQA Guidelines). However, an initiative generated and placed on a ballot by a city council is considered a discretionary project under CEQA and thus environmental review under CEQA is required. *Friends of Sierra Madre v City of Sierra Madre* (2001) 25 C4th 165, 105 CR2d 214.

PRACTICE TIP: The requirement of environmental review under CEQA will hamper cities' ability to place city council-generated counter-initiatives on the ballot. If a city believes that a voter-sponsored initiative is ill-advised because it will have an adverse impact on the environment, the city may refer the matter for an abbreviated environmental review under Elec C §§9111 and 9212.

On CEQA, see chap 11.

© The Regents of the University of California

§3.122 3. Housing Limitation Findings

Evidence Code §669.5, which states that cities bear the burden of proof as to growth control ordinances, applies to initiatives, but Govt C §65863.6, which requires that growth control ordinances contain findings as to public health, safety, and welfare, does not. *Building Indus. Ass'n v City of Camarillo* (1986) 41 C3d 810, 226 CR 81.

NOTE: It is unclear whether the logic used in *Camarillo* may be extended to exempt initiative measures from other types of findings.

© The Regents of the University of California

§3.123 E. Judicial Review

Courts are generally more willing to review an initiative or referendum *after* the election. See *Bailey v County of El Dorado* (1984) 162 CA3d 94, 210 CR 237 (overruling trial court decision to keep "Homeowners Protective Initiative" off ballot); *Brosnahan v Eu* (1982) 31 C3d 1, 181 CR 100 (in pre-election challenge, California Supreme Court allowed "Victims' Bill of Rights" initiative to be placed on ballot).

In some circumstances, however, courts have kept measures off the ballot. See *Committee of Seven Thousand v Superior Court* (1988) 45 C3d 491, 247 CR 362; *San Francisco Forty-Niners v Nishioka (Comstock)* (1999) 75 CA4th 637, 89 CR2d 388; *Citizens for Responsible Behavior v Superior Court* (1991) 1 CA4th 1013, 2 CR2d 648; *deBottari v City Council of Norco* (1985) 171 CA3d 1204, 217 CR 790. The test for pre-election review is whether the challenger can make a compelling showing that the initiative's invalidity is clear beyond a doubt. *Save Stanislaus Area Farm Econ. v Board of Supervisors* (1993) 13 CA4th 141, 16 CR2d 408. This test is more easily met when the challenge is to the measure's alleged non-compliance with procedural requirements or subject matter limitations. The test is much more difficult to meet when the challenge is to the substantive validity of the measure. See *Costa v Superior Court* (2006) 37 C4th 986, 39 CR3d 470 (pre-election review is proper to assess petition's compliance with procedural requirements); *Senate of the State v Jones* (1999) 21 C4th 1142, 90 CR2d 810 (pre-election review is proper to evaluate whether petition complied with single-subject rule).

© The Regents of the University of California

§3.124 VII. ELECTION CONTESTS

The result of an election may be challenged in an election contest. See Elec C §§16000-16940. Such a proceeding is purely statutory and is wholly distinct from the common law remedy of quo warranto, which may also be used to determine a person's claim to an office. See §1.188.

An election contest is not adversarial in the ordinary sense, as when two individuals assert conflicting personal rights or interests. Instead, the primary purpose of an election contest is to ascertain the will of the people and to make certain that mistake or fraud has not frustrated the public volition. *Hardeman v Thomas* (1989) 208 CA3d 153, 166, 256 CR 158. However, it is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible. *Friends of Sierra Madre v City of Sierra Madre* (2001) 25 C4th 165, 192, 105 CR2d 214.

PRACTICE TIP: On election contests, see Armento, *Term Limitations for Council Members and A Primer on Election Contests* (League of California Cities Annual Conference, City Attorneys Department Session, 1989).

© The Regents of the University of California

A. Contests at General Elections

§3.125 1. Who May Contest a Local Election

Any elector of any county or city, or of any political subdivision of either, may contest any election held therein. See Elec C §16100. An election contest is considered to belong to the elector in his or her individual capacity.

© The Regents of the University of California

§3.126 2. Grounds for Contest

An election may be contested on the following grounds (see Elec C §16100):

- A precinct board or any member thereof was guilty of malconduct;
- The person declared elected was ineligible to hold office at the time of the election, *i.e.,* the person lacked the legal qualifications as prescribed for the office by statute (see *Shinn v Heusner* (1949) 91 CA2d 248, 249, 204 P2d 886);
- The person elected allegedly offered or gave bribes or rewards, or committed other offenses against the elective franchise defined in Elec C §§18000-18700 (see *Hale v Farrell* (1981) 115 CA3d 164, 167, 171 CR 228);
- Illegal votes were cast, *i.e.,* votes cast by persons not privileged to vote or not entitled to be counted because not cast in a manner provided by law (see *Stebbins v Gonzales* (1992) 3 CA4th 1138, 1141, 5 CR2d 88);
- Sufficient number of eligible voters who attempted to vote were denied the right to vote (see Elec C §§16402.5, 16204);
- Precinct board made errors sufficient to change the result of the election as to any person declared elected; or
- Errors were made in counting the votes or the summation of the ballot counts and the official declared elected did not receive the highest number of legal votes (see *In re Cryer* (1926) 77 CA 605, 609, 247 P 252).

The city may provide the defense for any person elected to the city council or the office of city clerk or city treasurer if the contest is based on precinct malconduct, illegal votes, or precinct errors. See Govt C §36812.5.

© The Regents of the University of California

3. Statement of Contest

§3.127 a. Form

A contestant of an election must file with the clerk of the superior court a statement setting out prescribed allegations, including the grounds for contest. Elec C §16400. See §3.126. The statement may not be rejected for failing to comply with form requirements, if the grounds of contest are alleged with such certainty as to advise the defendant of the particular proceeding or grounds on which the election is contested. Elec C §16403. However, the contestant must meet prescribed requirements when alleging illegal voting as a cause of contest. Elec C §16402; *Benson v Superior Court* (1963) 214 CA2d 551, 554, 29 CR 760. The statement must be verified and timely filed. Elec C §16401.

© The Regents of the University of California

§3.128 b. Timing

The statement of contest of an election must be filed within the applicable time period, as follows:

- Within 6 months when the contest is brought on the grounds that a bribe or reward was offered or given to any elector or a precinct board member for the purpose of procuring the election, or alleging a violation of Elec C §§18000-18700. Elec C §16401(a).
- Within 20 days when the contest is brought based on a tie vote. Elec C §16401(b).
- Within 30 days in all other cases. Elec C §16401(d). See *Cummings v Stanley* (2009) 177 CA4th 493, 514, 99 CR3d 284.

The time for filing the statement starts to run from the declaration of the election results. Elec C §16401. A statement filed before that point is premature but does not preclude a later filing. *Broadbent v Keith* (1911) 15 CA 382, 384, 114 P 996.

© The Regents of the University of California

§3.129 c. Amendment

It is permissible to amend a statement of contest, even at trial, to make it more specific (*Garrison v Rourke* (1948) 32 C2d 430, 438, 196 P2d 884, overruled on other grounds in *Keane v Smith* (1971) 4 C3d 932, 95 CR 197), but an amendment with new grounds of contest offered after the expiration of the filing period is not allowed. *Freshour v Howard* (1904) 142 C 501, 505, 77 P 1101.

© The Regents of the University of California

§3.130 4. Pretrial Proceedings

After the statement is filed, the clerk of the superior court must notify the superior court of all statements filed, and the presiding judge must designate the time and place of hearing. Both tasks must be done within certain statutory time frames. See Elec C §16500.

The clerk of the superior court must then issue a citation for the defendant to appear at the time and place so specified and have the citation properly served on the defendant. Elec C §16501. However, failure to properly serve does not deprive the court of jurisdiction. *O'Dowd v Superior Court* (1910) 158 C 537, 541, 111 P 751.

© The Regents of the University of California

§3.131 5. Answer

No answer by the defendant is required by statute, but typically a defendant answers. The answer should contain not only denials, but the grounds on which the defendant bases a claim to office. *Bass v Leavitt* (1909) 11 CA 582, 585, 105 P 771. If no answer is filed and the claims in the statement are never disputed, they are deemed admitted. *Canales v City of Alviso* (1970) 3 C3d 118, 126, 89 CR 601.

© The Regents of the University of California

6. Trial

§3.132 a. Court Powers

The trial court hearing an election contest has all powers necessary to its determinations, including the authority to adjourn from day to day or to continue the trial for up to 20 days for good cause at the cost of the party requesting the continuance. Elec C §16600. The court may dismiss the proceedings for insufficient cause or want of prosecution. Elec C §16602. When it appears a recount is necessary, the ballots must be opened and a recount taken in a manner prescribed by law. Elec C §16601.

© The Regents of the University of California

§3.133 b. Evidence

The court is governed by the applicable rules of law and evidence as to questions of law and fact. Elec C §16602. The clerk of the superior court must issue subpoenas for witnesses at the request of any party and the superior court may issue attachments to compel the attendance of subpoenaed witnesses. Elec C §16502.

The contestant carries the burden of proof in proving the grounds alleged for contest by clear and convincing evidence. *Gooch v Hendrix* (1993) 5 C4th 266, 279, 19 CR2d 712; *Bagg v Wickizer* (1935) 9 CA2d 753, 760, 50 P2d 1047.

© The Regents of the University of California

§3.134 c. Determination and Judgment

After hearing the proofs and allegations of the parties to an election contest, the court must pronounce judgment within 10 days, either confirming or annulling and setting aside the election. Elec C §16603. If it appears that a person other than the defendant has the highest number of legal votes, the court must declare that person elected (see Elec C §16703), issue that person a certificate of election (see Elec C §16700), and annul any certificates of election issued earlier to another candidate (see Elec C §16701; *Stebbins v Gonzales* (1992) 3 CA4th 1138, 1144, 5 CR2d 88).

A court may not, however, annul the election of a winning candidate "based on offenses that did not change the result of the election, and then declare another candidate elected by shifting legal votes between the two candidates under the primacy effect theory." *Bradley v Perrodin* (2003) 106 CA4th 1153, 1170, 131 CR2d 402. Further, an election must not be set aside on account of eligible voters being denied the right to vote, unless it appears that the denial would change the result. Elec C §§16204, 16402.5. Similarly, an election must not be set aside on account of illegal votes unless it appears the defendant could not have won the election without them. Elec C §16203; *Gooch v Hendrix* (1993) 5 C4th 266, 282, 19 CR2d 712.

Malconduct by a precinct board or its members will only void an election if such malconduct is held to have changed the result of the election. Elec C §§16201-16202. However, malconduct need not be intentional; erroneous conduct without wrongful intention is sufficient to support an election contest on the grounds of precinct board malconduct. *In re Cryer* (1926) 77 CA 605, 609, 247 P 252.

NOTE: Summary judgment is not available in election contest cases. *Anderson v County of Santa Barbara* (1976) 56 CA3d 780, 787, 128 CR 707.

© The Regents of the University of California

§3.135 d. Costs

Each party to an election contest is generally liable for the costs that he or she creates. Elec C §16802. Thus, if a recount occurs, the contestant will in the first instance be liable to pay the court's expenses on a daily basis. Elec C §16503.

Ultimately, the contestant will assume the costs if the court dismisses the contest for insufficiency or for want of prosecution, or if the court confirms the election. Elec C §16800. Likewise, the defendant will assume the costs if the election is annulled or set aside, unless the election is set aside on the ground of errors of a precinct board in conducting the election or canvassing returns, in which cases the costs are a charge to the city or county where the election was held. Elec C §16800.

NOTE: When two or more contests are joined for the purpose of recounting votes, the costs must be apportioned among the parties in the discretion of the court. Elec C §16801.

© The Regents of the University of California

§3.136 7. Review

Generally, any party aggrieved by the judgment of the court in an election contest may appeal to the court of appeal. Until the appeal is finally determined, the person declared elected by the superior court is entitled to the office as if no appeal had been taken. Elec C §16900.

Whenever an election is annulled or set aside by the judgment of the superior court and no appeal occurs within a specified number of days, the commission, if any has issued, is void and the office vacant. Elec C §16702. On the applicable standard of review, see *Gooch v Hendrix* (1993) 5 C4th 266, 277, 19 CR2d 712.

© The Regents of the University of California

§3.137 8. Contests on Ballot Measures

On occasion, election contests are brought over ballot measures, such as incorporation (see *Singletary v Kelley* (1966) 242 CA2d 611, 613, 51 CR 682); consolidation (see *Canales v City of Alviso* (1970) 3 C3d 118, 129, 89 CR 601); and annexation (see *Enterprise Residents Legal Action Against Annexation Comm. v Brennan* (1978) 22 C3d 767, 151 CR 1). On incorporation, see §§1.135-1.148; on consolidation, see §§1.168-1.173; on annexation, see §§1.149-1.163.

© The Regents of the University of California

B. Contests at Primary Elections

1. General Requirements

§3.138 a. Affidavit

A candidate may contest the results of a primary election by filing an affidavit alleging any of the following grounds (Elec C §16101):

- defendant's ineligibility to office;
- offenses committed by the defendant against the elective franchise defined in Elec C §§18000-18700;
- illegal or otherwise improper votes sufficient to have given defendant more votes than contestant;
- eligible voters attempting to vote in accordance with the law were denied the right to vote in sufficient numbers to give defendant more votes than contestant; or
- miscounting of votes sufficient to change the results of the election.

The affidavit must name the defendant (see Elec C §16420), contain certain information specified by law (see Elec C §16404), and be filed in a designated manner and time frame (see Elec C §16421). For a good discussion regarding the distinction between contests of the results of primary versus general elections, see *Cummings v Stanley* (2009) 177 CA4th 493, 507, 99 CR3d 284.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.139 b. Grounds for Annulment or Set-Aside

§3.139 b. Grounds for Annulment or Set-Aside

Irregularity or improper conduct will only annul or set aside a nomination if it appears that illegal votes caused the defendant to receive more votes than the contestant. *Jacobson v Glidden* (1978) 84 CA3d 748, 751, 148 CR 825; Elec C §16300.

© The Regents of the University of California

§3.140 c. Costs

The cost provisions for general election contests apply to primary election contests as well. Elec C §16803. See §3.135.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.141 2. Contests Involving a Simple Recount

§3.141 2. Contests Involving a Simple Recount

Certain procedural requirements apply only when the election is contested on the ground that due to mistake, error, or misconduct the votes were so incorrectly counted as to change the result. Elec C §§16460-16467.

© The Regents of the University of California

§3.142 a. Procedures

The superior court of the county of the precinct in which the contestant demands a recount has jurisdiction. Elec C §16461. The affidavit must be filed in the office of the clerk of the superior court within 5 days after completion of the official canvass, and must be served on defendant in a manner prescribed by law. Elec C §16462. The defendant may file an affidavit on his or her own behalf and the contestant may file an answer to defendant's affidavit. Elec C §16464. Within statutory time frames, the elections official must present the affidavits to the presiding judge, who will set the time and date of hearing. Elec C §16540.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.143 b. Defendant Appearance

§3.143 b. Defendant Appearance

The defendant must appear at the hearing (see Elec C §16465), and no demurrer or objection may be taken by the parties except by answer within the time frame designated. Elec C §16466. If the defendant does not appear, the court must note his default and determine the contest with all convenient speed. Elec C §16467.

© The Regents of the University of California

§3.144 c. Recounts

The presiding judge may obtain the services of other judges if needed to finish counting the votes in time to print the ballots for the final election. Elec C §§16640-16641. The recount will then occur according to prescribed procedures. Elec C §§16642-16643, 16740.

© The Regents of the University of California

§3.145 d. Judgment

The court's judgment is final and non-appealable. Elec C §16940. But see *Keane v Smith* (1971) 4 C3d 932, 937, 95 CR 197 (finding primary election was "transmuted" into general election for purposes of appeal under former Elec C §20115 (now Elec C §16900)).

Certified copies of the judgment must be served in the prescribed manner. Elec C §§16741-16742.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.146 3. Contests Other Than Those Involving a Simple Recount

§3.146 3. Contests Other Than Those Involving a Simple Recount

Certain procedures apply only to contests on the following grounds (Elec C §16440):

- defendant is ineligible to hold office,
- defendant committed an offense against the elective franchise as defined in Elec C §§18000-18700, or
- illegal or otherwise improper votes were cast sufficient to have given the defendant more votes than the contestant.

© The Regents of the University of California

§3.147 a. Procedures

The contestant's affidavit is filed with the clerk of the superior court and served on the defendant in the designated manner (see Elec C §16442), after which the defendant may file an answer and a cross-contest affidavit within a prescribed number of days (Elec C §16443). No special appearance, demurrer, or objection may be taken other than by the affidavits that must be considered a general appearance in the contest. Elec C §16444. Within specified time frames, the county clerk must present the affidavits to the presiding judge, who must designate the time and place of hearing. Elec C §16520. The parties will be served with a citation containing a copy of the order setting a contest for trial. Elec C §16521.

© The Regents of the University of California

§3.148 b. Hearing and Judgment

The court must meet at the time and place designated in the order and must have all powers necessary to determine the issues. Elec C §16620. After hearing the proofs and allegations of the parties, the court must make its findings and pronounce judgment. Elec C §16720. Either party may appeal in accordance with designated procedures. Elec C §16920.

© The Regents of the University of California

§3.149 VIII. RECALL

Recall is the power of the electors to remove local or state elective officers. Cal Const art II, §13. The legislature must provide for the recall of elected officers of cities. Cal Const art II, §19; Elec C §§11000-11386 (statutory scheme for recall). These rights are comparable to the constitutional right of free speech. *U.C. Nuclear Weapons Labs Conversion Project v Lawrence Livermore Lab.* (1984) 154 CA3d 1157, 1163, 201 CR 837. General law cities must comply with the state statutory scheme. Cal Const art XI, §2(a). Many charter cities have incorporated all or portions of the California Elections Code recall provisions into their charters. See Elec C §11000 (state law does not supersede local recall provisions in charter cities).

PRACTICE TIP: A charter city's charter and municipal code should always be reviewed in addition to the Election Code's procedures to ensure that any unique processes are followed.

© The Regents of the University of California

A. Starting the Process

§3.150 1. Limitations on Recall

Recall proceedings may not be commenced until the officer has held office for more than 90 days and only if the officer has more than 6 months remaining in the term of office. Elec C §11007(a), (c). Recall is not an option if the officer has already defeated a recall in the last 6 months. Elec C §11007(b). These limitations do not apply to an officer appointed in lieu of election or to fill a vacancy. Elec C §11006.

"Commencement" is defined as service, filing, and publication or posting of a notice of intention. Elec C §11006. Proponents must comply with all these requirements within the specified timeframes.

PRACTICE TIP: Compliance with these limitations on recall proceedings is the responsibility of the recall proponents. The proponents should determine the beginning and ending dates of the term of office and the time required to complete the recall proceedings before commencing the recall proceedings. Although the proceedings may be commenced with 6 months and 1 day remaining in the term of office, the entire recall procedure may exceed that period. A recall could hypothetically become moot due to an intervening regular election.

© The Regents of the University of California

§3.151 2. Notice of Intention to Recall

Proponents begin the process of recall by serving, by either personal delivery or certified mail, a copy of the notice of intention on each officer sought to be recalled. Elec C §11021.

© The Regents of the University of California

§3.152 a. Contents of Notice

The notice of intention must contain the following (Elec C §11020):

- The name and title of the officer sought to be recalled;
- A statement not exceeding 200 words of the reasons for the proposed recall;
- The printed name, signature, and residence address of each of the proponents of the recall (if its proponent cannot receive mail at the residence address, he or she must provide an alternative mailing address); and
- The provisions of Elec C §11023.

Elections Code §9 provides rules for counting to determine whether a statement of reasons falls within the 200-word count limit.

The minimum number of proponents' signatures contained in the notice must either be 10, or equal to the number of signatures required to have been filed on the nomination paper of the officer sought to be recalled, whichever is greater. Elec C §11020(c). Any examination by proponents must be commenced no later than 21 days after certification of insufficiency. Govt C §6253.5.

PRACTICE TIP: Exhibit C of the Procedure for Recalling State and Local Officials provided by the Secretary of State's Office (www.sos.ca.gov/elections/recall.pdf) contains a form of notice of intention; the city clerk should also be consulted. Elections Code §11041(a)(2) refers to a statement of "grounds" for recall. This appears synonymous with the statement of "reasons" in Elec C §11020. The statement is intended solely for the information of the voters; no insufficiency in form or substance of the statement affects the validity of the recall proceedings. Elec C §11024.

© The Regents of the University of California

§3.153 b. Filing of Notice

Within 7 days of the service of the notice of intention on the officer, the recall proponent must file the original notice of intention with the city clerk, along with an affidavit of the time and manner of service of the notice on the officer. The filing of the notice of intention must be accompanied by an affidavit of the time and place of service. Elec C §11021.

PRACTICE TIP 1: Although not required by Elec C §11021, the city clerk should acknowledge the filing in writing delivered to the officer, because the date of filing establishes the date of subsequent steps (and the officer would not otherwise have official notice of the date of filing).

PRACTICE TIP 2: The Secretary of State's booklet Procedure for Recalling State and Local Officials (www.sos.ca.gov/elections/recall.pdf) contains two forms: Exhibit A for use as proof of personal service, and Exhibit B for use as proof of service by certified mail. The date that service by certified mail is deemed complete is not stated in Elec C §11021, but the Secretary of State form refers only to the date the certified mail was deposited, indicating that the date of mailing determines the date of service. Confirm this with the city clerk.

© The Regents of the University of California

§3.154 c. Publication of Notice

The proponents must publish, one time only, the notice of intention, in a newspaper of general circulation. Govt C §§6060-6061. The provision in the notice, which was served on the officer and informs the officer that an answer may be filed to the statement of the proponents, is omitted from the published notice. If publication is not possible, the notice must be posted in three public places in the city. Elec C §11022. Proof of publication or affidavit of posting of the notice must be filed with the city clerk. Elec C §11042(b).

PRACTICE TIP: No time limit is specified for the publication, but under 7- and 10-day time limits of subsequent steps of the recall procedure, the proponents must file the proof of publication no later than 17 days from the filing of the notice of intention with the city clerk.

© The Regents of the University of California

§3.155 3. Answer to Recall Statement

Within 7 days after the filing of the notice of intention with the city clerk by the recall proponent, the officer sought to be recalled may file an answer with the city clerk in not more than 200 words to the statement of reasons contained in the notice of intention. Elec C §11023(a). The answer must contain the printed name, signature, and business or residence address of the officer. The officer must also serve a copy of the answer on one of the recall proponents by personal delivery or certified mail. Elec C §11023(b).

NOTE: The answer is intended solely for the information of the voters; no insufficiency in form or substance of the answer affects the validity of the recall proceedings. Elec C §11024.

PRACTICE TIP: There is no requirement that the officer file a proof of service with the city clerk.

© The Regents of the University of California

B. Recall Petition

§3.156 1. Form and Contents

Each page of each section of the recall petition must be in the format provided by the Secretary of State (see Elec C §§11041(a), 11043.5) and the contents must be in no less than eight-point type with uniform spacing, containing the following information (Elec C §11041):

- A request that an election be called to elect a successor to the officer;
- The text of the notice of intention as published; and
- The text of the answer of the officer or a statement no answer was made by the officer.

Each signer must personally affix his or her signature, printed name, residence address, and city of residence; prescribed margins must be provided. Elec C §11043. Each section must have a prescribed form of declaration to be executed by the circulator. Elec C §§104, 11046. Signature requirements must also be satisfied. See Elec C §§100-106. Only persons registered to vote in the jurisdiction at the time the petition is signed may sign the petition. Elec C §11045. Compliance with these requirements is determined under the "substantial compliance" standard. *Ruiz v Sylva* (2002) 102 CA4th 199, 215, 125 CR2d 351. If the proponent seeks to recall multiple officers, a separate petition is required for each officer. Elec C §11044. Recall petitions are not required to be translated into applicable minority languages before circulation. *Padilla v Lever* (9th Cir 2006) 463 F3d 1046.

PRACTICE TIP 1: Although not expressly prescribed, a title should be provided at the top of each section, in capital letters, stating "PETITION FOR RECALL." In addition, a brief introductory address to the city clerk should immediately follow the title.

PRACTICE TIP 2: The space provided for each voter should be consecutively numbered so the second page continues the numbering sequence from the first page.

PRACTICE TIP 3: Only one form of declaration by the circulator must be included on each section; in other words, printed on one side only of the two-page section.

© The Regents of the University of California

2. Filing Proposed Petition

§3.157 a. Proponent Obligations

The recall proponents must file with the city clerk two blank copies of the proposed form of recall petition within 10 days after the officer sought to be recalled files with the city clerk the answer to the statement of reasons by the recall proponents as contained in the notice of intention or, if no answer is filed, then within 10 days of the expiration of the 7-day deadline for filing the answer. The proof of publication (or posting) of the notice of intention must also be filed at this time. Elec C §11042.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.158 b. City Clerk Obligations

§3.158 b. City Clerk Obligations

The city clerk must within 10 days notify the recall proponent whether the form and wording of the proposed form of recall petition meets the requirements of the California Elections Code, and what alterations, if any, must be made. Elec C §11042.

NOTE: The proponent has 10 days after receiving such notification to file, if necessary, a corrected petition with the city clerk; this process continues until the city clerk finds no alterations are needed. Elec C §11042.

© The Regents of the University of California

§3.159 c. Signatures

No signature may be affixed to a recall petition until the city clerk has notified the proponents the form and wording of the proposed petition meet the requirements of the recall statute. Elec C §11042.

PRACTICE TIP 1: The date the city clerk notifies the proponents that the form of recall petition meets the legal requirements is extremely significant because it fixes the deadlines for several important steps in the recall procedure. The date is determined by the date of the city clerk's written notice (which can be delivered personally or by deposit in the mail).

PRACTICE TIP 2: To eliminate or reduce the necessity for alterations after the form of proposed recall petition is filed, the recall proponent should contact the city clerk early in the process to obtain a form of recall petition that the city clerk may have. The proponent also should, after the filing of the blank forms of recall petitions, keep in close personal contact with the city clerk to avoid lost time in receiving mailed notice of the city clerk's finding as to the sufficiency of the of the form of petition (the time starts running from the date of the city clerk's notice).

PRACTICE TIP 3: Although not expressly required, the city clerk may wish to inform the proponents, in the written notice of the sufficiency of the form of petition, of the number of qualified registered voter signatures needed to qualify the recall petition to eliminate any subsequent misunderstanding.

© The Regents of the University of California

C. Collecting Signatures

§3.160 1. Number of Days to Obtain Signatures

Once qualified by the city clerk's written notice of sufficiency, sections of the recall petition may be signed by registered voters and must be submitted to the city clerk within a prescribed time period determined by the number of registered voters in the electoral jurisdiction, as follows:

- 40 days if less than 1000 voters;
- 60 days if less than 5000 voters;
- 90 days if less than 10,000 voters;
- 120 days if less than 50,000 voters; and
- 160 days if 50,000 or more voters.

The number of registered voters is determined from the last report to the state filed by the county clerk before the city clerk's written notice to the proponents of the sufficiency of the form of ballot. Elec C §11220.

PRACTICE TIP: The number of days is calculated from the day after the date of the city clerk's written notice, and thus the day of the written notice should be excluded. The last day of the applicable period is the final date all the sections of the recall petition must be submitted for filing to the city clerk; if the last day is a weekend day or other holiday, the final date is extended to the next regular business day.

© The Regents of the University of California

§3.161 2. Number of Qualified Signatures

The number of qualified, valid signatures of registered voters required is calculated as a percentage of the number of registered voters in the electoral jurisdiction, as follows (Elec C §11221):

- 30 percent if less than 1000 voters;
- 25 percent if less than 10,000 voters;
- 20 percent if less than 50,000 voters;
- 15 percent if less than 100,000 voters;
- 10 percent if 100,000 or more voters.

© The Regents of the University of California

§3.162 3. Withdrawal of Signatures

Any voter who has signed the petition may withdraw his or her signature by filing a written request with the city clerk. A request to withdraw a signature from a recall petition is effective, without regard to whether the voter signs the petition before or after signing the request to have his or her signature withdrawn, as long as the request is filed with the city clerk prior to the day that the petition bearing the voters' signatures is filed. Elec C §§103, 11303; *Carson Citizens for Reform v Kawagoe* (2009) 178 CA4th 357, 367, 100 CR3d 358 (2009). A voter's request to withdraw his or her signature from a recall petition is not a "petition or paper" that requires a circulator's affidavit. Elec C §§103-104, 1130; *Carson*, 178 CA4th at 369.

© The Regents of the University of California

D. Filing and Examination of Petition

§3.163 1. Submission for Filing and Acceptance

All sections of the recall petition are "presented" for filing with the city clerk at the same time. Elec C §11222(a). The city clerk must first make a prima facie examination of all petition sections to determine if the minimum number of required signatures have been submitted. If the number of signatures equals or exceeds the minimum, the clerk must accept the petition for filing. If the number of signatures is insufficient, the petition must not be filed and must be returned to the proponents. Elec C §11222(b).

PRACTICE TIP 1: The prima facie examination is a simple quick count, obtained by multiplying the number of sections that have been completely filled with signatures by the total number of signature spaces on each section and adding the total signatures from sections that are not completely filled; no determination is made as to the validity of the signatures or the declarations of the circulators.

PRACTICE TIP 2: If the petition is insufficient as a result of the prima facie examination, the petition is returned to the proponents; although the statute is silent, there should be no reason why the proponents could not attempt to obtain more signatures, provided the time period has not elapsed (but if the proponents cannot pass the prima facie examination, there also may well be a serious question as to whether a substantial number of the signatures are not qualified registered voters).

PRACTICE TIP 3: Because Elec C §11220 expressly requires the petition be submitted for filing during normal business hours, the date the petition is deemed filed under Elec C §11222 is the same as the date the petition is submitted (or "presented") for filing. For example, if the petition is submitted for filing just before closing hour of the last day of the applicable period and the prima facie examination is completed the next morning, the date of filing is deemed to be the date it was submitted for filing, that is, on the prior day.

© The Regents of the University of California

§3.164 2. Petition Examination

The city clerk has 30 days from the date of filing the petition (excluding Saturdays, Sundays, and holidays) to examine the petition and determine if there are a sufficient number of valid signatures of registered voters. Elec C §11224(a). The city clerk may verify each and every signature, or alternatively, if more than 500 signatures have been obtained, the clerk may use a random sampling method. A random sampling requires examining at least 500 signatures or 5 percent of the petition signatures, whichever is greater. Elec C §11225(a). The random sampling method is very inviting, especially in cities with a large number of registered voters. If the result of the random sampling shows 110 percent or more of the number of signatures required are valid, the petition is sufficient. Elec C §11225(b). If between 90 and 110 percent are valid, the clerk must abandon the random sampling method and verify each signature. If less than 90 percent of the signatures are valid by the random sampling method, the petition is insufficient. Elec C §11225(d). In order for a signature to be counted, the residence address listed for the signer must match the residence address shown on the signer's voter registration affidavit. Elec C §105; *Mapstead v Anchundo* (1998) 63 CA4th 246, 265, 73 CR2d 602.

PRACTICE TIP 1: Under Elec C §11224(b), the city clerk may use the duplicate file of affidavits from the registered voters maintained by the county election official or otherwise to check the petition signatures against facsimile signatures of registered voters in accordance with law.

PRACTICE TIP 2: The city clerk should consider not only the practical realities of whether to conduct a random sampling of signatures, but the inherent controversial nature of recall in making the decision. If the proponents gathered far more than the required number of signatures as a cushion against invalid signatures, the petition may nevertheless be found insufficient because less than 90 percent of the submitted signatures pass the random sampling test—and no provision is made in the statute for the city clerk to then examine 100 percent of the signatures despite the possibility the petition might have been found sufficient from an examination of 100 percent of the signatures. Similarly, it is possible that a random sampling could result in a finding that the number of valid signatures overall is greater than 110 percent of the required number rendering the petition sufficient, although an examination of 100 percent of the signatures might not have resulted in a sufficient petition.

© The Regents of the University of California

§3.165 3. Certification of Examination Results

At the completion of the examination of the petition (not later than on the 30th day from the day of the filing of the petition, excluding Saturdays, Sundays, and holidays), the city clerk must (Elec C §11224)

- Certify the petition as sufficient or insufficient,
- Notify proponents of the sufficiency or insufficiency of the petition, and
- If the petition is sufficient, submit the certificate of sufficiency to the city council at its next regular meeting.

PRACTICE TIP: Under Elec C §11224, the city clerk must certify the results of the petition examination to the city council. If the petition is insufficient, the city council merely receives the certificate. No further action is required by the city council or city clerk. Section 11224 does not state what the notification by the city clerk to the proponents must consist of, but transmitting such certificate would certainly be a simple method for such notice.

The certificate must contain (Elec C §11227)

- the name and title of the officer whose recall is sought,
- the number of signatures required,
- the number of signatures on the petition,
- the number of valid signatures, and
- the number of disqualified signatures.

An insufficient petition remains on file with the city clerk, and is not a public record, though it may be examined by the proponents to determine which signatures were disqualified and the reasons therefor. Elec C §§11226, 11301; Govt C §6253.5. The examination must commence within 21 days of the determination of insufficiency. Govt C §6253.5. The right to examine recall petitions after a certificate of insufficiency issues does not confer on the proponents the right to file amended petitions. *Hartman v Kenyon* (1991) 227 CA3d 413, 277 CR 765.

PRACTICE TIP 1: In addition to the contents of the certificate prescribed by the statute, the certificate must contain a statement by the city clerk as to the sufficiency or insufficiency of the petition.

PRACTICE TIP 2: In the category of disqualified signatures on the certificate, the clerk may wish to identify separately signatures withdrawn as distinguished from signatures disqualified for other reasons.

PRACTICE TIP 3: Although there is no provision for the proponents to overcome a certificate of insufficiency by obtaining more valid signatures, Elec C §11300 clearly authorizes a new petition to be filed against the same officer, without any restraint as to when the new recall effort may commence (which means the day following the certificate of insufficiency a new notice of intention could be served).

© The Regents of the University of California

E. Recall Election

§3.166 1. Timing

Within 14 days after the meeting at which the city council receives the certificate of sufficiency, the city council must issue an order calling a special election to determine whether or not the officer named in the petition will be recalled. Elec C §11240. The election must be held not fewer than 88 days nor more than 125 days after the date of the issuance of the order calling the election; it must be consolidated with any regularly scheduled or other special election being held in such time period. Elec C §11242. If the city council fails to call the election within the 14-day time period, the county clerk must, within 5 days of the expiration of the 14-day period, set and call the election. Elec C §11241.

For related information, see Secretary of State, *Procedure for Recalling State and Local Officials* (Rev 2007) at www.sos.ca.gov/elections/recall.pdf.

PRACTICE TIP 1: The city council has no discretion not to call the election after receiving the certificate of sufficiency. The only discretion it has is to act within 14 days to choose the election date if the date is not already decided for it by a regularly scheduled election within the 88- to 125-day period. The 14-day period permits a limited flexibility to consolidate with a regular or other already scheduled special election by postponing the election call up to 14 days and obtain the cost savings of a consolidated election.

PRACTICE TIP 2: Although the city clerk's certification must be submitted to and received at a regular city council meeting, the statute does not require the city council, within the 14-day period, to call the election at a regular meeting. The city council could adjourn the regular meeting to an adjourned meeting, or call a special meeting.

PRACTICE TIP 3: If the city council meets weekly, the date of the regular meeting at which it receives the city clerk's certification would not be counted in the 14-day period because Elec C §11240 states the council must act within 14 days "after" the meeting it received the certification. The city council thus would be able to act as late as the second regular meeting following the meeting it received the certification.

PRACTICE TIP 4: The city clerk and city attorney will need to prepare the resolution or other form of order to call the election to transmit to the city council for its consideration. This will necessitate contacting the county elections official concerning regular or other special elections during the 88- to 125-day period (plus the additional 14-day period).

PRACTICE TIP 5: If the county elections official were required to set and call the election because of the failure of the city council to act, the 88- to 125-day period would be calculated from the day the county election official acts within the 5-day period the county clerk is required to act. This could produce different options for available election dates (including the ability to call the election to be consolidated with a regular or other special election already scheduled within 5 days of the expiration of the 125th day from the 14th day on which the city could have acted, but did not).

© The Regents of the University of California

§3.167 2. Recall Ballot

The recall ballot has one question that asks the voter to answer "Yes" or "No": "Shall [name of officer sought to be recalled] be recalled (removed) from the office of [title of office]?" See Elec C §11320. The ballot must also contain the names of the candidates nominated to succeed the officer and a blank for the voter to write in a name not printed on the ballot. Elec C §11322.

PRACTICE TIP 1: Before 1995, the law contained separate recall election procedures specifically applicable only to cities. See former Elec C §27310 (repealed). Beginning in 1995, the general recall election procedures for public officers are applicable to city officials. This revision may affect the usefulness of pre-1995 case law.

PRACTICE TIP 2: The statute appears to require the word "(removed)", inside parentheses, to follow the word "recalled" in the ballot question; "removed" is not indicated by brackets ([ ]) to be a synonym interchangeable with "recalled," although the city clerk may wish to check with the county clerk or Secretary of State for the preferred practice on this point.

© The Regents of the University of California

§3.168 3. Sample Ballot and Ballot Information

The city clerk, or other official responsible for preparing the ballot (generally the county registrar of voters), must at least 10 days before the recall election mail a sample ballot to each registered voter of the electoral jurisdiction of the officer against whom recall is sought. Elec C §11324. The sample ballot must contain or be accompanied by the statement of reasons from the notice of intention filed by the proponents, with the answer of each officer sought to be recalled printed on the same or facing page as the statement. Elec C §11325. An officer whose recall is being sought, and each candidate nominated to succeed that officer, may file a statement that must be sent with the sample ballot to each voter. Elec C §§11327, 13307.

© The Regents of the University of California

§3.169 4. Election Procedures

A recall election must be conducted, canvassed, and the results declared in substantially the manner provided by law for general municipal elections. Elec C §11328. See §§3.19-3.28. One election is sufficient for the recall of several city officers. Elec C §11329. The election procedures for city officers and measures are described in division 10 of the California Elections Code (Elec C §§10000-10734), and in particular in Elec C §§10100-10312.

PRACTICE TIP 1: Early in the recall process, preferably no later than soon after the recall petition is accepted for filing and of necessity at the time a recall petition is certified as sufficient, the city clerk should determine (a) the probable or optional dates available for a recall election, and (b) based on customary practices and information available from the county clerk, whether the recall election may be consolidated and whether the services of the county elections official will need to be requested. See Elec C §10002.

PRACTICE TIP 2: A notice of election will need to be published, adapted from the forms provided in Elec C §§12109-12110.

© The Regents of the University of California

§3.170 5. Declaration of Results

If the majority of voters vote "Yes," the officer sought to be recalled is to be removed from office on the qualification of his or her successor. Elec C §11384. The candidate receiving the highest number (not necessarily a majority) of votes for the office must be declared elected for the unexpired term of the recalled officer. Elec C §11385.

© The Regents of the University of California

F. Successor Candidate

§3.171 1. Nominations

Nomination of candidates to succeed the recalled officer must be made in the same manner as nominating a candidate in a regular election, with certain timing exceptions. Elec C §11381. See §§3.15-3.18. No person whose recall is being sought may be a candidate to succeed himself or herself at a recall election nor any other member of the same body whose recall is being sought at the same election. Elec C §11381(c).

PRACTICE TIP: State law does not prohibit the recalled officer from again becoming a candidate at the next regular municipal election for the next term of office, or (and even if highly unlikely) from being appointed to fill a vacancy in another office on the city council that was not subject to recall.

© The Regents of the University of California

§3.172 2. Election

The candidate receiving the highest number of votes for the office must be declared elected for the unexpired term of the recalled officer. Elec C §11385.

© The Regents of the University of California

§3.173 3. Failure to Qualify

If, within 10 days after receiving the certificate of election, the candidate receiving the highest number of votes fails to qualify, the office must be considered vacant and must be filled according to law. Elec C §11386. See §§3.174-3.175.

PRACTICE TIP 1: When the city council receives the certification of the results of the recall election (from the city clerk or county clerk), the city council has only a ministerial duty to declare the results of the recall election and the city council must take action to declare the results of the recall election at the regular meeting in which it receives the certification.

PRACTICE TIP 2: It is unclear from Elec C §11328 whether the city clerk (or county clerk) would certify the election results and the city council would still declare the results of the recall election if a majority of the city council were recalled. The order issued by the city council calling the recall election (which under Elec C §11240 remains within the jurisdiction of the city council even if a majority of its members are sought to be recalled), when there is a possibility of a majority recall, should expressly delegate to the city clerk (or county clerk or board of supervisors) the authority to conduct the canvass, certify, and formally declare the results. If a majority is not recalled, then the city council would retain its normal jurisdiction.

PRACTICE TIP 3: Immediately following the declaration of results confirming the results of the recall election, the successful candidate or candidates immediately assume office on taking the required oath. This entire process to install new council members or other officers is no different (at least for general law cities) than the process used following a regular municipal election.

© The Regents of the University of California

G. Filling Vacancies by Appointment

§3.174 1. Vacancy Before Petition Filing

If the officer sought to be recalled vacates office before the filing of the recall petition with the city clerk, by resignation, death, or otherwise, the city council must fill the vacancy by appointment or special election. Govt C §36512(a)-(b). Up until the day the petition is filed, both the proponents and officer control the recall process in an important respect, in that the officer can resign and terminate the recall proceedings, and the proponents can terminate the recall proceedings by not filing the petition (before the expiration of the petition circulation period); after the petition is filed, the process is exclusively within the jurisdiction of the city clerk and the electorate. Elec C §11102.

PRACTICE TIP: If the officer sought to be recalled resigns (by submitting an unequivocal letter of resignation to the city clerk) and thus terminates the recall proceedings, any recall petition submitted after such a resignation should be rejected by the city clerk because the officer sought to be recalled is no longer in office (but see §3.175).

© The Regents of the University of California

§3.175 2. Vacancy Occurring After Petition Filing

If a vacancy occurs in an office after a recall petition is filed against the vacating officer, the recall election must nevertheless proceed. Such a vacancy must be filled as provided by law, but the person appointed must hold office only until a successor is selected and qualifies for office. Elec C §11302. Elections Code §11302 is not independent authority to make an interim appointment because the authority must be "provided by law." The Government Code provides the method to fill vacancies in local elected offices. For general law cities, an ordinance may be adopted and in place to make an interim or temporary appointment for a vacancy on the city council. Govt C §36512(c)(3).

PRACTICE TIP 1: The date of filing is the same day as the day the petition is submitted for filing under Elec C §11222.

PRACTICE TIP 2: If an officer intends to resign, it would be preferable to do so no later than the day before the petition is submitted for filing. The provisions of Elec C §§11222 and 11302, read together, make it unclear whether a resignation on the actual day the petition is submitted and accepted for filing (which are one and the same) would terminate the recall proceedings. For example, a resignation filed with the city clerk at 4:00 p.m. might not be considered legally timely to permit the city clerk to reject a petition submitted at 4:55 p.m. of the same day, if the proponents insisted on submitting the petition for filing notwithstanding being informed by the city clerk of the resignation. If the vacancy occurs by death or any other reason except by resignation, the same rules apply; the statute does not distinguish among causes of vacancy.

PRACTICE TIP 3: Under Elec C §11302, the vacancy "shall" be filled "as provided by law," but the provisions of law for general law cities are directory and not mandatory for the obvious reason that, if a majority of the city council cannot agree to appoint an individual, it would be impossible to mandate an appointment (the public policy behind "shall," however, does favor appointments to fill temporary vacancies). See Govt C §36512.

© The Regents of the University of California

IX. CAMPAIGN REGULATIONS

§3.176 A. Contribution Limits—Constitutional Issues

Because contribution limitations necessarily infringe on the contributor's ability to engage in free communication and association, they impinge on First Amendment freedoms. *Buckley v Valeo* (1976) 424 US 1, 19, 46 L Ed 2d 659, 96 S Ct 612; *Citizens United v Federal Election Comm'n* (2010) ___ US ___, 175 L Ed 2d 753, 130 S Ct 876. However, the state's interest in eliminating the appearance of impropriety and actual corruption associated with large contributions justifies the burdens placed on First Amendment rights. *Buckley*, 424 US at 21. Restrictions on contributions, however, still face a "rigorous" standard of review. *Nixon v Shrink Missouri Gov't PAC* (2000) 528 US 377, 378, 145 L Ed 2d 886, 120 S Ct 897; *Buckley v Valeo* (1976) 424 US 1, 29, 46 L Ed 2d 659, 96 S Ct 612. See also *Federal Election Comm'n v National Right to Work Comm.* (1982) 459 US 197, 209, 74 L Ed 2d 364, 103 S Ct 552; *Citizens Against Rent Control v City of Berkeley* (1981) 454 US 290, 297, 70 L Ed 2d 492, 102 S Ct 434; *Brown v Superior Court* (1971) 5 C3d 509, 524, 96 CR 584. Restrictions on contributions may be sustained if the state demonstrates a sufficiently important interest and employs means "closely drawn" to avoid unnecessary abridgement of associational freedoms. *Buckley v Valeo*, *supra*. To date, the courts have recognized only corruption, the appearance of corruption, and circumvention of otherwise valid campaign finance regulations as sufficiently important governmental interests to support a restriction on campaign contributions. *Buckley*, 424 US at 26.

NOTE: The goal of equalizing political opportunities between candidates and parties has been rejected as a sufficiently important governmental interest, and cannot be used as the basis for a limitation on campaign contributions. *Buckley*, 424 US at 48.

© The Regents of the University of California

§3.177 1. Organizational Contribution Limits

The special characteristics of corporate structures justify particularly close regulation of their campaign activities. However, political speech (such as campaign contributions) does not lose First Amendment protection "simply because its source is a corporation." *Citizens United v Federal Election Comm'n* (2010) ___ US ___, 175 L Ed 2d 753, 784, 130 S Ct 876.

© The Regents of the University of California

§3.178 a. Ballot Measure Contribution Bans

A state may not constitutionally bar a corporation or other organization from making contributions to a committee organized solely to assist the passage or defeat of a ballot measure. *First Nat'l Bank of Boston v Bellotti* (1978) 435 US 765, 779, 55 L Ed 2d 707, 98 S Ct 1407; *PG&E v City of Berkeley* (1976) 60 CA3d 123, 127, 131 CR 350. The state's interest in preserving the integrity of government does not justify such limits when the funds are not given to help elect a particular candidate. 60 C3d at 128. In such case, there is little risk the contribution is being given to secure a political favor. *Bellotti,* 435 US at 788; *PG&E,* 60 CA3d at 128.

© The Regents of the University of California

§3.179 b. Corporate Candidate Contribution Bans

The state's interest in preventing corruption becomes stronger when the contribution is given directly to a candidate or controlled committee. *First Nat'l Bank of Boston v Bellotti* (1978) 435 US 765, 788, 55 L Ed 2d 707, 98 S Ct 1407. The U.S. Supreme Court has explicitly recognized the state's interest in preserving the democratic process is a valid concern, and a ban on organization contributions may meet exacting scrutiny when corruption is threatened. See *Bellotti*, 435 US at 789.

© The Regents of the University of California

§3.180 2. Dollar Amount of Contribution Limits

Courts examine the specific dollar amount imposed as a contribution limit to determine whether the limit is "closely drawn," *i.e.,* the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v Rock Against Racism* (1989) 491 US 781, 799, 105 L Ed 2d 661, 109 S Ct 2746; *Buckley v Valeo* (1976) 424 US 1, 30, 46 L Ed 2d 659, 96 S Ct 612.

At least one court in California has found that a variable contribution limit system that could apply different dollar limits to candidates for the same office was not "closely drawn." *California Prolife Council PAC v Scully* (ED Cal 1998) 989 F Supp 1282, 1297, aff'd (9th Cir 1999) 164 F3d 1189. The *Scully* court appeared to expand the standard of review for contribution limits somewhat when the court found that the $250 per contributor basic contribution limit imposed in Proposition 208 was too low to permit candidates for state legislative offices the ability to engage in meaningful campaigns. 989 F Supp at 1298. However, the court noted that contribution limits in different jurisdictions would be subject to individual, fact-specific evaluation on a case-by-case basis. 989 F Supp at 1299.

© The Regents of the University of California

§3.181 3. Limits on Contributions to Committees Making Independent Expenditures

Unlike limits on contributions made directly to candidates or their committees, which are viewed under the "less than strict scrutiny" standard (*Nixon v Shrink Missouri Gov't PAC* (2000) 528 US 377, 387, 145 L Ed 2d 886, 120 S Ct 897; *Buckley v Valeo* (1976) 424 US 1, 25, 46 L Ed 2d 659, 96 S Ct 612), restrictions on contributions to committees making independent expenditures in support of or opposition to an candidate may be reviewed under the "strict scrutiny" standard. *Lincoln Club v City of Irvine* (9th Cir 2002) 292 F3d 934. In *Lincoln Club,* which involving an independent expenditure committee that funded its independent expenditures from its annual dues, the court held that a restriction on contributions, which was lower than the committee's annual dues and thereby prevented the committee from making expenditures without first changing its dues structure, substantially burdened protected speech and associational rights, requiring the application of the strict scrutiny test.

In the context of ballot measures, the Supreme Court has invalidated municipal efforts to limit contributions to committees supporting or opposing local initiatives and referenda, finding no sufficiently important governmental interest in regulating such contributions. *Citizens Against Rent Control v City of Berkeley* (1981) 454 US 290, 70 L Ed 2d 492, 102 S Ct 434. See also *Montana Chamber of Commerce v Argenbright* (9th Cir 2000) 226 F3d 1049.

© The Regents of the University of California

§3.182 B. Expenditure Limits—Constitutional Issues

A more stringent test measures the constitutionality of expenditure limits. Expenditure limits must be both "narrowly tailored to the evil that may legitimately be regulated" (*Federal Election Comm'n v National Conservative PAC* (1985) 470 US 480, 496, 84 L Ed 2d 455, 105 S Ct 1459), and necessary to serve a compelling state interest (*Federal Election Comm'n v Massachusetts Citizens for Life, Inc.* (1986) 479 US 238, 251, 93 L Ed 2d 539, 107 S Ct 616). See also *Citizens United v Federal Election Comm'n* (2010) ___ US ___, 175 L Ed 2d 753, 782, 130 S Ct 876. Indeed, because it is unconstitutional to limit a candidate's personal expenditures, spending limitations involving such funds are constitutionally invalid unless conditioned on acceptance of public funds. *Buckley v Valeo* (1976) 424 US 1, 54, 57 n65, 46 L Ed 2d 659, 96 S Ct 612.

NOTE: Expenditure limits require a more compelling justification than restrictions on contributions (see §§3.176-3.181) because they are a much more direct form of restraint on expression and association. *Federal Election Comm'n v Massachusetts Citizens for Life, Inc.* (1986) 479 US 238, 260, 93 L Ed 2d 539, 107 S Ct 616; *Federal Election Comm'n v National Conservative PAC* (1985) 470 US 480, 487, 84 L Ed 2d 455, 105 S Ct 1459; *California Med. Ass'n v Federal Election Comm'n* (1981) 453 US 182, 194, 69 L Ed 2d 567, 101 S Ct 2712. In general, the state's interest in ridding the electoral process of the corruption and appearance of impropriety is insufficient to justify the restrictions on campaign-related expenditures. *Buckley v Valeo* (1976) 424 US 1, 45, 46 L Ed 2d 659, 96 S Ct 612. Moreover, the state has no legitimate ancillary interest in equalizing the amount of funds spent by the candidates and their committees. 424 US at 46.

© The Regents of the University of California

§3.183 1. Independent Expenditure Limits

The state may not restrict independent expenditures made by individuals or committees that are not made at the behest of an affected candidate or committee, unless the restrictions are supported by a meaningful governmental interest. *McConnell v Federal Election Comm'n* (2003) 540 US 93, 217, 157 L Ed 2d 491, 124 S Ct 619, overruled on other grounds by *Citizens United v Federal Election Comm'n* (2010) ___ US ___, 175 L Ed 2d 753, 799, 130 S Ct 876. See also *Citizens United v Federal Election Comm'n* (2010) ___ US ___, 175 L Ed 2d 753, 799, 130 S Ct 876 (concluding that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"). The absence of coordination between the individual or group making the expenditure and the affected candidate minimizes the chance that the payment is being made in exchange for political favors. *Federal Election Comm'n v National Conservative PAC* (1985) 470 US 480, 497, 84 L Ed 2d 455, 105 S Ct 1459; *Buckley v Valeo* (1976) 424 US 1, 47, 46 L Ed 2d 659, 96 S Ct 612. However, Proposition 34 expressly prohibits candidates or their controlled committees from making an independent expenditure or contributing to a committee for the purpose of making an independent expenditure to support or oppose other candidates. Govt C §85501.

© The Regents of the University of California

§3.184 2. Organization Expenditure Limits

A state's desire to eliminate the corrosive effects of concentrated corporate wealth from elections generally does not justify independent expenditure limits (see §3.183) for political committees and corporations. Limiting or eliminating the amount of money a political committee or corporation spends may unduly burden protected First Amendment activities. *Federal Election Comm'n v Massachusetts Citizens for Life, Inc.* (1986) 479 US 238, 263, 93 L Ed 2d 539, 107 S Ct 616; *Federal Election Comm'n v National Conservative PAC* (1985) 470 US 480, 492, 84 L Ed 2d 455, 105 S Ct 1459; *Citizens United v Federal Election Comm'n* (2010) ___ US ___, 175 L Ed 2d 753, 130 S Ct 876.

© The Regents of the University of California

§3.185 3. Candidate's Personal Funds

The problem of avoiding undue influence on candidates is inapplicable when the funds involved come from the candidate or the candidate's family; thus, the state interest in preventing the appearance of impropriety and actual corruption cannot justify the burdens placed on the First Amendment. *Buckley v Valeo* (1976) 424 US 1, 53, 46 L Ed 2d 659, 96 S Ct 612. Further, the state has no legitimate interest in equalizing the financial resources of candidates competing for elective office except when limitations are conditioned on receipt of public funds. *Buckley v Valeo, supra*.

© The Regents of the University of California

§3.186 C. Political Reform Act Campaign Regulations

The Political Reform Act of 1974 (PRA) (Govt C §§81000-91014) campaign regulations are a highly complex and rapidly changing area of the law that is difficult to keep up with on a less than full-time basis. Candidates who make related inquiries can be referred to the Fair Political Practices Commission (FPPC), which provides this advice on either a telephone or more formal (written) basis.

NOTE: Some city attorneys decline to provide advice on campaign regulations to individual candidates on the theory that the city attorney's client is the city as an corporate entity, not individual council members or candidates for council. Moreover, the city attorney's advice on this issue does not confer immunity from FPPC enforcement action if the FPPC disagrees with the city attorney's advice.

For related material, see §2.119-2.161.

© The Regents of the University of California

§3.187 1. Propositions 68, 73, and 208

On June 7, 1988, California voters approved two initiatives both amending and supplementing the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014). See Govt C §83112; 2 Cal Code Regs §§18109-18117. The measures, Propositions 68 and 73, established limits on campaign contributions made by individuals, corporations, political parties, and political committees.

Proposition 68 established a system for publicly-financed elections, and Proposition 73 specifically prohibited candidates from accepting any public financing. Proposition 73 received more votes in the election and, because the measures both regulated the same subject matter, the California Supreme Court determined that only Proposition 73 became operative. *Taxpayers to Limit Campaign Spending v Fair Political Practices Comm'n* (1990) 51 C3d 744, 274 CR 787. In 1992, the Ninth Circuit invalidated Proposition 73's contribution limitations and candidate transfers. *Service Employees Int'l Union v Fair Political Practices Comm'n* (9th Cir 1992) 955 F2d 1312. On November 6, 1996, California voters approved Proposition 208, another initiative statute amending provisions of the PRA pertaining to campaign contributions, campaign spending limitations, and lobbyist activities, which replaced a number of the provisions enacted under Proposition 73.

© The Regents of the University of California

§3.188 2. Proposition 208 Invalidated and Repealed

In 1998, the United States District Court for the Eastern District of California issued a preliminary injunction prohibiting the Fair Political Practices Commission (FPPC) from enforcing any of the provisions of the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014) enacted under Proposition 208. *California Prolife Council PAC v Scully* (ED Cal 1998) 989 F Supp 1282, aff'd (9th Cir 1999) 164 F3d 1189. Specifically, the court concluded that the Proposition's contribution limits, referred to by the court as the "linchpin" of the statute, "must fail because they are set at a level precluding an opportunity to conduct a meaningful campaign," and that there was no rational basis for authorizing higher contribution limits to candidates who voluntarily agreed to campaign spending limits. 989 F Supp at 1296, 1299. The court enjoined enforcement of these provisions pending a determination by the California Supreme Court, to which it referred the matter, as to whether any provisions are severable from the invalid provisions of Proposition 208. 989 F Supp at 1300. The court indicated that once the California Supreme Court made this determination, it would issue its permanent injunction either prohibiting enforcement of Proposition 208 entirely or only its contribution limitation provisions. In dicta, the court indicated that local campaign contribution limit ordinances might pass constitutional muster depending on the limitations imposed in the context of facts pertinent to the particular jurisdiction such as size, available news media coverage, and cost of media, printing and staff support.

© The Regents of the University of California

§3.189 3. Proposition 34

At the statewide election in November 2000 the voters adopted Proposition 34, the State Legislature's proposal for campaign finance regulations. The proponents of Proposition 34 argued that it was intended to impose a reasonable system of campaign finance reform, addressing some of the constitutional problems of Proposition 208. Proposition 34 is largely aimed at elections for state legislative and constitutional offices, and it repealed the majority of Proposition 208. Most significantly, Proposition 34 repealed all of Proposition 208's limits on contributions applicable to local elections, along with the statutory authority to adopt local voluntary expenditure limits. Cities retain the statutory authority to adopt local ordinances regulating campaign finance issues to the extent the local ordinance does not prevent compliance with the Political Reform Act. Govt C §81013; Elec C §10202.

In response to the adoption of Proposition 34, the Fair Political Practices Commission (FPPC) has acted quickly to provide guidance as to which of its provisions are applicable to local jurisdictions. The FPPC adopted 2 Cal Code Regs §18573, a list of the applicable sections of Proposition 34.

PRACTICE TIP: To fully implement Proposition 208, some cities adopted voluntary campaign expenditure limits in amounts up to one dollar per resident of the jurisdiction. Proposition 34 repealed both the statutory authority and the incentive for cities to do so. To avoid confusion in the elections process, city attorneys should determine whether such an ordinance is still in effect and, if so, take the necessary steps to repeal it.

© The Regents of the University of California

§3.190 D. Political Reform Act Disclosure Requirements

A number of situations exist when a candidate is required to reveal the amount of contributions received and expenditures made during the course of a campaign. Govt C §§84100-84511. The disclosure provisions of the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014) serve at least the following purposes:

- Educate voters as to influences likely to be placed on the candidate; and
- Prevent evasion of contribution restrictions imposed by the PRA.

Govt C §81002; *Brown v Superior Court* (1971) 5 C3d 509, 529, 96 CR 584; *Bach v McNelis* (1989) 207 CA3d 852, 863, 255 CR 232; *Thirteen Comm. v Weinreb* (1985) 168 CA3d 528, 532, 214 CR 297.

© The Regents of the University of California

1. Constitutional Issues

§3.191 a. Interests Infringed

Statutes requiring a candidate or committee to reveal the amount of contributions received, the source of the contribution, and campaign-related expenses can seriously infringe on privacy of association and belief guaranteed by the First Amendment. *Buckley v Valeo* (1976) 424 US 1, 14, 64, 46 L Ed 2d 659, 96 S Ct 612. The right to join together for the advancement of beliefs and ideals is diluted if it does not include the right to pool money together through contributions. The freedom of association for the advancement of ideals is an inseparable aspect of liberty ensured by the due process clause, and restrictions on the ability of groups to associate inevitably affect the financial strength of the organization. See *National Ass'n for the Advancement of Colored People v Alabama* (1958) 357 US 449, 460, 2 L Ed 2d 1488, 78 S Ct 1163; *Cantwell v Connecticut* (1940) 310 US 296, 303, 84 L Ed 1213, 60 S Ct 900; *Gitlow v New York* (1925) 268 US 652, 666, 69 L Ed 1138, 45 S Ct 625.

© The Regents of the University of California

§3.192 b. Heightened Scrutiny

Because disclosure laws burden constitutionally protected interests, the state must be able to demonstrate more than a legitimate interest. The increased level of scrutiny ensures laws burdening fundamental rights are drawn with narrow specificity. *Buckley v Valeo* (1976) 424 US 1, 66, 46 L Ed 2d 659, 96 S Ct 612; *National Ass'n for the Advancement of Colored People v Button* (1963) 371 US 415, 433, 9 L Ed 2d 405, 83 S Ct 328; *National Ass'n for the Advancement of Colored People v Alabama* (1958) 357 US 449, 463, 2 L Ed 2d 1488, 78 S Ct 1163.

© The Regents of the University of California

§3.193 c. Governmental Interests

Despite the fact disclosure laws burden constitutional rights, such requirements withstand constitutional scrutiny because they generally educate the voters about interests a candidate is likely to respond to, expose large contributions to the public eye (thus discouraging candidates from accepting them and becoming beholden to special interests), and assist enforcement of contribution limits. *Buckley v Valeo* (1976) 424 US 1, 68, 46 L Ed 2d 659, 96 S Ct 612.

NOTE: These state interests are less compelling when applied to minor parties. Smaller parties have a less stable financial base and are likely to lose contributions because of disclosure laws. If minor party candidates can demonstrate that they or their contributors will be subject to threats, harassment, or reprisal from the government or private parties because of compelled disclosure, the laws cannot be constitutionally enforced against them. The proof of such intimidation consists of past displays of harassment. *Buckley v Valeo* (1976) 424 US 1, 74, 46 L Ed 2d 659, 96 S Ct 612.

© The Regents of the University of California

§3.194 2. When Disclosure Statements Are Required

Candidates for elective state and local office are required by the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014) to file semiannual statements documenting their contributions and expenditures made. The statements must be filed no later than July 31 and January 31. Govt C §84200. However, a candidate who receives less than $1000 and who makes expenditures of less than $1000 may file a short form statement provided by the Fair Political Practices Commission. Govt C §84206. Unless it is clear from the surrounding circumstances that a payment is not being made for political purposes, a payment or promise to make a payment to a candidate or a controlled committee is considered a contribution, and a payment made by a candidate or a controlled committee is considered an expenditure. Govt C §§82015, 82025; 65 Ops Cal Atty Gen 493, 498 (1982).

© The Regents of the University of California

§3.195 a. Reporting Late Contributions

The Political Reform Act of 1974 (PRA) places a continuing obligation on the part of candidates and committees to update their disclosure of contributions received after the last statement filed and before the election. Late contributions totaling $1000 or more must be reported by facsimile, overnight, or personal delivery within 24 hours after they are received or made. Govt C §§82036, 84203.

© The Regents of the University of California

§3.196 b. Reporting Independent Expenditures

An independent expenditure is a payment made in connection with a communication by a person advocating the election or defeat of a clearly identifiable candidate or ballot measure, but not made at the behest of the affected candidate or committee. Govt C §82031. Such expenditures must also be disclosed if the total amount totals $1000 or more in a calendar year. Govt C §84203.5. Independent expenditures totaling $1000 or more in support of or opposition to a candidate or measure, made after the last campaign statement was submitted but before the election, must be reported by facsimile, overnight, or personal delivery within 24 hours. Govt C §84204.

© The Regents of the University of California

§3.197 c. Pre-Election Statements

In addition to filing statements as required by Govt C §84200, all candidates, their controlled committees, and all other committees formed to support or oppose a candidate or ballot measure (including state, county, and city general purpose committees other than political party committees) must file pre-election statements. Govt C §§84200.5, 84200.7-84200.8.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.198 3. Contents of Disclosure Statements

§3.198 3. Contents of Disclosure Statements

Each campaign statement must include (Govt C §84211):

- The total amount of contributions received and expenditures made during the period covered by the campaign statement;
- The cumulative amount of contributions received and expenditures made; and
- Information on certain individual contributors, lenders, and recipients of expenditures.

© The Regents of the University of California

§3.199 a. Identifying Contributors, Lenders, and Recipients

If an individual contributes or loans to a candidate or committee $100 or more, and a contribution or loan has been received by that person during the period covered by the campaign statement, the name, street address, occupation, date of contribution, and cumulative amount received from the contributor must be included in the campaign statement. If an expenditure is made to a person in excess of $100 during the period covered by the campaign statement, the name and street address of the person receiving the contribution, the total amount of the expenditure, and a brief description of the consideration received for the payment must be disclosed. Govt C §§82018, 84211.

© The Regents of the University of California

b. Disclosure of Advertisement Funding Sources

§3.200 (1) Mass Mailing Restrictions

The California Government Code forbids any mailing of 200 or more substantially similar pieces of mail by a candidate or committee unless the name, street address, and city of the candidate or committee are shown. Govt C §§82041.5, 84305; *Griset v Fair Political Practices Comm'n* (1994) 8 C4th 851, 35 CR2d 659, cert denied (1994) 514 US 1083. See also Govt C §84305.5 (identification and disclaimer requirements for slate mailers). For further discussion of mass mailing restrictions, see §2.157.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.201 (2) Ballot Measure Campaign Advertisements

§3.201 (2) Ballot Measure Campaign Advertisements

Government Code §§84503-84511 imposes disclosure requirements on donors of $50,000 or more to ballot measure campaigns. The California Code of Regulations contains further specifics for compliance. See 2 Cal Code Regs §18450.4.

© The Regents of the University of California

§3.202 (3) Paid Spokespeople

Proposition 34 added the requirement that any committee that makes an expenditure of $5000 or more to a spokesperson for an appearance in an advertisement in support of or opposition to the qualification, passage, or defeat of a ballot measure must report the measure, the date of expenditure, the name of the recipient, and the amount expended within 10 days. In addition, the advertisement itself must disclose the fact that the spokesperson is being paid. Govt C §84511.

© The Regents of the University of California

§3.203 E. Political Reform Act Contribution Limits

Government Code §84308 imposes a $250 limit on contributions to commissioners and other appointed officials involved in discretionary proceedings relating to licenses, permits, land use entitlements, and non—publicly bid contracts. Although the statute does not cover council members and other local elected officials when acting as such, it does cover them when they are acting in an appointee capacity (*e.g.,* when serving as the city's appointed member of a joint powers authority, or a regional commission). The statute restricts contributions received by the official for the official's own behalf, or on behalf of another person (*e.g.,* a planning commissioner receiving a contribution for his or her own candidacy or on behalf of an incumbent council member). Officials subject to the provisions of Govt C §84308 must:

- Disclose campaign contributions received by the official before the commencement of specified proceedings involving individuals who have or are affiliated with persons who have given contributions to the official;
- Refuse campaign contributions in excess of $250 from persons supporting or opposing the proposed action during the pendency of the proceeding and for 3 months thereafter; and
- Refrain from participating in specified types of proceedings if the official has received in excess of $250 during the preceding 12 months from any individual involved in the proceeding in support of or opposition to the application.

The Fair Political Practices Commission has promulgated regulations interpreting Government Code §84308 at 2 Cal Code Regs §§18438.1-18438.8.

© The Regents of the University of California

F. Political Reform Act Enforcement

§3.204 1. Criminal Penalties

Violation of the Political Reform Act of 1974 (PRA) is a misdemeanor. In addition, on conviction, a violation of the PRA is punishable by a fine of three times the amount improperly disclosed, received, or expended or $10,000, whichever is greater. Govt C §91000. Finally, anyone convicted of a misdemeanor under the PRA is disqualified from seeking elective office for 4 years. Govt C §91002; *People v Ballard* (1980) 104 CA3d 757, 762, 164 CR 81.

The Attorney General has the authority to enforce the criminal provisions of the PRA with respect to state agencies, lobbyists, and state elections. Govt C §91001. District attorneys have concurrent powers with the Attorney General, and an elected city attorney in a charter city may also act as the prosecutor with respect to violations occurring within the city limits. Govt C §91001.5. Proposition 34 repealed the Fair Political Practices Commission's authority to prosecute criminal violations of the PRA.

© The Regents of the University of California

§3.205 2. Civil Sanctions

In addition to criminal penalties (see §3.204), any person who intentionally or negligently violates the reporting provisions of the Political Reform Act (PRA) is liable for civil damages in an amount not more than the amount or value not properly reported. Govt C §91004. Anyone violating the limits on cash contributions, anonymous contributions, or prohibited gifts is liable in a civil action up to $1000 or three times the amount of the unlawful contribution or gift, whichever is greater. Govt C §91005(a). Under Proposition 34, any person who violates other provisions of the PRA for which no specific civil penalty is provided is liable in a civil action for damages of up to $5000 per violation. Govt C §91005.5.

For PRA violations involving the state or a state agency, except the Fair Political Practices Commission (FPPC) itself, the civil prosecutor is the FPPC. District attorneys are the civil prosecutors with respect to all other agencies. Govt C §91001(b). An elected city attorney in a charter city may also act as the prosecutor with respect to violations occurring within the city limits. Govt C §§91001.5, 91005.5. However, any resident of a jurisdiction where the violation occurred may bring an action for violations of the reporting requirements or the limits on cash contributions, anonymous contributions, and prohibited gifts, if the civil prosecutor is notified, but declines prosecution. Govt C §§91004, 91005(a), 91007; *Thirteen Comm. v Weinreb* (1985) 168 CA3d 528, 536, 214 CR 297; *Rhodes v Superior Court* (1979) 90 CA3d 484, 486, 153 CR 495.

© The Regents of the University of California

§3.206 3. Administrative Sanctions

When the Fair Political Practices Commission determines there is probable cause to believe a Political Reform Act of 1974 (PRA) violation has been committed, it may conduct an administrative hearing under which, if a violation is established, it may issue a cease and desist order, direct the filing of any reports or information required, and/or impose monetary penalties of up to $5000 per citation. Govt C §83116.

© The Regents of the University of California

§3.207 4. Injunctive Relief

Any person residing in the jurisdiction may sue to enjoin violations or to compel compliance with the Political Reform Act of 1974 (PRA). Govt C §91003(a).

© The Regents of the University of California

§3.208 G. Local Regulations

The campaign disclosure laws of the Political Reform Act of 1974 (PRA) apply not only to all candidates and committees for state elective office but also for local elective office. By its terms, the PRA intended to establish a single body of law pertaining to the financing of elections. Govt C §81001 ("The People find and declare … State and local government should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth").

NOTE: This discussion of local regulations does not attempt to comprehensively outline all local campaign laws; rather, it isolates a few areas in which cities frequently add to the requirements imposed by the PRA. See, *e.g.,* Money and Politics in the Golden State: Report and Recommendations of the California Commission on Campaign Finance 71, 75 (1989).

PRACTICE TIP: For more information on local regulations, see Rasiah, A Primer on Local Campaign Regulations (League of California Cities—City Attorneys' Continuing Education Seminar, February 2008).

© The Regents of the University of California

§3.209 1. Authority for More Stringent Requirements

A city may enact contribution and disclosure laws in addition to those required by the Political Reform Act of 1974 (PRA). See Govt C §81013 ("Nothing in this title prevents the Legislature or any other state or local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with this title."). Government Code §85703 provides that nothing in Proposition 34 nullifies local contribution limits or prohibitions except that those that conflict with Government Code §85312 on membership communications.

© The Regents of the University of California

§3.210 2. Public Monies for Candidates in Municipal Elections

Proposition 73 expressly prohibited expending or accepting public monies to seek elective office. See Govt C §85300. The California Supreme Court determined such a ban does not apply to charter cities. *Johnson v Bradley* (1992) 4 C4th 389, 14 CR2d 470 (expressly overruling *County of Sacramento v Fair Political Practices Comm'n* (1990) 222 CA3d 687, 689, 271 CR 802). Subsequent Fair Political Practices Commission (FPPC) regulations confirmed the exemption for charter cities and counties. See 2 Cal Code Regs §18530. The term "public monies" has the same meaning as in Pen C §426, *i.e.,* "all bonds and evidence of indebtedness, and all moneys belonging to the state, or any city, county, town, district, or public agency therein, and all moneys, bonds, and evidence of indebtedness received or held by state, county, district, city, town or public agency officers in their official capacity." Govt C §85206.

PRACTICE TIP: Pending the adoption of regulations, the FPPC has construed the prohibition of Govt C §85300 to mean accepting or expending public resources as well as simply "monies."

© The Regents of the University of California

H. City Participation in Ballot Measures

§3.211 1. Prohibited Expenditures to Support or Defeat a Ballot Measure

Absent clear and unambiguous statutory authority, a local government may not spend public funds to assist the passage or defeat of an initiative or other ballot measure. Public monies may not be used to purchase such items as television and radio announcements, printing cards, banners, and other promotional items. The theory is using public funds in this manner would be manifestly unjust to the rights of those voters with opposing views. The selective use of government funds also raises the danger elected officials would use their authority to perpetuate themselves and their allies in office. See *Vargas v City of Salinas* (2009) 46 C4th 1, 92 CR3d 286; *Miller v California Comm'n on the Status of Women* (1984) 151 CA3d 693, 697, 198 CR 877; *Stanson v Mott* (1976) 17 C3d 206, 217, 130 CR 697; Govt C §54964. Such expenditures are reportable to the Fair Political Practices Commission. Govt C §84203.5.

NOTE: Public entities that illegally expend funds on political campaigns likely violate the Political Reform Act of 1974 (PRA) as well if those expenditures are not reported as campaign expenditures. However, the Fair Political Practices Commission (FPPC) has advised that the campaign reporting requirements of the PRA do not apply to expenditures relating to the mailed-ballot and protest procedures required by Proposition 218. In the FPPC's opinion, Proposition 218 ballot and protest procedures are not "elections" or "ballot measures" as defined in the PRA. Ewing Advice Letter, No. A-97-061.

For more on city participation in ballot measures, see League of California Cities, *Legal Issues Associated with City Participation in Ballot Measure Campaigns* (July 1996) (question-and-answer guide with extensive footnotes to authorities).

© The Regents of the University of California

§3.212 a. Statutory Prohibition

Government Code §54964 prohibits a city officer, employee, or consultant from expending or authorizing the expenditure of any city funds to conduct campaign activities such as supporting or opposing the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters. "Ballot measure" refers to an initiative, referendum, or recall measure that is certified to appear on the ballot, or a measure submitted to the voters by the city council. Govt C §54964(b)(1). "Expenditure" includes payment of city funds used for communications that "expressly advocate" the approval or rejection of a clearly defined ballot measure, or the election or defeat of a clearly identified candidate. Govt C §54964(b)(3). Section 54964(c) further narrows the term "expenditure" to exclude the use of city funds to inform the public about the possible effects of a ballot measure on the activities, operations, or policies of the city, as long as the informational activities are not otherwise prohibited under California law and the information is an accurate, fair, and impartial presentation of the relevant facts to aid the voters in reaching an informed judgment on the ballot measure.

PRACTICE TIP: The distinctions between unlawful campaign activities and lawful information activities are narrow and nuanced. Local agencies should exercise restraint when communicating to voters about local measures. Additionally, when Govt C §54964 is triggered on the certification of a ballot measure for a specific election, city expenditures are presumptively valid only until a notice of intent is filed to circulate a petition seeking to qualify a measure for the ballot. *League of Women Voters v Countywide Criminal Justice Coordination Comm.* (1988) 203 CA3d 529, 555, 250 CR 161. For these reasons, cities should be cautious in structuring public information and outreach activities that comply only with Govt C §54964, and instead should also consider the court decisions in cases interpreting the statute. See League of California Cities, *Legal Issues Associated with City Participation in Ballot Measure Campaigns* (September 2001).

© The Regents of the University of California

§3.213 b. Equal Protection Issues

Cities should be careful in maintaining impartiality in selecting the ballot position of an initiative or referendum. This is even more important on a measure in which the city has taken a position. Although invalidating a candidate election procedure reserving advantageous ballot positions based on incumbency and alphabetical order, the California Supreme Court in *Gould v Grubb* (1975) 14 C3d 661, 677, 122 CR 377, remarked

> "[a] fundamental goal of a democratic society is to attain the free and pure expression of the voter's choice of candidates. To that end, our state and federal constitutions mandate government must, if possible, avoid any feature that might adulterate or, indeed, frustrate that free and pure choice."

PRACTICE TIP: Although a ballot position in a candidate election (as was the case in *Gould*) is factually distinct from the ballot position of an initiative or referendum, cities should still exercise caution in this area.

© The Regents of the University of California

2. Permissible Public Expenditures

§3.214 a. Informational Expenses

Although a city may not use public funds to assist the passage or defeat of a ballot measure without clear authorization, it may spend public monies to enhance the voters' knowledge about the consequences of a particular initiative. The information disseminated must be objective and impartial. *Stanson v Mott* (1976) 17 C3d 206, 221, 130 CR 697. See also *Vargas v City of Salinas* (2009) 46 C4th 1, 40, 92 CR3d 286 (validating city's communications regarding local initiative when city conveyed past and present facts relating to the initiative, avoided inflammatory rhetoric, did not urge voters to vote in a particular manner, and disseminated information though website and regular circulation of city's official newsletter). A fair presentation of facts relating to a ballot measure is easily distinguished from unauthorized campaign or promotional expenses such as television or radio expenses or posters. *Citizens to Protect Pub. Funds v Board of Educ.* (1953) 13 NJ 172, 98 A2d 673 (cited with approval in *Stanson v Mott* (1976) 17 C3d 206, 220, 130 CR 697).

NOTE: Some expenses closely approach impermissible promotional costs. Publicly financed advertisements may refrain from exhorting a particular position, but still be declared an unauthorized campaign expenditure. The propriety or impropriety of each expenditure depends on such factors as the style, tenor, and timing of an advertisement. 17 C3d at 221. See also *DiQuisto v County of Santa Clara* (2010) 181 CA4th 236, 265, 104 CR3d 93 (county's discussion with labor union regarding proposed ballot initiative as part of collective bargaining process was "framed in the dispassionate language of contract, not in the exhortatory tone of persuasion").

© The Regents of the University of California

§3.215 b. Opinions of Local Legislative Bodies

Local legislative bodies may still go on record at public meetings in favor of or opposed to a particular measure. Moreover, municipal employees are free to join other citizen groups supporting or opposing initiatives. See *League of Women Voters v Countywide Criminal Justice Coordination Comm.* (1988) 203 CA3d 529, 555, 250 CR 161.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.216 c. Voter Registration Expenses

§3.216 c. Voter Registration Expenses

Cities may permissibly expend public funds for voter registration and get-out-the-vote efforts, even in conjunction with elections in which a majority of the city council strongly supports or opposes a measure on the ballot. *Schroeder v City of Irvine* (2002) 97 CA4th 174, 187, 118 CR2d 330.

© The Regents of the University of California

3. Lobbying

§3.217 a. Lobbying Permitted

Lobbying efforts involve the use of public funds to promote causes that some members of the public may not support. However, one of the primary functions of elected and appointed officials is to devise legislative proposals and to implement the current administration's policies. Because the legislative process envisions the participation of interested persons at public hearings, lobbying by public agencies in no way undermines the democratic process and is generally allowed. *Stanson v Mott* (1976) 17 C3d 206, 218, 130 CR 697. See also Govt C §50023 (enabling local legislative bodies to appear before state legislature and Congress to aid passage of favorable legislation and allowing costs and expenses to be paid for with public funds).

On lobbying, see §§2.41, 2.185-2.187.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/3 Elections/§3.218 b. Lobbyist Registration and Reporting Requirements

§3.218 b. Lobbyist Registration and Reporting Requirements

The Political Reform Act of 1974 (PRA) requires that compensated state lobbyists and those who employ state lobbyists register and report their lobbying activities and expenditures. Govt C §§82038.5, 86100-86300.

PRACTICE TIP: Because lobbying registration and reporting requirements are complex and fact specific, local officials should consult with counsel, the Fair Political Practices Commission, and the Secretary of State to determine whether these requirements apply.

© The Regents of the University of California

§3.219 c. Distinguishing Between Lobbying and Campaigning

The audience to whom an appeal is directed, not the substantive issues, determines if the government's actions constitute lobbying or campaigning. Lobbying efforts are aimed at the legislature; campaigning is directed at the voters. *Miller v Miller* (1978) 87 CA3d 762, 768, 151 CR 197, superseded by statute as stated in *Miller v California Comm'n on the Status of Women* (1984) 151 CA3d 693, 696, 198 CR 877. It may be difficult to distinguish between the two. Although a lobbyist's principal appeal may be directed at the legislature, a secondary audience may also be the electorate and the media. 87 C3d at 775 (Reynoso, J., concurring).

© The Regents of the University of California

4. Drafting Ballot Measures

§3.220 a. Municipal Drafting Permitted

A local government may spend public funds to draft and find a sponsor for an initiative. The local legislative body has the authority to spend public funds on a public purpose and its determination a particular expense furthers a public purpose will ordinarily not be disturbed by the courts. If the interests the city seeks to serve are legitimate but the state legislature has proven disinterested, the city has the power to draft a proposed initiative at public expense in the hope a sympathetic sponsor will be found. *League of Women Voters v Countywide Criminal Justice Coordination Comm.* (1988) 203 CA3d 529, 548, 250 CR 161; 73 Ops Cal Atty Gen 255, 266 (1990).

© The Regents of the University of California

§3.221 b. Drafting Does Not Constitute Campaigning

Before and through the drafting stage of an initiative, a city's efforts are not taken to influence voters either to qualify or pass a proposed initiative. The audience is not the electorate per se, but only potentially interested citizens. The act of drafting a measure does not constitute an attempt to influence any particular vote. *League of Women Voters v Countywide Criminal Justice Coordination Comm.* (1988) 203 CA3d 529, 551, 250 CR 161.

© The Regents of the University of California

§3.222 c. Collecting Signatures Likely Impermissible

When a local government provides funds to assist the qualification of a ballot measure, it arguably has crossed the point of neutrality by claiming a proposed initiative should be adopted. Such expenditures would be invalid unless authorized by express statutory authority, and even then they would be susceptible to First Amendment and equal protection claims. See *League of Women Voters v Countywide Criminal Justice Coordination Comm.* (1988) 203 CA3d 529, 554, 250 CR 161; 73 Ops Cal Atty Gen 255, 266 (1990).

© The Regents of the University of California

5. Analyzing City Ballot Measures

§3.223 a. Impartial Analysis by City Attorney

Once a city measure has qualified for a place on the ballot, the governing body of the city may direct the clerk to forward a copy of the measure to the city attorney. The city attorney must prepare an analysis of the measure showing the effect of the measure on existing law and the operation of the measure. The analysis is printed on the ballot preceding the arguments in favor of and against the measure. The purpose of the analysis, like all other ballot arguments, is to ensure a more informed electorate. Elec C §9280; *Horwath v City of East Palo Alto* (1989) 212 CA3d 766, 772, 261 CR 108; *Patterson v Board of Supervisors* (1988) 202 CA3d 22, 29, 248 CR 253.

© The Regents of the University of California

§3.224 b. Remedy for Imperfect Analyses

An omission, inaccuracy, or misleading statement in a city attorney's analysis of a proposed measure may result in the invalidation of a ballot measure passed by the voters. The due process clause requires invalidation when the error prevented voters from making an informed choice. In determining whether the voters were unable to make an informed choice, the court should consider the following (*Horwath v City of East Palo Alto* (1989) 212 CA3d 766, 777, 261 CR 108):

- The availability of the text of the ordinance to the public;
- The extent of other informational activities and the content of these efforts;
- The arguments for or against the measure appearing on the ballot; and
- The materiality of the omission.

In this regard, "[t]he bar is very high indeed for a litigant to successfully mount a post-election challenge to a ballot measure using a due process rationale based on defects in a county counsel's impartial analysis." *People ex rel Kerr v County of Orange* (2003) 106 CA4th 914, 934, 131 CR2d 274. For example, when a proposed ballot measure dealing with rent control was submitted to the voters, the city attorney's failure to mention the existence of a rent rollback provision did not render the initiative invalid because newspaper articles discussed the provision and leaflets explained the measure, ensuring that voters were sufficiently informed. Moreover, the voters were informed by the city they could obtain a copy of the ordinance at no charge. *Horwath v City of East Palo Alto* (1989) 212 CA3d 766, 778, 261 CR 108.

© The Regents of the University of California

4

Personnel

I. INTRODUCTION
- A. Nature of Public Employment §4.1
- B. Public Employee Rights §4.2

II. RECRUITMENT AND QUALIFICATIONS OF PUBLIC EMPLOYEES
- A. Hiring §4.3
  - 1. Non-discrimination Requirement §4.4
  - 2. Residency Requirement §4.5
- B. Affirmative Action §4.6
  - 1. Sources of Affirmative Action Obligations §4.7
  - 2. Legality of Voluntary Affirmative Action
    - a. Proposition 209 §4.8
    - b. City Programs Involving Federal Monies §4.9
  - 3. Third Party Rights §4.10
  - 4. EEOC Guidelines §4.11
- C. Immigration Issues §4.12
- D. Testing Issues §4.13
  - 1. Uniform Guidelines on Employee Selection §4.14
  - 2. Theories of Discrimination §4.15
  - 3. Specific Types of Tests
    - a. Polygraph Tests §4.16
    - b. Voice Tests §4.17
    - c. Psychological Tests §4.18
    - d. Drug Tests §4.19
- E. Other Restrictions on Hiring
  - 1. Americans with Disabilities Act §4.20
  - 2. California Fair Employment and Housing Act §4.21
  - 3. Arrests §4.22
  - 4. Criminal Record §4.23
  - 5. HIV Test Results §4.24
  - 6. Special Rules for Employees Working With Children §4.25
  - 7. Department of Motor Vehicles Records §4.26
- F. Compensation and Benefits
  - 1. Compensation Plans
    - a. Establishment §4.27
    - b. Amount §4.28
    - c. Constitutional Prohibition §4.29
  - 2. Benefit Plans §4.30
  - 3. Employee Recognition Plans §4.31
  - 4. Pension and Retirement Systems
    - a. Purpose §4.32
    - b. Validity §4.33
    - c. Legislation §4.34
    - d. Employee Rights §4.35
    - e. Amendments §4.36
    - f. Persons Entitled to Benefits §4.37
      - (1) On Death §4.38
      - (2) On Disability §4.39
    - g. Beneficiary Remedies §4.40
- G. Reductions in Force for Financial Reasons (Layoffs) §4.41

III. FEDERAL FAIR LABOR STANDARDS ACT (FSLA) §4.42
- A. Public Entity Coverage Under FLSA §4.43
- B. Exclusions From FLSA Coverage §4.44
  - 1. Volunteers §4.45
  - 2. Independent Contractors §4.46
  - 3. Trainees §4.47

C. Exemptions From FLSA Coverage §4.48
1. Exemption for White-Collar Employees §4.49
a. Salary Basis Test §4.50
(1) Suspension of Exempt Employees §4.51
(2) Furloughs §4.52
(3) Improper Deductions From Exempt Employee's Salary §4.53
b. Duties Test §4.54
2. Exemption for Work in a Different Capacity §4.55
3. Other Exemptions §4.56
4. Exclusion for "First Responders" §4.57
D. FLSA Requirements
1. Minimum Wage Requirements §4.58
a. To Suffer or Permit to Work §4.59
(1) "On-Call" or "Standby" Time §4.60
(2) Rest and Meal Periods §4.61
(3) Travel Time §4.62
(4) Waiting and Sleeping Time §4.63
(5) Employees Residing on Employer's Premises §4.64
(6) Miscellaneous Instances Giving Rise to Compensable Time §4.65
(7) Miscellaneous Instances Not Giving Rise to Compensable Time §4.66
b. State Minimum Wage Requirements §4.67
c. Payment of Wages and Deductions for Employee Debts §4.68
2. Overtime Pay Requirements §4.69
a. Workweek §4.70
b. "Regular Rate" of Pay §4.71
c. Police and Firefighter Partial Exemption §4.72
(1) Fire Protection Employees §4.73
(2) Law Enforcement Employees §4.74
(3) Overtime Pay for Police and Firefighters §4.75
3. Compensatory Time Off Requirements §4.76
a. Limitations on Accrual §4.77
b. Conditions for Use §4.78
c. Forced Use §4.79
4. Child Labor Prohibition §4.80
5. Equal Pay Act Prohibition §4.81
6. Recordkeeping Requirements §4.82
E. Enforcement of Fair Labor Standards Act (FLSA)
1. Investigations and Settlements §4.83
2. Judicial Enforcement §4.84
3. Criminal Sanctions §4.85
4. Employee Suits §4.86
a. No Need to Exhaust Administrative Remedies §4.87
b. No Class Action Under CCP §382 §4.88
c. No Discrimination Against Employee for Bringing Suit §4.89
5. Monetary Amounts Recoverable §4.90
6. Statute of Limitations §4.91
7. Employer Defenses §4.92

IV. DRUG TESTING §4.93
A. Constitutional Tests
1. Fourth Amendment Test §4.94
a. Legitimate Interest §4.95
b. Nexus §4.96
c. Privacy Expectation §4.97
d. Other Factors §4.98
2. State Privacy Test §4.99
B. Constitutionality of Particular Types of Drug Testing
1. Pre-employment Testing §4.100
2. Routine Physical Examinations §4.101
3. Testing Following Leave of Absence §4.102
4. Testing for Cause §4.103
5. Testing as Part of Rehabilitation Program §4.104
6. Testing as Part of Promotion Procedure §4.105
7. Random Testing §4.106
a. When Random Testing Upheld §4.107

b. When Random Testing Not Upheld §4.108
8. Testing Following Accident §4.109
a. When Testing Following Accident Upheld §4.110
b. When Testing Following Accident Not Upheld §4.111
C. Drug Testing Procedures §4.112
1. Meet and Confer Requirements §4.113
2. Confidentiality of Medical Information §4.114
D. Other Federal Laws on Drug Testing
1. Drug Free Workplace Act of 1988 §4.115
2. Omnibus Transportation Employee Testing Act of 1991 §4.116
3. Rehabilitation Act of 1973 §4.117
4. Americans with Disabilities Act §4.118
E. Other State Laws on Drug Testing
1. State Drug Free Workplace Act of 1990 §4.119
2. Alcohol and Drug Rehabilitation Act §4.120
3. Fair Employment and Housing Act §4.121

V. PRIVACY RIGHTS AND PERSONNEL RECORDS
A. Maintenance of Personnel Records §4.122
1. State Law §4.123
2. Federal Law §4.124
B. Access to Personnel Records
1. Employee's Right to Access Own Records §4.125
2. Third Party's Right to Access Records §4.126
a. Public Records Act §4.127
b. Federal Civil Rights Law §4.128
c. Meyers-Milias-Brown Act §4.129
d. Subpoenas §4.130
e. Records of Police Officers §4.131
f. HIV Tests §4.132

VI. EMPLOYEE RIGHTS AGAINST ADVERSE EMPLOYMENT ACTIONS §4.133
A. Whistle-blowers §4.134
B. First Amendment Rights §4.135
C. Political Activity §4.136

VII. WORKPLACE SAFETY
A. Injury and Illness Prevention Plan §4.137
B. Other Safety Plans and Programs §4.138

VIII. ANTIDISCRIMINATION LAWS
A. Federal Laws
1. Title VII of the Civil Rights Act of 1964 §4.139
a. Exclusions From Coverage Under Title VII §4.140
b. Sexual Harassment Is Prohibited by Title VII §4.141
c. Discrimination Based on Pregnancy Is Prohibited by Title VII §4.142
2. Federal Equal Pay Act of 1963 §4.143
3. Age Discrimination in Employment Act of 1967 §4.144
a. Exclusions From Coverage Under the ADEA §4.145
b. Restriction on Waiver of ADEA Rights §4.146
4. Age Discrimination Act of 1975 §4.147
5. Rehabilitation Act of 1973 §4.148
6. Immigration Reform and Control Act of 1986 §4.149
7. Civil Rights Act of 1991: §1981 §4.150
a. Who Can Sue §4.151
b. Coverage §4.152
c. Immunities §4.153
d. Procedural Differences From Title VII §4.154
e. Remedies §4.155
8. Civil Rights Act of 1871: §1983 §4.156
a. Who Can Sue §4.157
b. Immunities §4.158
c. Procedure §4.159
d. Remedies §4.160

9. Civil Rights Act of 1871: §1985(3) §4.161
10. Family and Medical Leave Act of 1993 §4.162
11. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) §4.163
B. State Laws
1. State Constitution §4.164
2. Fair Employment and Housing Act §4.165
3. Tort Actions for Violation of Public Policy §4.166
4. California Equal Pay Law §4.167
5. Unruh and Ralph Civil Rights Acts §4.168
6. California Government Code §11135 §4.169
7. State Personnel Laws §4.170
8. HIV Testing §4.171
9. California Family Rights Act and Similar Leaves
a. Leave Under California Family Rights Act §4.172
b. "Kin Care" Use of Sick Leave §4.173
c. Pregnancy Disability Leave §4.174
d. Additional Leave Requirements §4.175
10. Workplace Appearance and Gender Identity §4.176
C. Theories of Discrimination §4.177
1. Disparate Treatment §4.178
2. Disparate Impact §4.179
3. Retaliation §4.180
D. Affirmative Defenses to Discrimination Allegations
1. Bona Fide Occupational Qualification §4.181
2. Business Necessity §4.182
3. Job-Relatedness §4.183
4. Conformity With Security Regulations §4.184
5. Non-discrimination Plan or Affirmative Action Plan §4.185
E. Sexual Harassment §4.186
1. Definition of Sexual Harassment §4.187
a. Conduct of a Sexual Nature §4.188
b. Unwelcome Conduct §4.189
2. Quid Pro Quo Harassment
a. Prima Facie Case §4.190
b. Preferential Treatment or Reverse Quid Pro Quo Harassment §4.191
c. Equal Employment Opportunity Commission's Position §4.192
3. Hostile Environment Sexual Harassment
a. Federal Law §4.193
b. California Law §4.194
c. Elements of Hostile Environment Claim §4.195
d. Standard Applicable to Hostile Environment Claim
(1) Reasonable Person Standard §4.196
(2) Reasonable Woman Standard §4.197
4. Employer Liability for Sexual Harassment
a. Quid Pro Quo Harassment
(1) Federal Law §4.198
(2) California Law §4.199
b. Hostile Environment Harassment
(1) Federal Law §4.200
(2) California Law §4.201
c. Co-employee Conduct §4.202
d. Non-employee Conduct §4.203
5. Individual Liability for Sexual Harassment
a. Federal Law §4.204
b. California Law §4.205
6. Sexual Harassment Prevention and Policies
a. Preventing Sexual Harassment §4.206
b. Creating Effective Sexual Harassment Policy §4.207
7. Investigating and Responding to Sexual Harassment §4.208
8. Defamation Claim by Alleged Harasser §4.209
9. Other Theories of Liability Arising Out of Sexual Harassment §4.210
10. Posting and Pamphlet Requirement §4.211
11. Mandatory Training §4.212
F. Selection and Hiring Practices §4.213
1. Testing §4.214

2. Performance Standards §4.215
3. Pre-employment Inquiries §4.216
4. Job Requirements §4.217
5. Loyalty Oaths §4.218
G. Constructive Discharge
1. Federal Law §4.219
2. California Law §4.220
H. Discrimination Based on Disability §4.221
1. Qualified Individual With a Disability §4.222
a. Definition of Disability §4.223
b. Individuals Who Are Not Disabled §4.224
c. Essential Functions §4.225
d. Obesity Is Not Disability Per Se §4.226
2. Types of Discrimination Prohibited §4.227
3. Reasonable Accommodation §4.228
a. Definition of "Reasonable Accommodation" §4.229
b. Best Available Accommodation Not Required §4.230
c. Examples of Reasonable Accommodations §4.231
4. Interactive Process §4.232
5. Employer Defenses to Disability Discrimination Claims §4.233
6. Pre- and Post-employment Inquiries and Medical Examinations
a. Pre-offer Medical Examination and Inquiry §4.234
b. Post-offer Examination and Inquiry §4.235
c. Post-employment Exam and Inquiries §4.236
7. Restrictions on Drug and Alcohol Use §4.237
8. Drug Testing §4.238
9. Effect of Other Disability Laws §4.239
10. Exhaustion of Administrative Remedies §4.240
11. Effect of ADA on Equal Protection Analysis §4.241
I. Procedures for Enforcing Discrimination Laws
1. Title VII and Title I of the ADA §4.242
a. The Charge §4.243
b. Timeliness §4.244
c. Investigation of Charge §4.245
d. EEOC Determination
(1) Right to Sue Notice §4.246
(2) Reasonable Cause §4.247
e. Civil Lawsuit §4.248
2. Age Discrimination in Employment Act §4.249
3. Equal Pay Act §4.250
4. State Procedures in California
a. Administrative Agency §4.251
b. Complaint §4.252
c. Timeliness §4.253
d. Investigation of Complaint §4.254
e. Accusation §4.255
f. Right to Sue Notice §4.256
g. Civil Lawsuit §4.257
h. Exhaustion of Administrative Remedies §4.258
J. Remedies for Violation of Anti-discrimination Laws
1. Federal Remedies
a. Monetary Relief
(1) Back Pay §4.259
(2) Front Pay §4.260
(3) Compensatory and Punitive Damages §4.261
(4) Liquidated Damages §4.262
(5) Attorney Fees §4.263
b. Equitable Relief §4.264
c. Affirmative Relief §4.265
2. State Remedies
a. Administrative Remedies §4.266
b. Judicial Remedies §4.267
K. Mandatory Employer Posters §4.268

IX. EVALUATING AND DISCIPLINING EMPLOYEES

A. Performance Standards §4.269
B. Performance Evaluations §4.270
C. Employee Discipline
1. Just Cause §4.271
2. Progressive Discipline
a. Definition §4.272
b. Stages of Progressive Discipline
(1) Warnings §4.273
(2) Suspension §4.274
(3) Demotion §4.275
(4) Discharge §4.276
c. Courts Give City Deference in Selection of Penalty or Discipline §4.277
3. Due Process §4.278
a. Protection of Property Interest: *Skelly* Rights §4.279
(1) Pre-disciplinary *Skelly* Rights §4.280
(2) Type of Proceeding Required: *Skelly* Conference §4.281
(3) Types of Discipline That Trigger Procedural Due Process §4.282
(4) Types of Discipline That Do Not Trigger Procedural Due Process §4.283
(5) Remedies for *Skelly* Violations §4.284
b. Protection of Liberty Interest: *Lubey* Rights §4.285
(1) When Liberty Interest Arises §4.286
(2) Name Clearing Hearing §4.287
c. Post-disciplinary Proceedings §4.288

X. EMPLOYEE SEPARATION AND TERMINATION §4.289
A. Grievances
1. Types of Grievances §4.290
2. Investigating a Grievance §4.291
3. Grievance Case File §4.292
4. Answering a Grievance §4.293
B. Public Safety Officers Procedural Bill of Rights Act §4.294
1. Covered Employees §4.295
2. Punitive Action
a. Broadly Defined §4.296
b. Exclusions §4.297
3. Adverse Comments in Personnel File §4.298
4. Inspection of Personnel File §4.299
5. Procedures for Interrogations of Peace Officers
a. Pre-interrogation Requirements §4.300
b. Additional Requirement for Potentially Criminal Conduct: *Lybarger* Warning §4.301
c. Post-interrogation Requirements §4.302
d. Imposition of Discipline §4.303
6. Right to Privacy §4.304
a. Polygraph Examinations §4.305
b. Financial Records §4.306
c. Media Attention §4.307
d. Searches §4.308
7. Appeals of Disciplinary Actions §4.309
8. Remedies for Noncompliance §4.310
C. Firefighters Procedural Bill of Rights Act §4.311
1. Covered Employees §4.312
2. Adverse Comments in Personnel Files §4.313
3. Procedures for Interrogation of Peace Officers §4.314
a. Pre-interrogation Requirements §4.315
b. Additional Requirement for Potentially Criminal Conduct §4.316
4. Imposition of Discipline §4.317
5. Administrative Appeals §4.318
6. Remedies for Noncompliance §4.319

XI. LABOR NEGOTIATIONS AND THE MEYERS-MILIAS-BROWN ACT (MMBA) §4.320
A. Summary of MMBA
1. MMBA Provides Rules for Administration of Employer-Employee Relations §4.321
2. MMBA Guarantees Certain Employee Rights §4.322
3. Dispute Resolution for MMBA Violations
a. Public Employment Relations Board Jurisdiction §4.323

b. No Binding Arbitration for Law Enforcement Officers and Firefighter Employee Organizations §4.324
B. Harmonizing Meyers-Milias-Brown Act With National Labor Relations Act §4.325
C. Provisions Under Meyers-Milias-Brown Act
1. Discrimination §4.326
2. Right to Organize §4.327
a. Law Enforcement Employees and Firefighters §4.328
b. Management and Confidential Employees §4.329
c. Professional Employees §4.330
d. Unrepresented Employees §4.331
3. Agency Shop Agreements §4.332
4. Bargaining Unit Issues §4.333
5. Required Notice §4.334
6. Meet and Confer Obligation §4.335
a. Matters Within Scope of Representation §4.336
(1) No Definitive Test §4.337
(2) Liberal Construction §4.338
b. Good Faith Requirement §4.339
7. Management Rights and Restrictions §4.340
8. Impasse §4.341
a. Binding Arbitration for Law Enforcement Officers and Firefighters §4.342
b. Other Employees §4.343
9. Unilateral Changes §4.344
10. Unilateral Implementation Following Meet and Confer §4.345
11. Memorandum of Understanding §4.346
12. Unfair Labor Practices §4.347
13. Strikes §4.348
14. Mediation §4.349

XII. CALIFORNIA WORKERS' COMPENSATION LAW
A. Workers' Compensation Law Generally §4.350
1. Workers' Compensation Law Is Specialized Area §4.351
2. Workers' Compensation as Sole and Exclusive Remedy §4.352
3. Interactive Process Under Discrimination Laws Imposes Separate Obligation §4.353
B. Work-Related Injury: Prerequisite for Recovering Workers' Compensation Benefits
1. Injury Required §4.354
a. Burden of Proof §4.355
b. Presumptions §4.356
c. Special Proof Problems §4.357
2. Only Employees Entitled to Benefits §4.358
3. Affirmative Defenses §4.359
C. Workers' Compensation Benefits §4.360
1. Employer-Paid Medical Treatment §4.361
2. Treatment Provider
a. Pre-designated Physician §4.362
b. Employer Physician §4.363
3. Employee May Not Refuse Treatment §4.364
D. Disability Benefits
1. Temporary Disability Benefits §4.365
a. When Temporary Disability Benefits Cease §4.366
b. Amount of Temporary Disability Benefits §4.367
2. Permanent Disability Benefits §4.368
a. Permanent Disability Rating §4.369
b. Permanent Partial Disability §4.370
c. Individual Jurisdiction Pension Plan Limits §4.371
d. Supplemental Job Displacement Benefits §4.372
E. Death Benefits §4.373
F. Penalties for Violations of Workers' Compensation Laws
1. Labor Code Governs §4.374
2. Multiple Penalties §4.375
3. Late Payments §4.376
4. Serious and Willful Misconduct of Employer §4.377
5. Serious and Willful Misconduct of Employee §4.378
G. Penalties for Discrimination Against Injured Employee §4.379
1. Fair Employment and Housing Act Claim §4.380

2. Defenses §4.381
H. Litigation §4.382
1. Typical Issues §4.383
2. Expert Medical Opinion §4.384
3. Claim Presentation Requirement §4.385
4. Investigation and Response §4.386
5. Discovery §4.387
6. Methods of Resolution
a. Compromise and Release §4.388
b. Stipulations With Request for Award §4.389
c. Judicial Decision §4.390
7. Resolution of Penalties §4.391
8. Statutes of Limitations; Tolling §4.392
I. Related Litigation §4.393
1. Disability Retirement §4.394
a. Determine Effect of Workers' Compensation Board Decision §4.395
b. Consider Possibility of Offset §4.396
2. Subrogation §4.397
3. Federal Causes of Action §4.398
4. State Causes of Action §4.399

© The Regents of the University of California

I. INTRODUCTION

§4.1 A. Nature of Public Employment

All appointive officers and employees in a general law city hold their offices at the pleasure of the city council. Govt C §36506. Most municipal officers and employees have no right in their offices or employment except as that right may be conferred by statute or charter. *Butterworth v Boyd* (1938) 12 C2d 140, 82 P2d 434. Not all those in public employment hold a public office. The distinction between an officer and an employee may affect the manner in which a city deals with matters such as appointment and removal.

For further discussion of topics covered by this chapter, see generally Advising California Employers and Employees (Cal CEB 2005); California Workers' Compensation Practice (4th ed Cal CEB 2000); Wrongful Employment Termination Practice (2d ed Cal CEB 1997).

© The Regents of the University of California

§4.2 B. Public Employee Rights

Public employees enjoy the full protection of the First Amendment. *Keyishian v Board of Regents* (1967) 385 US 589, 17 L Ed 2d 629, 87 S Ct 675. See also *Garrity v New Jersey* (1967) 385 US 493, 17 L Ed 2d 562, 87 S Ct 616 ("Policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights"); *Board of County Comm'rs v Umbehr* (1996) 518 US 668, 675, 135 L Ed 2d 843, 852, 116 S Ct 2342 ("First Amendment's guarantee of freedom of speech protects government employees from termination *because* of their speech on matters of public concern"). The interests of the public employee as a citizen commenting on matters of public concern must be balanced against the interests of the government in promoting the efficiency of the public services it performs through its employees. *Connick v Myers* (1983) 461 US 138, 75 L Ed 2d 708, 103 S Ct 1684 (when public employee speaks not as citizen on matters of public concern, but as employee on matters of personal interest, federal court is not appropriate forum to review personnel decision against employee); *Pickering v Board of Educ.* (1968) 391 US 563, 20 L Ed 2d 811, 88 S Ct 1731. See *Garcetti v Ceballos* (2006) 547 US 410, 164 L Ed 2d 689, 126 S Ct 1951 (speech that is part of official duties, *e.g.,* memoranda or reports, is not speech as citizen on matters of public concern, and thus is not constitutionally protected and does not protect employee from discipline); *Chico Police Officers' Ass'n v City of Chico* (1991) 232 CA3d 635, 283 CR 610 (police officer association president's speech critical of department management protected by First Amendment because speech involved matter of public concern (employment relations and safety).

An employer may not deny a volunteer his or her constitutionally protected right to freedom of speech. See *Hyland v Wonder* (9th Cir 1992) 972 F2d 1129, cert denied (1993) 508 US 908.

© The Regents of the University of California

II. RECRUITMENT AND QUALIFICATIONS OF PUBLIC EMPLOYEES

§4.3 A. Hiring

Public agencies establish standards, requirements, and procedures for hiring personnel consistent with the agency's charter or Government Code requirements. Many agencies also have "civil service" systems that include comprehensive procedures for recruitment, hiring, testing, and promotion. See Govt C §§45000-45210.

PRACTICE TIP: For a list of acceptable and unacceptable pre-employment inquiries, see Advising California Employers and Employees §§1.22-1.31 (Cal CEB 2005). The California Department of Fair Employment and Housing also publishes a fact sheet regarding pre-employment inquiries. The publication is DFEH-161: Employment Inquiries: What Can Employers Ask Applicants and Employees? and is available at www.dfeh.ca.gov/DFEH/Publications/ or by contacting the DFEH at 2218 Kausen Drive, Suite 100, Elk Grove, CA 95758.

© The Regents of the University of California

§4.4 1. Non-discrimination Requirement

A nondiscriminatory hiring practice focuses on setting appropriate minimum qualifications for each job. Minimum qualifications are the prerequisites for the position, such as appropriate education, background, employment experience, skills, and licenses. Minimum qualifications must be job-related and consistent with business necessity. 42 USC §12112; Govt C §12940.

© The Regents of the University of California

§4.5 2. Residency Requirement

"A city or county, including any chartered city or chartered county, or public district, may not require that its employees be residents of such city, county or district; except that such employees may be required to reside within a reasonable and specific distance of their place of employment or other designated location." Cal Const art XI, §10(b). See *International Ass'n of Fire Fighters, Local 55, AFL-CIO v City of San Leandro* (1986) 181 CA3d 179, 226 CR 238 (40-mile residency requirement for firefighters without individual assessment of travel time was reasonable); *Cooperrider v Civil Service Comm'n* (1979) 97 CA3d 495, 158 CR 801 (prohibition on residency requirements applies to applicants for employment and current employees); *Graham v Kirkwood Meadows Pub. Utils. Dist.* (1994) 21 CA4th 1631, 26 CR2d 793 (requirement that water/wastewater operator whose duties include emergency repair live within three driving miles of treatment plant was reasonable). See also *Lanam v Civil Service Comm'n* (1978) 80 CA3d 315, 145 CR 590 (hand-drawn, irregularly shaped residency boundaries for firefighter was not reasonable).

PRACTICE TIP: Some city attorneys maintain that the constitutional prohibition does not apply to an officer of the city, such as a city manager, despite being a city employee. This position appears to be in the minority and has not been tested in the courts. As a recruitment tool and means of encouraging certain employees (typically the city manager and public safety personnel) to live within the city limits, some cities have provided housing loans contingent on the property being within the city limits. See 77 Ops Cal Atty Gen 170 (1994).

© The Regents of the University of California

§4.6 B. Affirmative Action

Affirmative action is an employer's commitment to establish objectives and plans to ensure equal employment opportunity and, when appropriate, to achieve full utilization of minorities and women, at all levels and in all areas of the employer's workforce. Affirmative action is premised on the concept that absent discrimination, the employer's work force will generally mirror the availability of persons possessing the applicable skills in the relevant labor market.

NOTE: Affirmative action programs may be viewed as a form of "reverse discrimination," albeit one with positive social consequences, and may be challenged on both Title VII of the Civil Right Act of 1964 (Title VII) (42 USC §§2000e—2000e-17) and equal protection grounds.

On affirmative action in public works projects, see §§7.28-7.34.

© The Regents of the University of California

§4.7 1. Sources of Affirmative Action Obligations

Nothing in Title VII requires the institution of affirmative action. *Johnson v Transportation Agency, Santa Clara County* (1987) 480 US 616, 94 L Ed 2d 615, 107 S Ct 1442; *United Steelworkers of Am. v Weber* (1979) 443 US 193, 61 L Ed 2d 480, 99 S Ct 2721. Affirmative action programs in employment are generally instituted for one of the following three reasons:

(1) Voluntary Commitment. An employer may decide voluntarily to engage in affirmative action in employment to remedy past discrimination, correct an imbalance in the work force, or offset the disparate impact of prior selection practices. The existence of a reasonable basis for undertaking voluntary affirmative action does not constitute an admission of a Title VII violation. *Johnson v Transportation Agency, Santa Clara County, supra*; *United Steelworkers of Am. v Weber, supra*.

NOTE: Consent decrees, approved by the court as part of a settlement, often provide for the adoption of an affirmative action program. Any affirmative remedy contained in it is viewed as voluntary affirmative action rather than court-ordered relief.

(2) Judicial Action. See*, e.g., Firefighters Local Union No. 1784 v Stotts* (1984) 467 US 561, 81 L Ed 2d 483, 104 S Ct 2576 (Supreme Court rejects modification of consent decree to cover issues, such as preventing minorities from being laid off under seniority system, when consent decree only addressed hiring and promotion of minorities).

(3) Contractual or Funding Obligation. When an entity has a contract or subcontract with, or receives funding from, the federal government or the state, as a condition of such contract or funding, the agency may be required to engage in affirmative action in employment. See*, e.g.,* Executive Order 11246, as amended by Executive Orders 11375 and 12086 (contractors and subcontractors and certain other employers with specified levels of contacts with federal government); 29 USC §§701-796*l* (§503 of Rehabilitation Act of 1973, as amended); Govt C §12990 (governing certain contracts with state).

© The Regents of the University of California

2. Legality of Voluntary Affirmative Action

§4.8 a. Proposition 209

Proposition 209 was approved by California voters on November 6, 1996, and added Cal Const art I, §31(a) to prohibit public employers, among others, from "discriminat[ing] against or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting." Several statutory affirmative action programs have been invalidated under Proposition 209. See *Connerly v State Personnel Bd.* (2001) 92 CA4th 16, 112 CR2d 5 (affirmative action program that established timetables to seek, hire, and promote minorities and women constitutes impermissible racial and gender preference); *Hi-Voltage Wire Works, Inc. v City of San Jose* (2000) 24 C4th 537, 101 CR2d 653 (city's program that required prime contractors to notify, solicit, and negotiate with minority and women business subcontractors as well as justify rejection of their bids was unlawful). However, a public employer may still maintain affirmative action programs for the purpose of establishing or maintaining eligibility for any federal program, when ineligibility would result in a loss of federal funds to the state. Cal Const art I, §31(e). See *C & C Constr., Inc. v Sacramento Mun. Util. Dist.* (2004) 122 CA4th 284, 299, 18 CR3d 715 (federal funds exception does not require federal adjudication that race-based discrimination is necessary to maintain federal funding, but governmental agency must have substantial evidence it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination).

PRACTICE TIP: The League of California Cities has published the Proposition 209 Implementation Guide. For copies, contact the League's publication unit at 1400 K Street, Suite 400, Sacramento, CA 95814, telephone (916) 658-8257; fax (916) 658-8220.

© The Regents of the University of California

§4.9 b. City Programs Involving Federal Monies

City programs involving the expenditure of federal monies are still required to meet the following federal requirements for affirmative action:

- The program must address actual discrimination. Under Title VII of the Civil Rights Act of 1964, an affirmative action program addressing past societal discrimination based on a manifest imbalance in traditionally segregated job categories is legally valid. *Johnson v Transportation Agency, Santa Clara County* (1987) 480 US 616, 94 L Ed 2d 615, 107 S Ct 1442. However, remedying societal discrimination is not sufficient to justify a race or gender-conscious affirmative action plan under the Fourteenth Amendment; there must be some showing of actual prior discrimination by the public employer involved for such a plan to be constitutionally valid. *City of Richmond v J.A. Croson Co.* (1989) 488 US 469, 102 L Ed 2d 854, 109 S Ct 706; *Wygant v Jackson Bd. of Educ.* (1986) 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842; *Regents of Univ. of Cal. v Bakke* (1978) 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733.
- The employer's governing body must either find the existence of discriminatory conditions or indicia of possible discrimination. *Johnson v Transportation Agency, Santa Clara County, supra*; *Wygant v Jackson Bd. of Educ., supra*; *United Steelworkers of Am. v Weber* (1979) 443 US 193, 61 L Ed 2d 480, 99 S Ct 2721; *Regents of Univ. of Cal. v Bakke, supra*.
- The program may be used to eliminate racial imbalances in a portion of the employer's workforce relative to the availability of qualified individuals within the relevant labor market. *United Steelworkers of Am. v Weber, supra*; *Johnson v Transportation Agency, Santa Clara County, supra*. Statistical evidence of minority underrepresentation in an employer's work force may support an inference of past discrimination by the employer sufficient to constitute a prima facie case under Title VII of the Civil Rights Act of 1964, and a strong basis in evidence that a voluntary affirmative action plan was required and is consistent with the Fourteenth Amendment. See *Officers for Justice v Civil Service Comm'n of the City of San Francisco* (9th Cir 1992) 979 F2d 721, cert denied (1993) 507 US 1004; *Billish v City of Chicago* (7th Cir 1992) 962 F2d 1269, rev'd on other grounds (7th Cir 1993) 989 F2d 890, cert denied (1993) 510 US 908.
- There must be some relationship between the degree of imbalance in the workforce, the goal of eliminating the imbalance, and the reasonableness of the affirmative action taken. Generally, the goal of seeking a racial proportion in the workforce equivalent to that in the area labor force is reasonable. However, reasonableness will depend on the facts of each case. *Stotts v Memphis Fire Dep't* (6th Cir 1982) 679 F2d 541, rev'd on other grounds (1984) 467 US 561, 81 L Ed 2d 483, 104 S Ct 2576.
- The program must be temporary in the sense it must end when its goals are met. *Johnson v Transportation Agency, Santa Clara County, supra*. See *Grutter v Bollinger* (2003) 539 US 306, 342, 156 L Ed 2d 304, 341, 123 S Ct 2325 (durational limit is considered in determining whether race-conscious program is constitutional).

© The Regents of the University of California

§4.10 3. Third Party Rights

Third parties whose employment is adversely affected by affirmative action can challenge a voluntary plan, and the plan will be found to be unlawful when it unreasonably interferes with their rights. *Wygant v Jackson Bd. of Educ.* (1986) 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842.

NOTE: The Civil Rights Act of 1991 prohibits a person from challenging a litigated or consent judgment involving employment discrimination when that person had actual notice of the adverse impact and an opportunity to object, or the person's interest was adequately represented. 42 USC §2000e-2(n)(1).

© The Regents of the University of California

§4.11 4. EEOC Guidelines

The Equal Employment Opportunity Commission has issued guidelines on affirmative action that clarify the situations in which Title VII of the Civil Rights Act of 1964 voluntary affirmative action programs may be adopted, and address how to develop a permissible voluntary affirmative action program. 29 CFR pt 1608.

© The Regents of the University of California

§4.12 C. Immigration Issues

The Immigration Reform and Control Act of 1986 (IRCA) (8 USC §§1101-1537) prohibits hiring anyone without the legal right to work in the United States. It also prohibits discriminating against applicants and employees based on their citizenship or national origin. 8 USC §§1324a-b.

PRACTICE TIP 1: Covered employees must complete §1 of an I-9 form (U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, download at http://www.uscis.gov/files/form/i-9.pdf) by the close of business on the first day of employment. They must be able to provide the required documents establishing identity and eligibility to work. The employer must examine the documents presented and determine they appear genuine on their face. The employer must then complete its portion of the I-9 form by the close of business on the employee's third day of employment service.

PRACTICE TIP 2: An employee who has applied for the documents must be able to provide the actual documents within 90 days after hire.

PRACTICE TIP 3: Employees who cannot or do not comply within the required time period must be terminated.

PRACTICE TIP 4: Employers must reverify the employment status of any employee who has a limited duration work authorization (as indicated by a government-issued work authorization with an expiration date, except for a lawful permanent resident or "green card" holder). The employer may have the employee complete a new I-9 form to establish continued eligibility to work before the expiration of the work authorization.

PRACTICE TIP 5: Non-citizens who satisfy the requirements of IRCA must be given the same opportunities as citizens.

PRACTICE TIP 6: The I-9 forms must be kept for all existing employees hired after November 6, 1986. In the case of former employees, employers shall keep the I-9 forms for 3 years after hire or 1 year after termination from employment, whichever is later. The original I-9 should be kept separately from the personnel file.

© The Regents of the University of California

§4.13 D. Testing Issues

Employers' use of tests and other measures or procedures to make hiring, promotion, retention, and similar employment decisions may constitute violations of the various federal and California laws prohibiting discrimination.

© The Regents of the University of California

§4.14 1. Uniform Guidelines on Employee Selection

Title VII expressly recognizes the usefulness of employment testing and approves of testing provided neither the tests themselves nor their administration results in unlawful discrimination. The Equal Employment Opportunity Commission has adopted Uniform Guidelines on Employee Selection Procedures. See 29 CFR §§1607.1-1607.18. The guidelines establish standards with which employers must comply to prove tests and other selection devices are not discriminatory.

© The Regents of the University of California

§4.15 2. Theories of Discrimination

The use of tests in employment decisions may lead to disparate impact or disparate treatment discrimination. The Civil Rights Act of 1991 specifically prohibits an employer from scoring employment-related tests on the basis of race, religion, sex, national origin, or color to ensure a minimum number of minorities are included in the relevant applicant pool. 42 USC §2000e-2(1) (Civil Rights Act of 1991, §106). An employer that disregards employment testing information that might have a disparate *impact* on particular groups, without strong evidence of such impact, may inadvertently create disparate *treatment* liability to other groups. *Ricci v DeStefano* (2009) ___ US ___, 174 L Ed 2d 490, 129 S Ct 2658. Even when the test is administered in a non-discriminatory manner, it may result in discrimination if it has a disproportionate impact that operates to exclude protected categories at a higher rate than other applicants. The employer must be able to demonstrate the test is a valid and reasonable measure of job performance, *i.e.,* it is job-related and justified by business necessity. *Griggs v Duke Power Co.* (1971) 401 US 424, 28 L Ed 2d 158, 91 S Ct 849. However, the employer concerned about disparate impact of a particular test must have a "strong basis in evidence" to believe it would be subject to disparate-impact liability before it may disregard test results in which one racial group outperformed others. *Ricci v DeStefano, supra*.

PRACTICE TIP: The use of non-professionally developed tests is dangerous because of the likelihood a court will find, in the absence of validation, that the test was not sufficiently job-related and it had a disparate impact on applicants in the protected class. Even the use of professionally developed tests should be avoided unless they are validated as required in the Uniform Guidelines on Employee Selection (see §4.14).

© The Regents of the University of California

3. Specific Types of Tests

§4.16 a. Polygraph Tests

The provisions of Lab C §432.2 exempt public employers from the general prohibition against requiring polygraph examinations as a condition of employment or continued employment. However, the California Supreme Court has determined that involuntary polygraphs intruded on the employees' privacy rights. It also stated the legislative classification that protected all private employees, as well as public safety officers under Govt C §3307, from involuntary polygraph testing, denied equal protection to the remaining public employees because the invasion of privacy rights was not sufficiently justified by a compelling state interest. *Long Beach City Employees Ass'n v City of Long Beach* (1986) 41 C3d 937, 227 CR 90.

NOTE: State and local employers are exempt from the Employee Polygraph Protection Act of 1988 (29 USC §2006).

© The Regents of the University of California

§4.17 b. Voice Tests

An employer may not use a test that examines or records voice prints or voice stress to determine the truth or falsity of a person's statements without obtaining that person's written consent in advance of the examination or recordation. Pen C §637.3.

© The Regents of the University of California

§4.18 c. Psychological Tests

Questions on a pre-employment psychological test may violate an applicant's right to privacy under the California Constitution if the questions are not job-related. However, under Govt C §1031, a peace officer's emotional and mental condition is to be evaluated by a licensed physician, surgeon, or licensed psychologist who has the specified levels of training and experience.

© The Regents of the University of California

§4.19 d. Drug Tests

An employer may lawfully refuse to hire an applicant who tests positive for illegal drugs if the employer can demonstrate a specific need to test for the particular position. The California Supreme Court has upheld the drug testing of job applicants for public employment if the program is (*Loder v City of Glendale* (1997) 14 C4th 846, 59 CR2d 696*,* cert denied *(*1997) 522 US 807):

- Administered in a reasonable fashion,
- Part of a lawful pre-employment medical examination, and
- Required of all job applicants.

The Ninth Circuit, however, has held that without a demonstrated "specialized need," applicants for certain non-"safety-sensitive" positions (such as a library page) could not be subjected to a pre-employment drug test without violating the Fourth Amendment to the U.S. Constitution. See *Lanier v City of Woodburn* (9th Cir 2008) 518 F3d 1147. For more on drug testing, see §§4.93-4.121.

© The Regents of the University of California

E. Other Restrictions on Hiring

§4.20 1. Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (referred to hereinafter in this chapter as ADA) (42 USC §§12101-12213) affects the following aspects of the hiring process:

- qualification standards and other selection criteria,
- testing procedures for screening of job applicants, and
- pre-employment inquiries.

Qualification standards and other selection criteria must be job-related and consistent with business necessity. Pre-employment tests must only test skills and abilities necessary for the job and must measure what they purport to measure. The ADA also prohibits requiring medical examinations before an offer of employment; however, an offer of employment may be lawfully conditioned on the results of a medical examination.

© The Regents of the University of California

§4.21 2. California Fair Employment and Housing Act

The California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) prohibits any non—job-related inquiry that expresses a limitation specification or discrimination as to physical disability, mental disability, or medical condition. FEHA prohibits an employer from:

- Requiring any medical or psychological examination of an applicant;
- Inquiring if an applicant has a mental or physical disability or a medical condition; or
- Inquiring about the nature and severity of a mental or physical disability or a medical condition of an applicant.

An employer may inquire into the ability of the applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation. Once an employment offer has been made, but before the start of job duties, an employer may require a medical or psychological examination that is job-related, consistent with business necessity, and administered to all entering employees in that same job classification.

© The Regents of the University of California

§4.22 3. Arrests

An employer is generally prohibited from seeking or using information about an arrest or detention that did not result in conviction. Lab C §432.7. Inquiries about referral to or participation in a pretrial or post trial diversion program are also precluded. However, Lab C §432.7 permits employers to ask an applicant or an employee about an arrest for which the individual is out on bail, or on his or her own recognizance, pending trial because it may bear on his or her availability to work. Further, candidates for peace officer positions are partially exempted. Health care facilities may ask applicants for positions with regular access to patients about arrests for violation of Pen C §290 (sex offenses) and applicants for positions with access to drugs may be asked about arrests for violation of Health & S C §11590 (duty of certain convicted persons to register with police). Cities, counties, and districts may seek criminal history information about a prospective concessionaire. Lab C §432.7.

PRACTICE TIP: Although the Labor Code permits certain questions about arrest information, it prohibits others. Thus, any questions about arrests may, depending on the situation and the response, raise problems. A better practice is to ask more general questions about the person's availability to work, rather than about arrests.

© The Regents of the University of California

§4.23 4. Criminal Record

An employer may not require applicants to provide a copy of their criminal records. Pen C §13326. Violation of §13326 is a misdemeanor. However, an employer may inquire into an applicant's criminal record by other means and use an applicant's criminal conviction as a basis for denying employment, as long as the conviction is related to the job and future job performance. See *Avant v South Central Bell Tel. Co.* (5th Cir 1983) 716 F2d 1083; *Green v Missouri Pac. R.R. Co.* (8th Cir 1975) 523 F2d 1290.

© The Regents of the University of California

§4.24 5. HIV Test Results

An employer may not use the results of a test for HIV in making a hiring decision. Health & S C §120980(f).

© The Regents of the University of California

§4.25 6. Special Rules for Employees Working With Children

A city cannot hire a person or a volunteer to perform services at a park, playground, recreational center, or beach used for recreational purposes, in a position having supervisory or disciplinary authority over any minor, if that person has been convicted of various offenses specified in Pub Res C §5164. A city must require each such prospective employee or volunteer to complete an application that inquires as to whether or not that individual has been convicted of any of these specified offenses. The city must screen, under Pen C §11105.3, any such prospective employee or volunteer for that person's criminal background. Pub Res C §5164.

PRACTICE TIP: Background checks of minors who supervise other minors should be sufficiently thorough to uncover traits or information that cannot be revealed through the criminal screening process.

© The Regents of the University of California

§4.26 7. Department of Motor Vehicles Records

Under Veh C §1808.1, some employers must request a copy of the employee/driver's current public record from the Department of Motor Vehicles (DMV); such employers may not employ as a driver anyone against whom the DMV has taken a disqualifying action. DMV records, including abstracts of accident reports, are maintained in Sacramento and are open for public inspection during the DMV's office hours.

© The Regents of the University of California

F. Compensation and Benefits

1. Compensation Plans

§4.27 a. Establishment

Most cities establish one or more compensation plans, depending on the size of the city and the number of different employee groups. Compensation may be reflected in statutes, charters, ordinances, and resolutions, as well as through negotiated collective bargaining agreements.

In general law cities, the city council prescribes the time and method of payments of salaries and other wages. Govt C §37206. The California Constitution grants plenary authority to charter cities to provide for compensation of officers and employees. Cal Const art XI, §5(b).

© The Regents of the University of California

§4.28 b. Amount

The legislative body may establish the amount of compensation. It cannot fix the amount so low that no one will be willing to take the job. *DeMerritt v Weldon* (1908) 154 C 545, 98 P 671. A court cannot alter the amount, absent fraud or bad faith by the legislative body. *City & County of San Francisco v Boyd* (1943) 22 C2d 685, 140 P2d 666.

NOTE: Many compensation plans are spelled out in collective bargaining agreements, adopted as a result of the Meyers-Milias-Brown Act (Govt C §§3500-3511). See §§4.320-4.349.

© The Regents of the University of California

§4.29 c. Constitutional Prohibition

A city cannot grant extra compensation or extra allowance after service has been rendered. Cal Const art XI, §10(a). This prohibition does not eliminate the possibility of a retroactive pay increase, however. *Gai v City Council* (1976) 63 CA3d 381, 133 CR 753.

© The Regents of the University of California

§4.30 2. Benefit Plans

Benefits, such as paid leave time and insurance, are often linked with compensation. Under the general law, a city may adopt a system of health and welfare benefits. Govt C §§53200-53210. Deferred compensation plans are specifically authorized. Govt C §§53212-53214.5. The Meyers-Milias-Brown Act (Govt C §§3500-3511) requires a public employer to meet and confer over changes in benefits as well as wages. *San Bernardino Pub. Employees Ass'n v City of Fontana* (1998) 67 CA4th 1215, 79 CR2d 634 (annual leave and longevity pay benefits trigger collective bargaining process.)

© The Regents of the University of California

§4.31 3. Employee Recognition Plans

Employee recognition plans have become increasingly popular. There does not appear to be any specific law addressing the legal parameters of such programs. The Attorney General has concluded service awards of emblems based on the logo of the governmental entity are a valid means of longevity recognition. 5 Ops Cal Atty Gen 81 (1945). A pay-for-performance plan designed to recruit and retain the most competent employees is in the agency's self-interest and also is permissible. See *San Joaquin County Employees' Ass'n, Inc. v County of San Joaquin* (1974) 39 CA3d 83, 113 CR 912. Depending on the plan, there may be taxation consequences to the employee.

© The Regents of the University of California

4. Pension and Retirement Systems

§4.32 a. Purpose

Pension programs for public employees serve two objectives: to induce persons to enter and continue in public service and to provide subsistence for disabled or retired employees (or their dependents) who have performed their obligations under the employment contract.

A retirement system provided by a public agency for its employees enables the government to secure better-qualified personnel and encourages the employees to continue in government service. Govt C §20001; *Knight v Board of Admin.* (1948) 32 C2d 400, 196 P2d 547.

© The Regents of the University of California

§4.33 b. Validity

The provisions of Cal Const art XVI, §6 prohibit gifts of public funds, but a pension paid to persons who perform services subsequent to the passage of the law granting the pension is not a gift. When a right to a pension exists, an increase in benefits is not a gift. *Holtzendorff v Housing Auth. of City of Los Angeles* (1967) 250 CA2d 596, 58 CR 886, cert denied (1967) 389 US 1038.

© The Regents of the University of California

§4.34 c. Legislation

California law provides for several retirement systems, including the Public Employees' Retirement System (Govt C §§20000-21703). Legislation authorizing a local agency or subdivision of the state to establish a pension fund may be in the form of an enabling act or it may actually establish a pension system in the local agency. A pension system is a municipal affair within state constitutional home rule provisions. Cal Const art XI, §§3-5. Consequently, when the subject of employee pensions is covered by the provisions of a charter, the rights of a claimant are governed solely by the charter. Absent an applicable charter provision, the general law controls. *Estes v Richmond* (1967) 249 CA2d 538, 57 CR 536.

NOTE: Pension legislation is construed liberally in favor of the employee or applicant to effectuate the beneficial purpose of the law. *Gorman v Cranston* (1966) 64 C2d 441, 50 CR 533.

© The Regents of the University of California

§4.35 d. Employee Rights

Pensions and other retirement benefits for public employees are deferred compensation to which the pensioner becomes entitled on fulfillment of the terms of his or her contract. *Sweesy v Los Angeles County Peace Officers' Retirement Bd.* (1941) 17 C2d 356, 110 P2d 37. Cases finding contractual obligations regarding public pensions base their findings on explicit language in statutes or legislative enactments. *Retired Employees Ass'n v County of Orange* (CD Cal 2009) 632 F Supp 2d 983, 987 (past practices of coverage do not confer contractual right absent explicit language in statutes or legislative enactments). Absent express legislative direction, when a public employee becomes entitled to a pension after serving the aggregate time required by the statute, subsequent removal from employment cannot operate to forfeit the employee's previously earned pension unless the employee specifically renounces the pension right or some other provision necessarily excludes him or her. *Skaggs v Los Angeles* (1954) 43 C2d 497, 275 P2d 9. See also *Smith v City of Napa* (2004) 120 CA4th 194, 14 CR3d 908.

Public employees are frequently given the election of several alternative modes of receiving pension payment. The mode chosen affects such things as the amount or frequency of individual payments. See*, e.g.,* Govt C §§21450-21465.

© The Regents of the University of California

§4.36 e. Amendments

An attempted repeal of all pension provisions by a public body is an impairment of its contractual obligations to its employees who have performed services under the pension law and who have a vested right therein. *Kern v Long Beach* (1947) 29 C2d 848, 179 P2d 799. Because the right to a pension is not rigidly fixed by the specific terms of legislation in effect during any particular period in which an employee serves, certain types of amendments enacted after employees have earned some pension rights, but before retirement, have been upheld by the courts. *Packer v Board of Retirement* (1950) 35 C2d 212, 217 P2d 660.

© The Regents of the University of California

§4.37 f. Persons Entitled to Benefits

Determining the persons entitled to participate in a pension plan depends on the statute or charter granting the pension. The rule that pension laws are liberally construed to carry out their beneficent policy may be applied in construing language that specifies which employees must be included within the pension statutes. *Adams v Modesto* (1960) 53 C2d 833, 3 CR 561.

© The Regents of the University of California

§4.38 (1) On Death

When the power to designate a beneficiary is given in a retirement law, the designated beneficiary is entitled to any death benefit that becomes payable under such law unless otherwise provided by statute (*e.g.,* surviving spouse of deceased employee is entitled to death benefits over designated beneficiary). *Lee v Board of Admin.* (1982) 130 CA3d 122, 129, 181 CR 754.

© The Regents of the University of California

§4.39 (2) On Disability

The right to receive a pension may accrue on disability arising as a result of service or, under some systems, on incapacity resulting from any cause. The right ceases on termination of the disability. *Hermanson v Board of Pension Comm'rs* (1933) 219 C 622, 28 P2d 21. The manner and time within which a member of a retirement system must file for retirement for physical or mental disability is regulated in the various pension laws. Govt C §§21154-21176 (public employees retirement system). Subrogation of the employing body for the amount of payments made to the member of the retirement system is frequently provided for when the injury that results in incapacity or death is due to the act of a third person. Govt C §§20250-20255.

PRACTICE TIP: Pay special attention to disability retirement claims for safety employees (generally police and fire), particularly under the Public Employees' Retirement System (PERS). The determination of eligibility for safety employees has been delegated to the local agency. Govt C §§21156-21158. The local agency must make the required determinations and provide the necessary due process procedures. Appeal hearings must be conducted by an administrative law judge (ALJ) of the Office of Administrative Hearings under Govt C §§11500-11529. *Usher v County of Monterey* (1998) 65 CA4th 210, 76 CR2d 274; Govt C §21156. The ALJ's decision is advisory to the local agency.

The agency should be cognizant of "incapacity" requirements for disability retirement (*Mansperger v Public Employees' Retirement Sys.* (1970) 6 CA3d 873, 86 CR 450) and the ability to utilize "light" duty positions that meet specific criteria in lieu of a PERS disability retirement (*Stuessel v City of Glendale* (1983) 141 CA3d 1047, 190 CR 773). The law encourages employment rather than retirement; thus, light or modified duty positions are favored. See *Stuessel v City of Glendale, supra*; *Winslow v City of Pasadena* (1983) 34 C3d 66, 192 CR 629; *Barber v Retirement Bd. of the City & County of San Francisco* (1971) 18 CA3d 273, 95 CR 657. A city may revoke an employee's disability retirement to place him or her in a newly-created light duty position that meets specified criteria and involves no change in city policy. See *Winslow v City of Pasadena, supra*.

For purposes of an industrial disability retirement, disputes over whether an injury or disability is "industrial" (*i.e.,* job-related) are resolved by the Workers' Compensation Appeals Board. Govt C §21166. However, the workers' compensation decision is not determinative on the issue of whether the employee is "permanently incapacitated" and thus eligible for disability retirement. *Winn v Board of Pension Comm'rs* (1983) 149 CA3d 532, 197 CR 111. Workers' compensation determinations on percentage of permanent disability are not decisive on the issue of incapacity in the retirement proceeding. The former should not be allowed as conclusive evidence with regard to the adjudication of "incapacity" in the retirement proceeding. *Winn v Board of Pension Comm'rs, supra*; *Reynolds v City of San Carlos* (1981) 126 CA3d 208, 178 CR 636; *Summerford v Board of Retirement* (1977) 72 CA3d 128, 139 CR 814.

PRACTICE TIP: Some safety employee retirement applicants argue that the workers' compensation award affects the city's independent adjudication of whether the employee is incapacitated from the performance of his or her duties (including light or modified duty). However, the only retirement issue determined by workers' compensation is whether or not the employee injury is industrial (*i.e.,* job-related).

© The Regents of the University of California

§4.40 g. Beneficiary Remedies

The administration of a retirement system is usually placed in the hands of a retirement board, with power to make necessary rules for the administration of the system. Govt C §§20090-20099 (Board of Administration of Public Employees' Retirement System). The retirement board's holding of hearings is governed by statute; the usual practice is to permit applicants to appear either in person or by counsel to present evidence.

A person with a vested right to a pension if the facts are as he or she claims also has the right to have his or her claim as to the facts judicially determined. *French v Cook* (1916) 173 C 126, 160 P 411. Mandamus is the proper proceeding to compel a public body to pay a pension, or to compel a pension board to act on a pension claim when it fails, neglects, or refuses to do so. If the order or decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 112 CR 805.

© The Regents of the University of California

§4.41 G. Reductions in Force for Financial Reasons (Layoffs)

Employees who become subject to reductions in force (RIF) for financial reasons, commonly referred to as layoffs, may be entitled to certain protections described in state law or contained in an applicable collective bargaining agreement. Traditionally, laid off employees were not entitled to the same notice and due process protections afforded to employees discharged for cause. However, when the layoff affects a single position, the Ninth Circuit has held that at least a pre-termination hearing is required in circumstances in which an employee is "targeted" for layoff. See *Levine v City of Alameda* (9th Cir 2008) 525 F3d 903.

The Meyers-Milias-Brown Act (Govt C §§3500-3511) does not contain any specific reference to the issue of layoffs. However, any city that has adopted an ordinance establishing a personnel system, merit system, or civil service system must do layoffs in a seniority order in the event of a reduction in personnel for economic reasons. Govt C §45100. The Act does not require public employers to meet and confer with employee organizations on the decision to lay off because it is considered a policy matter about levels of service, but the impact of any layoff on the terms and conditions of employment must be negotiated. *Fire Fighters Union v City of Vallejo* (1974) 12 C3d 608, 116 CR 507.

© The Regents of the University of California

§4.42 III. FEDERAL FAIR LABOR STANDARDS ACT (FSLA)

The Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) is the federal statute that mandates minimum wages, overtime pay, equal pay, recordkeeping, and child labor standards for employees covered by and not exempt from the statute. The FLSA may be enforced by individuals filing a private right of action and by the United States Department of Labor (DOL). The DOL has promulgated regulations addressing various wage and hour issues, beginning at 29 CFR pt 516. The regulations most often referred to by municipal lawyers, managers, and employees are:

- 29 CFR pt 541 (Defining the terms "Executive," "Administrative," "Professional," and "Computer Employees" for purposes of overtime exemptions);
- 29 CFR pt 778 (Interpretive Bulletin on Overtime Compensation);
- 29 CFR pt 785 (Interpretive Bulletin on Hours Worked Under the Fair Labor Standards Act); and
- 29 CFR pt 553 (Application of the Fair Labor Standards Act to Employees of State and Local Governments).

NOTE: The FLSA does not preempt nor "excuse noncompliance" with any California statutes or municipal ordinances that are more protective. 29 USC §218(a). However, unless the California Labor Code's wage and hour provisions are specifically made applicable to public employers, they apply only to employers in the private sector. *Johnson v Arvin-Edison Water Storage Dist.* (2009) 174 CA4th 729, 95 CR3d 53.

For material on the FLSA, see the DOL Opinion Letters and Rulings, Fair Labor Standards Handbook for States, Local Governments and Schools (Thompson Publishing Group, 1725 K Street N.W., Suite 280, Washington D.C., 20086, telephone (800) 424-2959).

© The Regents of the University of California

§4.43 A. Public Entity Coverage Under FLSA

The Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) defines the term "employer" broadly to include public agencies. 29 USC §203(d). It defines "public agency" to be "the government of a State or political subdivision thereof; any agency of … a State, or a political subdivision of a State." 29 USC §203(x).

NOTE: The Eleventh Amendment doctrine of sovereign immunity bars suit against states and arms of the state by private individuals (but not by the federal government) under the FLSA. *Alden v Maine* (1999) 527 US 706, 754, 144 L Ed 2d 636, 119 S Ct 2240. However, sovereign immunity does not extend to municipalities, which are not arms of the state. 527 US at 756.

To be subject to the FLSA there must be an employment relationship. In the context of public agencies, the FLSA defines "employee" as (29 USC §203(e)(2)(C))

> any individual employed by a State, a political subdivision of a State … , other than [an employee]:
> (i) who is *not* subject to the civil service laws of the State, political subdivision, or agency which employs him; *and*
> (ii) who
> (I) holds a public elective office of that State, political subdivision, or agency;
> (II) is selected by the holder of such an office to be a member of his personal staff;
> (III) is appointed by such an office holder to serve on a policy making level;
> (IV) is an immediate advisor to such an office holder with respect to the constitutional or legal powers of his office; *or*
> (V) is an employee in the legislative branch of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency." [Emphasis added.]

© The Regents of the University of California

§4.44 B. Exclusions From FLSA Coverage

The following persons are not covered by the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219):

- Elected officials not subject to civil service laws, *e.g.,* elected mayors, council members, and sheriffs (29 CFR §553.11(c));
- Elected officials' personal staff not subject to civil service laws, generally only including persons who are under the direct supervision of the selecting elected official (29 CFR §553.11(b)-(c));
- Elected officials' immediate advisors not covered by civil service laws, *e.g.,* a city attorney (29 CFR §553.11(d)); and
- Employees not subject to civil service laws working in a legislative branch agency. This exclusion does not apply to employees of state or local legislative libraries, or employees of school boards (meaning that such individuals are covered by the FLSA). 29 CFR §553.12.

NOTE: There are other persons who are covered by the FLSA but exempt from particular provisions of the FLSA. See §§4.48-4.57.

© The Regents of the University of California

§4.45 1. Volunteers

Non-employee volunteers are not covered by the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219). 29 CFR §§553.101, 553.104(a). A non-employee volunteer is a person not otherwise an employee of the agency who donates hours of service to the agency for civic, charitable or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof. 29 USC §203(e)(4). Common examples are volunteer firefighters, auxiliary police, or youth program counselors.

An individual is not a volunteer if the person is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer. 29 USC §203(e)(4). See 29 CFR §§553.101(d), 553.102(b). For example, the Department of Labor (DOL) has ruled that a jailer cannot volunteer as a reserve deputy sheriff (Department of Labor Wage & Hour Administrative Letter Ruling (February 18, 1992)); a field evidence technician cannot volunteer as a reserve police officer (Department of Labor Wage & Hour Administrative Letter Ruling (September 26, 1991)); and community service officers cannot volunteer as reserve police officers (Department of Labor Wage & Hour Administrative Letter Ruling (April 10, 1990)). The DOL has, however, determined that an agency can employ its volunteer reserve deputies to provide the same type of services for which they volunteer (to work as security guards) on an "occasional and sporadic" basis without loss of the deputies' volunteer status. Department of Labor Opinion Letter, FLSA 2005-32 (September 9, 2005). The hours that public employees volunteer to work will not be considered compensable if the criteria listed in 29 CFR §§553.101-553.104 are satisfied. See also Department of Labor Wage & Hour Opinion Letter (August 12, 1974) (for additional criteria).

NOTE: Employees may receive a nominal stipend for volunteer services without losing their volunteer status. 29 CFR §553.106. See Department of Labor Wage & Hour Administrative Letter Ruling (July 11, 1995). The DOL has concluded that a stipend of no more than 20 percent of what the agency would have paid a full-time employee for the services provided by the volunteer is a permissible "nominal fee." Department of Labor Opinion Letter, FLSA 2005-51 (November 10, 2005). On payment of permissible nominal fees to volunteers, see Department of Labor Wage & Hour Administrative Letter Ruling (August 6, 1999).

© The Regents of the University of California

§4.46 2. Independent Contractors

Independent contractors are not considered "employees" and therefore are not covered by the FLSA. Mere labeling of someone as an independent contractor, however, is not sufficient to exempt them from the FLSA. In determining whether an individual qualifies as an independent contractor or as an employee, the courts apply the IRS twenty-factor test, the economic reality test, or the common law right-to-control test in determining independent contractor status. See*, e.g., Metropolitan Water Dist. v Superior Court* (2004) 32 C4th 491, 9 CR3d 857; *Holmgren v County of Los Angeles* (2008) 159 CA4th 593, 71 CR3d 611. See also *Eastern Inv. Corp. v U.S.* (10th Cir 1995) 49 F3d 651 (applying Rev Rul 87-41); *Doty v Elias dba Eddy's Steakhouse* (10th Cir 1984) 733 F2d 720.

© The Regents of the University of California

§4.47 3. Trainees

It is important to distinguish "trainees" from employees who are receiving training. See 29 CFR §§785.27-785.32; Department of Labor Wage & Hour Opinion Letter (January 6, 1969). The former are excluded from coverage and the latter are covered by the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219).

To determine whether a trainee should be excluded, the following criteria must be met:

- The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- The training is for the benefit of the trainees;
- The trainees do not displace regular employees, but work under close observation;
- The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion employer operation may be impeded;
- The trainees are not necessarily entitled to a job at the conclusion of the training period; and
- The employer and the trainees understand that the trainees are not entitled to wages for the time spent training.

© The Regents of the University of California

§4.48 C. Exemptions From FLSA Coverage

There are several types of employees who are exempt from the overtime pay and/or minimum wage provisions of the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219). See §§4.49-4.56.

© The Regents of the University of California

§4.49 1. Exemption for White-Collar Employees

The Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) provides exemptions for "executive," "administrative," and "professional" employees. To qualify for these exemptions, the employee must satisfy both the "salary basis" and "duties" tests (although some professions, such as teachers and licensed and practicing doctors and attorneys, need not satisfy the salary basis test to qualify for an exemption).

© The Regents of the University of California

§4.50 a. Salary Basis Test

Generally, to satisfy the salary basis test, the employee must receive each pay period (on a weekly or less frequent basis) a predetermined amount constituting all or part of the compensation; the amount received may not be subject to reduction due to the quantity or quality of work performed. 29 CFR §541.602(a). Note, however, that the payment of overtime to exempt employees does not defeat their exempt status. *Boykin v Boeing Co.* (9th Cir 1997) 128 F3d 1279.

NOTE: Under a regulation published by the Department of Labor on September 6, 1991, a public employee subject to deductions from his or her salary and/or leave accounts for absences of less than 1 day may still meet the requirements of the salary test. A regulation specifically applicable to public agencies generally allows partial day deductions from public employees' salaries under specified circumstances, such as when accrued leave has been exhausted. 29 CFR §541.710(a). This regulation was enacted in response to hundreds of lawsuits filed throughout the United States challenging the exempt status of public employees who were subject to such deductions. The regulation was predicated on principles of public accountability. Thus, once an exempt employee has exhausted all accrued leave, public agencies can deduct from salary to account for partial day absences without defeating exempt status. 29 CFR §541.710(a).

© The Regents of the University of California

§4.51 (1) Suspension of Exempt Employees

A public employer may suspend exempt employees without pay on a daily basis if: (1) the discipline is for a violation of a workplace conduct rule; (2) discipline is imposed in good faith; and (3) the disciplinary suspension is imposed under a written policy that is applicable to all employees. 29 CFR §541.602(b)(5).

Employers may not, however, deduct from the salary of exempt employees for performance or attendance issues that do not rise to the level of a suspension. Department of Labor Opinion Letter, FLSA 2006-7 (March 10, 2006).

© The Regents of the University of California

§4.52 (2) Furloughs

Deductions from pay for absences due to a budget-required furlough destroy a public employee's exempt status during the workweek that includes the furlough. 29 CFR §541.710(b).

© The Regents of the University of California

§4.53 (3) Improper Deductions From Exempt Employee's Salary

Under the former regulations, an employer who made improper deductions from an exempt employee's salary lost the ability to classify all employees in that category as "exempt." The current regulations change the effect of making improper deductions. "Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employee for such improper deductions." 29 CFR §541.603(c). Consequently, if the employer improperly deducts time from an exempt employee's salary, the employer will not lose the exemption if the reduction was isolated, was not intentional, and is corrected. An employer who has an "actual practice of making improper deductions" will lose the exemption. However, the employer's exempt employees will only be deemed nonexempt for the "time period in which the improper deductions were made." 29 CFR §541.603(b). Moreover, only employees in the same job classification as the employee from whom improper deductions were made and who work for the manager(s) responsible for the improper deductions will lose their exempt status. 29 CFR §541.603(b).

NOTE: If an employer makes an improper deduction from an exempt employee's salary, a "safe harbor" may be invoked to ensure that the exempt status is not lost. Employers who have a "clearly communicated policy" prohibiting improper pay deductions, including a complaint mechanism, a reimbursement provision, and a good faith commitment to comply with the law, will not lose an exemption if erroneous deductions are made but they cease making them on receipt of an employee complaint. 29 CFR §541.603(d).

© The Regents of the University of California

§4.54 b. Duties Test

An employee qualifies for exemption under the duties test if his or her job duties meet the criteria for an "executive," "administrative," or "professional" employee. See 29 CFR §§541.2-541.3, 541.100-541.106, 541.200-541.203, 541.300-541.304.

© The Regents of the University of California

§4.55 2. Exemption for Work in a Different Capacity

When a public employee, solely at his or her option, works occasionally or sporadically on a part-time basis for the same public agency in a different capacity from the employee's regular employment, the hours in the different jobs cannot be combined to determine overtime liability. 29 CFR §553.30.

For purposes of this exemption, "occasional or sporadic" means infrequent, irregular, or occurring in scattered instances (see Department of Labor Wage & Hour Administrative Letter Ruling (October 1, 1987)), and "different capacity" means the jobs must not fall within the same general occupational category.

NOTE: Public safety employees taking on any kind of security or safety function within the same local government are never considered to be employed in a "different capacity." 29 CFR §553.30(c)(3).

© The Regents of the University of California

§4.56 3. Other Exemptions

The following are exempt from the overtime provisions of the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) (provided they meet certain minimum requirements set out in the applicable regulations):

- Outside salespersons (see 29 CFR §§541.500-541.504).
- Computer system analysts and programmers (see 29 CFR §§541.400-541.402).
- Seasonal recreational employees (see 29 USC §213(a)(3); Department of Labor Wage & Hour Letter Ruling (May 12, 1986); Department of Labor Wage & Hour Opinion Letter WH 388 (August 10, 1976)).
- Highly compensated employees (see 29 CFR §541.601).

NOTE: In 2004, the FLSA was amended to create a new overtime exemption for the "highly compensated" employee. To qualify, the employee must: (1) perform office or non-manual work; (2) be paid a total annual compensation of at least $100,000, of which at least $455 per week must be paid on a salary or fee basis; and (3) customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.

© The Regents of the University of California

§4.57 4. Exclusion for "First Responders"

The overtime exemptions do not apply, however, to certain "first responders," such as police officers, detectives, deputy sheriffs, firefighters, and paramedics who perform work like preventing fires, rescuing victims, preventing crimes, apprehending suspects, or preparing investigative reports (29 CFR §541.3(b)(1)).

© The Regents of the University of California

D. FLSA Requirements

§4.58 1. Minimum Wage Requirements

Employers must pay nonexempt employees not less than the statutory minimum wage for all hours worked and overtime for all hours worked in excess of the statutory maximum. California has its own minimum wage that is higher than that established by the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219). See §4.67.

© The Regents of the University of California

§4.59 a. To Suffer or Permit to Work

It is critical to determine when an employee of the agency is "working" for purposes of the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219). 29 USC §206(a)(1). The FLSA defines employment as any time that an employee is "suffered or permitted" to work by the employer. 29 USC §203(g). See §§4.60-4.66 for special categories of time worked.

© The Regents of the University of California

§4.60 (1) "On-Call" or "Standby" Time

Whether "on-call" or "standby" time is compensable depends on whether the employee can engage in personal pursuits while on call. Generally, the determination of this issue requires an analysis of several factors relating to the restrictions placed on the employee, the two most predominant factors of which are (*Berry v County of Sonoma* (9th Cir 1994) 30 F3d 1174, cert denied (1995) 513 US 1150):

- The degree to which the employee is free to engage in personal activities; and
- Any agreements between the parties.

If on-call time is compensable, the employee must be paid at least minimum wage for all hours spent on call. Employers can, however, agree to a special rate for on-call time, provided it meets or exceeds minimum wage.

© The Regents of the University of California

§4.61 (2) Rest and Meal Periods

Rest periods of short duration must be compensated and counted toward hours worked. 29 CFR §785.18. Meal periods, in contrast, can generally be excluded from hours worked as long as the employee is completely freed of duty during the meal period. 29 CFR §785.19. See 29 CFR §§785.18-785.19; 29 CFR §553.223 (for law enforcement and fire protection officers).

The Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) provides the exclusive remedy for meal and rest period violations alleged by local public agency employees. *Curcini v County of Alameda* (2008) 164 CA4th 629, 79 CR3d 383.

© The Regents of the University of California

§4.62 (3) Travel Time

Ordinary home-to-work travel time is not compensable even if the employee reports to work at a location away from the employer's premises. 29 CFR §553.221(e); *Imada v City of Hercules* (9th Cir 1998) 138 F3d 1294. See 29 CFR §§785.33-785.41. Overnight travel on public transportation is not compensable unless the travel time occurs during an employee's normal working hours or during the same hours on non-working days. 138 F3d at 1297. If the employee drives to the location, overnight travel is compensable. 29 CFR §785.39.

© The Regents of the University of California

§4.63 (4) Waiting and Sleeping Time

Whether waiting time is considered time worked under the Fair Labor Standards Act of 1938 (FLSA) is determined on a case-by-case basis. See 29 CFR §§785.14-785.17. See also *Boehm v Kansas City Power & Light Co.* (10th Cir 1989) 868 F2d 1182.

Generally, the compensability of sleep time turns on whether the employee is required to be on duty for 24 hours or more. See 29 CFR §§785.20-785.23; 29 CFR §553.222 (for law enforcement and fire protection employees).

© The Regents of the University of California

§4.64 (5) Employees Residing on Employer's Premises

An employee who resides on his or her employer's premises on a permanent basis or for extended periods of time is not considered to be working all the time he or she is on the premises. 29 CFR §785.23. To determine hours worked in that situation, the employer will need to analyze the type of duties performed and the degree to which the employee is free to engage in personal pursuits. See 29 CFR §785.23.

© The Regents of the University of California

§4.65 (6) Miscellaneous Instances Giving Rise to Compensable Time

Employee time spent on the following must be compensated:

- Adjusting grievances (see 29 CFR §785.42).
- Work performed at home (see 29 CFR §785.12).
- Medical attention (see 29 CFR §785.43).
- Civic and charitable work (see 29 CFR §785.44).
- Attendance at lectures, meetings, and training (see 29 CFR §§785.27-785.32; 29 CFR §553.226 (for law enforcement and fire protection employees) (Department of Labor Wage & Hour Opinion Letter WH 504 (October 23, 1980)).
- Donning and doffing protective equipment (see *IBP, Inc. v Alvarez* (2005) 546 US 21, 163 L Ed 2d 288, 126 S Ct 514 (when donning and doffing start and end the work day, those activities are compensable in some circumstances; however, activities outside time between donning and doffing specialized protective gear, such as the employee's wait to receive the protective gear, are not compensable)).

NOTE: Whether the *IBP* case applies to donning and doffing the types of protective equipment worn by public employees in California (for example, fire and police employees) is currently an open question.

- Mandatory counseling sessions (see *Sehie v City of Aurora* (7th Cir 2005) 432 F3d 749 (employee is entitled to compensation for time spent seeing therapist chosen by employer when counseling sessions are required by employer as condition of continued employment, as well as travel time to and from counseling sessions in certain circumstances)).
- Care, feeding, and grooming for police canines (see *Brock v City of Cincinnati* (6th Cir 2001) 236 F3d 793, 804).

NOTE: Agencies may enter into agreements with canine officers, through their authorized representative, on a reasonable estimate as to the amount of off-duty hours they spend related to the care of their canine. *Leever v City of Carson* (9th Cir 2004) 360 F3d 1014. The agreement may also specify that canine hours are worked at a different rate than the officer's normal hourly rate. Department of Labor Wage & Hour Administrative Letter Ruling (August 11, 1993).

© The Regents of the University of California

§4.66 (7) Miscellaneous Instances Not Giving Rise to Compensable Time

Under the Portal-to-Portal Act, employers are not required to compensate employees for time spent: "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary or postliminary to said principal activity or activities." See 29 USC §254(a); 29 CFR §785.9.

Although time spent providing off-duty care, feeding, and grooming for police canines is compensable (see §4.65), the travel time spent transporting dogs is not compensable unless the care for the dogs during the travel is more than de minimis. *Bobo v U.S.* (1998) 136 F3d 1465.

© The Regents of the University of California

§4.67 b. State Minimum Wage Requirements

Most public employers in California are subject to state minimum wage requirements. Lab C §1182.12; 8 Cal Code Regs §11040(1), (4)(A). But see *Dimon v County of Los Angeles* (2008) 166 CA4th 1276, 83 CR3d 576 (wage and hour statutes and Industrial Welfare Commission (IWC) Wage Orders do not abrogate wage-setting authority of charter counties (or, as noted in *dicta,* charter cites)).

The state minimum wage is $8.00 per hour. Lab C §1182.12. Some local jurisdictions have enacted their own minimum wage requirements that may exceed the state minimum. See*, e.g.,* San Francisco Minimum Wage Ordinance (adopting $9.79 minimum wage).

PRACTICE TIP: State and local minimum wage requirements change fairly frequently, so it is wise to check regularly for updates.

© The Regents of the University of California

§4.68 c. Payment of Wages and Deductions for Employee Debts

Even when otherwise authorized by judgment and garnishment or by agreement with affected employees, employers cannot deduct debts owed by employees from their final paychecks if doing so would

- result in the employee receiving less than minimum wage for all hours worked, and
- effectuate an improper set-off.

See *City of Oakland v Hassey* (2008) 163 CA4th 1477, 78 CR3d 621.

© The Regents of the University of California

§4.69 2. Overtime Pay Requirements

The Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) requires overtime be paid for work over specified maximum hours within a designated work period. As a general rule, the FLSA requires that non-public safety employees be paid overtime for hours worked in excess of 40 in one workweek. The FLSA does not place a limit (other than for children) on the number of hours an employee may work in a day or week, nor, generally, does the FLSA require an employee be paid overtime compensation for hours worked in excess of 8 per day, or for work on Saturdays, Sundays, or holidays. 29 CFR §778.102.

NOTE: Cities are exempt from California's 8-hour workday rule. California Industrial Welfare Commission Wage Orders 1-2002, 2-2001—13-2001, 16-2001, 17-2001.

Whether overtime must be paid depends on the number of hours an employee works within one workweek. The overtime rate is calculated as not less than one and one-half times the employee's "regular rate of pay," which is expressed as an hourly rate. 29 USC §207(a)(1). See §4.71. A partial exemption to the overtime provisions applies to certain public safety employees. 29 USC §207(k). See §§4.72-4.75.

© The Regents of the University of California

§4.70 a. Workweek

For the purposes of calculating overtime pay, a "workweek" is a fixed and regularly recurring period of 168 hours in any seven consecutive 24-hour periods, starting with the same day each week. 29 CFR §778.105. The workweek need not coincide with the calendar week, and it may begin on any day and at any hour of the day. 29 CFR §778.105. Distinct departments in an agency may have different workweeks, and so may individual employees or groups of employees. 29 CFR §778.105.

Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by the employee. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the FLSA's overtime requirement. On the proper method of computing overtime pay in a period in which there is a change in the time of commencement of the workweek, see 29 CFR §§778.301-778.302.

Each workweek stands alone. The FLSA does not permit averaging of hours over two or more workweeks. 29 CFR §§778.103-778.104. Overtime compensation need not be paid weekly. The general rule is that overtime compensation earned in a particular workweek should be paid on the regular payday for the period in which such workweek ends. 29 CFR §778.106. See *Biggs v Wilson* (9th Cir 1993) 1 F3d 1537.

© The Regents of the University of California

§4.71 b. "Regular Rate" of Pay

The regular rate of pay is calculated as an hourly rate of pay. It is generally determined by dividing the employee's total remuneration (except statutory exclusions) in any workweek by the number of hours actually worked in that workweek. 29 CFR §778.109.

Certain compensation paid to nonexempt employees may be excluded from the calculation of regular rate, such as payments for time not worked (*e.g.,* minimum callback time), or payments for daily overtime under a memorandum of understanding. See 29 USC §207(e); 29 CFR §§778.200-778.224.

Compensation includable in the calculation of the regular rate includes, but is not limited to, the following:

- Commissions and non-discretionary bonuses (29 CFR §§778.200(c), 778.208, 778.303);
- On-call pay (29 CFR §778.200(c));
- Shift differentials (29 CFR §778.200(c));
- Retroactive pay increases (29 CFR §778.303); and
- Education and other incentive pay, special assignment pay, bilingual pay, hazard pay, and longevity pay.

For additional regulations on regular rate, see 29 CFR §§548.2-548.3, 553.30, 778.110, 778.113-778.115, 778.402-778.414, 778.419.

© The Regents of the University of California

§4.72 c. Police and Firefighter Partial Exemption

Because of their 24-hours-a-day, 7-days-a-week service to the public, a public agency may select a "work period" that is at least 7 consecutive days and not more than 28 consecutive days, for employees engaged in fire protection or law enforcement activities. 29 USC §207(k). If such a work period is selected, overtime must be paid based on work in excess of the maximum hours provided by the regulations. See 29 CFR §553.230. The public agency must affirmatively state it is subject to the 7(k) (29 USC §207(k)) exemption. Some notation on the payroll record is sufficient. 29 CFR §553.51. Adopting a 7(k) work period is subject to the collective bargaining process if applicable.

© The Regents of the University of California

§4.73 (1) Fire Protection Employees

Fire protection employees, whether they work part-time, full-time, temporary, probationary, trainee, or permanent and regardless of title, are eligible for the 7(k) (29 USC §207(k)) exemption if they fit the criteria described in 29 USC §203(y).

It is unclear whether the regulations (29 CFR §§553.210-553.216) that preceded enactment of 29 USC §203(y) will continue to have validity for fire protection employees after passage of 29 USC §203(y). Under the Fifth Circuit's analysis, firefighters remain subject to the 7(k) exemption even when they spend more than 20 percent of their work time engaged in non-fire protection activities. *McGavock v City of Water Valley* (5th Cir 2006) 452 F3d 423. The Fifth Circuit held that 29 USC §203(y) supersedes 29 CFR §§553.210 and 553.212 so that the 20-percent rule no longer applies to firefighters. The Ninth Circuit has not addressed this issue.

Civilian employees of the fire department who engage in support activities, such as dispatchers, are not included in the exemption. 29 CFR §553.210(g). Dual function paramedics (certified in fire suppression and advanced life support) have been found to not be subject to the 7(k) exemption when paramedic ambulances were rarely dispatched to fire scenes and there was no evidence that dual function paramedics were ever ordered to perform fire suppression activities. They did not come within the definition of an "employer in fire protection activities" because they did not have the responsibility to engage in fire suppression. *Cleveland v City of Los Angeles* (9th Cir 2005) 420 F3d 981, 988-989, cert denied sub nom *City of Los Angeles v Cleveland* (2006) 546 US 1176. However, dual function paramedics are subject to the 7(k) exemption when they have substantial responsibility for fire suppression in addition to their paramedic duties. Department of Labor Opinion Letter FLSA 2006-20 (June 1, 2006).

© The Regents of the University of California

§4.74 (2) Law Enforcement Employees

Law enforcement employees (whether they work part-time, full-time, temporary, probationary, trainee, or permanent, and regardless of title) are eligible for the 7(k) (29 USC §207(k)) exemption if they fit the criteria described in 29 CFR §553.211. In addition, security personnel in correctional institutions are covered. See Department of Labor Wage & Hour Administrative Letter Ruling (February 18, 1992).

Civilian employees of the police department who engage in support activities, such as dispatchers, building inspectors, animal control personnel, and civilian parking checkers, are not eligible for the exemption.

© The Regents of the University of California

§4.75 (3) Overtime Pay for Police and Firefighters

When calculating overtime pay for 7(k) (29 USC §207(k)) employees, the regular rate is determined in the same manner as for other employees, except the term "work period" is substituted for "workweek." 29 CFR §553.233. A public agency that employs fewer than five employees in fire protection or law enforcement activities during the workweek, including security personnel in correctional institutions (see 29 USC §213(b)(20)), is exempt from overtime pay provisions.

The maximum hours that police or firefighters may work without the entity incurring overtime pay liability is based on a ratio. The ratio for employees engaged in fire protection is 212 hours/28 days; the ratio for employees engaged in law enforcement is 171 hours/28 days. The following is a table outlining the maximum hours for each work period.

Maximum Hours Standards		
Work Period (Days)	**Fire Protection**	**Law Enforcement**
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

© The Regents of the University of California

§4.76 3. Compensatory Time Off Requirements

Compensatory time (also referred to as compensatory time off (CTO)) is paid time off that is earned and accrued by an employee in lieu of immediate cash payment for overtime. 29 CFR §553.22. The Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) permits a public agency to provide compensatory time off in lieu of overtime pay at a rate not less than one and one-half hours of compensatory time for each hour of overtime worked if the requirements specified in 29 CFR §§553.20-553.28 are met. See 29 USC §207(o). This type of CTO is also referred to as FLSA compensatory time.

Certain agencies have other forms of compensatory time. For example, agencies often provide overtime pay for all hours worked in excess of 8 per day, for working on a Saturday or Sunday, or for working on a scheduled day off in a non-overtime week. Payment of such overtime is not required by the FLSA. If the agency grants compensatory time off in lieu of overtime pay in such situations, this is non-FLSA compensatory time and is not governed by the FLSA (as long as it is not intended to and does not compensate for hours in excess of 40 in one workweek). 29 CFR §553.28(e).

On payment for accrued compensatory time, see 29 CFR §§553.26-553.27.

© The Regents of the University of California

§4.77 a. Limitations on Accrual

Most employees may accrue not more than 240 hours of Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) compensatory time. 29 CFR §553.22. This means 160 hours of work at time-and-one-half. Employees engaged in public safety, emergency response, and seasonal activities may accrue not more than 480 hours of FLSA compensatory time. 29 CFR §§553.22, 553.24. This means 320 hours of work at time-and-one-half.

© The Regents of the University of California

§4.78 b. Conditions for Use

Under the Department of Labor (DOL) regulations, any employee who requests use of accrued compensatory time must be permitted to use such time off within a reasonable period after making the request, if such use does not unduly disrupt the agency's operation. 29 CFR §553.25. Having to pay overtime to other employees does not satisfy the "unduly disrupt" standard for an agency to restrict use. However, in *Mortensen v County of Sacramento* (9th Cir 2004) 368 F3d 1082, the Ninth Circuit determined that the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) only requires the employer to allow the employee to use compensatory time within a reasonable time after the employee makes the request, even if not on the exact day the employee desires, and that what constitutes a reasonable period depends on the customary practices and the terms of any agreements between the parties. The Ninth Circuit did not defer to the DOL's regulations because the statutory language is clear. Thus, as long as the employee can take time off within a reasonable period after the request, the issue of whether the use of the time on the date specified is unduly disruptive is never reached. *County of Sacramento,* 368 F3d at 1089.

© The Regents of the University of California

§4.79 c. Forced Use

An employer may force its employees to use their compensatory time off (CTO). *Christensen v Harris County* (2000) 529 US 576, 146 L Ed 2d 621, 120 S Ct 1655. Additionally, an employer may require its employees to use CTO before they use other types of accrued leave. *Local 889, A.F.S.C.M.E. v Louisiana* (5th Cir 1998) 145 F3d 280. An employer's policy on forced use of CTO is negotiable under the Meyers-Milias-Brown Act (Govt C §§3500-3511).

© The Regents of the University of California

§4.80 4. Child Labor Prohibition

Unless employed under the Department of Labor regulations, the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) prohibits the employment of "oppressive child labor." 29 USC §212(c). Oppressive child labor is defined to include the employment of an individual under age 16 in virtually any occupation. 29 USC §203(l)(1). However, minors 14 to 16 may be employed in certain occupations. 29 CFR §§570.31-570.38. See also 29 CFR §570.35.

The penalties and enforcement of child labor laws are specified in 29 USC §216(e) and 29 CFR §§579.1-579.5. Section 302 of the Genetic Information Non-Discrimination Act, enacted May 21, 2008, increases the penalties for child labor violations under the FLSA. 29 USC §216(e).

© The Regents of the University of California

§4.81 5. Equal Pay Act Prohibition

The Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) prohibits an employer from discriminating between employees on the basis of sex by paying employees of one sex less than the employees of the opposite sex for work performed under similar working conditions within the same establishment on jobs that require equal skill, effort, and responsibility. See 29 USC §206(d) (Equal Pay Act of 1963); 29 CFR §§1620.1-1620.34. On Equal Pay Act, see §§4.143, 4.250. An employer may justify differences in compensation for such work if the differential is based on:

- A bona fide seniority system;
- A merit system;
- A compensation system that measures earning in terms of quantity or quality; or
- A differential based on any factor other than sex.

© The Regents of the University of California

§4.82 6. Recordkeeping Requirements

Regulations codified at 29 CFR §§516.1-516.34 and 553.50-553.51 list important recordkeeping requirements for nonexempt employees, police and fire 7(k) (29 USC §207(k)) employees, white-collar exempt employees, and employees subject to compensatory time-off agreements.

© The Regents of the University of California

E. Enforcement of Fair Labor Standards Act (FLSA)

§4.83 1. Investigations and Settlements

The Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) authorizes the Department of Labor to investigate and determine if an employer has violated the FLSA's provisions, and to attempt to resolve such violations.

© The Regents of the University of California

§4.84 2. Judicial Enforcement

The Department of Labor (DOL) may pursue a court action for unpaid minimum wages and overtime pay. 29 USC §216(c). The DOL may also sue an employer for violations of the child labor provisions of the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219). The DOL may seek injunctive relief to prevent further violations of the FLSA and to enforce the FLSA's recordkeeping requirements. 29 USC §§215, 217.

© The Regents of the University of California

§4.85 3. Criminal Sanctions

The United States Department of Justice is authorized to bring a criminal action against a person who willfully violates the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219). Such violations subject the person to a fine of up to $10,000 and/or imprisonment for up to 6 months. A person convicted of a willful violation is subject to imprisonment only after a prior conviction under this section. 29 USC §216(a).

© The Regents of the University of California

§4.86 4. Employee Suits

Employees may sue their employers for failure to pay minimum wages and overtime pay required by the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219). 29 USC §216(b).

NOTE: An employee's right to sue terminates when the Department of Labor institutes an action. 29 USC §216(c). See §4.84.

© The Regents of the University of California

§4.87 a. No Need to Exhaust Administrative Remedies

The employee need not exhaust any available administrative remedies before bringing the lawsuit. See 29 USC §216(b); *Albertson's, Inc. v United Food & Commercial Workers Union* (9th Cir 1998) 157 F3d 758, cert denied (1998) 528 US 809.

© The Regents of the University of California

§4.88 b. No Class Action Under CCP §382

Employees cannot maintain a Fair Labor Standards Act of 1938 (FLSA) action as a class action under CCP §382 (*i.e.,* as an "opt-out class"). The FLSA is a uniquely "opt-in" statutory scheme based on its language. "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 USC §216(b). See *Haro v City of Rosemead* (2009) 174 CA4th 1067, 94 CR3d 874; *Smith v T-Mobile USA Inc.* (9th Cir 2009) 570 F3d 1119.

© The Regents of the University of California

§4.89 c. No Discrimination Against Employee for Bringing Suit

The Fair Labor Standards Act of 1938 (FLSA) prohibits an employer from discharging or discriminating in any other manner against an employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the FLSA, or has testified or is about to testify in any such proceeding. 29 USC §215(a)(3).

© The Regents of the University of California

§4.90 5. Monetary Amounts Recoverable

If found liable, employers are liable for the following:

- Back pay (including unpaid minimum wages and/or overtime pay plus interest) (29 USC §216(b)), and
- Attorney fees and costs (29 USC §216(b)).

NOTE: The Fair Labor Standards Act of 1938 (FLSA) does not entitle a successful defendant to an attorney fee award. See 29 USC §216(b)-(c).

In addition to unpaid wages and overtime pay, the employer may be liable for liquidated damages up to an amount equal to the back pay awarded. 29 USC §216(b).

© The Regents of the University of California

§4.91 6. Statute of Limitations

The time limit for filing suit for a violation under the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219) varies according to whether the violation is willful. See 29 USC §255(a). For non-willful violations of the FLSA,, the statute of limitations is generally 2 years. In case of a willful violation of the FLSA, however, the statute of limitations is 3 years. A violation is "willful" if the employer either knew its conduct was barred by the FLSA or showed reckless disregard as to whether its conduct was prohibited by the FLSA. *McLaughlin v Richland Shoe Co.* (1988) 486 US 128, 108 S Ct 1677, 100 L Ed 2d 115.

© The Regents of the University of California

§4.92 7. Employer Defenses

An employer that can prove its actions, even if in violation of the Fair Labor Standards Act of 1938 (FLSA) (29 USC §§201-219), were taken in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, or interpretation of the Administrator of the Wage and Hour Division of the Department of Labor, or any administrative or enforcement practice of the agency with respect to the class of employers to which the entity belongs, is entitled to a complete defense. 29 USC §259; 29 CFR §§790.13-790.19.

A partial defense (which, at the court's discretion, may bar or reduce the recovery of liquidated damages) is available if the employer proves it acted in good faith and had reasonable grounds for believing its actions were not in violation of the FLSA. 29 USC §260.

© The Regents of the University of California

§4.93 IV. DRUG TESTING

Public employers can constitutionally require drug testing for new job applicants seeking safety-sensitive positions or positions for which the city demonstrates a specialized need for testing. *Lanier v City of Woodburn* (9th Cir 2008) 518 F3d 1147. See *Loder v City of Glendale* (1997) 14 C4th 846, 880, 59 CR2d 696, cert denied (1997) 522 US 807. Employers may also legitimately require drug testing of current employees under certain circumstances. See §§4.101-4.111.

PRACTICE TIP: The validity of a drug test always depends on federal and state constitutional law. In addition, a federal or state statute may apply to the particular situation and any agency policy, procedures, or negotiated agreements about testing must be followed.

© The Regents of the University of California

A. Constitutional Tests

§4.94 1. Fourth Amendment Test

A blood or urine test for drugs is a search for purposes of the Fourth Amendment to the United States Constitution. The permissibility of any particular test is determined either on individualized suspicion or by balancing the intrusion on the employee's expectation of privacy against the promotion of legitimate governmental interests. *Skinner v Railway Labor Executives' Ass'n* (1989) 489 US 602, 103 L Ed 2d 639, 109 S Ct 1402; *Lanier v City of Woodburn* (9th Cir 2008) 518 F3d 1147; *Bluestein v Skinner* (9th Cir 1990) 908 F2d 451, cert denied (1991) 498 US 1083.

© The Regents of the University of California

§4.95 a. Legitimate Interest

Three governmental interests that might, in appropriate circumstances, justify mandatory testing include (*International Bhd. of Elec. Workers v Skinner* (9th Cir 1990) 913 F2d 1454, 1462):

- safety,
- security, or
- public integrity.

© The Regents of the University of California

§4.96 b. Nexus

Testing is not justified unless the government shows a clear, direct nexus between the individual's job duties and the nature of the feared violation. *National Treasury Employees Union v Von Raab* (1989) 489 US 656, 103 L Ed 2d 685, 109 S Ct 1384; *Bluestein v Skinner* (9th Cir 1990) 908 F2d 451, cert denied (1991) 498 US 1083.

© The Regents of the University of California

§4.97 c. Privacy Expectation

The court will also examine whether the employee had a reduced expectation of privacy. Employment in a position regulated by federal or state law, such as a railroad operator, commercial truck driver, or drug interdiction official, may have a lower privacy expectation. *Skinner v Railway Labor Executives' Ass'n* (1989) 489 US 602, 627, 103 L Ed 2d 639, 109 S Ct 1402.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/4 Personnel/§4.98 d. Other Factors

§4.98 d. Other Factors

Other factors that will be balanced include (*Semore v Pool* (1990) 217 CA3d 1087, 1099, 266 CR 280):

- the nature and reliability of the test;
- the testing equipment used;
- the manner of administration; and
- the degree to which it protects privacy and the confidentiality of the results.

© The Regents of the University of California

§4.99 2. State Privacy Test

The right to privacy under Cal Const art I, §1 may impose a heavier burden on an employer than the federal Fourth Amendment test.

Under current law, an invasion of privacy may be justified if it is outweighed by a "competing" interest, rather than a compelling interest. *Hill v National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 26 CR2d 834. Before *Hill,* a compelling interest, as opposed to a legitimate interest, was required to outweigh an individual's privacy right. *Luck v Southern Pac. Transp. Co.* (1990) 218 CA3d 1, 267 CR 618, cert denied (1990) 498 US 939. However, some decisions apply a "reasonable" test if the right to privacy is not substantially burdened by the test (*i.e.,* for a job applicant as opposed to current employee). *Wilkinson v Times Mirror Corp.* (1989) 215 CA3d 1034, 264 CR 194.

© The Regents of the University of California

B. Constitutionality of Particular Types of Drug Testing

§4.100 1. Pre-employment Testing

In most cases, courts have upheld pre-employment drug testing, in part because they consider applicants to have reduced privacy rights. *National Treasury Employees Union v Von Raab* (1989) 489 US 656, 103 L Ed 2d 685, 109 S Ct 1384; *International Bhd. of Teamsters v Department of Transp.* (9th Cir 1991) 932 F2d 1292; *Willner v Thornburgh* (DC Cir 1991) 928 F2d 1185, cert denied (1991) 502 US 1020; *Wilkinson v Times Mirror Corp.* (1989) 215 CA3d 1034, 264 CR 194. However, the Ninth Circuit has held that without a demonstrated "specialized need," applicants for certain non-"sensitive" positions could not be subjected to a pre-employment drug test without violating the Fourth Amendment to the U.S. Constitution. *Lanier v City of Woodburn* (9th Cir 2008) 518 F3d 1147 (library page cannot be subjected to pre-employment drug test). In *Hill v National Collegiate Athletic Ass'n* (1994) 7 C4th 1, 26 CR2d 834, the California Supreme Court held that an athlete does not have a right to participate in NCAA competition and that advance notice of the drug testing program diminished the expectation of privacy. See *Loder v City of Glendale* (1997) 14 C4th 846, 59 CR2d 696, cert denied (1997) 522 US 807.

© The Regents of the University of California

§4.101 2. Routine Physical Examinations

Routine physical examination that includes drug testing has received mixed acceptance in the courts. See, *e.g., International Bhd. of Teamsters v Department of Transp.* (9th Cir 1991) 932 F2d 1292 (upholding testing at periodic medical exams for commercial truck drivers); *Doe v City & County of Honolulu* (1991) 8 Haw App 571, 6 IER Cases 1406 (holding drug testing as part of firefighter's annual physical exam did not violate Fourth Amendment); *Beattie v City of Saint Petersburg Beach* (MD Fla 1990) 733 F Supp 1455 (test for firefighters is unconstitutional even though it was done as part of routine annual fitness for duty physical).

© The Regents of the University of California

§4.102 3. Testing Following Leave of Absence

Drug testing following a leave of absence has received mixed support from the courts. See, *e.g., Wrightsell v City of Chicago* (ND Ill 1988) 678 F Supp 727 (upholding test for police officers returning to duty from extended leave, after noting officers had minimal privacy interest in urine sample provided during employment-related medical examinations); *Transport Workers' Union v Southeastern Pennsylvania Transp. Auth.* (3d Cir 1988) 884 F2d 709 (return to work testing following absence of over 30 days for any reason other than vacation, even for safety sensitive positions, not permissible).

© The Regents of the University of California

§4.103 4. Testing for Cause

Testing for cause has been upheld when sufficient evidence justifies a reasonable suspicion that the employee is impaired by or using drugs. For example, in *Bangert v Hodel* (D DC 1989) 705 F Supp 643, the court upheld such testing because it was based on observable factors (*e.g.,* direct observation of drug use or possession and/or physical symptoms of being under the influence of drugs; a pattern of abnormal conduct or erratic behavior; an arrest for or conviction of a drug-related offense; identification of employee as focus of criminal investigation into illegal drug possession, use, or trafficking; information provided either by reliable and credible source or independently corroborated; or newly discovered evidence the employee tampered with a previous drug test), and the employer's program conformed to safeguards necessary for protection of employee's rights.

© The Regents of the University of California

§4.104 5. Testing as Part of Rehabilitation Program

Testing as part of a rehabilitation program is usually not challenged; thus, there are few cases discussing it. See Lab C §432.7 (restrictions on use of data concerning drug diversion programs).

© The Regents of the University of California

§4.105 6. Testing as Part of Promotion Procedure

Whether testing as part of a promotion procedure is permissible usually depends on the type of job into which the applicant might be promoted. For example, in *National Treasury Employees Union v Von Raab* (1989) 489 US 656, 103 L Ed 2d 685, 109 S Ct 1384, the Court upheld regulations that required drug testing of all customs agents who applied to be hired, transferred, or promoted into positions that had direct involvement with drug interdiction or enforcement of related laws; required an agent to carry a firearm; or permitted an agent access to "classified information." Such positions included accounting technicians, accountants, animal caretakers, and messengers. See *Loder v City of Glendale* (1997) 14 C4th 846, 59 CR2d 696, cert denied (1997) 522 US 807.

© The Regents of the University of California

§4.106 7. Random Testing

Random testing is the most controversial type of testing program and is the most difficult to defend. The deciding factor is generally the type of position held by the employee and the nexus of the position to the safety of the general public.

© The Regents of the University of California

§4.107 a. When Random Testing Upheld

Examples of jobs for which random testing has been upheld are:

- Commercial truck drivers (*International Bhd. of Teamsters v Department of Transp.* (9th Cir 1991) 932 F2d 1292);
- Pipeline workers (*International Bhd. of Elec. Workers v Skinner* (9th Cir 1990) 913 F2d 1454);
- Airline flight safety personnel (*Bluestein v Skinner* (9th Cir 1990) 908 F2d 451, cert denied (1991) 498 US 1083);
- Police officers who carry firearms and participate in drug interdiction (*Guiney v Roache* (1st Cir 1989) 873 F2d 1557, cert denied (1989) 493 US 963); and
- Motor vehicle operators (*National Treasury Employees Union v Yeutter* (DC Cir 1990) 918 F2d 968; *Transport Workers' Union v Southeastern Pennsylvania Transp. Auth.* (3d Cir 1988) 884 F2d 709).

© The Regents of the University of California

§4.108 b. When Random Testing Not Upheld

Examples of jobs for which random testing was not upheld or serious questions were raised about its lawfulness include: *Luck v Southern Pac. Transp. Co.* (1990) 218 CA3d 1, 267 CR 618, cert denied (1990) 498 US 939 (transportation company violated state constitution when it discharged computer programmer for refusing to take random drug test, when employee did not consent to it when she was hired and was not in safety-sensitive position); *Semore v Pool* (1990) 217 CA3d 1087, 266 CR 280 (employee in unspecified job could state cause of action for violation of right to privacy when he was discharged for refusing to take eye reaction drug test); *American Fed'n of Gov't Employees v Derwinski* (ND Cal 1991) 777 F Supp 1493 (random testing violated Fourth Amendment as to safety engineers, boiler plant operators, utility system operators, electricians, and other "non-safety" positions).

© The Regents of the University of California

§4.109 8. Testing Following Accident

Testing following an accident has received mixed support from the courts. Such testing will generally be upheld if there is sufficient justification for it.

© The Regents of the University of California

§4.110 a. When Testing Following Accident Upheld

One of the most important examples of the cases in which testing following an accident was upheld is *Skinner v Railway Labor Executives' Ass'n* (1989) 489 US 602, 103 L Ed 2d 639, 109 S Ct 1402, in which the employer required testing of blood and urine of train crew members following a "major train accident" or "impact accident," as defined in regulations. The Court also upheld permissive testing of breath or urine when a supervisor has a reasonable suspicion an employee's acts or omission contributed to an accident or incident; there is a certain, specific rule violation; or when a supervisor has a reasonable suspicion an employee is under the influence of alcohol based on specific, personal observations. The Ninth Circuit has applied *Skinner* to allow testing commercial truck drivers after certain accidents. *International Bhd. of Teamsters v Department of Transp.* (9th Cir 1991) 932 F2d 1292.

© The Regents of the University of California

§4.111 b. When Testing Following Accident Not Upheld

Insufficient justification for testing following an accident was found in *Connelly v Newman* (ND Cal 1990) 753 F Supp 293 (court struck down post-accident drug testing for on-the-job accidents that result in injury requiring hospitalization or damage over $1000; court found less compelling interest and lower damage threshold than in *Skinner*); *American Fed'n of Gov't Employees v Thornburgh* (ND Cal 1989) 713 F Supp 359 (court struck down Immigration and Naturalization Service drug testing when no particularized suspicion of drug use, no evidence to establish illegal drug use is current or potential problem, or drug testing interferes with government objectives; accidents, incidents, or rule violations by themselves do not create reasonable grounds for suspecting tests will demonstrate alcohol or drug impairment).

© The Regents of the University of California

§4.112 C. Drug Testing Procedures

When an employer tests for drugs, certain procedures must be followed to protect the employee's privacy rights. In broad terms, they are (see, *e.g., Wilkinson v Times Mirror Corp.* (1989) 215 CA3d 1034, 1049, 264 CR 194):

- Collection procedures that ensure privacy and accuracy;
- Chain of custody procedures that ensures accuracy;
- Testing procedures that result in accurate results;
- Procedures to ensure confidentiality of test results; and
- Opportunity for the individual to explain or rebut a positive test result.

© The Regents of the University of California

§4.113 1. Meet and Confer Requirements

Drug testing of current employees is a condition of employment and thus subject to meet and confer requirements under the Meyers-Milias-Brown Act (Govt C §§3500-3511). *Holliday v City of Modesto* (1991) 229 CA3d 528, 280 CR 206. However, drug testing of applicants may not be subject to any meet and confer requirement. *Star Tribune Division,* 295 NLRB 543, 131 LRRM 1404 (1989).

© The Regents of the University of California

§4.114 2. Confidentiality of Medical Information

A health care provider may not release confidential medical information without authorization. CC §56.10. The statute prohibits discrimination against an employee based on a refusal to sign an authorization. CC §56.20. But see *Loder v City of Glendale* (1997) 14 C4th 846, 859, 59 CR2d 696, cert denied (1997) 522 US 807 (as long as employer-mandated medical examination or drug testing program is otherwise lawful, CC §56.20 does not prohibit employer from disqualifying applicant or employee who refuses to authorize disclosure of test results to employer).

A health care provider can give an employer information describing "functional limitations … that … may limit the patient's fitness to perform his or her present employment," provided that no statement of medical cause is included in the information disclosed. CC §56.10(c)(8)(B). Additionally an employer's use of such confidential information to support a decision to terminate the employee violates CC §56.20 and the employee's right to privacy. *Pettus v Cole* (1996) 49 CA4th 402, 57 CR2d 46.

© The Regents of the University of California

D. Other Federal Laws on Drug Testing

§4.115 1. Drug Free Workplace Act of 1988

The Drug Free Workplace Act of 1988 (41 USC §§701-707) covers federal contractors for goods or services with a value of $100,000 or more and recipients of federal grants irrespective of value. 41 USC §§701(a), 702(a). It applies only to employees directly engaged in the performance of work under the provisions of the grant or contract (41 USC §706); thus, it does not apply to subcontractors.

Although the Act does not require drug testing, it does require that the contractor or grantee (41 USC §§701(a), 702(a)):

- Notify employees on the employer's prohibitions on workplace drug use;
- Establish a "drug free awareness program";
- Notify the federal contracting or granting agency of employees convicted of a criminal drug statute; and
- Make a good faith effort to maintain a drug free workplace, as described in the Act.

Contractors who fail to carry out the Act's requirements are subject to having the payments suspended and/or the contract or grant terminated, or being suspended or debarred from future government contracts for up to 5 years. 41 USC §§701(b), 702(b).

© The Regents of the University of California

§4.116 2. Omnibus Transportation Employee Testing Act of 1991

The Omnibus Transportation Employee Testing Act of 1991 covers employers of individuals involved in operation of aircraft, trains, trucks, and buses, including holders of commercial driver licenses who operate commercial motor vehicles exceeding 26,001 pounds, vehicles transporting hazardous materials, and vehicles designed to transport 16 or more passengers. 49 USC §§5331, 20140, 31306, 45102; 14 CFR pt 121 apps I, J; 49 CFR §§219.1-219.905; 49 CFR §§382.101-382.605. Also included are employers of operators and maintenance workers on pipelines used to transport natural gas or hazardous liquids. 49 CFR §§199.1-199.245.

NOTE: State law reinforces these requirements and prohibits allowing certain new hires to start driving before a negative test result is reported and until any required investigation of employment and driver history is complete. Veh C §34520.

© The Regents of the University of California

§4.117 3. Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (29 USC §§701-796*l*) applies to all federal contractors and subcontractors with contracts exceeding $10,000. 29 USC §793(a). Although primarily a disability discrimination law, it has been used to challenge drug testing programs. A 1978 amendment provides that the definition of "disability" does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. 29 USC §705(20)(C)(ii)(I)-(II); *Robertson v Amtrak/Nat'l R.R. Passenger Corp.* (SD NY 2005) 400 F Supp 2d 612, 622. See *Copeland v Philadelphia Police Dep't* (3d Cir 1988) 840 F2d 1139, cert denied (1989) 490 US 1004 (act does not require retention of drug-using police officer). Rehabilitated alcoholics are disabled within the meaning of the Rehabilitation Act (29 USC §705(20)(C)(v)); *Golson-El v Runyon* (ED Pa 1993) 812 F Supp 558, 560.

If the individual is found to be a qualified disabled person, the Rehabilitation Act requires that the employer provide reasonable accommodation. In the case of alcohol use, this accommodation need not be extensive. *Southeastern Community College v Davis* (1979) 442 US 397, 99 S Ct 2361, 60 L. Ed 2d 980.

© The Regents of the University of California

§4.118 4. Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA) (42 USC §§12101-12213) excludes current illegal drug use from the definition of disability. 42 USC §12210. However, alcoholics are subject to the protection of the statute if the employee can perform the essential functions of the job. 42 USC §12114(c)(4); *Brown v Lucky Stores, Inc.* (9th Cir 2001) 246 F3d 1182, 1187. A test to determine the illegal use of drugs is not considered a medical examination under the ADA. 42 USC §12114(d); *Loder v City of Glendale* (1997) 14 C4th 846, 864, 59 CR2d 696, cert denied (1997) 522 US 807.

© The Regents of the University of California

E. Other State Laws on Drug Testing

§4.119 1. State Drug Free Workplace Act of 1990

The State Drug Free Workplace Act of 1990 (Govt C §§8350-8357) covers every person or organization awarded a contract or a grant for the procurement of any property or services from any state agency. Govt C §8355. It does not require any contractor or grantee to ensure that other businesses with which it subcontracts also provide drug free workplaces. Govt C §8357.

Although the Act does not require drug testing, it does require each person or organization to (Govt C §8355):

- notify employees of the employer's prohibitions on workplace drug use;
- establish a "drug free awareness program"; and
- make it a condition of employment on the contract or grant that the employee abide by drug free workplace rules.

Penalties for violation of the Act can include suspension of payments under the contract or grant, termination of the contract or grant, or both, and debarment. Govt C §8356.

© The Regents of the University of California

§4.120 2. Alcohol and Drug Rehabilitation Act

Under the Alcohol and Drug Rehabilitation Act (Lab C §§1025-1028), employers of 25 or more employees must

- Reasonably accommodate the participation in alcohol or drug rehabilitation by an employee who voluntarily seeks help; and
- Make reasonable efforts to safeguard the confidentiality of the employee's decision to enter program, as long as the accommodation does not impose an undue hardship on the employer.

These provisions do not appear to apply to public entities, although there are no published opinions providing this interpretation. However, it is likely that reasonable accommodation may be required under the Americans with Disabilities Act (see §4.118) or the Fair Employment and Housing Act (see §4.121). 42 USC §12111(8)-(9); Govt C §12940(m).

© The Regents of the University of California

§4.121 3. Fair Employment and Housing Act

The Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) bars discrimination on the basis of physical and mental disability. Govt C §12940. Physical and mental disabilities do not include psychoactive substance disorders resulting from current unlawful use of controlled substances or other drugs. Govt C §12926(i), (k).

The Department of Fair Employment and Housing (DFEH) regulations require an applicant, if subject to disqualification based on a pre-employment physical, be permitted to provide an independent medical opinion. 2 Cal Code Regs §7294(d). The DFEH also requires confidentiality of physical results and uniform application of pre-employment inquiries. 2 Cal Code Regs §7294(d). The examinations and inquiries must be job-related and consistent with business necessity. Govt C §12940(e).

© The Regents of the University of California

V. PRIVACY RIGHTS AND PERSONNEL RECORDS

§4.122 A. Maintenance of Personnel Records

The employment relationship by its nature demands records be kept by an employer pertaining to employees. Such records include, *e.g.,* the employment application, resumes, testing materials, insurance records, and performance evaluations.

© The Regents of the University of California

§4.123 1. State Law

Every employer in the state must keep a record of the names and addresses of all its employees. Lab C §1174(c); *Craib v Bulmash* (1989) 49 C3d 475, 483, 261 CR 686. Employers and labor organizations must maintain and preserve all applications, personnel, membership, or employment referral records and files for at least 2 years after the files are created or after the employment action on applicants and terminated employees. Govt C §12946.

A police officer or firefighter has the right to read any adverse comment before it is placed in his or her personnel file (Govt C §§3255, 3305) and file a written response to any adverse comments (Govt C §§3256, 3306). See also *Sacramento Police Officers Ass'n v Venegas* (2002) 101 CA4th 916, 925, 124 CR2d 666.

© The Regents of the University of California

§4.124 2. Federal Law

The ADA requires that medical information received as the result of a medical examination "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record." 42 USC §12112(d)(3)(B). There are exceptions for use of the information as follows (42 USC §12112(d)(3)(B)(i)-(iii)):

- Supervisors and managers may be informed about necessary restrictions on work;
- First aid and safety personnel may be informed if emergency treatment might be required; and
- Government officials investigating ADA compliance must be informed.

© The Regents of the University of California

B. Access to Personnel Records

§4.125 1. Employee's Right to Access Own Records

Many agencies have personnel rules or negotiated procedures that allow the inspection of personnel files. Further, an applicant or employee may obtain copies of every document the employee signed relative to his or her employment. Lab C §432. Finally, every employee has the right to inspect the personnel records that the employer maintains relating to the employee's performance or any grievance concerning the employee. Lab C §1198.5.

© The Regents of the University of California

§4.126 2. Third Party's Right to Access Records

The rights of a third party to access personnel records of an employee depends on who the third party is, the reasons for the request, and under what authority the records are sought.

© The Regents of the University of California

§4.127 a. Public Records Act

The California Public Records Act (Public Records Act) (Govt C §§6250-6268) grants persons the right to inspect and copy certain public records. Govt C §§6250-6252. However, the PRA also provides that personnel records may not be disclosed when it would constitute an unwarranted invasion of privacy. Govt C §6254(c). See*, e.g., Braun v City of Taft* (1984) 154 CA3d 332, 201 CR 654 (council member was allowed access to records pertaining to appointment of transit administrator; irrelevant personal items could be taken out before being made public). On the other hand, employment contracts between a state or local agency or a public official or public employee are public records. Govt C §6254.8. But see *Versaci v Superior Court* (2005) 127 CA4th 805, 817, 26 CR3d 92 (community college district superintendent's personal performance goals were not part of her employment contract, within meaning of PRA).

The names and salaries of public employees, including peace officers, who earn $100,000 or more per year are subject to public disclosure under the PRA. *International Fed'n of Prof. & Tech. Eng'rs v Superior Court* (2007) 42 C4th 319, 327, 64 CR3d 693. Public officials have a significantly reduced expectation of privacy in matters related to their public employment than other public employees. *BRV, Inc. v Superior Court* (2006) 143 CA4th 742, 758, 49 CR3d 519 (investigation report on school superintendent's alleged misconduct is subject to disclosure under PRA). Further, the Peace Officers Standards and Training records of officers' names, employing agencies, and dates of employment are subject to disclosure under the PRA and are not confidential under Pen C §832.7. *Commission on Peace Officer Standards & Training v Superior Court* (2007) 42 C4th 278, 64 CR3d 661.

© The Regents of the University of California

§4.128 b. Federal Civil Rights Law

In actions under Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17), federal common law privilege controls and personnel files are discoverable. See *Garrett v City & County of San Francisco* (9th Cir 1987) 818 F2d 1515, 1519 n6.

© The Regents of the University of California

§4.129 c. Meyers-Milias-Brown Act

A union may have the right to access records under certain circumstances. Under the Meyers-Milias-Brown Act (Govt C §§3500-3511), a public agency may adopt rules and regulations on "furnishing nonconfidential information pertaining to employment relations to employee organizations." Govt C §3507(a)(8). See, *e.g., Stockton Unified Sch. Dist.* (1980) 4 PERC 11189 (representative entitled to all information necessary and relevant to discharging duty to represent employees). On the Public Employee Reporter for California (PERC) and other sources for decisions of the Public Employment Relations Board, see Advising California Employers and Employees §21.8 (Cal CEB 2005).

© The Regents of the University of California

§4.130 d. Subpoenas

Persons who subpoena personnel records in the course of litigation must comply with CCP §§1985, 1985.3-1985.4, and 1985.6. Employers have a duty to protect the privacy rights of employees in their personnel records. *Valley Bank of Nevada v Superior Court of San Joaquin County* (1975) 15 C3d 652, 125 CR 553.

© The Regents of the University of California

§4.131 e. Records of Police Officers

The personnel records of a police officer are protected from unwarranted disclosure. Pen C §832.7.

© The Regents of the University of California

§4.132 f. HIV Tests

Except when necessary for public health purposes, state law imposes liability on those who improperly disclose to third parties the results of an HIV test absent written consent. Health & S C §120980.

© The Regents of the University of California

§4.133 VI. EMPLOYEE RIGHTS AGAINST ADVERSE EMPLOYMENT ACTIONS

Employers are generally prohibited from using most legal, off-duty activities as a basis for adverse employment actions. Lab C §98.6. However, in the wrongful termination context, this protection is limited to employees' conduct asserting a recognized constitutional right or conduct protected by the Labor Code. *Grinzi v San Diego Hospice Corp.* (2004) 120 CA4th 72, 84, 14 CR3d 893.

© The Regents of the University of California

§4.134 A. Whistle-blowers

Employers may not retaliate against an employee for disclosing violations of state or federal statutes to a government or law enforcement agency. Lab C §1102.5. However, not every report or corrective action constitutes "whistleblowing." See *Patten v Grant Joint Union High Sch. Dist.* (2005) 134 CA4th 1378, 1384, 37 CR3d 113 (school principal's disclosures to school officials concerning needing more staff for safety purposes did not amount to "whistle-blowing"; disclosures were made in exclusively internal administrative context and did not show any belief on principal's part that she was disclosing violation of state or federal law in any sort of whistle-blowing context). See also *Mueller v County of Los Angeles* (2009) 176 CA4th 809, 822, 98 CR3d 281 (matters such as transferring employees, writing up employees, and counseling employees are personnel matters and "[t]o exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief [and] would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site").

© The Regents of the University of California

§4.135 B. First Amendment Rights

Public employees are granted some, but not absolute, constitutional protections when speaking out on matters of public concern. *Rankin v McPherson* (1987) 483 US 378, 97 L Ed 2d 315, 107 S Ct 2891 (government bears burden of justifying discharge on legitimate grounds); *Connick v Myers* (1983) 461 US 138, 75 L Ed 2d 708, 103 S Ct 1684 (whether employee's speech addresses matter of public concern must be determined by content, form, and context of given statement); *Pickering v Board of Educ.* (1968) 391 US 563, 20 L Ed 2d 811, 88 S Ct 1731 (in determining public employee's rights of free speech, task of Supreme Court is to arrive at balance between interests of employee, as citizen, in commenting on matters of public concern and interest of state, as employer, in promoting efficiency of public services it performs through its employees); *Chico Police Officers' Ass'n v City of Chico* (1991) 232 CA3d 635, 283 CR 610. The protections apply to both applicants and employees. *Gay Law Students Ass'n v Pacific Tel. & Tel. Co.* (1979) 24 C3d 458, 156 CR 14 (superseded by statute on other grounds). The protections apply to independent government contractors as well. *Navab-Safavi v Broadcasting Bd. of Governors* (D DC 2009) 650 F Supp 2d 40. They may also apply to some kinds of volunteers. See *Hyland v Wonder* (9th Cir 1992) 972 F2d 1129, cert denied (1993) 508 US 908.

The public entity may curtail even protected speech if necessary to prevent workplace disruption. See *City of San Diego v Roe* (2004) 543 US 77, 160 L Ed 2d 410, 125 S Ct 521 (police officer's speech—selling sexual videos of himself off-duty, in unidentified uniform—was not matter of public concern when police department demonstrated legitimate and substantial interests that were compromised by police officer's speech). Further, when public employees make statements under their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *Garcetti v Ceballos* (2006) 547 US 410, 164 L Ed 2d 689, 126 S Ct 1951.

© The Regents of the University of California

§4.136 C. Political Activity

Employers may not make, adopt, or enforce any policy that tends to control or direct the political activities or affiliations of employees, nor may they coerce, influence, or attempt to coerce or influence employees' political activities by threatening a loss of employment. Lab C §§1101-1102. The provisions of Govt C §§3201-3209 limit a public agency's authority to prescribe employee political activity. See also *Rutan v Republican Party of Illinois* (1990) 497 US 62, 111 L Ed 2d 52, 110 S Ct 2729; *Branti v Finkel* (1980) 445 US 507, 63 L Ed 2d 574, 100 S Ct 1287; *Elrod v Burns* (1976) 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673. But see *Nichols v Dancer* (2009) 567 F3d 423 (patronage dismissal doctrine does not extend to adverse employment actions motivated by employee's personal, rather than political, loyalties).

© The Regents of the University of California

VII. WORKPLACE SAFETY

§4.137 A. Injury and Illness Prevention Plan

State law requires city employers to furnish a safe workplace (Lab C §§6400-6413.5), and to adopt and implement an illness and injury prevention plan (Lab C §6401.7; 8 Cal Code Regs §3203).

© The Regents of the University of California

§4.138 B. Other Safety Plans and Programs

Title 8 of the California Code of Regulations imposes numerous other safety regulations on employers, including other mandated plans and programs for certain workplaces. See, *e.g.,* 8 Cal Code Regs §§1509 (code of safe practices), 1512, 3220, 3400 (emergency action and medical services plan), 3221, 6151 (fire prevention plan), 5097 (hearing conservation program), 5157 (confined spaces, *e.g.,* manholes, program), 5194(e) (hazard communication program).

Cities are also subject to workplace safety regulation enforcement by the California Division of Occupational Safety and Health, including civil and administrative penalties. Lab C §§6308-6327.5, 6423-6436.

© The Regents of the University of California

VIII. ANTIDISCRIMINATION LAWS

A. Federal Laws

§4.139 1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17) prohibits discrimination on the basis of race, color, religion, national origin, sex, or participation in certain protected activities. 42 USC §§2000e—2000e-3. It also prohibits retaliation for engaging in certain protected activities. 42 USC §2000e-3(a).

Title VII applies to private employers with more than 15 employees and to all public entities regardless of size. 42 USC §2000e(a)-(b). Title VII applies to both applicants and employees. 42 USC §2000e-2(a).

© The Regents of the University of California

§4.140 a. Exclusions From Coverage Under Title VII

Title VII of the Civil Rights Act of 1964 does not apply to individuals (42 USC §2000e(f))

- Elected to public office in a state or political subdivision of a state by the qualified voters,
- Selected by an elected official to serve on the official's personal staff,
- Appointed by an elected official on the policy making level, or
- Those who are immediate advisors of elected officials with respect to the exercise of the constitutional or legal powers of their offices.

This exemption does not include state employees subject to the civil service laws of the state government or its agencies or subdivisions. 42 USC §2000e(f).

© The Regents of the University of California

§4.141 b. Sexual Harassment Is Prohibited by Title VII

Under guidelines issued by the Equal Employment Opportunity Commission, sexual harassment is a form of sex discrimination and is a violation of Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17). 29 CFR §1604.11.

© The Regents of the University of California

§4.142 c. Discrimination Based on Pregnancy Is Prohibited by Title VII

The Pregnancy Discrimination Act of 1978 (42 USC §2000e(k)) is incorporated into Title VII of the Civil Rights Act of 1964. It applies to local government and prohibits discrimination on the basis of pregnancy, childbirth, and related medical conditions. The law basically requires that women disabled by pregnancy, childbirth, or related medical conditions be treated the same as other similarly disabled applicants and employees, including the terms of employment, ability to transfer, and the availability of leaves. 42 USC §2000e(k).

© The Regents of the University of California

§4.143 2. Federal Equal Pay Act of 1963

The federal Equal Pay Act of 1963 (29 USC §206(d)) requires equal pay without regard to sex for equal work performed under similar working conditions on jobs requiring equal skill, effort, or responsibility. Exceptions can be made for differentials based on a seniority or merit system, a system that measures earnings by quantity or quality, or any other factors not based on sex. 29 USC §206(d)(1); *Stanley v University of S. Cal.* (9th Cir 1999) 178 F3d 1069.

© The Regents of the University of California

§4.144 3. Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act of 1967 (ADEA) (29 USC §§621-663), which applies to local governments regardless of size, prohibits discrimination on the basis of age for persons age 40 and over. The ADEA applies to both applicants and employees. 29 USC §623(d).

Employee plaintiffs can allege either a disparate treatment or disparate impact theory of discrimination under the ADEA. If an employee alleges that a particular practice has a disparate impact on older workers, the employer has the burden of proving that the challenged practice is based on "reasonable factors other than age." *Meacham v Knolls Atomic Power Lab.* (2008) __ US __, 171 L Ed 2d 283, 128 S Ct 2395.

© The Regents of the University of California

§4.145 a. Exclusions From Coverage Under the ADEA

The Age Discrimination in Employment Act of 1967 (ADEA) does not apply to individuals (29 USC §630(f))

- Elected to public office in a state or political subdivision of a state,
- Selected by an elected official to serve on the official's personal staff,
- Appointed by an elected official on the policy making level, or
- Those who are immediate advisors of elected officials with respect to the exercise of the constitutional or legal powers of their offices.

This exemption does not include state employees subject to the civil service laws of the state government or its agencies or subdivisions. 29 USC §630(f).

© The Regents of the University of California

§4.146 b. Restriction on Waiver of ADEA Rights

Rights under the Age Discrimination in Employment Act of 1967 (ADEA) may not be waived unless knowing and voluntary, and there are special criteria that must be satisfied to constitute a knowing and voluntary waiver. 29 USC §626(f); *Oubre v Entergy Operations, Inc.* (1998) 522 US 422, 139 L Ed 2d 849, 118 S Ct 838 (release is unenforceable if it fails to comply with specific federal statutory requirements for release of claims under ADEA, even though employee retained severance pay monies).

PRACTICE TIP: In any employment-related settlement and release agreement involving an employee over 40, the city should incorporate special waiver language under 29 USC §626(f). There are additional requirements that apply if severance benefits are offered and claims are released in connection with a reduction in force. 29 CFR §1625.22.

© The Regents of the University of California

§4.147 4. Age Discrimination Act of 1975

Under the Age Discrimination Act of 1975 (42 USC §§6101-6107), employers who receive federal financial assistance are prohibited from discriminating on the basis of age. The ban against discrimination is not confined to a specified age range.

© The Regents of the University of California

§4.148 5. Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (29 USC §§701-796*l*) applies to local government employers who receive certain kinds of federal financial assistance and prohibits discrimination against the disabled in programs or activities receiving federal financial assistance. 29 USC §794. Although §794 parallels the ADA in most respects, the exclusion of alcoholics provided in the ADA (42 USC §12114(c)(4)) does not apply to §791 (federal agencies) of the Rehabilitation Act, even though it does apply to §§793 (federal contracts) and 794 (federal grants and programs). See, *e.g.,* 29 USC §705(20)(C)(v); *Fuller v Frank* (9th Cir 1990) 916 F2d 558.

© The Regents of the University of California

§4.149 6. Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act of 1986 (8 USC §§1101-1537) prohibits discrimination based on national origin and citizenship by all employers with more than three employees. 8 USC §1324b.

© The Regents of the University of California

§4.150 7. Civil Rights Act of 1991: §1981

The Civil Rights Act of 1991 (42 USC §1981) provides additional protection against discrimination on the basis of race by ensuring that all persons have the same right to make and enforce contracts, enjoy all benefits of the contractual relationship, and have the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

NOTE: Section 1981 does not provide a remedy for discrimination based on sex, religion, or national origin. *Runyon v McCrary* (1976) 427 US 160, 49 L Ed 2d 415, 96 S Ct 2586; *Woods v New York* (SD NY 1979) 469 F Supp 1127, aff'd (2d Cir 1979) 614 F2d 1293.

© The Regents of the University of California

§4.151 a. Who Can Sue

Any individual who claims discrimination on the basis of "race" can state a claim under the Civil Rights Act of 1991 (42 USC §1981). Caucasians claiming race discrimination can sue under this statute. *McDonald v Santa Fe Trail Transp. Co.* (1976) 427 US 273, 49 L Ed 2d 493, 96 S Ct 2574. Hispanics have generally been allowed to sue under this statute as well. See, *e.g., Manzanares v Safeway Stores, Inc.* (10th Cir 1979) 593 F2d 968. But see *Vera v Bethlehem Steel Corp.* (MD Pa 1978) 448 F Supp 610.

© The Regents of the University of California

§4.152 b. Coverage

Before the Civil Rights Act of 1991, 42 USC §1981 only applied to the formation of employment contracts and not to conduct by an employer after the formation of a contract. See *Patterson v McLean Credit Union* (1989) 491 US 164, 105 L Ed 2d 132, 109 S Ct 2363. The Civil Rights Act of 1991 reversed the *Patterson* decision and §1981 now prohibits all forms of racial discrimination in employment. Employees can also sue for "retaliation" under §1981. *CBOCS W., Inc. v Humphries* (2008) 553 US 442, 170 L Ed 2d 864, 128 S Ct 1951.

© The Regents of the University of California

§4.153 c. Immunities

The principles of absolute and qualified immunities developed under 42 USC §1983 have been applied to suits brought under 42 USC §1981 against local government officials. See, *e.g., Lombard v U.S.* (DC Cir 1982) 690 F2d 215, cert denied (1983) 462 US 1118. Although municipalities are not immune from suit, a municipality will be liable only for acts of local government officials under a government policy or custom. See, *e.g., Des Vergnes v Seekonk Water Dist.* (1st Cir 1979) 601 F2d 9, vacated on other grounds (1981) 454 US 807, 70 L Ed 2d 76, 102 S Ct 81.

© The Regents of the University of California

§4.154 d. Procedural Differences From Title VII

Although there are similarities between the Civil Rights Act of 1991 (42 USC §1981) and Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17), there are four significant differences, particularly in procedure:

(1) The Civil Rights Act of 1991 now authorizes recovery of compensatory and punitive damages within set limits. *Williams v Owens-Illinois, Inc.* (9th Cir 1982) 665 F2d 918, cert denied (1982) 459 US 971.

(2) Actions are governed by the state statute of limitations for personal injury actions. *McDougal v County of Imperial* (9th Cir 1991) 942 F2d 668 (2-year statute of limitations applies under CCP §335.1).

(3) It is unnecessary to exhaust any Title VII administrative remedies before bringing suit. *Torre v Barry* (DC Cir 1981) 661 F2d 1371.

(4) There is no minimum number of employees required as a condition for coverage of employment.

© The Regents of the University of California

§4.155 e. Remedies

A successful plaintiff in an action brought under the Civil Rights Act of 1991 (42 USC §1981) may recover both equitable and legal relief, including compensatory and punitive damages, although punitive damages are not recoverable against the municipality. *Johnson v Railway Express* (1975) 421 US 454, 44 L Ed 2d 295, 95 S Ct 1716. Expert witness and attorney fees are also available to the prevailing party. 42 USC §2000e-5(k) (§113(b)). Prevailing defendants, however, are awarded fees only when the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v EEOC* (1978) 434 US 412, 421, 54 L Ed 2d 648, 98 S Ct 694.

© The Regents of the University of California

§4.156 8. Civil Rights Act of 1871: §1983

Section 1983 prohibits the deprivation of any right, privilege, or immunity secured by the United States Constitution and federal laws. 42 USC §1983. This statute has often been used as the basis of employment discrimination lawsuits.

NOTE: Violations of Title II of the ADA (42 USC §§12101-12213) or §504 of the Rehabilitation Act of 1973 (29 USC §§701-796*l*) are not actionable under 42 USC §1983. *Vinson v Thomas* (9th Cir 2002) 288 F3d 1145.

© The Regents of the University of California

§4.157 a. Who Can Sue

Because 42 USC §1983 protects citizens and persons within the jurisdiction of the United States, even noncitizens can sue under the statute. *Graham v Richardson* (1971) 403 US 365, 29 L Ed 2d 534, 91 S Ct 1848. Labor unions have also been found to be persons under this law. *Allee v Medrano* (1974) 416 US 802, 40 L Ed 2d 566, 94 S Ct 2191.

© The Regents of the University of California

§4.158 b. Immunities

Municipalities cannot be found liable on a respondeat superior theory, but can be found liable under 42 USC §1983 for actions taken under official policy, practice, or custom. *Monell v Department of Soc. Servs.* (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018. Single acts can be sufficient to constitute an official policy or custom under appropriate circumstances. *Pembaur v City of Cincinnati* (1986) 475 US 469, 89 L Ed 2d 452, 106 S Ct 1292; *Owen v City of Independence* (1980) 445 US 622, 63 L Ed 2d 673, 100 S Ct 1398. Public officials may be able to claim qualified immunity. *Harlow v Fitzgerald* (1982) 457 US 800, 73 L Ed 2d 396, 102 S Ct 2727; *Wood v Strickland* (1975) 420 US 308, 43 L Ed 2d 214, 95 S Ct 992, overruled in part on other grounds, *Harlow v Fitzgerald, supra*.

© The Regents of the University of California

§4.159 c. Procedure

State personal injury statutes of limitations apply to actions brought under 42 USC §1983. *Wilson v Garcia* (1985) 471 US 261, 85 L Ed 2d 254, 105 S Ct 1938. A plaintiff need not pursue state administrative remedies, and generally need not exhaust state judicial remedies, before filing suit in federal court. *Patsy v Board of Regents* (1982) 457 US 496, 73 L Ed 2d 172, 102 S Ct 2557. When a plaintiff does seek administrative relief and does not exhaust administrative remedies before filing in federal court, his or her claim may be barred by res judicata or collateral estoppel. *Miller v County of Santa Cruz* (ND Cal 1992) 796 F Supp 1316.

© The Regents of the University of California

§4.160 d. Remedies

A successful plaintiff under 42 USC §1983 may obtain equitable relief, as well as compensatory and punitive damages. *Smith v Wade* (1983) 461 US 30, 75 L Ed 2d 632, 103 S Ct 1625; *Carey v Piphus* (1978) 435 US 247, 55 L Ed 2d 252, 98 S Ct 1042; *Harris v Harvey* (7th Cir 1979) 605 F2d 330, cert denied (1980) 445 US 938; *Martinez v Procunier* (ND Cal 1973) 354 F Supp 1092, aff'd (1974) 416 US 396, 40 L Ed 2d 224, 94 S Ct 1800. However, punitive damages cannot be awarded against a municipality. *City of Newport v Fact Concerts, Inc.* (1981) 453 US 247, 69 L Ed 2d 616, 101 S Ct 2748. Attorney fees are also available. 42 USC §1988.

© The Regents of the University of California

§4.161 9. Civil Rights Act of 1871: §1985(3)

Section 1985(3) of the Civil Rights Act of 1871 protects persons from conspiracies for the purpose of depriving a person of equal protection of the laws or equal privileges and immunities under the laws. 42 USC §1985(3). *Great Am. Fed. Sav. & Loan Ass'n v Novotny* (1979) 442 US 366, 376, 60 L Ed 2d 957, 99 S Ct 2345.

NOTE: The courts have not provided a definitive answer on whether this law was intended to reach any class-based animus other than race. *United Bhd. of Carpenters & Joiners v Scott* (1983) 463 US 825, 77 L Ed 2d 1049, 103 S Ct 3352. Violations of Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17) are not actionable under §1985. *Great Am. Fed. Sav. & Loan Ass'n, supra*. Thus, the use of §1985(3) in employment-related cases has been limited.

© The Regents of the University of California

§4.162 10. Family and Medical Leave Act of 1993

Under the Family and Medical Leave Act of 1993 (FMLA) (29 USC §§2601-2654), covered employers must grant eligible employees up to 12 workweeks of unpaid leave (and up to 26 weeks for certain military-caregiver leave) during a 12-month period (see 29 USC §§2601-2654; 29 CFR Part 825)

- for the birth or placement for adoption or foster care of a child,
- to care for a spouse, child, or parent with a serious health condition, or
- because the employee is unable to work because of his or her serious health condition.

Such leave may be taken on an intermittent or reduced schedule basis. 29 CFR §825.202. All public agencies, regardless of size, are "covered employers" under FMLA (29 CFR §825.104(a)), but may not have "eligible employees" (29 CFR §825.110) depending on the size of their workforces. In general, "eligible employees" are those who have been employed by the employer for at least 12 months, have worked at least 1250 hours in the 12 months immediately preceding the beginning of the leave, and are employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. 29 CFR §825.110(a). Posting notices are available from the Department of Labor.

NOTE: Special rules apply when there is an existing labor agreement. FMLA also does not supersede state and local laws providing greater employee leave rights. See Govt C §12945.2 (California Family Rights Act (CFRA)), discussed in §4.172.

© The Regents of the University of California

§4.163 11. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (38 USC §§4301-4335) provides for military leave and applies to all employers regardless of size. 38 USC §4303(4); 20 CFR §1002.34. It also applies to virtually all employees, regardless of their length of service or status (*e.g.,* temporary versus permanent). 38 USC §4303(3); 20 CFR §1002.41. Typically, the leave is unpaid, although California public agency employers are required to compensate the first 30 days of some military leaves. See Mil & V C §395.01.

© The Regents of the University of California

B. State Laws

§4.164 1. State Constitution

The provisions of Cal Const art I, §8 prohibit an employer from disqualifying any person from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, national origin, or ethnic origin.

The provisions of Cal Const art I, §31 (Proposition 209) prohibit public entities from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

© The Regents of the University of California

§4.165 2. Fair Employment and Housing Act

The Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) prohibits discrimination on the basis of any of the following: race, color, national origin, ancestry, sex, pregnancy, childbirth, or related medical condition, marital status, religious creed, physical, or mental disability, medical condition (cancer related or genetic characteristics), age 40 and over, and sexual orientation. On discrimination based on pregnancy, childbirth, or related medical conditions, see Govt C §12945; *California Fed. Sav. & Loan Ass'n v Guerra* (1987) 479 US 272, 93 L Ed 2d 613, 107 S Ct 683. Unlawful discrimination also includes the perception that an individual has any of these characteristics or that an individual is associated with a person who has, or is perceived to have, any of these characteristics. Govt C §§12920-12927, 12940-12948.

The FEHA is applicable to public employers regardless of size under Govt C §12926(d). Implementing regulations have been adopted by the Fair Employment and Housing Commission. See 2 Cal Code Regs §§7286.0-7297.11.

© The Regents of the University of California

§4.166 3. Tort Actions for Violation of Public Policy

The Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996) embodies a fundamental public policy, because it inures to the benefit of the public at large. Thus, a discrimination claim under the FEHA may also be the basis of a tortious violation of public policy. *Gantt v Sentry Ins.* (1992) 1 C4th 1083, 4 CR2d 874.

© The Regents of the University of California

§4.167 4. California Equal Pay Law

California's Equal Pay Law (Lab C §1197.5) requires employers to pay equal pay without regard to an individual's sex for equal work performed under similar working conditions on jobs requiring equal skill, effort, and responsibility. As with its federal counterpart (see §4.143), exceptions are made for differentials based on a seniority or merit system, a system that is based on quantity or quality of work, or a bona fide factor other than sex.

© The Regents of the University of California

§4.168 5. Unruh and Ralph Civil Rights Acts

The Unruh Civil Rights Act (CC §51) and the Ralph Civil Rights Act (CC §51.7) protect against unlawful discrimination and harassment by business establishments on the basis of sex, race, color, religion, ancestry, national origin, or disability. They also guarantee the right to be free from violence and intimidation by threat of violence on the basis of race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. See also CC §52.

NOTE: The Unruh Civil Rights Act does not appear to apply to the employment relationship, only to business establishments in the supplying of services or facilities to clients, patrons, or customers. See *Gauvin v Trombatore* (ND Cal 1988) 682 F Supp 1067. See also *Rojo v Kliger* (1990) 52 C3d 65, 276 CR 130.

© The Regents of the University of California

§4.169 6. California Government Code §11135

Employers who are funded by or receive any financial assistance from the State of California are prohibited from discriminating on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability. Govt C §11135. Discrimination based on the perception that a person has any of these characteristics is also unlawful, as is discrimination against a person because he or she associates with a person who has, or is perceived to have, any of these characteristics.

© The Regents of the University of California

§4.170 7. State Personnel Laws

The state personnel laws apply to the State Personnel Board and state employees, and prohibit discrimination on the basis of age, blindness, color vision problems, sex, race, religious creed, color, national origin, ancestry, marital status, physical or mental disability, and political and religious affiliations or opinions. Govt C §§19700-19706, 19230-19237.

© The Regents of the University of California

§4.171 8. HIV Testing

The provisions of Health & S C §120980 prohibit the use of HIV test results for employment purposes.

© The Regents of the University of California

9. California Family Rights Act and Similar Leaves

§4.172 a. Leave Under California Family Rights Act

Under the Moore-Brown-Roberti Family Rights Act (Govt C §§12945.2, 19702.3) (hereinafter referred to as the California Family Rights Act (CFRA); see 2 Cal Code Regs §7297.0(b)), all public employers (and private employers employing 50 or more employees) must grant to eligible employees up to 12 work weeks of unpaid leave for

- a serious health condition rendering the employee unable to perform the job,
- the birth or illness of a child, or
- to care for an ill parent or spouse.

"Eligible employees" are those who have been employed by the employer for at least 12 months, have worked at least 1250 hours in the 12 months immediately preceding the beginning of the leave, and are employed at a worksite within 75 miles of which 50 or more employees are employed by the employer. Govt C §12945.2.

State law has been amended to generally conform with the federal Family and Medical Leave Act of 1993 (FMLA) (29 USC §§2601-2654); however, significant differences remain. State law provides disability compensation for any individual who is unable to work due to the employee's own sickness or injury, the sickness or injury of a family member, or the birth, adoption, or foster care placement of a new child. Un Ins C §§3300-3306.

PRACTICE TIP: The 2009 amendments to the FMLA provided some additional FMLA leave benefits (*e.g.,* military exigency leave) that would not qualify for leave under the CFRA. Thus, an eligible employee could exhaust his or her FMLA leave via one of the federally-mandated qualifying events, but still not have tapped into the leave available under state law.

© The Regents of the University of California

§4.173 b. "Kin Care" Use of Sick Leave

If a city provides sick leave to its employees, then it must permit the employee to use up to one-half of the employee's annual accrued sick leave to attend to an illness of a child, parent, spouse, or domestic partner. Lab C §233.

© The Regents of the University of California

§4.174 c. Pregnancy Disability Leave

California carves out a separate unpaid leave benefit of up to 4 months for eligible pregnant employees. See Govt C §12945(a); 2 Cal Code Regs §7291.7. This leave does not run concurrently with leave taken under the California Family Rights Act (CFRA). 2 Cal Code Regs §7297.6(a). Unlike FMLA or the CFRA, this statute does not require any minimum length of service before the employee is eligible. 2 Cal Code Regs §7291.7(c).

© The Regents of the University of California

§4.175 d. Additional Leave Requirements

California law mandates several other forms of protected leave, including but not limited to time off for the following:

- Military service (Mil & V C §§394-395.10);
- Observance of religious holidays (Govt C §12940(a), (*l*); 2 Cal Code Regs §7293.3);
- Jury or witness duty (Lab C §230(a)-(b));
- Voting (Elec C §14000);
- Emergency service as a volunteer firefighter, reserve peace officer, or emergency rescue person (Lab C §230.3);
- Obtaining relief or safety assistance for a domestic violence victim and his or her child (Lab C §230(c)-(d)); and
- Participation in the employee's child's school activities (Lab C §230.8).

PRACTICE TIP: The leaves discussed in §§4.172-4.175 are not an exhaustive list of potential leaves, and the particular leave benefit and eligibility requirements vary from one leave to the next. Employers are cautioned to consult knowledgeable counsel or human resource professionals for specific information.

© The Regents of the University of California

§4.176 10. Workplace Appearance and Gender Identity

The definition of "sex" includes a person's gender, as defined in Pen C §422.56 to mean the employee's actual sex, or the employer's perception of the employee's sex, and includes the employer's perception of the employee's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the employee's sex at birth. Govt C §12926.

An employer can require employees to comply with workplace appearance, grooming, or dress standards consistent with state and federal law, provided that the employer allow the employee to dress in a manner consistent with the employee's gender identity. Govt C §12949.

© The Regents of the University of California

§4.177 C. Theories of Discrimination

There are three theories under which discrimination may be established: disparate treatment, disparate impact, and retaliation.

© The Regents of the University of California

§4.178 1. Disparate Treatment

Under the disparate treatment theory, an individual can establish discrimination if the individual shows the employer intentionally discriminated against the individual on the basis of a protected characteristic. A prima facie case generally consists of evidence that (*McDonnell Douglas Corp. v Green* (1973) 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817):

- the individual is a member of a protected category,
- an adverse employment action was taken with respect to that individual, and
- the same adverse action was not taken with respect to other similarly situated individuals.

In the case of a hiring decision, an individual can establish a prima facie case of discrimination by showing the individual is a member of a protected class, the individual was qualified and applied for a position for which the employer was seeking applicants, the individual was rejected, and the position remained open and the employer continued to seek similarly qualified applicants. *McDonnell Douglas Corp. v Green, supra.*

© The Regents of the University of California

§4.179 2. Disparate Impact

Under the disparate impact theory, an individual can establish a prima facie case of discrimination if the individual shows that an employment-related practice, although neutral on its face and applied in a nondiscriminatory manner, nevertheless has an adverse impact on individuals sharing a common, protected characteristic. No intent need be shown. See, *e.g., Griggs v Duke Power Co.* (1971) 401 US 424, 28 L Ed 2d 158, 91 S Ct 849.

PRACTICE TIP: Employers that use "objective" promotional exams for their employees must be careful when considering disregarding examination results due to possible disparate impact. The Supreme Court held that in order to defend against disparate treatment claims by the employees who did well on the exam, the employer must show it had a "strong basis of evidence" that it would have been liable under disparate impact theory had it not disregarded the exam results. The employer cannot rely on purely statistical evidence, but must show that the tests were not job-related or that there existed an equally valid, less discriminatory alternative. *Ricci v DeStefano* (2009) ___ US ___, 174 L Ed 2d 490, 129 S Ct 2658.

© The Regents of the University of California

§4.180 3. Retaliation

It is unlawful under federal law (Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17)) and California law (Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996)) to retaliate against an employee because he or she has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under Title VII or the FEHA. Both statutes also prohibit retaliation for opposing discriminatory practices (not only for filing a charge). See 42 USC §2000e-3; Govt C §12940(f); *Fisher v San Pedro Peninsula Hosp.* (1989) 214 CA3d 590, 262 CR 842; *EEOC v Hacienda Hotel* (9th Cir 1989) 881 F2d 1504 (federal law). It is unlawful to retaliate against employees or applicants because they have made charges of discrimination under the Age Discrimination in Employment Act of 1967 (29 USC §§621-663) or 42 USC §1981, either for themselves or on behalf of another. *Gomez-Perez v Potter* (2008) __ US __, 170 L Ed 2d 887, 128 S Ct 1931. It is also unlawful under California law to discriminate against employees and applicants who exercise certain rights afforded by the Labor Code. Lab C §98.6. Former employees may sue under Title VII for retaliatory post-employment actions. See *Robinson v Shell Oil Co.* (1997) 519 US 337, 136 L Ed 2d 808, 117 S Ct 843.

Employer action constitutes actionable retaliation only if it has a substantial and material adverse effect on the terms and conditions of the plaintiff's employment. *Yanowitz v L'Oreal U.S.A., Inc.* (2005) 36 C4th 1028, 32 CR3d 436; *Akers v County of San Diego* (2002) 95 CA4th 1441, 116 CR2d 602.

One California court recognized a claim for "preemptive retaliation" when the plaintiff-employee had not yet engaged in any protected activity, but the allegedly retaliating managers knew she had grounds for a complaint and knew she was likely to be a witness in another employee's complaint proceedings. *Steele v Youthful Offender Parole Board* (2008) 162 CA4th 1241, 76 CR3d 632.

© The Regents of the University of California

D. Affirmative Defenses to Discrimination Allegations

§4.181 1. Bona Fide Occupational Qualification

Under the bona fide occupational qualification (BFOQ) affirmative defense, the employer must be able to prove a discriminatory practice based on sex, religion, or national origin is justified because all or substantially all of the individuals adversely affected by the practice are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined. *International Union, Auto., Aerospace & Agric. Implement Workers v Johnson Controls, Inc.* (1991) 499 US 187, 113 L Ed 2d 158, 111 S Ct 1196; 42 USC §2000e-2(e)(1); Govt C §12940; 2 Cal Code Regs §7286.7(a).

© The Regents of the University of California

§4.182 2. Business Necessity

In a disparate impact case, under the business necessity affirmative defense, the employer must be able to prove there exists an overriding legitimate business purpose such that the discriminatory practice is necessary to the safe and efficient operation of the business and the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be unlawful, however, if the plaintiff can show there exists an alternative practice that would accomplish the business purpose equally well with a lesser discriminatory impact. See 42 USC §2000e-2(e), (k); *Griggs v Duke Power Co.* (1971) 401 US 424, 28 L Ed 2d 158, 91 S Ct 849. See also 2 Cal Code Regs §7286.7(b).

© The Regents of the University of California

§4.183 3. Job-Relatedness

When the employee has been able to show adverse impact, the employer must be able to show the practice is sufficiently related to an essential function of the job in question to warrant its use. See 42 USC §2000e-2(k)(1)(A)(i); *Albemarle Paper Co. v Moody* (1975) 422 US 405, 45 L Ed 2d 280, 95 S Ct 2362; *Griggs v Duke Power Co.* (1971) 401 US 424, 28 L Ed 2d 158, 91 S Ct 849; 2 Cal Code Regs §7287.4(e).

© The Regents of the University of California

§4.184 4. Conformity With Security Regulations

Discriminatory practices that conform to applicable security regulations established by the United States or the State of California are lawful. See, *e.g.,* 2 Cal Code Regs §7286.7(d).

© The Regents of the University of California

§4.185 5. Non-discrimination Plan or Affirmative Action Plan

Under federal law, discriminatory practice is lawful if it conforms to a bona fide voluntary affirmative action plan, a non-discrimination plan, an order of a state or federal court or administrative agency of proper jurisdiction, or is otherwise required by law. See, *e.g.,* 42 USC §2000e-2(h), (j). But see Cal Const art I, §31(a) (prohibiting discrimination and preferential treatment based on race, sex, color, or national origin). Under California law, state laws requiring "participation goals" or "hiring goals" are unconstitutional under Cal Const art I, §31(a). *Connerly v State Personnel Bd.* (2001) 92 CA4th 16, 112 CR2d 5.

© The Regents of the University of California

§4.186 E. Sexual Harassment

Sexual harassment is a form of discrimination based on sex prohibited by federal and California law. The federal statute generally invoked is Title VII of the Civil Rights Act of 1964. 42 USC §2000e-2(a)(1). See also 29 CFR §1604.11 (federal regulations on sexual harassment). The California statutory prohibition is the Fair Employment and Housing Act (FEHA). Govt C §12940(j). See also 2 Cal Code Regs §§7286.5(f), 7287.6(b), 7291.1(f)(1) (California regulations on sexual harassment).

© The Regents of the University of California

§4.187 1. Definition of Sexual Harassment

Sexual harassment involves:

- Unwelcome sexual advances;
- Requests for sexual favors; or
- Other verbal or physical conduct of a sexual nature.

When:

- Submission to sexual advances or behavior is made either explicitly or implicitly a term or condition of an individual's employment;
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

See 29 CFR §1604.11(a); *Meritor Sav. Bank v Vinson* (1986) 477 US 57, 91 L Ed 2d 49, 106 S Ct 2399. See also *Harris v Forklift Sys., Inc.* (1993) 510 US 17, 126 L Ed 2d 295, 114 S Ct 367; *Ellison v Brady* (9th Cir 1991) 924 F2d 872.

NOTE: Same-sex harassment is actionable under Title VII, which generally prohibits discrimination because of sex that is so objectively offensive as to alter the conditions of the victim's employment. See *Oncale v Sundowner Offshore Servs., Inc.* (1998) 523 US 75, 140 L Ed 2d 201, 118 S Ct 998; *Rene v MGM Grand Hotel, Inc.* (9th Cir 2001) 243 F3d 1206.

California law uses the same basic definition of harassment as federal law. *Fisher v San Pedro Peninsula Hosp.* (1989) 214 CA3d 590, 262 CR 842; *Department of Fair Employment & Hous. v Madera County* (1990) (FEHC Decision No. FEP 84-85; C2-0217se; N-26041; 90-03) 1990 CAFEHC Lexis 11; *Department of Fair Employment & Hous. v Bee Hive Answering Serv.* (1984) (FEHC Decision No. FEP 80-81; A7-1047s; N-18839; 84-16) 1984 CAFEHC Lexis 1 and cases cited therein; 2 Cal Code Regs §§7286.5(f), 7287.6(b), 7291.1(f)(1).

© The Regents of the University of California

§4.188 a. Conduct of a Sexual Nature

The offensive conduct must be directed at the employee because of the employee's gender. Thus, the offensive conduct may be of a nonsexual nature. See*, e.g., Hicks v Gates Rubber Co.* (10th Cir 1987) 833 F2d 1406 (evidence of threats of physical violence and incidents of verbal abuse considered actionable); *Hall v Gus Constr. Co.* (8th Cir 1988) 842 F2d 1010 (co-workers subjected women to epithets and derogatory comments, did things of sexual nature to embarrass women, and showed women pornographic pictures).

© The Regents of the University of California

§4.189 b. Unwelcome Conduct

Conduct is "unwelcome" if the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive. *Moylan v Maries County* (8th Cir 1986) 792 F2d 746. The fact that sex-related conduct is "voluntary," in the sense that the complainant was not forced to participate against his or her will, is not a defense. *Meritor Sav. Bank v Vinson* (1986) 477 US 57, 91 L Ed 2d 49, 106 S Ct 2399. It is not essential that the complainant prove that he or she resisted the advances. *Bundy v Jackson* (DC Cir 1981) 641 F2d 934. A claimant could maintain a sexual harassment claim even if she had frequent sexual relations with her supervisor. *Meritor Sav. Bank v Vinson* (1986) 477 US 57, 91 L Ed 2d 49, 106 S Ct 2399.

© The Regents of the University of California

2. Quid Pro Quo Harassment

§4.190 a. Prima Facie Case

Elements of a prima facie case of quid pro quo harassment are:

- Person was subjected to unwelcome sexual advances;
- Harassment was sexually motivated;
- Person's reaction to supervisor's advances affected tangible aspect of employment; and
- Basis to impose liability on employer exists.

See *Burlington Indus., Inc. v Ellerth* (1998) 524 US 742, 141 L Ed 2d 633, 118 S Ct 2257; *Heyne v Caruso* (9th Cir 1995) 69 F3d 1475; *Henson v City of Dundee* (11th Cir 1982) 682 F2d 897; *Bundy v Jackson* (DC Cir 1981) 641 F2d 934. See also *Mogilefsky v Superior Court* (1993) 20 CA4th 1409, 26 CR2d 116 (claim of same-sex harassment is viable).

NOTE: Under federal law, denial of some tangible employment benefit is an essential element of a quid pro quo case. See, *e.g., Trautvetter v Quick* (7th Cir 1990) 916 F2d 1140. State law claims under the Fair Employment and Housing Act need not show loss of tangible employment benefits. Govt C §12940(h).

© The Regents of the University of California

§4.191 b. Preferential Treatment or Reverse Quid Pro Quo Harassment

When employment opportunities or benefits are granted because an individual submits to the employer's sexual advances or requests for sexual favors, the employer may be liable to other persons who were qualified but denied that employment opportunity or benefit. 29 CFR §1604.11(g); *Miller v Department of Corrections* (2005) 36 C4th 446, 30 CR3d 797. Employment-related favoritism based on coerced sexual conduct may constitute illegal harassment. See, *e.g., Priest v Rotary* (ND Cal 1986) 634 F Supp 571 (finding liability). But see *DeCintio v Westchester County Med. Ctr.* (2d Cir 1986) 807 F2d 304, cert denied (1987) 484 US 825 (no liability).

© The Regents of the University of California

§4.192 c. Equal Employment Opportunity Commission's Position

The Equal Employment Opportunity Commission's position is that not all types of sexual favoritism violate Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17). Isolated instances of favoritism toward a paramour, spouse, or friend may be unfair but do not discriminate against men or women in violation of Title VII, because both are disadvantaged for reasons other than their genders. Equal Employment Opportunity Commission, Policy Guide on Employer Liability for Sexual Favoritism Under Title VII, 8 FEP Manual 405:6817 (January 1990); Equal Employment Opportunity Commission, Compliance Manual, p N5051 (Bureau of National Affairs (BNA).

© The Regents of the University of California

3. Hostile Environment Sexual Harassment

§4.193 a. Federal Law

The unwelcome sexual conduct must have the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 CFR §1604.11(a)(3). Plaintiff need not show economic injury or loss of tangible job benefit (*Meritor Sav. Bank v Vinson* (1986) 477 US 57, 91 L Ed 2d 49, 106 S Ct 2399), or the harassment seriously affected the psychological well-being of the plaintiff (*Harris v Forklift Sys., Inc.* (1993) 510 US 17, 126 L Ed 2d 295, 114 S Ct 367). A single, isolated comment typically does not create a hostile work environment. *Clark County Sch. Dist. v Breeden* (2001) 532 US 268, 149 L Ed 2d 509, 121 S Ct 1508.

© The Regents of the University of California

§4.194 b. California Law

One of the employment benefits protected by the Fair Employment and Housing Act (FEHA) is "a workplace free of harassment." 2 Cal Code Regs §§7286.5(f), 7287.6(b). Hostile or unwelcome sex-linked conduct that deprives its victims of a workplace free of such harassment is a violation of the FEHA whether or not the harassment results in the loss of some more tangible employment benefit. *Fisher v San Pedro Peninsula Hosp.* (1989) 214 CA3d 590, 262 CR 842; *Department of Fair Employment & Hous. v Madera County* (1990) (FEHC Decision No. FEP 84-85; C2-0217se; N-26041; 90-03) 1990 CAFEHC Lexis 11; *Department of Fair Employment & Hous. v Bee Hive Answering Serv.* (1984) (FEHC Decision No. FEP 80-81; A7-1047s; N-18839; 84-16) 1984 CAFEHC Lexis 1 and cases cited therein.

© The Regents of the University of California

§4.195 c. Elements of Hostile Environment Claim

The victim must show:

- He or she was subjected to sexual advances, to requests for sexual favors, or to other verbal or physical conduct of a sexual nature;
- The conduct was unwelcome; and
- The conduct was sufficiently severe or pervasive to alter conditions of employment and to create an abusive working environment.

Ellison v Brady (9th Cir 1991) 924 F2d 872; *EEOC v Hacienda Hotel* (9th Cir 1989) 881 F2d 1504; *Henson v City of Dundee* (11th Cir 1982) 682 F2d 897.

Whether an environment is "hostile" or "abusive" is determined by looking at all of the circumstances surrounding the discriminatory conduct, including *(Harris v Forklift Sys., Inc.* (1993) 510 US 17, 126 L Ed 2d 295, 114 S Ct 367):

- its frequency,
- its severity,
- whether it is physically threatening or humiliating, or a mere offensive utterance, and
- whether it unreasonably interferes with an employee's work performance.

© The Regents of the University of California

d. Standard Applicable to Hostile Environment Claim

§4.196 (1) Reasonable Person Standard

The Supreme Court has held a "reasonable person" standard applies, *i.e.,* that unlawful harassment creates a work environment that a reasonable person would find "hostile or abusive." *Harris v Forklift Sys., Inc.* (1993) 510 US 17, 126 L Ed 2d 295, 114 S Ct 367.

© The Regents of the University of California

§4.197 (2) Reasonable Woman Standard

The Ninth Circuit continues to hold that the "reasonable woman" standard applies, *i.e.,* that in determining whether harassment creates a work environment that a female employee would find hostile, the court must consider what is offensive and hostile to a "reasonable woman." *Steiner v Showboat Operating Co.* (9th Cir 1994) 25 F3d 1459 (citing *Harris v Forklift Sys., Inc.* (1993) 510 US 17, 126 L Ed 2d 295, 114 S Ct 367); *Ellison v Brady* (9th Cir 1991) 924 F2d 872.

© The Regents of the University of California

4. Employer Liability for Sexual Harassment

a. Quid Pro Quo Harassment

§4.198 (1) Federal Law

In quid pro quo cases of supervisor harassment of subordinate employees, the employer is vicariously liable for harassment by its supervisors. *Burlington Indus., Inc. v Ellerth* (1998) 524 US 742, 141 L Ed 2d 633, 118 S Ct 2257. If no tangible adverse employment action is taken, the employer may raise an affirmative defense to liability by proving (*Burlington Indus., Inc. v Ellerth*, *supra*):

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise.

© The Regents of the University of California

§4.199 (2) California Law

California employers are strictly liable under the Fair Employment and Housing Act (FEHA) for sexual harassment by a supervisor. *Department of Health Servs. v Superior Court of Sacramento County (McGinnis)* (2003) 31 C4th 1026, 6 CR3d 441.

PRACTICE TIP: The doctrine of "avoidable consequences" applies to actions under FEHA, meaning that damages can be reduced if the harassed employee has not taken reasonable steps to stop the harassment, but, unlike under federal law (see *Faragher v City of Boca Raton* (1998) 524 US 775, 141 L Ed 2d 662, 118 S Ct 2275, and *Burlington Indus., Inc. v Ellerth* (1998) 524 US 742, 141 L Ed 2d 633, 118 S Ct 2257), the doctrine does not provide a complete defense. *Department of Health Servs. v Superior Court of Sacramento County, supra*. Further, a public employee need not exhaust internal administrative remedies before filing a complaint with the Department of Fair Employment and Housing. *Schifando v City of Los Angeles* (2003) 31 C4th 1074, 6 CR3d 457.

© The Regents of the University of California

b. Hostile Environment Harassment

§4.200 (1) Federal Law

Employer liability for hostile environment harassment committed by a supervisor most often arises when the agency knew or should have known about the harassment and failed to take prompt, remedial action. When an employee is subjected to sexual harassment in which no tangible adverse employment action is taken, the employer may raise an affirmative defense by proving that:

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

See *Faragher v City of Boca Raton* (1998) 524 US 775, 141 L Ed 2d 662, 118 S Ct 2275; *Burlington Indus., Inc. v Ellerth* (1998) 524 US 742, 141 L Ed 2d 633, 118 S Ct 2257.

© The Regents of the University of California

§4.201 (2) California Law

An employer is strictly liable for sexual harassment under the Fair Employment and Housing Act if the harasser is an agent or supervisor. An employer is only liable for harassment of an employee by anyone other than an agent or supervisor if the employer knew or should have known about the conduct and failed to take immediate and appropriate corrective action. Govt C §12940(j)(1); *Kelly-Zurian v Wohl Shoe Co.* (1994) 22 CA4th 397, 27 CR2d 457.

© The Regents of the University of California

§4.202 c. Co-employee Conduct

An employer is liable for harassment by co-employees when the employer (or its agents or supervisors) knows or should have known of this conduct and fails to take immediate and appropriate corrective action. Govt C §12940(j)(1). Both federal and California law apply the same standard for employer's liability for co-employee harassment. See Govt C §12940(j)(i); 2 Cal Code Regs §7287.6(b)(3); *Department of Fair Employment & Hous. v Madera County* (1990) (FEHC Decision No. FEP 84-85; C2-0217se; N-26041; 90-03) 1990 CAFEHC Lexis 11; 29 CFR §1604.11(d); *Hall v Gus Constr. Co.* (8th Cir 1988) 842 F2d 1010 (employer liable for co-worker harassment when employer knew of such harassment but did little to stop it); *Barrett v Omaha Nat'l Bank* (8th Cir 1984) 726 F2d 424 (finding harassment by co-worker took place but employer took prompt remedial steps resulting in no liability).

© The Regents of the University of California

§4.203 d. Non-employee Conduct

An employer is liable for harassment by non-employees (including independent contractors) when the employer (or its agents or supervisors) knows or should have known of harassment and fails to take immediate and appropriate corrective action. Govt C §12940(j); 29 CFR §1604.11(e); *Folkerson v Circus Circus Enters., Inc.* (9th Cir 1997) 107 F3d 754; Equal Employment Opportunity Commission, Decision No. 84-3, 34 FEP 1887 (February 16, 1984) (employer liable when waitress subjected to sexual harassment by male customers and failed to take corrective action); *People v Hamilton* (Sup Ct 1986) 511 NYS2d 190 (during pre-employment polygraph administered by independent contractor, examiner fondled female applicants and asked them non—job-related questions about their sexual experiences). See *Bradley v Department of Corrections & Rehabilitation* (2008) 158 CA4th 1612, 71 CR3d 222.

© The Regents of the University of California

5. Individual Liability for Sexual Harassment

§4.204 a. Federal Law

Individual supervisors are not liable for monetary damages under Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17) or the Age Discrimination in Employment Act (ADEA) (29 USC §§621-663). *Miller v Maxwell's Int'l, Inc.* (9th Cir 1993) 991 F2d 583; *Sattar v Unocal Corp.* (ND Cal 1993) 829 F Supp 331. However, individual supervisors may be subject to injunctive orders under Title VII. *Sattar v Unocal Corp., supra*.

© The Regents of the University of California

§4.205 b. California Law

All employees are personally liable for engaging in unlawful harassment, but not for discrimination that does not involve harassment. Govt C §12940(j)(3); *Reno v Baird* (1998) 18 C4th 640, 76 CR2d 499; *Janken v GM Hughes Electronics* (1996) 46 CA4th 55, 53 CR2d 741. A non-harassing second tier supervisor who fails to act on an employee's sexual harassment complaint cannot be held personally liable as an aider and abettor for failing to prevent the harassment. *Fiol v Doellstedt* (1996) 50 CA4th 1318, 58 CR2d 308. Further, although the employer is liable for retaliation, individual employees are not. *Jones v The Lodge at Torrey Pines Partnership* (2008) 42 C4th 1158, 72 CR3d 624.

© The Regents of the University of California

6. Sexual Harassment Prevention and Policies

§4.206 a. Preventing Sexual Harassment

An employer should take all steps necessary to prevent sexual harassment from occurring, including, but not limited to:

- Affirmatively raising the subject;
- Expressing strong disapproval;
- Ensuring that all supervisory employees receive mandatory training on harassment and discrimination, in accordance with Govt C §12950.1;
- Establishing, disseminating, and implementing an effective anti-harassment policy;
- Informing all employees of policy and procedure for bringing their complaints of alleged harassment;
- Developing methods to sensitize all concerned, including training of employees;
- Fairly, thoroughly, and promptly investigating complaints;
- Taking prompt action reasonably calculated to end harassment and prevent it from recurring; and
- Developing appropriate sanctions.

See *Ellison v Brady* (9th Cir 1991) 924 F2d 872; 29 CFR §1604.11(f). On investigating and responding to sexual harassment, see §4.208.

© The Regents of the University of California

§4.207 b. Creating Effective Sexual Harassment Policy

An employer should do the following to create an effective sexual harassment policy:

- Put the policy in writing.
- Have the policy state that
- Sexual harassment in any form will not be tolerated;
- The employer will investigate alleged violations; and
- The employer will take prompt appropriate action as a result of such investigation and offenders will be subject to discipline up to and including discharge.
- Define sexual harassment and include clear examples.
- Require employees and supervisors to report incidents they experience or witness without fear of reprisal.
- Include effective complaint and investigation procedures, including procedures that allow employees to bypass supervisors who they believe may be a perpetrator and allow complaints to be filed with an individual outside the chain of command.
- Refer to the complaint processes of the Department of Fair Employment and Housing and the Equal Employment Opportunity Commission and provide information about how to contact the local offices of these agencies.
- Distribute the policy to all employees at the commencement of employment relationship, and retain evidence that the policy has been distributed (redistribute policy with paychecks at least twice each year thereafter).

See Govt C §§12940(j), 12950; 29 CFR §1604.11(f); *Ellison v Brady* (9th Cir 1991) 924 F2d 872.

© The Regents of the University of California

§4.208 7. Investigating and Responding to Sexual Harassment

The employer must conduct a prompt, objective, and thorough investigation. See *Swenson v Potter* (9th Cir 2001) 271 F3d 1184. When an employee makes an allegation or complaint of harassment, the employer should remind all employees of the anti-harassment policy and the seriousness of sexual harassment. The employer must require supervisory employees to attend periodic mandatory sexual harassment training. See Govt C §12950.1; 2 Cal Code Regs §7288.0.

PRACTICE TIP: In conducting an investigation, consider the following steps and factors:

(1) Choose an appropriate investigating team. To ensure neutrality, consider including an outside trained investigator. Remember that even if an attorney investigator is used, the attorney-client privilege and work product doctrine might not apply if the sufficiency of the investigation is challenged or if the employer relies on the investigation as a defense. See *Kaiser Found. Hosps. v Superior Court* (1998) 66 CA4th 1217, 78 CR2d 543.

(2) Review all relevant documents.

(3) Interview the alleged victim, alleged harasser, co-workers, supervisors, and others identified by both the alleged victim and alleged harasser as likely to have relevant information.

(4) If applicable, protect the attorney-client and work product privileges.

(5) Bear in mind that the employer has a duty to investigate allegations of harassment even if the harassment has stopped. *Fuller v City of Oakland* (9th Cir 1995) 47 F3d 1522.

If, after the investigation, the employer determines that harassment has occurred, it should sanction the harasser with some form of disciplinary action, in accordance with the disciplinary guidelines, and advise the complainant that it has taken appropriate action. The action taken must be reasonably calculated to end the harassment. *Intlekofer v Turnage* (9th Cir 1992) 973 F2d 773; *Ellison v Brady* (9th Cir 1991) 924 F2d 872. The effectiveness of the employer's action is measured by the "twin purposes of ending the current harassment and deterring future harassment by the same offender or others." *Fuller v City of Oakland* (9th Cir 1995) 47 F3d 1522 (citing *Ellison v Brady, supra*). See also *Cotran v Rollins Hudig Hall Int'l, Inc.* (1998) 17 C4th 93, 69 CR2d 900 (employer sued for alleged wrongful discharge of employee charged with sexual harassment does not need to prove misconduct actually occurred, but only that it acted in good faith after appropriate investigation and there were reasonable grounds for action).

If the investigation is inconclusive, the employer should so advise the parties and reaffirm the employer's anti-harassment policy by posting the policy, redistributing an updated policy, issuing a generalized warning/reminder for all employees to refrain from engaging in any retaliatory action against the complaining employee, and providing additional training on sexual harassment.

© The Regents of the University of California

§4.209 8. Defamation Claim by Alleged Harasser

The investigation and related discipline of an alleged harasser may raise defamation issues; a false complaint of sexual harassment could lead to a defamation suit. See *EEOC v Levi Strauss & Co.* (ND Ill 1981) 515 F Supp 640. However, there is a qualified privilege for:

- Statements made during investigations by investigators and witnesses who make defamatory statements in good faith and for a proper purpose to one who has a legitimate interest to receive the information. CC §47(4)(c); *DiSilva v Polaroid Corp.* (D Mass 1985) 45 FEP Cases 639.
- Employers for publicizing the fact that it has enforced its policy against sexual harassment, without disclosing specific charges against an employee. *Garziano v E.I. du Pont de Nemours & Co.* (5th Cir 1987) 818 F2d 380.

A qualified privilege may be lost by statements beyond the scope of the investigation, or to persons who have no need to know about the sexual harassment claim. *Stockley v AT&T Info. Sys., Inc.* (ED NY 1988) 687 F Supp 764.

© The Regents of the University of California

§4.210 9. Other Theories of Liability Arising Out of Sexual Harassment

The following are other theories of liability arising out of sexual harassment:

- Breach of public policy (*Rojo v Kliger* (1990) 52 C3d 65, 276 CR 130);
- Assault and battery;
- Infliction of emotional distress;
- Invasion of privacy;
- Defamation (see §4.209);
- False imprisonment;
- Constitutional violations giving rise to actions under 42 USC §1983 (*Bohen v City of E. Chicago* (7th Cir 1986) 799 F2d 1180); and

NOTE: Employee has the right to be free from sexual harassment under the equal protection clause of the Fourteenth Amendment to the United States Constitution. Sexual harassment constitutes sexual discrimination for equal protection purposes and is a violation of §1983. But see *Woodward v City of Worland* (10th Cir 1992) 977 F2d 1392 (employer only liable for violation of equal protection clause if supervisors acted "under color of state law").

- Liability under federal Title IX of the Education Amendments of 1972 (20 USC §§1681-1688) for recipients of Title IX funding (*e.g.,* school boards) for student-on-student sexual harassment if the funding recipient acted with deliberate indifference to known acts of harassment, the harasser was under the school's disciplinary authority, and the harassment was sufficiently severe and pervasive to interfere with educational opportunities (*Davis v Monroe County Bd. of Educ.* (1999) 526 US 629, 143 L Ed 2d 839, 119 S Ct 1661).

© The Regents of the University of California

§4.211 10. Posting and Pamphlet Requirement

State law requires employers to post a poster developed by the Department of Fair Employment and Housing and distribute specified kinds of information to each employee about sexual harassment. See Govt C §12950.

© The Regents of the University of California

§4.212 11. Mandatory Training

All California employers with 50 or more employees or contractors must provide at least 2 hours of sexual harassment training to all supervisory employees who have not received such training every 2 years. All newly hired supervisors (including persons newly promoted to supervisor) are required to attend 2 hours of sexual harassment training within 6 months of their hiring or promotion. Govt C §12950.1.

© The Regents of the University of California

§4.213 F. Selection and Hiring Practices

The non-discrimination laws affect the criteria that employers may use to recruit and select individuals for employment, training, promotion, and other employment opportunities. See 2 Cal Code Regs §§7287.1-7287.6; 29 CFR pt 1607.

© The Regents of the University of California

§4.214 1. Testing

The Equal Employment Opportunity Commission (EEOC) has adopted uniform guidelines on employee selection procedures, published at 29 CFR pt 1607. These deal in great detail with testing of applicants and employees.

PRACTICE TIP: In general, it is dangerous for employers to use tests that are not developed by a professional and have not been validated under one or more of the criteria established in the EEOC guidelines.

© The Regents of the University of California

§4.215 2. Performance Standards

The Equal Employment Opportunity Commission (EEOC) has also published guidance on enforcing performance standards under the ADA (42 USC §§12101-12213): EEOC, The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities (2008).

The EEOC has also updated the section in its compliance manual on religious discrimination: EEOC, Compliance Manual, §12 (Religious Discrimination).

Both of these publications are available on the EEOC's website at www.eeoc.gov.

© The Regents of the University of California

§4.216 3. Pre-employment Inquiries

Both the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing have ruled certain inquiries are unlawful because they can directly or indirectly identify an individual's protected status.

An employer may make a medical or psychological inquiry of a job applicant only if (Govt C §12940(e)):

- a conditional job offer has been made, and
- the inquiry is consistent with business necessity and is job-related.

See, *e.g.,* 29 CFR §1630.13 (questions regarding disabilities); 2 Cal Code Regs §7287.3(b). But see 29 CFR §§1604.7 (permitting good faith inquiry into gender and marital status), 1605.3 (permitting questions about religion if no exclusionary effect, or if supported by business necessity), 1625.5 (questions about age permissible but closely scrutinized for discriminatory intent).

Federal and state fair credit and reporting act requirements must be adhered to when an employer obtains background information regarding a job applicant or an employee in the form of a "consumer report" or "investigative consumer report" from a third party "consumer reporting agency." 15 USC §§1681-1681x; CC §§1785.1-1785.22.

© The Regents of the University of California

§4.217 4. Job Requirements

Job requirements may not be used as a subterfuge for discrimination. Thus, they must be (*Roth v Rhodes* (1994) 25 CA4th 530, 538, 30 CR2d 706)

- uniformly applied for all similarly situated individuals, and
- defensible as sufficiently job-related to an essential function of the job.

See also *Davis v Indiana State Police* (7th Cir 2008) 541 F3d 760, 761.

© The Regents of the University of California

§4.218 5. Loyalty Oaths

The loyalty oath found in the California Constitution cannot be required of applicants for public agency jobs if swearing allegiance would violate the applicants' religious beliefs. *Bessard v California Community Colleges* (ED Cal 1994) 867 F Supp 1454.

© The Regents of the University of California

G. Constructive Discharge

§4.219 1. Federal Law

Under federal law, an employee is constructively discharged when, looking at the totality of circumstances, a reasonable person in the employee's position would have felt he or she was forced to quit because of intolerable and discriminatory working conditions. See *Steele v Offshore Shipbuilding, Inc.* (11th Cir 1989) 867 F2d 1311; *Watson v Nationwide Ins. Co.* (9th Cir 1987) 823 F2d 360.

© The Regents of the University of California

§4.220 2. California Law

Under California law on constructive discharge, an employee must show that the employer had either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. *Turner v Anheuser-Busch, Inc.* (1994) 7 C4th 1238, 32 CR2d 223; *Gibson v Aro Corp.* (1995) 32 CA4th 1628, 38 CR2d 882.

© The Regents of the University of California

§4.221 H. Discrimination Based on Disability

Laws prohibiting discrimination based on disability include the ADA (42 USC §§12101-12213), the Rehabilitation Act of 1973 (29 USC §§701-796*l*), and California's Fair Employment and Housing Act (FEHA) (Govt C §§12926(i)(1), (k)(1), 12926.1(a) (applying to California employers with five or more employees and prohibiting discrimination in employment to broader extent than ADA).

Title I of the ADA generally provides that no covered entity may discriminate against a qualified individual with a disability because of such disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 USC §12112. The effective date for Title I of the ADA was July 26, 1992, and it does not apply retroactively. *Chiari v City of League City* (5th Cir 1991) 920 F2d 311; *Barraclough v ADP Automotive Claims Servs., Inc.* (ND Cal 1993) 818 F Supp 1310. Local government agencies are covered by the ADA's employment provisions.

Title II of the ADA prohibits local governmental agencies from excluding qualified individuals from participating in or receiving the benefits of the entity's services, programs, or activities on the basis of a disability. 42 USC §12132. The regulations prohibit discrimination on the basis of disability in employment under any service, program, or activity conducted by a public entity. 28 CFR §35.140 (arguably protecting disabled individuals applying for or participating in volunteer activities with cities, such as volunteer fire and police programs).

NOTE: The ADA supplements, but does not supersede, the Rehabilitation Act.

© The Regents of the University of California

§4.222 1. Qualified Individual With a Disability

A qualified individual with a disability means an individual with a disability who (42 USC §12111; 29 CFR §1630.2(m)):

- Satisfies the requisite skill, experience, education, and other job-related requirements of the position, and
- With or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

© The Regents of the University of California

§4.223 a. Definition of Disability

The term "disability," with respect to an individual, means (42 USC §12102; 29 CFR §1630.2(h), (k)):

- A physical or mental impairment that substantially limits one or more of the major life activities;
- A record of such impairment; or
- Being regarded as having such impairment.

The determination of whether an impairment substantially limits a major life activity must be made without regard to ameliorative effects of mitigating measures such as medication, prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy, assistive technology, reasonable accommodations or auxiliary aids or services, or learned behavioral or adaptive neurological modifications. 42 USC §12102.

NOTE: The definition of "disability" under California's Fair Employment and Housing Act (FEHA) differs from the ADA definition in that under FEHA, a disability need only "limit" a major life activity by making the achievement of that major life activity more difficult. Govt C §§12926(i)(1)(A)-(B), 12926(k)(1)(B)(i), 12926.1(c); *Colmenares v Braemar Country Club, Inc.* (2003) 29 C4th 1019, 130 CR2d 662 (FEHA provides broader coverage than federal law by defining disability as one that "limits" rather than "substantially limits" one or more major life activities).

© The Regents of the University of California

§4.224 b. Individuals Who Are Not Disabled

Exceptions to the definitions of "disability" and "individuals with a disability" are as follows (42 USC §§12114(a), 12210(a), 12211; 29 CFR §1630.3(a), (d)):

- Persons currently engaged in the illegal use of drugs, except persons who (42 USC §§12114(b), 12210(b); 29 CFR §1630.3(b)):
- are currently enrolled in a drug rehabilitation program and no longer engaged in such use;
- have successfully completed a drug rehabilitation program and are no longer engaging in the use of illegal drugs;
- have otherwise been rehabilitated; or
- are erroneously regarded as engaging in such use.

NOTE: In California, there is no duty to reasonably accommodate the use of medical marijuana for the treatment of a disability. *Ross v RagingWire Telecommunications, Inc.* (2008) 42 C4th 920, 70 CR3d 382.

- Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.
- Compulsive gambling, kleptomania, or pyromania.
- Psychoactive substance use disorders resulting from the current illegal use of drugs.
- Homosexuality and bisexuality.

NOTE: California's FEHA and the ADA both require that an individual be assessed for a disability without regard to corrective measures. Govt C §12926(i)(A), (k)(B)(i); 42 USC §12102. The ADA provides an exception for ordinary eyeglasses or contact lenses. 42 USC §12102.

© The Regents of the University of California

§4.225 c. Essential Functions

The essential functions are the fundamental job duties of the position applied for or currently held, but not the marginal functions of that position. 29 CFR §1630.2(n)(1). A function may be essential because (29 CFR §1630.2(n)(1)-(2)):

- The reason the position exists is to perform that function;
- A limited number of employees are available to whom the function can be distributed; and/or
- The function is highly specialized or unique.

© The Regents of the University of California

§4.226 d. Obesity Is Not Disability Per Se

Under the ADA (42 USC §§12101-12213), Rehabilitation Act of 1973 (29 USC §§701-796*l*), and California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996), being overweight is not a disability per se. An overweight condition qualifies as a disability if it results from a physiological disorder affecting the body's systems. See, *e.g., Cassista v Community Foods, Inc.* (1993) 5 C4th 1050, 22 CR2d 287 (FEHA); *Tudyman v United Airlines* (CD Cal 1984) 608 F Supp 739 (weight due to voluntary bodybuilding not disability under Rehabilitation Act). See also 29 CFR pt 1630, App §1630.2(h) (weight that is not result of physiological disorder is not disability under ADA); Govt C §12926.1(d).

© The Regents of the University of California

§4.227 2. Types of Discrimination Prohibited

Qualified employees with a disability must be treated the same as qualified non-disabled employees in all terms, conditions, and privileges of employment, including (29 CFR §1630.4):

- Recruiting, advertising, and job application procedures;
- Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- Rates of pay or any other form of compensation and changes in compensation;
- Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- Leaves of absence, sick leave, or any other leave;
- Fringe benefits available by virtue of employment, whether or not administered by the covered entity, including insurance;
- Selection and financial support for training;
- Activities sponsored by the covered entity, including social and recreational programs; and
- Any other term, condition, or privilege of employment.

Employers are also prohibited from engaging in the following (29 CFR §§1630.4-1630.12):

- Participating in any contractual or other relationship with an employment or referral agency, labor union, organization providing fringe benefits, training or apprenticeship programs, that subject qualified employees or applicants to discrimination based on disability;
- Devising standards, criteria, or other methods of administration that have the effect of discrimination based on disability;
- Excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
- Not making reasonable accommodations to the known physical or mental limitations of any otherwise qualified individual with a disability who is an applicant or employee unless the employer can demonstrate undue hardship for such accommodations;
- Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need to make reasonable accommodations to the employee/applicant;
- Using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or class of individuals with a disability unless the standard, test, or other selection criteria is job-related and consistent with business necessity; and
- Retaliating against, coercing, interfering with, or intimidating an individual for opposing any act or practice made unlawful by the ADA.

© The Regents of the University of California

§4.228 3. Reasonable Accommodation

The ADA requires an employer to make reasonable accommodations to a qualified individual with a disability.

NOTE: An employer is required to provide reasonable accommodation only to the "physical or mental limitations" from disability that are *known* to the employer. 42 USC §12112(b)(5)(A).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/4 Personnel/§4.229 a. Definition of 'Reasonable Accommodation'

§4.229 a. Definition of "Reasonable Accommodation"

The EEOC regulations broadly define "reasonable accommodation" as follows (29 CFR §1630.2(o)(1)):

- Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position;
- Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable the qualified individual with a disability to perform the essential functions; or
- Modifications or adjustments that enable a disabled employee to enjoy equal benefits and privileges of employment.

© The Regents of the University of California

§4.230 b. Best Available Accommodation Not Required

When more than one accommodation will provide the disabled individual with an equal employment opportunity, the employer may choose between these reasonable accommodations. The employer may make this decision based on which accommodation is less expensive or more readily available.

The disabled individual may elect to provide his or her own accommodation. This does not relieve the employer of its duty to accommodate, should the individual later be unable or unwilling to continue providing the accommodation. 29 CFR §1630, App.

© The Regents of the University of California

§4.231 c. Examples of Reasonable Accommodations

Examples of reasonable accommodations include (29 CFR §1630.2(o)(2)):

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- Job restructuring;
- Part-time or modified work schedules;
- Leaves of absence (*Hansen v Lucky Stores, Inc.* (1999) 74 CA4th 215, 226, 87 CR3d 487);
- Reassignment to a vacant position;
- Acquisition or modifications of equipment or devices;
- Appropriate adjustment or modifications of examinations, training materials, or policies;
- The provision of qualified readers or interpreters; and
- Other similar accommodations for individuals with disabilities.

NOTE: The Fair Employment and Housing Act (Govt C §§12900-12996) also requires that the employer make known to the employee other suitable job opportunities to determine whether the employee is interested in or qualified for those positions. *Prilliman v United Air Lines, Inc.* (1997) 53 CA4th 935, 62 CR2d 142.

© The Regents of the University of California

§4.232 4. Interactive Process

The ADA requires the employer to engage in an interactive process with qualified individuals with a disability to assess reasonable accommodations. 42 USC §12112(b)(5)(A); 29 CFR §1630.2(o)(3). The FEHA also requires employers to engage in a timely, good faith, interactive process to determine effective reasonable accommodations. Govt C §12940(n).

© The Regents of the University of California

§4.233 5. Employer Defenses to Disability Discrimination Claims

Defenses against charges of discrimination may include the following:

- **Legitimate, nondiscriminatory reason** justifies challenged action (29 CFR §1630.15(a));
- **Job-related and consistent with business necessity** criteria screened out a person with a disability, and performance cannot be accomplished with reasonable accommodation (29 CFR §1630.15(b)-(e)).
- **Direct threat**, *i.e.,* a significant risk of substantial harm to the health and safety of others is posed by disabled individual and cannot be eliminated or reduced by a reasonable accommodation (42 USC §12111(3); 29 CFR §1630.2(r); *Chevron U.S.A. Inc. v Echazabal* (2002) 536 US 73, 153 L Ed 2d 82, 122 S Ct 2045).

NOTE: The FEHA differs from the ADA in that the FEHA allows the employer to refuse to hire or to discharge an individual who cannot perform essential duties in a manner that would not endanger the health or safety of the individual or of others. Govt C §12940(a)(1).

- **Undue hardship** on the covered entity would be posed by the reasonable accommodation (42 USC §12112(b)(5)(A); 29 CFR §1630.15(d)).

PRACTICE TIP: "Undue hardship" means an accommodation would be unduly costly, expensive, substantial, or disruptive; or it would fundamentally alter the nature or operation of the business. 29 CFR §1630.2(p). In determining whether an accommodation would impose an "undue hardship" consider (42 USC §12111(10)(B); 29 CFR §1630.2(p)(2))

(1) the nature and net cost of the accommodation;

(2) the overall financial resources of the facility(ies) involved in providing the accommodation, the number of employees at such facility, and the effect on expenses and resources;

(3) the overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type, and location of its facilities;

(4) the type of operation(s) of the covered entity, including the composition, structure, and functions of its workforce, and the geographic separateness and administrative or fiscal relationship of the facility(ies) in question to the covered entity; and

(5) the impact of the accommodation on the operation of the facility, including on the ability of other employees to perform their duties and the facility's ability to conduct business.

- **Other federal law or regulation** requires, necessitates, or prohibits an action that would otherwise be required by the ADA. 29 CFR §1630.15(e). See 29 CFR §1630.15.

© The Regents of the University of California

6. Pre- and Post-employment Inquiries and Medical Examinations

§4.234 a. Pre-offer Medical Examination and Inquiry

A covered entity cannot conduct a pre-offer medical examination, or make pre-job offer inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability. 42 USC §12112(d)(2)(A); 29 CFR §1630.13.

However, an employer may make pre-employment offer inquiries into the ability of an applicant to perform job-related functions or whether the applicant will require any reasonable accommodation to take the test for the position. 42 USC §12112(d)(2)(B); 29 CFR §1630.14(a).

© The Regents of the University of California

§4.235 b. Post-offer Examination and Inquiry

An employer may require a post-offer medical examination of the applicant only

- after an offer of employment is made, and
- if the same examination is required of all persons considered for the position.

The offer of employment can be contingent on the successful completion of the medical examination. 42 USC §12112(d)(3); 29 CFR §1630.14(c).

The FEHA differs from the ADA in that the FEHA allows a post-offer examination to be given only if the examination is (Govt C §12940(e)(3)):

- job-related,
- consistent with business necessity, and
- given to all entering employees in the same job classification.

© The Regents of the University of California

§4.236 c. Post-employment Exam and Inquiries

An employer cannot require a medical examination or make inquiries of an employee regarding disabilities unless the examination or inquiry is job-related and consistent with business necessity. 42 USC §12112(d)(4)(A); 29 CFR §1630.14(c). See also *Yin v State* (9th Cir 1996) 95 F3d 864 (health problems must have had "substantial and injurious impact on an employee's job performance" before employer can require examination). The FEHA is consistent with the ADA in this regard. Govt C §12940(f)(2).

© The Regents of the University of California

§4.237 7. Restrictions on Drug and Alcohol Use

The ADA generally permits employers to (42 USC §12114(c)):

- Prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
- Prohibit employees from possessing alcohol or illegal drugs in the workplace;
- Require employees to conform to the Drug Free Workplace Act of 1988 (41 USC §§701-707); and
- Hold an employee who is an alcoholic or an individual currently engaging in the illegal use of drugs to the same qualification standards as other employees, even if the employee's unsatisfactory behavior or performance is related to the employee's drug use or alcoholism.

© The Regents of the University of California

§4.238 8. Drug Testing

The ADA does not preclude drug testing for employees. The ADA neither encourages, authorizes, nor prohibits drug tests, and the results of drug tests may be used for disciplinary action. 29 CFR §1630.16(c). However, federal and California constitutions may restrict drug testing of employees and applicants. See §4.19.

© The Regents of the University of California

§4.239 9. Effect of Other Disability Laws

In addition to the ADA, most public employers are subject to other "disability" discrimination laws at the federal, state, and local level. In California, for example, employers must comply with the FEHA, which prohibits discrimination on the basis of physical or mental disability, medical condition, and genetic testing. Govt C §12940.

NOTE: The ADA does not supersede state, county, or local laws, regulations, or ordinances that provide greater or equal protection for the rights of individuals with disabilities. However, if the state or local law is inconsistent with ADA obligations, the employer cannot rely on that law or regulation to defend its actions. 42 USC §12201(b); 29 CFR §1630.15(e).

PRACTICE TIP: A possible defense to a charge of discrimination under the ADA is a challenged action is required or necessitated by another federal law or regulation or another federal law or regulation prohibits an action that would be required by the ADA. 29 CFR §1630.15(e). See §4.233.

© The Regents of the University of California

§4.240 10. Exhaustion of Administrative Remedies

In its committee report, Congress expressed its intent the ADA not require exhaustion of administrative remedies before a civil action may be brought. See, *e.g., J.L. v Social Security Admin.* (9th Cir 1992) 971 F2d 260 (federal law).

Similarly, a public employee need not exhaust internal administrative remedies before filing a complaint for disability discrimination under FEHA. *Schifando v City of Los Angeles* (2003) 31 C4th 1074, 6 CR3d 457.

© The Regents of the University of California

§4.241 11. Effect of ADA on Equal Protection Analysis

The ADA states that disabled individuals "are a discreet and insular minority," historically faced with restrictions, limitations, and political powerlessness. 42 USC §12101(a)(7). This suggests, for equal protection purposes, disabled individuals are members of a protected class. However, the only court that has thus far addressed the question stated in dicta that the ADA does "not purport to alter the standard for equal protection claims." *More v Farrier* (8th Cir 1993) 984 F2d 269. The Supreme Court declined to address the question in *Heller v Doe* (1993) 509 US 312, 125 L Ed 2d 257, 113 S Ct 2637.

© The Regents of the University of California

I. Procedures for Enforcing Discrimination Laws

§4.242 1. Title VII and Title I of the ADA

The Equal Employment Opportunity Commission (EEOC) is the major federal agency that enforces the federal nondiscrimination laws. Enforcement procedures begin with the filing of a charge with the EEOC.

© The Regents of the University of California

§4.243 a. The Charge

A charge may be filed with the Equal Employment Opportunity Commission (EEOC) by any of the following:

- The EEOC itself,
- Any person claiming to be aggrieved, or
- Any person on behalf of an aggrieved person.

The charge must be in writing and under oath or affirmation. Once the EEOC receives a charge, notice is to be served on the employer within 10 days. 42 USC §§2000e-5—2000e-6; 29 CFR §1601.7. However, the EEOC's failure to serve the employer with notice may not be fatal to the employee's claim. *Federal Express Corp. v Holowecki* (2008) 552 US 389, 170 L Ed 2d 10, 128 S Ct 1147.

© The Regents of the University of California

§4.244 b. Timeliness

In general, employee claims accrue on awareness of the actual injury. *Lukovsky v City & County of San Francisco* (9th Cir 2008) 535 F3d 1044, cert denied sub nom *Zolotarev v City & County of San Francisco* (2009) ___US ___, 173 L Ed 2d 1086, 129 S Ct 1997. A charge alleging a violation of Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17) must be filed with the EEOC within 180 days after the occurrence in question. This time limit is extended in a "deferral agency" state, such as California. In California, the charge must first be filed with the Department of Fair Employment and Housing. The charge may thereafter be filed with the EEOC within 300 days of the occurrence of the incident, or within 30 days of receiving notice the deferral agency has terminated proceedings, whichever is earlier. However, the filing period may be "tolled" or suspended for reasons of fairness. See, *e.g., McDonald v. Antelope Valley Community College Dist.* (2008) 45 C4th 88, 84 CR3d 734. In addition, a seemingly untimely charge may be allowed to proceed if the employer has committed "continuing violations" of Title VII. 42 USC §2000e-5; 29 CFR §1601.13. For example, the 180-day statute of limitations for filing an equal-pay-based discrimination lawsuit resets with each new discriminatory paycheck. See, *e.g.,* 42 USC §2000e-5 and §2000e-16 (Lilly Ledbetter Fair Pay Act of 2009 (Pub L 111-2, 123 Stat 5)).

© The Regents of the University of California

§4.245 c. Investigation of Charge

The Equal Employment Opportunity Commission (EEOC) has very broad powers to investigate charges of discrimination. The investigation must be completed, as far as practicable, within 120 days from the time the charge is filed.

The EEOC will notify the employer a charge has been filed and will usually request a written response and pertinent information. It may issue subpoenas, conduct fact-finding conferences, and interview the parties and witnesses. During its investigation, the EEOC will typically explore settlement possibilities. 42 USC §§2000e-5, 2000e-9; 29 CFR §§1601.15-1601.16.

© The Regents of the University of California

d. EEOC Determination

§4.246 (1) Right to Sue Notice

The Equal Employment Opportunity Commission (EEOC) will issue a right to sue notice at the request of the charging party after the expiration of 180 days from the filing of the charge or before expiration of the 180 days if the agency determines it cannot process the charge within that period. It will also issue such a right to sue notice when (29 CFR §1601.28(b)):

- It has determined there is no reasonable cause to believe unlawful discrimination has occurred;
- It has found reasonable cause but has decided not to pursue a civil action itself; or
- There is a conciliation agreement, if the charging party is not a party to that agreement.

This notice states that the EEOC has terminated its process and decided not to bring suit on the plaintiff's behalf, but allows the charging parties to pursue a civil lawsuit on their own.

© The Regents of the University of California

§4.247 (2) Reasonable Cause

If the Equal Employment Opportunity Commission (EEOC) determines, based on its investigation, that there is no reasonable cause to believe that unlawful discrimination has occurred, it will make a "no cause" determination and dismiss the charge. 42 USC §2000e-5(a). This finding does not preclude the charging party from pursuing a civil action on its own, nor is it binding in a civil action, although the court in its discretion may allow evidence of the EEOC's determination to be admitted into evidence. 29 CFR §§1601.19, 1601.21; *Grimm v Westinghouse Elec. Corp.* (ND Cal 1969) 300 F Supp 984.

If the EEOC finds reasonable cause, it will try to conciliate the parties and reach an agreement to end the discriminatory practice and provide a remedy. Once an agreement is reached, the case will be closed and neither party may file suit based on the same facts. 29 CFR §1601.24.

© The Regents of the University of California

§4.248 e. Civil Lawsuit

State and federal courts share jurisdiction over Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17) lawsuits. *Yellow Freight Sys., Inc. v Donnelly* (1990) 494 US 820, 108 L Ed 2d 834, 110 S Ct 1566. They also share jurisdiction over Age Discrimination in Employment Act of 1967 (ADEA) (29 USC §§621-634) lawsuits. See §4.249; *Chapman v Detroit* (6th Cir 1986) 808 F2d 459.

Once an aggrieved private party receives a "right to sue" notice from the EEOC (see §4.246), the party has 90 days to bring a private civil lawsuit against the defendant named in the charge. 42 USC §2000e-5(f); 29 CFR §1601.28. The time limit is longer (1 year) in California for claims based on FEHA. Govt C §12965(b).

© The Regents of the University of California

§4.249 2. Age Discrimination in Employment Act

The Equal Employment Opportunity Commission (EEOC) also enforces the Age Discrimination in Employment Act of 1967 (ADEA) (29 USC §§621-634), and the procedures under the ADEA are similar to those under Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17) after the amendments made by the 1991 Civil Rights Act. See §§4.242-4.248. There are, however, these differences:

- The ADEA does not require the aggrieved individual to obtain a right to sue notice before initiating litigation. An individual filing an ADEA charge may file suit within 60 days after filing an EEOC charge regardless of whether he or she has received a right to sue notice. 29 CFR §1626.18; *Bak v Postal Serv.* (9th Cir 1995) 52 F3d 241.
- As with Title VII and the ADA, an aggrieved employee must first file a charge with the EEOC within 180 days of the discriminatory act, or within 300 days if there is a deferral state statute. After the charge is filed, EEOC must be given 60 days in which to investigate before bringing a court action. ADEA complainants then have 90 days in which to file suit after receipt of the EEOC right to sue notice. 29 USC §626(d)-(e).
- Settlement of ADEA claims must comply with the special requirements of the Older Workers Benefit Protection Act (29 USC §626(f)). See *Oubre v Entergy Operations, Inc.* (1998) 522 US 422, 139 L Ed 2d 849, 118 S Ct 838.

© The Regents of the University of California

§4.250 3. Equal Pay Act

Generally the same provisions applicable to Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17) apply to the Equal Pay Act of 1963 (29 USC §206(d)); however, individuals with Equal Pay Act claims may file suit directly in court without first filing a charge with EEOC. 29 USC §216(b). Consequently, the time limit to file a civil lawsuit is different. Suits must be commenced within 2 years after the cause of action accrued for non-willful violations and within 3 years after the cause of action accrued for willful violations. These provisions are contained in the Portal-to-Portal Act, a provision of the Fair Labor Standards Act of which the Equal Pay Act is a part. 29 USC §255(a).

© The Regents of the University of California

4. State Procedures in California

§4.251 a. Administrative Agency

The Department of Fair Employment and Housing (DFEH) is responsible for all of the following:

- Receiving, investigating, and conciliating complaints alleging discrimination under state discrimination law;
- Issuing and revising regulations that interpret and implement state discrimination laws; and
- Conducting hearings and resolving issues raised by accusations issued by the DFEH.

Enforcement procedures begin with the filing of a complaint with the DFEH. Govt C §§12960-12976; 2 Cal Code Regs §§7400-7467.

© The Regents of the University of California

§4.252 b. Complaint

A verified complaint may be filed with the Department of Fair Employment and Housing (DFEH) by the following (Govt C §12960):

- The DFEH itself,
- Any person claiming to be aggrieved, or
- Any person on behalf of an aggrieved person.

© The Regents of the University of California

§4.253 c. Timeliness

A complaint generally must be filed with the Department of Fair Employment and Housing within 1 year from the date of the occurrence in question. This time limit may be extended for an additional 90 days if the person alleging to have been harmed first obtains knowledge of the facts after the expiration of the initial 1-year period. Govt C §12960; *Snipes v City of Bakersfield* (1983) 145 CA3d 861, 193 CR 760. See *Lukovsky v City & County of San Francisco* (9th Cir 2008) 535 F3d 1044, cert denied sub nom *Zolotarev v City & County of San Francisco* (2009) ___US ___, 173 L Ed 2d 1086, 129 S Ct 1997 (claims accrue on awareness of actual injury (*e.g.* adverse action of not being hired) and not necessarily with knowledge that some actionable discrimination had occurred).

© The Regents of the University of California

§4.254 d. Investigation of Complaint

The Department of Fair Employment and Housing (DFEH) has very broad powers to investigate complaints of discrimination. It will notify the employer a complaint has been filed and will usually request a written response and pertinent information. It may issue subpoenas, interview the parties and witnesses under oath, and require the production of documents and records. Govt C §§12930(g), 12963-12963.5. During its investigation, the DFEH will typically explore settlement possibilities. Govt C §§12963.7, 12964.

© The Regents of the University of California

§4.255 e. Accusation

The Department of Fair Employment and Housing (DFEH) may issue a written accusation against an employer if it is unable to eliminate an unlawful practice through its investigation and conciliation efforts.

Generally, the accusation must be issued within 1 year from the date the complaint is filed, unless the complaint alleges or is treated as a group complaint. Govt C §12965(a).

If an accusation is issued, the Fair Employment and Housing Commission (FEHC) must conduct a public hearing of a civil nature within 90 days of the date of issuance. If an accusation issues, the parties have the right of appeal to court. Govt C §§12967-12970.

© The Regents of the University of California

§4.256 f. Right to Sue Notice

The Department of Fair Employment and Housing (DFEH) will issue a right to sue notice if an accusation is not issued within 150 days from the filing of the charge or if it earlier determines no accusation will issue. It will also issue such a notice when it has found cause but has decided not to pursue a civil action itself. This notice allows the charging party to pursue a civil lawsuit. Govt C §12965(b). The DFEH will also issue an immediate right to sue notice if requested by the charging party. Govt C §12965(b).

© The Regents of the University of California

§4.257 g. Civil Lawsuit

Once an aggrieved private party receives a right to sue notice from the Department of Fair Employment and Housing (DFEH) stating it has terminated its process and decided not to bring suit on the plaintiff's behalf, the party has 1 year to bring a private civil lawsuit against the defendant named in the charge. Govt C §12965(b).

The time to commence suit for concurrent claims filed with the DFEH and the federal Equal Employment Opportunity Commission (EEOC), when investigation is deferred to the EEOC, expires when the federal right to sue period to commence a civil action expires, or 1 year from the date of the right to sue notice by the DFEH, whichever is later. Govt C §12965(d)(2), (e)(2).

© The Regents of the University of California

§4.258 h. Exhaustion of Administrative Remedies

Public employees claiming employment-related discrimination are not required to exhaust internal administrative remedies before filing a FEHA claim. *Schifando v City of Los Angeles* (2003) 31 C4th 1074, 6 CR3d 457.

© The Regents of the University of California

J. Remedies for Violation of Anti-discrimination Laws

1. Federal Remedies

a. Monetary Relief

§4.259 (1) Back Pay

Back pay, including fringe benefits, is available for violations of some anti-discrimination laws. 42 USC §2000e-5(g) (Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17)); *Brunnemann v Terra Int'l, Inc.* (5th Cir 1992) 975 F2d 175. But see *Air Line Pilots Ass'n, Int'l v Trans World Airlines, Inc.* (2d Cir 1983) 713 F2d 940, aff'd in part and rev'd in part on other grounds (1985) 469 US 111, 83 L Ed 2d 523, 105 S Ct 613 (Age Discrimination in Employment Act of 1967) (ADEA) (29 USC §§621-663)). See also 29 USC §§206, 216(b) (Equal Pay Act of 1963); 29 USC §626 (ADEA); 29 USC §794a (Rehabilitation Act of 1973 (29 USC §§701-796*l*)); 42 USC §12117 (ADA).

Mitigating circumstances, including interim earnings, may be considered as possible deductions to back pay. The employer has the burden of proof of showing that the employee failed to mitigate damages. See *Cline v Roadway Express, Inc.* (4th Cir 1982) 689 F2d 481.

NOTE: Courts differ as to whether unemployment insurance benefits, Social Security, or other "collateral sources" may be deducted from a back pay award. Compare *EEOC v Enterprise Ass'n Steamfitters Local 638* (2d Cir 1976) 542 F2d 579, with *Brown v A.J. Gerrard Mfg. Co.* (11th Cir 1983) 715 F2d 1549. See also *Maxfield v Sinclair Int'l* (3d Cir 1985) 766 F2d 788.

Although discretionary with the court, both pre-judgment and post-judgment interest are available.

© The Regents of the University of California

§4.260 (2) Front Pay

"Front pay" is an award of future lost earnings. It is designed to compensate the plaintiff for economic losses that may occur as the plaintiff seeks comparable employment or is otherwise made whole. Front pay is most commonly awarded when reinstatement is inappropriate due to disharmony or antagonism between the parties. *Cassino v Reichhold Chems., Inc.* (9th Cir 1987) 817 F2d 1338, cert denied (1988) 484 US 1047; *Cancellier v Federated Dep't Stores* (9th Cir 1982) 672 F2d 1312, cert denied (1982) 459 US 859 (ADEA).

NOTE: Statutory caps on the Title VII of the Civil Rights Act of 1964 (42 USC §§2000e—2000e-17) damages do not apply to front pay awards. *Gotthardt v National R.R. Passenger Corp.* (9th Cir 1999) 191 F3d 1148.

Front pay may be subject to various limitations and affirmative defenses, such as the "after-acquired evidence" defense. See, *e.g., McKennon v Nashville Banner Publ'g Co.* (1995) 513 US 352, 130 L Ed 2d 852, 115 S Ct 879 (discussing situation in which employer learns, post-termination, about employee wrongdoing that would have led to his or her termination in any event).

© The Regents of the University of California

§4.261 (3) Compensatory and Punitive Damages

Compensatory damages are available for such items as future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in cases of intentional discrimination. 42 USC §1981a(b)(2) (Civil Rights Act of 1991 §1777(A)).

NOTE: Section 1981a does not apply to disparate impact cases, or cases in which recovery is available under §1981. 42 USC §1981a(a). Further, no damages are available for failure to provide reasonable accommodation when the employer demonstrated good faith efforts, in consultation with the employee, to provide such accommodations. 42 USC §1981a(a)(3).

Punitive damages are available in Title VII of the Civil Rights Act of 1964 cases but cannot be awarded against a public agency. 42 USC §1981a(b)(1) (§1977(A)(b)(1) of the Civil Rights Act of 1991. Punitive damages are available against individuals. See *White v Washington Pub. Power Supply Sys.* (9th Cir 1982) 692 F2d 1286.

Limits to the amount of compensatory and punitive damages awardable are described in the Civil Rights Act of 1991 (42 USC §1981a(b)(3)).

© The Regents of the University of California

§4.262 (4) Liquidated Damages

Statutory liquidated damages are available under the Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act of 1963 for a willful violation. 29 USC §§206, 216(b), 626.

© The Regents of the University of California

§4.263 (5) Attorney Fees

Reasonable attorney fees are available to the prevailing party. 42 USC §2000e-5(k); *Hensley v Eckerhart* (1983) 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933. Attorney fees are also available in cases of action under 42 USC §§1981, 1981a, 1982-1983, 1985-1986, Title VI of the Civil Rights Act of 1964, and portions of Title IX of the Education Amendments of 1972 (20 USC §§1681-1688). 42 USC §1988. Attorney fees and costs are also available to respondents charged with violating 42 USC §2000e-2(m) who demonstrate they would have taken the same action in the absence of the impermissible motivating factor. 42 USC §2000e-5(g)(2)(B)(i).

NOTE: There are different standards applied to prevailing plaintiffs and defendants. Although prevailing plaintiffs are generally presumed to be entitled to attorney fees, prevailing defendants are awarded fees only when the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v EEOC* (1978) 434 US 412, 421, 54 L Ed 2d 648, 98 S Ct 694.

© The Regents of the University of California

§4.264 b. Equitable Relief

Injunctive relief is available to prevent future violations. 42 USC §2000e-5(g) (Title VII of the Civil Rights Act of 1964); 29 USC §626(b) (Age Discrimination in Employment Act of 1967 (ADEA)); 29 USC §216(b) (Equal Pay Act of 1963).

Reinstatement, a form of equitable relief, is available in certain cases. See 42 USC §2000e-5(g)(1); *Blim v Western Elec. Co.* (10th Cir 1984) 731 F2d 1473.

© The Regents of the University of California

§4.265 c. Affirmative Relief

Courts are authorized to order preferential affirmative relief such as numerical goals for employment actions. *Local 28 of Sheet Metal Workers' Int'l Ass'n v Equal Employment Opportunity Comm'n* (1986) 478 US 421, 92 L Ed 2d 344, 106 S Ct 3019.

© The Regents of the University of California

2. State Remedies

§4.266 a. Administrative Remedies

The Fair Employment and Housing Commission may administratively award damages that make the aggrieved party whole. This may include such elements as (Govt C §12970):

- Back pay and fringe benefits;
- Front pay and reinstatement;
- Necessary injunctive relief; and
- Administrative fine up to $50,000.

Punitive damages may not be awarded against municipalities. Govt C §818.

© The Regents of the University of California

§4.267 b. Judicial Remedies

All relief generally available in non-contractual actions, including punitive damages, may be awarded by a court. *Monge v Superior Court* (1986) 176 CA3d 503, 222 CR 64; *Commodore Home Sys., Inc. v Superior Court* (1982) 32 C3d 211, 185 CR 270. Punitive damages are not awardable against municipalities. Govt C §818. The court may also award reasonable attorney fees. Govt C §12965(b).

© The Regents of the University of California

§4.268 K. Mandatory Employer Posters

The California Chamber of Commerce has a checklist of mandatory workplace posters. The ordering information is available by telephone at (800) 331-8877 or by fax at (916) 443-4730. Mailing address is California Chamber of Commerce, 3255 Ramos Circle, Sacramento, California 95827. Posters and publications can also be obtained through the Equal Employment Opportunity Commission (EEOC) at www.eeoc.gov and the Department of Fair Employment and Housing (DFEH) at www.dfeh.ca.gov.

© The Regents of the University of California

IX. EVALUATING AND DISCIPLINING EMPLOYEES

§4.269 A. Performance Standards

Performance standards provide a yardstick for the supervisor and employee to evaluate his or her performance and identify areas in which improvement or further development is desirable.

A job performance standard is defined as whatever is expected of a trained and experienced employee in fulfilling the duties of the position. Problems arise when levels of performance vary throughout a department so that a uniform standard on which to base an action, whether laudatory or disciplinary, does not exist.

© The Regents of the University of California

§4.270 B. Performance Evaluations

The primary purpose of an evaluation program is to motivate employees to work at their highest capacity by better delineating work responsibilities, establishing job standards and objectives, reviewing progress, planning future development, and providing a basis for acknowledgment and reward. Performance evaluations are also related to discipline. Viewed positively, performance evaluation aids in correcting marginal or unsatisfactory performance before it becomes necessary to take more severe disciplinary action. Performance evaluations play a pivotal role in any dispute over the nature of a disciplinary action.

An effective performance evaluation program does the following:

- Ensures employees are performing as effectively as possible;
- Enables supervisors and managers to pinpoint weak spots;
- Helps identify employees with supervisory and leadership potential;
- Identifies employees' training needs;
- Monitors morale;
- Serves as a basis of constructive discussion with employees;
- Helps head off disciplinary problems;
- Considers each employee as an individual;
- Encourages good communication; and
- Provides documentation for future employee actions.

Unless the evaluation system is formalized, an evaluation may tend to rely on haphazard observation and unreliable recollection. A planned system is intended to make the evaluation process more accurate, objective, and reliable for both management and employees. A planned system is more easily defended if an employee grieves or appeals a performance evaluation or if the evaluation becomes an issue in a subsequent disciplinary action.

Complete, accurate, and timely records are important in dealing with employee matters. Employees have a right to review their personnel files. Lab C §1198.5. If an employer fails to keep adequate and accurate records of an individual's employment, the burden of proof on the employee may be reduced. *Hernandez v Mendoza* (1988) 199 CA3d 721, 245 CR 36.

© The Regents of the University of California

C. Employee Discipline

§4.271 1. Just Cause

"Just cause" is a standard for determining the propriety of discipline. Other terms identifying the same standard include "good cause," "just and sufficient cause," or simply "cause." To help define the elements of "just cause," one commonly used approach lists seven factors that an employer should consider before disciplining an employee. A "no" answer to one or more of the following factors means just cause is not present or some arbitrary, capricious, or discriminatory element may have been present. See Koven & Smith, Just Cause: The Seven Tests (Cloverdale Publications, Inc., BNA 2d ed 1992).

- Was the employer's rule or order reasonably related to the orderly, efficient, and safe operation of the employer's business, and the performance that the employer might properly expect of the employee?
- Did the employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplined conduct? (See §§4.272-4.273 on how progressive discipline fulfills the notice requirement.)
- Did the employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- Was the employer's investigation conducted fairly and objectively?

PRACTICE TIP 1: A special 1-year statute of limitations applies to investigation of civilian police employee misconduct. Govt C §3508.1.

PRACTICE TIP 2: Employees may be compelled to respond to questions during the investigation, and may be disciplined for failure to answer, as long as they are informed and assured that their responses will be used only in administrative, rather than criminal, proceedings. *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 88 CR3d 590.

- At the investigation, did the investigator obtain substantial evidence or proof that the employee was guilty as charged?
- Has the employer applied its rules, orders, and penalties even-handedly and without discrimination to all employees?
- Was the degree of discipline administered by the employer in a particular case reasonably related to the seriousness of the employee's proven offense and the record of the employee in his or her service with the employer? (See §4.273 on the appropriate level of penalty.)

© The Regents of the University of California

2. Progressive Discipline

§4.272 a. Definition

Progressive discipline refers to an increasing level of discipline an employer may impose. By imposing increasingly more severe levels of discipline, an employer provides an employee effective notice that his or her work performance is unacceptable or conduct is inappropriate.

Particularly unacceptable work performance or egregious conduct may not require progressive discipline and the extent of the progressive discipline may vary with the seriousness of the situation. An employer's adherence to the concept of progressive discipline ensures the penalty is commensurate with both the seriousness of the conduct and the employee's prior disciplinary record.

© The Regents of the University of California

b. Stages of Progressive Discipline

§4.273 (1) Warnings

The first stage of progressive discipline is the warning stage. It progresses as follows:

- Counseling;
- Oral warning;
- Written warning that specifies:
- what occurred;
- the date and time of the event(s);
- what rule, policy, standard, or agreement provision the employee violated; and
- what the employee must do to improve.

© The Regents of the University of California

§4.274 (2) Suspension

Typically, the penalty of suspension involves temporary removal from work without pay. Employers imposing short suspensions (5 days or less) may provide the pre-disciplinary due process requirements either during the suspension, or a reasonable time thereafter. *Civil Serv. Ass'n v City & County of San Francisco* (1978) 22 C3d 552, 150 CR 129. On due process requirements, see §§4.278-4.288.

© The Regents of the University of California

§4.275 (3) Demotion

When utilized as a form of discipline, demotion is frequently imposed when an employee has performed well in a prior position, even though he or she is not performing well in the present position. (Demotion may also occur for non-disciplinary reasons such as a result of an economic layoff or other reduction in force.)

© The Regents of the University of California

§4.276 (4) Discharge

Discharge, the ultimate disciplinary penalty, is usually appropriate only after lower levels of discipline fail to improve performance or behavior. Discharge may be appropriate in the first instance, however, if the employee's behavior is particularly serious. *Cranston v City of Richmond* (1985) 40 C3d 755, 770 n13, 221 CR 779; *Kazensky v City of Merced* (1998) 65 CA4th 44, 76 CR2d 356.

© The Regents of the University of California

§4.277 c. Courts Give City Deference in Selection of Penalty or Discipline

In general, the court grants considerable deference to the city in its selection of an appropriate penalty or discipline. *Cranston v City of Richmond* (1985) 40 C3d 755, 221 CR 779. A disciplinary penalty, however, may be successfully challenged if the city:

- Relied on poorly documented prior instances of misconduct or instances that are too remote in time;
- Did not permit the employee sufficient time to improve before imposing the next level of discipline;
- Provided insufficient notice that failed to inform the employee of the seriousness of the problem;
- Did not document problems on performance evaluations and/or provided unmerited commendations or salary increases that are inconsistent with earlier discipline or performance; or
- Did not provide reasonable counseling and training to improve the employee's performance.

© The Regents of the University of California

§4.278 3. Due Process

The California and United States constitutions provide public employees procedural due process rights that protect against arbitrary employer deprivations of two types of interests:

- Property interest in continued employment (see *Skelly v State Personnel Bd.* (1975) 15 C3d 194, 207, 124 CR 14); and
- Liberty interest in pursuing an occupation of his or her choice (*Board of Regents of State Colleges v Roth* (1972) 408 US 564, 576, 33 L Ed 2d 548, 92 S Ct 2701; *Lubey v City & County of San Francisco* (1979) 98 CA3d 340, 159 CR 440).

In addition to pre-disciplinary procedures, constitutional due process also imposes post-disciplinary procedures. See §4.288.

© The Regents of the University of California

§4.279 a. Protection of Property Interest: *Skelly* Rights

A public employee is entitled to procedural due process before the city imposes discipline if the particular circumstances of his or her employment indicate the employee has a property interest in continued employment.

Property interests are not created by the United States Constitution or California Constitution; instead, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law, local rules, handbooks, policies, or understandings that secure certain benefits and that support claims of entitlement to those benefits. To have a property interest in a benefit, a person must demonstrate that he or she has a legitimate claim of entitlement to it, not merely a unilateral expectation. *Board of Regents of State Colleges v Roth* (1972) 408 US 564, 579, 33 L Ed 2d 548, 92 S Ct 2701.

Whether an employee should be accorded procedural due process is determined on a case-by-case basis. This inquiry involves an examination of the city's ordinances, personnel rules, employee handbooks, policies, practices, procedures, and memorandum of understanding. Generally, if this analysis shows an employee has a legitimate expectation of continued employment, then that employee must be accorded procedural due process. *Williams v County of Los Angeles* (1978) 22 C3d 731, 736, 150 CR 475. But see *Seidler v Municipal Court* (1993) 12 CA4th 1229, 16 CR2d 90 (terms and conditions of court commissioner's employment were changed from permanent to at-will by statute amendment occurring after date of hire).

Employees who truly serve at the pleasure of the appointing authority (for example, probationary or at-will employees) have no legitimate expectation of continued employment and are generally not entitled to due process. *Hinchliffe v City of San Diego* (1985) 165 CA3d 722, 725, 211 CR 560; *Kestler v City of Los Angeles* (1978) 81 CA3d 62, 64, 146 CR 61; *Bogacki v Board of Supervisors* (1971) 5 C3d 771, 783, 97 CR 657. But see *Zeron v City of Los Angeles* (1998) 67 CA4th 639, 79 CR2d 130 (probationary police officer reinstated as tenured employee for procedural deficiencies during termination).

© The Regents of the University of California

§4.280 (1) Pre-disciplinary *Skelly* Rights

When the employee has a property interest in continuing employment, the city must provide the employee with procedural due process. At a minimum, pre-disciplinary safeguards must include (*Skelly v State Personnel Bd.* (1975) 15 C3d 194, 215, 124 CR 14):

- Written "notice of the proposed action";
- "Reasons" for such proposed action;
- A copy of the charges and the material on which the action is based; and
- "The right to respond, either orally or in writing to the authority initially imposing the discipline."

Employers must give each *Skelly* safeguard at a meaningful time and in a meaningful manner. For example, the employee must have adequate time to review the charges and prepare a defense. The employer's representative must be willing to discuss the charges and to listen to the employee's response. *Kempland v Regents of Univ. of Cal.* (1984) 155 CA3d 644, 649, 202 CR 275.

PRACTICE TIP: Generally, the city should allow at least 5 days after receipt of the charges for the employee to respond, and even longer if the matter is complicated. If an employee's filing of a response to or an appeal of a disciplinary action is late, the city may have to accept it if the time period is short and caused by inadvertence, and there is no prejudice to the city. *Civil Serv. Comm'n v Velez* (1993) 14 CA4th 115, 17 CR2d 490.

© The Regents of the University of California

§4.281 (2) Type of Proceeding Required: *Skelly* Conference

Because the purpose of a pre-disciplinary proceeding is to provide an initial check against mistaken decisions, a formal evidentiary hearing is not required. *Cleveland Bd. of Educ. v Loudermill* (1985) 470 US 532, 84 L Ed 2d 494, 105 S Ct 1487. A meeting with the appointing authority or a designee is sufficient, provided the employee has received adequate notice and an adequate time to prepare an opposition to the proposed discipline. *Coleman v Regents of Univ. of Cal.* (1979) 93 CA3d 521, 525, 155 CR 589; *Coburn v State Personnel Bd.* (1978) 83 CA3d 801, 805, 148 CR 134.

For minor disciplinary actions, such as a short suspension, the employer may provide procedural due process safeguards within a reasonable time after the discipline occurs. *Civil Serv. Ass'n v City & County of San Francisco* (1978) 22 C3d 552, 564, 150 CR 129. But see statutory exceptions, such as Govt C §§19574 and 19590, regarding state employees.

The *Skelly* decision states that the employee must be permitted to respond to "the authority initially imposing the discipline." *Skelly v State Personnel Bd.* (1975) 15 C3d 194, 215, 124 CR 14. However, due process does not require the employee to meet with the person at the top of the chain of command who ultimately authorizes the disciplinary action. *Los Angeles Police Protective League v Gates* (9th Cir 1990) 907 F2d 879, 891; *Titus v Los Angeles County Civil Serv. Comm'n* (1982) 130 CA3d 357, 363, 181 CR 699. Although the person selected to conduct the proceeding should be knowledgeable about the circumstances of the proposed discipline, that person should not be "demonstrably biased" or have a "personal or financial interest that strongly suggest[s] a lack of impartiality." *Burrell v City of Los Angeles* (1989) 209 CA3d 568, 582, 257 CR 427. The person conducting the hearing must be a "[r]easonably impartial and noninvolved reviewer who possesses the authority to recommend a final disposition of the matter." *Bollinger v San Diego Civil Serv. Comm'n* (1999) 71 CA4th 568, 576, 84 CR2d 27.

PRACTICE TIP 1: The city should limit the number of persons attending the *Skelly* conference to maintain its informality and to avoid "trying the case" at this stage of the disciplinary proceeding.

PRACTICE TIP 2: At the *Skelly* conference, the city representative should have another representative present as a witness to the proceedings.

PRACTICE TIP 3: If the employee requests to be represented at the *Skelly* conference by an attorney or another employee, the city should grant such request. The city does not have to inform the employee of his or her right to representation.

PRACTICE TIP 4: If the employee has an attorney representative present at the *Skelly* conference, the city should also have an attorney present.

PRACTICE TIP 5: The city should not agree to the tape recording of a *Skelly* conference.

PRACTICE TIP 6: The *Skelly* conference should be used by the city to hear and evaluate the employee's response to the proposed discipline and not to engage in cross examination of witnesses, accusations, or personal attacks. The city representative should listen rather than talk at the *Skelly* conference.

PRACTICE TIP 7: A *Skelly* conference may and should be continued if the employee reasonably requests it, the employee's response requires review and evaluation by the city, or the conduct of the participants interferes with successful completion of the conference.

© The Regents of the University of California

§4.282 (3) Types of Discipline That Trigger Procedural Due Process

Generally, an employer must provide due process whenever a disciplinary action will result in a significant deprivation of an employee's property interest, including:

- Termination (*Skelly v State Personnel Bd.* (1975) 15 C3d 194, 207, 124 CR 14); *Chang v City of Palos Verdes Estates* (1979) 98 CA3d 557, 565, 159 CR 630.
- Abandonment of position (*Coleman v Department of Personnel Admin.* (1991) 52 C3d 1102, 1118, 278 CR 346; *International Bhd. of Elec. Workers v City of Gridley* (1983) 34 C3d 191, 207, 193 CR 518);
- Removal of merit pay (*Sanchez v City of Santa Ana* (9th Cir 1990) 915 F2d 424, 428);
- Demotion (*Ng v State Personnel Bd.* (1977) 68 CA3d 600, 606, 137 CR 387);
- Transfer with loss of pay (*McManigal v City of Seal Beach* (1985) 166 CA3d 975, 979, 212 CR 733); and
- Suspension without pay (*Civil Serv. Ass'n v City & County of San Francisco* (1978) 22 C3d 552, 564, 150 CR 129).

© The Regents of the University of California

§4.283 (4) Types of Discipline That Do Not Trigger Procedural Due Process

Procedural due process safeguards are not generally required for disciplinary procedures that do not result in a loss of the employee's pay or benefits, including:

- Written reprimands (*Stanton v City of W. Sacramento* (1991) 226 CA3d 1438, 1441, 277 CR 478);
- Reclassification (*Schultz v Regents of Univ. of Cal.* (1984) 160 CA3d 768, 777, 206 CR 910);
- Transfer without loss of pay (*Orange County Employees Ass'n v County of Orange* (1988) 205 CA3d 1289, 253 CR 584);
- Negative performance evaluation (*Turturici v City of Redwood City* (1987) 190 CA3d 1447, 1451, 236 CR 53); and
- Economic layoff (*AFSCME v County of Los Angeles* (1983) 146 CA3d 879, 888, 194 CR 540).

© The Regents of the University of California

§4.284 (5) Remedies for *Skelly* Violations

The remedy for *Skelly* violations is normally limited to an award of back pay for the period during which the discipline was improperly imposed. The period begins on the date the discipline was imposed and ends when the discipline is validated through a post-disciplinary hearing. Employees are not entitled to reinstatement for *Skelly* violations. *Barber v State Personnel Bd.* (1976) 18 C3d 395, 402, 134 CR 206; *Williams v City of Los Angeles* (1990) 220 CA3d 1212, 1217, 269 CR 869; *Parker v City of Fountain Valley* (1981) 127 CA3d 99, 116, 179 CR 351; *Kirkpatrick v Civil Service Comm'n* (1978) 77 CA3d 940, 945, 144 CR 51.

© The Regents of the University of California

§4.285 b. Protection of Liberty Interest: *Lubey* Rights

Even public employees who do not possess property interests in continued employment, such as at-will or probationary employees, possess liberty interests in pursuing the employment of their choice. Discipline deprives an employee of a liberty interest if it impugns the employee's reputation or imposes a stigma on him or her that would foreclose his or her freedom to take advantage of other employment opportunities. *Board of Regents of State Colleges v Roth* (1972) 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701; *Cox v County of San Diego* (1991) 233 CA3d 300, 311, 284 CR 266; *Lubey v City & County of San Francisco* (1979) 98 CA3d 340, 159 CR 440.

© The Regents of the University of California

§4.286 (1) When Liberty Interest Arises

Denial of due process based on deprivation of a liberty interest exists if:

- The discipline or discharge occurred in conjunction with a charge that impairs the employee's reputation for honesty or morality, or his or her standing and associations in the community;
- The employee denies the charge, or, at least, contests its accuracy;
- There is public disclosure of the charge by the governmental entity; and
- The charge is made in connection with the termination of employment or the alteration of some right or status recognized by state law.

Bishop v Wood (1976) 426 US 341, 48 L Ed 2d 684, 96 S Ct 2074; *Board of Regents of State Colleges v Roth* (1972) 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701; *Hyland v Wonder* (9th Cir 1992) 972 F2d 1129, cert denied (1993) 508 US 908; *Erickson v Pierce County* (9th Cir 1992) 960 F2d 801; *Vanelli v Reynolds Sch. Dist. No. 7* (9th Cir 1982) 667 F2d 773; *Lubey v City & County of San Francisco* (1979) 98 CA3d 340, 159 CR 440; *Kestler v City of Los Angeles* (1978) 81 CA3d 62, 146 CR 61.

© The Regents of the University of California

§4.287 (2) Name Clearing Hearing

If the proposed discipline meets the criteria discussed in §4.286, the employer must provide the employee an opportunity to clear his or her name before the imposition of the discipline. Back pay is not generally required to remedy a deprivation of a liberty interest because the "sole purpose" of a liberty hearing is "to clear one's name." *Board of Regents of State Colleges v Roth* (1972) 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701; *Phillips v Civil Service Comm'n* (1987) 192 CA3d 996, 237 CR 751. But see *Lubey v City & County of San Francisco* (1979) 98 CA3d 340, 159 CR 440 (court ordered reinstatement of employees who were deprived of liberty interest hearing before termination).

© The Regents of the University of California

§4.288 c. Post-disciplinary Proceedings

In addition to pre-removal safeguards, constitutional due process generally requires that eligible public employees receive a post-disciplinary evidentiary hearing. *Cleveland Bd. of Educ. v Loudermill* (1985) 470 US 532, 545, 84 L Ed 2d 494, 105 S Ct 1487. Public agencies have discretion to develop a particular hearing procedure, after meeting collective bargaining duties, if any. The procedure should meet the following requirements:

- **Timing.** Due process requires the post-disciplinary hearing be granted at a "meaningful time." *Armstrong v Manzo* (1965) 380 US 545, 14 L Ed 2d 62, 85 S Ct 1187. The hearing should be held promptly after the discipline is imposed, but on notice sufficient to permit the employee to prepare a response to the charges. *Burrell v City of Los Angeles* (1989) 209 CA3d 568, 577, 257 CR 427; *Kempland v Regents of Univ. of Cal.* (1984) 155 CA3d 644, 649, 202 CR 275.
- **Impartiality.** The person or group that reviews the propriety of the discipline must be impartial. Although the decision-maker need not be a disinterested third party, he or she must not be "demonstrably biased," or have a "personal or financial interest" that strongly suggests a lack of impartiality. *Haas v County of San Bernardino* (2002) 27 C4th 1017, 119 CR2d 341; *Burrell v City of Los Angeles* (1989) 209 CA3d 568, 582, 257 CR 427; *Stanton v City of W. Sacramento* (1991) 226 CA3d 1438, 1443, 277 CR 478; *Parker v City of Fountain Valley* (1981) 127 CA3d 99, 116, 179 CR 351. Bias may also result if the legal counsel for the decision-maker and the employer are both employed by the same entity. *Howitt v Superior Court* (1992) 3 CA4th 1575, 5 CR2d 196; *Walker v City of Berkeley* (9th Cir 1991) 951 F2d 182.
- **Ex Parte Communications.** To preserve impartiality, the decision-maker may not communicate on the merits of a contested matter without notice and opportunity for all parties to participate. See Govt C §11430.10. A decision-maker who receives an ex parte communication should put it on the record and allow any person to rebut it. See Govt C §11430.50.
- **Presenting Evidence and Cross-examining Witnesses.** The employee must be permitted to appear before the hearing officer, present evidence in his or her behalf, and confront and cross-examine adverse witnesses. Both the employee and employer have the right to be represented by counsel. *Goldberg v Kelly* (1970) 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011. The employee also has the right to receive all evidence forming the basis of the disciplinary decision to develop a rebuttal and make an effective cross-examination. *Vollstedt v City of Stockton* (1990) 220 CA3d 265, 275, 269 CR 404.
- **Record of Hearing.** A "record" of the hearing should be preserved by stenographic transcript or tape recording in case of subsequent judicial review. *Goldberg v Kelly* (1970) 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011.
- **Burden of Proof.** The employer, as the party making the disciplinary charges, has the burden of proof by a preponderance of the evidence. *Parker v City of Fountain Valley* (1981) 127 CA3d 99, 113, 179 CR 351; *Pipkin v Board of Supervisors* (1978) 82 CA3d 652, 658, 147 CR 502.
- **No Increase in Penalty.** Depending on the language in a city's ordinance, rules, or regulations on the post-disciplinary reviewing authority's power to modify a previously imposed penalty, such reviewing authority may not increase the penalty from suspension to termination. *Paoli v Civil Service Comm'n* (1993) 12 CA4th 1073, 15 CR2d 874.
- **Findings.** A decision-maker's findings of fact must "bridge the analytic gap between the raw evidence and ultimate decision" to expose the decision-maker's analysis and provide the basis for judicial review of the disciplinary decision. *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 515, 113 CR 836.

© The Regents of the University of California

§4.289 X. EMPLOYEE SEPARATION AND TERMINATION

When an employee is terminated or otherwise separated from employment, certain requirements and limitations may apply, including:

- Procedures and limitations under applicable labor memoranda of understanding and due process and Public Safety Officers Procedural Bill of Rights Act.
- Federal and California COBRA and related notifications. 42 USC §§300bb-1—300bb-8; Health & S C §§1366.20-1366.28; Lab C §2808.
- California Health Insurance Premium Program notification. Lab C §2807.
- Notification of change in employment status and unemployment insurance benefit rights. 22 Cal Code Regs §1089-1(d).
- Severance pay up to 18 months of salary is permissible if provided by an employment agreement or a policy in effect before services were performed and not as a retroactive gift or bonus. Govt C §§53260-53264; *Miller v City of Sacramento* (1977) 66 CA3d 863, 871, 136 CR 315.

© The Regents of the University of California

A. Grievances

§4.290 1. Types of Grievances

There are two general types of grievances:

- Disciplinary grievances by which employees receive the pre- and post-deprivation appeal rights; and
- Contract/rule grievances by which an employee alleges a violation of a departmental rule, personnel rule, or a provision in a memorandum of understanding.

PRACTICE TIP 1: In developing a grievance procedure, employers should narrowly define "grievance" to exclude appeals of non-punitive actions, *e.g.,* layoff, denial of merit increase, or failure to receive promotion. Non-disciplinary grievances should also be limited to preclude appeals into areas of management discretion, such as policy decisions.

PRACTICE TIP 2: The city should not even consider the disciplinary process as subject to the grievance procedure. The grievance procedure should be reserved for contract/rule grievances only. The disciplinary action process should be segregated from the grievance process and considered separately.

© The Regents of the University of California

§4.291 2. Investigating a Grievance

The city should investigate a grievance as follows:

- Impartially collect all of the facts.
- Determine if the matter is grievable under the definition of a grievance.
- Review the memorandum of understanding, personnel rules, policy manuals, and/or resolution to determine the procedures required and/or any duties owed to the employee.
- Check for procedural violations, *e.g.,* whether the grievance is timely.
- Consider the impact of the grievance on other employees.
- Interview all persons who can shed light on the case, including the grievant's witnesses.

PRACTICE TIP: During witness interviews, listen carefully; do not respond defensively; understand the issues and the grievant's theory of the grievance; ask what the grievant proposes as a remedy and probe alternative remedies; and find out all information and evidence the grievant has in support of his or her contention. Maintain notes of all interviews. Consult with other managers, the personnel officer, and legal counsel.

- Examine and organize all records and documents.
- Inspect the physical premises.
- Determine if there is a past practice to support the city's position.
- Prepare a chronological outline of the facts to assist in assessing the merits of the grievance.
- Prepare the response at the initial level with the basic strategy for appeal/arbitration in mind. (This forces one to view the grievance as objectively as possible.)

© The Regents of the University of California

§4.292 3. Grievance Case File

The grievance case file should include all information or materials needed for determining the result of the grievance investigation.

Divide the file into the following categories:

- Facts leading up to the dispute;
- Verbatim copy of the grievance at issue and all answers given in the course of the grievance procedure;
- Documents, minutes, and reports (identified as to source and date);
- Grounds to contest grievability or statement that no such grounds exist; and
- Overall evaluation of the merits of the employee's case.

NOTE: Depending on who prepares the grievance file—an attorney or personnel staff—the case file may be discoverable in subsequent administrative proceedings or litigation.

© The Regents of the University of California

§4.293 4. Answering a Grievance

The city should provide a written response to the grievance that contains all the basic arguments that management would use in an arbitration or appeal. Separate the response into procedural and substantive sections. The response should include references to basic rules of contract construction, if appropriate.

If the grievance has merit, resolve it. Consider alternative remedies and/or settlement options.

If the grievance is denied, explain the grievant's/employee's appeal rights.

© The Regents of the University of California

§4.294 B. Public Safety Officers Procedural Bill of Rights Act

The Public Safety Officers Procedural Bill of Rights Act (POBR) (Govt C §§3300-3313), also referred to as the Police Officers Bill of Rights, provides covered employees with interrogation and administrative appeal rights whenever the employer contemplates "punitive action." Covered employees also have the sometimes overlapping *Skelly* and *Lubey* rights (see §§4.279-4.287).

PRACTICE TIP: For further information on the POBR, see Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act (13th ed 2009), published by the California Public Employee Relations Institute of Industrial Relations, University of California at Berkeley.

© The Regents of the University of California

§4.295 1. Covered Employees

"Public safety officers" are all peace officers specified in Pen C §§830.1-830.5, 830.31-830.33 (except subdivision (e)), 830.34-830.35 (except subdivision (c)), 830.36-830.38; Govt C §3301. Probationary police officers, police chiefs, and firefighters whose primary duty is enforcing fire laws are covered by the Police Officers Bill of Rights. *Gray v City of Gustine* (1990) 224 CA3d 621, 273 CR 730 (at-will police chief); *Doyle v City of Chino* (1981) 117 CA3d 673, 172 CR 844 (police chief); *Barnes v Personnel Dep't of the City of El Cajon* (1978) 87 CA3d 502, 151 CR 94 (probationary employee); *Gauthier v City of Red Bluff* (1995) 34 CA4th 1441, 41 CR2d 35. Temporary employees not regularly employed and police academy recruits are excluded from coverage. *Burden v Snowden* (1992) 2 C4th 556, 7 CR2d 531 (police academy recruits); *Bell v Duffy* (1980) 111 CA3d 643, 168 CR 753 (temporary employees).

© The Regents of the University of California

2. Punitive Action

§4.296 a. Broadly Defined

The Public Safety Officers Procedural Bill of Rights Act (POBR) provides covered employees with interrogation and administrative appeal rights whenever the employer contemplates "punitive action." "Punitive action" is broadly defined in the act as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." Govt C §3303. Case law defines "punitive action" as:

- Any reduction in salary, even when occasioned by a transfer or reassignment that is not for purposes of punishment, including the loss of skill or hazard pay (*White v County of Sacramento* (1982) 31 C3d 676, 681, 183 CR 520; *Otto v Los Angeles Unified Sch. Dist.* (2001) 89 CA4th 985, 107 CR2d 664; *McManigal v City of Seal Beach* (1985) 166 CA3d 975, 979, 212 CR 733);
- Rejection from promotional probation that results in a return to the previously held position (*Henneberque v City of Culver City* (1983) 147 CA3d 250, 194 CR 869); and
- Removal of a previously granted merit increase (*Sanchez v City of Santa Ana* (9th Cir 1990) 915 F2d 424).

© The Regents of the University of California

§4.297 b. Exclusions

Case law has excluded the following from the definition of "punitive action":

- Routine performance evaluations stating the need to improve performance (*Turturici v City of Redwood City* (1987) 190 CA3d 1447, 236 CR 53);
- Reassignment with no accompanying loss of pay (*Tielsch v City of Anaheim* (1984) 160 CA3d 570, 206 CR 738);
- Transfer to compensate for performance deficiencies (*Orange County Employees Ass'n v County of Orange* (1988) 205 CA3d 1289, 253 CR 584);
- Transfer to a position at the same rank and pay, without a finding of wrongdoing (*Benach v County of Los Angeles* (2007) 149 CA4th 836, 57 CR3d 363); and
- Denial of a merit step increase (*Howitt v County of Imperial* (1989) 210 CA3d 312, 258 CR 384).

A summary of conference memorandum may or may not constitute a punitive action depending entirely on its content. *Otto v Los Angeles Unified Sch. Dist.* (2001) 89 CA4th 985, 107 CR2d 664.

© The Regents of the University of California

§4.298 3. Adverse Comments in Personnel File

No comment adverse to the interest of a public safety officer may be placed in his or her personnel file, or any other file used for personnel purposes, without the officer having first read the document containing the adverse comment and then signing it. The term "adverse comment" includes a citizen complaint, as well as any document that may serve as a basis for affecting the status of a peace officer's existing employment, regardless of whether it is kept separate from the officer's general personnel file, such as a background investigation during probation or internal affairs index card. Govt C §3305; *County of Riverside v Superior Court (Madrigal)* (2002) 27 C4th 793, 118 CR2d 167; *Sacramento Police Officers Ass'n v Venegas* (2002) 101 CA4th 916, 124 CR2d 666.

If the officer refuses to sign, the document may still be filed in the personnel file if the employer makes a notation on the document acknowledging the officer's refusal to sign. Govt C §3305. An officer has 30 days to file a written response to any adverse comment and the response must be attached to the adverse comment. Govt C §3306.

© The Regents of the University of California

§4.299 4. Inspection of Personnel File

Public safety officers have the right to inspect the personnel files that are "used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action" during usual business hours, without any loss of compensation. Govt C §3306.5. An officer is not entitled to review underlying internal affairs investigative materials related to citizen complaints, which are kept separately from personnel files and not used for employment purposes, that are deemed to be without merit. *McMahon v City of Los Angeles* (2009) 172 CA4th 1324, 92 CR3d 68. If the public safety officer believes there is material in the personnel file that is mistaken or unlawful, the officer may submit a request to correct or delete the disputed material. The agency then has 30 days to respond to the request. Govt C §3306.5(c)-(d).

PRACTICE TIP: A good general rule is to maintain internal investigation files separately from personnel files and to refrain from using them in personnel decisions unless the investigation's charges are sustained.

© The Regents of the University of California

5. Procedures for Interrogations of Peace Officers

§4.300 a. Pre-interrogation Requirements

If an investigatory interrogation "could lead to punitive action," an employer must provide the following procedural safeguards:

- The interrogation is to take place "preferably at a time when the public safety officer is on duty." If the interrogation occurs during off-duty time, the officer must be compensated in accordance with regular department procedures. Govt C §3303(a).
- The officer must be informed before the interrogation of the nature of the investigation, the rank, name, and command of the person in charge of the interrogation, and persons to be present at the interrogation. Govt C §3303(b)-(c). The interrogation may last only for a reasonable time and the officer may be questioned by only two officers. Govt C §3303(b), (d).
- The officer may be represented at investigations and interrogations on the filing of a formal written statement of charges or whenever an interrogation focuses on matters likely to result in punitive action. Govt C §3303(i). See *Upland Police Officers Ass'n v City of Upland* (2003) 111 CA4th 1294, 4 CR3d 629 (statute providing for representation of officer's choosing is limited by requirement of reasonableness and does not require rescheduling of hearings whenever chosen representative is unavailable).
- The officer being interrogated has the right to bring his or her own recording device to record any and all aspects of the interrogation. Govt C §3303(g).

© The Regents of the University of California

§4.301 b. Additional Requirement for Potentially Criminal Conduct: *Lybarger* Warning

A "*Lybarger* warning" must precede any questioning when (Govt C §3303(e), (g); *Lybarger v City of Los Angeles* (1985) 40 C3d 822, 221 CR 529):

- The employer initiates interrogation of a peace officer; and
- The officer may be charged with a criminal offense as a result of his or her misconduct; or
- The officer refuses to answer questions on the grounds the answers may be self-incriminating.

The "*Lybarger* warning" tells the officer that he or she has the right to remain silent and not incriminate himself or herself, his or her silence could be deemed insubordination and could lead to administrative discipline, and any statement the officer makes under the threat of such discipline could not be used against him or her in a subsequent criminal investigation. *Lybarger v City of Los Angeles* (1985) 40 C3d 822, 221 CR 529. See *Spielbauer v County of Santa Clara* (2009) 45 C4th 704, 88 CR3d 590 (formal grant of immunity not required when employee is notified that compelled responses will be used only in administrative, not criminal, proceedings; employee's subsequent refusal to answer questions is punishable as insubordination). But see *Gwillim v City of San Jose* (9th Cir 1991) 929 F2d 465 (response by police officer given during investigation may be made available to district attorney under certain circumstances without violating officer's right against self-incrimination).

© The Regents of the University of California

§4.302 c. Post-interrogation Requirements

After an interrogation, the officer is entitled to (Govt C §3303(g)):

- Transcribed copy of any notes made by a stenographer;
- Non-confidential reports, complaints, or statements made by investigators or other persons; and
- Recording of the interrogation, if further proceedings are contemplated or before any further interrogation.

There is no requirement to provide witness statements to an officer being investigated before his or her interrogation. *Pasadena Police Officers Ass'n v City of Pasadena* (1990) 51 C3d 564, 273 CR 584.

© The Regents of the University of California

§4.303 d. Imposition of Discipline

An employer must complete its disciplinary investigation and notify the officer of any proposed discipline within 1 year of the employer's discovery of alleged misconduct, subject to certain exceptions. Govt C §3304(d). The discipline itself need not be imposed within that year. Govt C §3304(d)(1). Typically, the discipline should be imposed within 30 days of the employer's final notice of discipline (*i.e.,* the notice that follows any predisciplinary procedure applied). Govt C §3304(f).

© The Regents of the University of California

§4.304 6. Right to Privacy

The Public Safety Officers Procedural Bill of Rights Act (POBR) provides officers several privacy rights. See §§4.305-4.308.

© The Regents of the University of California

§4.305 a. Polygraph Examinations

An officer may refuse to submit to a polygraph examination and his or her refusal may not be referred to during any subsequent proceeding. Govt C §3307; *Estes v City of Grover City* (1978) 82 CA3d 509, 147 CR 131. See also *Long Beach City Employees Ass'n v City of Long Beach* (1986) 41 C3d 937, 227 CR 90 (allowing certain constitutional protections against polygraph examination). But see *Los Angeles Police Protective League v City of Los Angeles* (1995) 35 CA4th 1535, 42 CR2d 23 (can require polygraph to screen applicants voluntarily seeking transfer to sensitive assignment within police department).

© The Regents of the University of California

§4.306 b. Financial Records

In most circumstances, officers may not be required to disclose information on property, income, assets, source of income, debts, or personal or domestic expenditures. Govt C §3308.

© The Regents of the University of California

§4.307 c. Media Attention

Employers may not cause the officer under interrogation to be subjected to visits by the press or news media without the officer's express consent, nor may the officer's home address or photograph be given to the press or news media without the officer's express consent. Govt C §3303(e).

© The Regents of the University of California

§4.308 d. Searches

Employers may not search an officer's locker or other assigned space except in the officer's presence, or with the officer's consent, or on a valid search warrant, or when the officer has been notified a search will be conducted. Govt C §3309; *Jackson v Gates* (9th Cir 1992) 975 F2d 648; *Los Angeles Police Protective League v Gates* (9th Cir 1990) 907 F2d 879. But see *Zazueta v County of San Benito* (1995) 38 CA4th 106, 44 CR2d 678 (officer suffered no prejudice when illegal search conducted if evidence obtained from sources independent of any illegal search constituted just cause for termination).

© The Regents of the University of California

§4.309 7. Appeals of Disciplinary Actions

The officer has a right to an "opportunity for administrative appeal" whenever punitive action is taken. On punitive action, see §§4.296-4.297. The employer need not provide the opportunity to appeal before imposing the punitive action. *Doyle v City of Chino* (1981) 117 CA3d 673, 172 CR 844; *Butler v County of Los Angeles* (1981) 116 CA3d 633, 172 CR 244.

Probationary employees are not generally entitled to an appeal if the termination was based on performance reasons and not on misconduct. *Browning v Block* (1985) 175 CA3d 423, 220 CR 763; *Swift v County of Placer* (1984) 153 CA3d 209, 200 CR 181. Conversely, if the discharge is based on misconduct, the officer is entitled to a hearing to establish the reasons for the discharge and to make a formal record for judicial review, even though he or she may be terminated without "cause." *Barnes v Personnel Dep't of the City of El Cajon* (1978) 87 CA3d 502, 151 CR 94 (probationary officer); *Gray v City of Gustine* (1990) 224 CA3d 621, 273 CR 730 (police chief).

The nature of the administrative appeal is not specified in the Police Officers Bill of Rights. A full evidentiary appeal hearing may not be required to satisfy the requirements of Govt C §3304(b), but such a hearing clearly would satisfy those requirements. See also *Binkley v City of Long Beach* (1993) 16 CA4th 1795, 20 CR2d 903. On due process requirements, see *Stanton v City of W. Sacramento* (1991) 226 CA3d 1438, 277 CR 478; *Holcomb v City of Los Angeles* (1989) 210 CA3d 1560, 259 CR 1.

NOTE: An employer need not actually provide the administrative appeal before instituting discipline. *Doyle v City of Chino* (1981) 117 CA3d 673, 172 CR 844; *Butler v County of Los Angeles* (1981) 116 CA3d 633, 172 CR 244.

© The Regents of the University of California

§4.310 8. Remedies for Noncompliance

Public safety officers may sue their employers in superior court for alleged violations of the Police Officers Bill of Rights. Govt C §3309.5. Remedies for noncompliance include:

- Exclusion of documents during the administrative appeal, if the city fails to comply with the interrogation procedural safeguards or requirements on access to documents. *Hanna v City of Los Angeles* (1989) 212 CA3d 363, 260 CR 782; *Williams v City of Los Angeles* (1988) 47 C3d 195, 252 CR 817.
- Back pay between the time of the punitive action and the time the administrative appeal is provided or the disciplinary decision is otherwise validated, if the officer is improperly denied an administrative appeal. *Barber v State Personnel Bd.* (1976) 18 C3d 395, 134 CR 206; *Williams v City of Los Angeles* (1990) 220 CA3d 1212, 269 CR 869; *Browning v Block* (1985) 175 CA3d 423, 220 CR 763; *Henneberque v City of Culver City* (1985) 172 CA3d 837, 218 CR 704.
- Injunction or other extraordinary relief, including a temporary restraining order, preliminary, or permanent injunction prohibiting the city from taking any punitive action against the officer. Govt C §3309.5.
- Payment of civil penalties and attorney fees. Govt C §3309.5.

© The Regents of the University of California

§4.311 C. Firefighters Procedural Bill of Rights Act

The Firefighters Procedural Bill of Rights Act (FBOR) (Govt C §§3250-3262) gives firefighters many of the same rights as peace officers. The FBOR is modeled in large part on the Public Safety Officers Procedural Bill of Rights Act (POBR) (see §§4.294-4.310), enacted over 30 years earlier, and case law interpreting the POBR is likely to be applied in interpreting the FBOR. *Holmes v McColgan* (1941) 17 C2d 426, 430, 110 P2d 428. For example, the FBOR generally contains the same provisions as the POBR with respect to firefighter political activity. The explicit protections for seeking elective office, however, are greater under the FBOR. Govt C §§3302, 3252. The subtle and not so subtle differences between the two laws will require courts to address issues of first impression.

PRACTICE TIP: For further information on the FBOR, see Pocket Guide to the Firefighters Procedural Bill of Rights Act (1st ed 2008), published by the California Public Employee Relations Institute of Industrial Relations, University of California at Berkeley.

© The Regents of the University of California

§4.312 1. Covered Employees

The Firefighters Procedural Bill of Rights Act (FBOR) (Govt C §§3250-3262) generally applies to any firefighter employed by a public agency, including any firefighter who is a paramedic or emergency medical technician. Govt C §3251(a). The FBOR does not apply to inmate firefighters, or individuals who are already protected by the POBR, such as arson investigators. Govt C §3251(a). Moreover, unlike the Public Safety Officers Procedural Bill of Rights Act (POBR), which protects probationary peace officers (Govt C §3301), the FBOR does not protect firefighters who have not yet passed probation. Govt C §3251(a). Interestingly, the FBOR states that "the rights and protections described in this chapter shall only apply to a firefighter during events and circumstances involving the performance of his or her official duties." Govt C §3262.

© The Regents of the University of California

§4.313 2. Adverse Comments in Personnel Files

With respect to personnel files, the Firefighters Procedural Bill of Rights Act (FBOR) (Govt C §§3250-3262) generally provides the same rights as the Public Safety Officers Procedural Bill of Rights Act (POBR). Specifically, no adverse comment may be entered into a firefighter's personnel file, or any other file used for any personnel purposes, without the firefighter having first read and signed the instrument. A firefighter then has 30 days to prepare a written response to any adverse comment entered in his or her personnel file. Govt C §§3255-3256. In addition, firefighters have the right to inspect their personnel files during usual business hours when the firefighter is on paid status. If the firefighter believes there is material in the personnel file that is mistaken or unlawful, the firefighter may submit a request to correct or delete the disputed material. The agency then has 30 days to respond to the request. Govt C §3256.5.

© The Regents of the University of California

§4.314 3. Procedures for Interrogation of Peace Officers

Similar to the Public Safety Officers Procedural Bill of Rights Act (POBR), the Firefighters Procedural Bill of Rights Act (FBOR) (Govt C §§3250-3262) establishes procedural safeguards that apply in the context of disciplinary investigations. In many respects, the FBOR's procedural protections mirror the protections afforded peace officers under the POBR (see §4.304), although there are some critical differences.

© The Regents of the University of California

§4.315 a. Pre-interrogation Requirements

If an investigatory interrogation "could lead to punitive action," an employer must provide the following procedural safeguards:

- The interrogation must take place "at a time when the firefighter is on duty, unless an imminent threat to the safety of the public requires otherwise." If the interrogation occurs during off-duty time, the officer must be compensated in accordance with regular department procedures. Govt C §3253(a).
- The firefighter must be informed before the interrogation of the nature of the investigation, the rank, name, and command of the person in charge of the interrogation and persons to be present at the interrogation. Govt C §3253(b)-(c). The interrogation may last only for a reasonable time and the firefighter may be questioned by only two interrogators. Govt C §3253(b), (d).
- Firefighters may be represented at investigations and interrogations on the filing of a formal written statement of charges or whenever an interrogation focuses on matters that are likely to result in punitive action. Govt C §3253(i).
- The firefighter being interrogated has the right to bring his or her own recording device to record any and all aspects of the interrogation. Govt C §3253(g).

© The Regents of the University of California

§4.316 b. Additional Requirement for Potentially Criminal Conduct

The employer must provide to, and obtain from, an employee a formal grant of immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in an interrogation. Subject to that grant of immunity, a firefighter refusing to respond to questions or to submit to interrogations must be informed that the failure to answer questions directly related to the investigation or interrogation may result in punitive action. Govt C §3253(e)(1).

© The Regents of the University of California

§4.317 4. Imposition of Discipline

The protections on the imposition of discipline provided by the Firefighters Procedural Bill of Rights Act (FBOR) (Govt C §§3250-3262) closely parallel the provisions of the Public Safety Officers Procedural Bill of Rights Act (POBR) (see §4.304), but with some notable differences. Like the POBR, the FBOR provides that an employer must complete its disciplinary investigation and notify a firefighter of any proposed discipline within 1 year of the employer's discovery of alleged misconduct. Govt C §3254(d). The FBOR provides that the limitations period begins to run when the "employing fire department or licensing or certifying agency" discovers the allegation of misconduct.

© The Regents of the University of California

§4.318 5. Administrative Appeals

The Firefighters Procedural Bill of Rights Act (FBOR) (Govt C §§3250-3262), like the Public Safety Officers Procedural Bill of Rights Act (POBR), provides that an employee who has completed probation and is subjected to punitive action or denied promotion on grounds other than merit must be afforded administrative appeal. Govt C §§3254(b), 3254.5. Similarly, before removing a fire chief, the agency must provide a chief with written notice, the reason(s) for removal, and an opportunity for administrative appeal. Govt C §3254(c).

Unlike the POBR, the FBOR requires any administrative appeal be conducted in conformance with the rules and procedures adopted by the employer that are in "accordance with" the requirements of the Administrative Procedure Act (Govt C §§11500-11529).

© The Regents of the University of California

§4.319 6. Remedies for Noncompliance

The Firefighters Procedural Bill of Rights Act (FBOR) (Govt C §§3250-3262) generally provides the same remedies as the Public Safety Officers Procedural Bill of Rights Act (POBR). See §4.310. Superior courts have initial jurisdiction over alleged FBOR violations. Firefighters can seek injunctive relief, penalties (up to $25,000 for each malicious violation), and actual damages, if any. In turn, a firefighter who initiates an action in bad faith or that is frivolous may be sanctioned and required to pay the agency's attorney fees. Govt C §3260.

© The Regents of the University of California

§4.320 XI. LABOR NEGOTIATIONS AND THE MEYERS-MILIAS-BROWN ACT (MMBA)

The purpose of the Meyers-Milias-Brown Act (MMBA) (Govt C §§3500-3511) is to promote full communication and improve relations between public employers and their employees by providing a reasonable method of resolving disputes on wages, hours, and other terms and conditions of employment. The MMBA provides a uniform basis for recognizing the rights of public employees to join labor organizations and be represented by such organizations in their employment relationships with public agencies. Govt C §3500.

The MMBA covers employees of all municipalities and many types of other governmental agencies. Some exceptions include public school districts, community colleges, and superior courts. Govt C §§3501(c)-(d), 3501.5.

PRACTICE TIP: For related material, see Zerger, Janiak, Johnson & Kay, California Public Sector Labor Relations (1997), available from LexisNexis Matthew Bender, telephone (800) 223-1940.

© The Regents of the University of California

A. Summary of MMBA

§4.321 1. MMBA Provides Rules for Administration of Employer-Employee Relations

The Meyers-Milias-Brown Act (MMBA) permits public employers to adopt rules and regulations for the administration of employer-employee relations such as the verification and formal recognition of employee representatives, subject to the duty to meet and confer. Govt C §3507. These rules, generally referred to as the Employer-Employee Relations Resolution (EER Resolution), are subject to a reasonableness standard and must conform with the overall purpose and principles described in the MMBA. See *International Bhd. of Elec. Workers v City of Gridley* (1983) 34 C3d 191, 193 CR 518.

PRACTICE TIP: Rules governing employer-employee relations are essential to the relationship between a city and its employees and should be carefully drafted to confirm the employee relations philosophy of the city.

© The Regents of the University of California

§4.322 2. MMBA Guarantees Certain Employee Rights

The Meyers-Milias-Brown Act (MMBA) guarantees covered employees certain rights on joining, participating in, and being represented by employee organizations. These rights and duties create a mandatory collective bargaining system for California local government. Govt C §§3502-3503, 3505.

© The Regents of the University of California

3. Dispute Resolution for MMBA Violations

§4.323 a. Public Employment Relations Board Jurisdiction

The California Public Employment Relations Board (PERB) has authority to hear and determine any complaints alleging violations of the Meyers-Milias-Brown Act (MMBA) or any rules and regulations concerning employee relations adopted by a public agency (except for the City of Los Angeles and the County of Los Angeles) as an unfair labor practice. Govt C §3509. See Govt C §§3541-3541.5 and 8 Cal Code Regs §§31001-32997 for PERB's general authority and procedural regulations.

NOTE: The PERB's authority with respect to the MMBA does not apply to peace officers as defined in Pen C §830.1. Govt C §3511.

There is a split of authority among the courts of appeal as to the exclusivity of PERB's jurisdiction over public employee strikes and whether an employer must first exhaust its administrative remedies with PERB before seeking relief in court. The issue is pending before the California Supreme Court. See *City of San Jose v Operating Engineers Local Union No. 3* (review granted June 18, 2008, S162647; superseded opinion at 160 CA4th 951, 73 CR3d 159).

PRACTICE TIP: PERB has been exercising similar authority over school district labor relations since its establishment in 1976. The PERB website (www.perb.ca.gov) contains PERB regulations concerning the MMBA, general information about PERB, procedures and forms used by PERB, and some PERB decisions.

The statute of limitations for MMBA unfair labor practices filed with PERB is 6 months. *Coachella Valley Mosquito & Vector Control Dist. v California Pub. Employment Relations Bd.* (2005) 35 C4th 1072, 29 CR3d 234.

© The Regents of the University of California

§4.324 b. No Binding Arbitration for Law Enforcement Officers and Firefighter Employee Organizations

The California Supreme Court held that binding interest arbitration under SB 402, passed in 2000, was an unconstitutional delegation of local government control to private parties. *County of Riverside v Superior Court (Riverside Sheriff's Ass'n)* (2003) 30 C4th 278, 132 CR2d 713. The provisions of SB 440 (2003), amending CCP §§1299.7 and 1299.9, were enacted in response to the decision in *County of Riverside v Superior Court, supra,* and provide that an arbitrator's decision is binding unless overturned by a unanimous vote of the governing board.

The First District Court of Appeal recently held that SB 440 was also unconstitutional. *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 93 CR3d 39.

© The Regents of the University of California

§4.325 B. Harmonizing Meyers-Milias-Brown Act With National Labor Relations Act

Federal cases interpreting the National Labor Relations Act (NLRA) (29 USC §§151-169) are viewed as authority in analyzing the Meyers-Milias-Brown Act (MMBA) (Govt C §§3500-3511). The MMBA parallels the NLRA, and California courts may look to federal case law in interpreting the act. *Holliday v City of Modesto* (1991) 229 CA3d 528, 535, 280 CR 206; *Public Employees Ass'n v Board of Supervisors of Tulare County* (1985) 167 CA3d 797, 806, 213 CR 491.

© The Regents of the University of California

C. Provisions Under Meyers-Milias-Brown Act

§4.326 1. Discrimination

Public agencies and employee organizations are prohibited from interfering with, restraining, or discriminating against an employee who chooses to exercise his or her rights under the Meyers-Milias-Brown Act (MMBA) (Govt C §§3500-3511). Govt C §3506; *Campbell Municipal Employees Ass'n v City of Campbell* (1982) 131 CA3d 416, 182 CR 461; *San Leandro Police Officers Ass'n v City of San Leandro* (1976) 55 CA3d 553, 127 CR 856.

A public employer may not unilaterally implement agreed-on benefits only for those unions that have reached agreement on all other bargaining issues, while denying those agreed-on benefits to unions that have not come to an agreement on remaining bargaining issues. Such a practice is discriminatory and violates the purpose and intent of the MMBA. *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1985) 168 CA3d 683, 214 CR 350.

© The Regents of the University of California

§4.327 2. Right to Organize

Public employees have the right to form, join, and participate in the activities of an employee organization of their own choosing for the purpose of representation on employer-employee relations matters. The procedure for gaining recognition as a valid employee group is developed by the municipality subject to the duty to meet and confer. See Govt C §§3507-3507.1; §4.335.

Employees also have the right to refuse to join employee associations, and the right to represent themselves as individuals in employee relations matters with the city, subject to agency shop requirements. Govt C §§3502, 3202.5. See §4.331.

© The Regents of the University of California

§4.328 a. Law Enforcement Employees and Firefighters

Law enforcement employees have the right to join or participate in employee organizations composed solely of peace officers. Govt C §3508.

In addition to the rights guaranteed under MMBA, firefighters are expressly guaranteed the right to unionize. Lab C §§1960-1964. The superior courts, not PERB, have exclusive jurisdiction over actions involving interest arbitration when the action involves an employee organization that represents firefighters. Govt C §3509(e).

© The Regents of the University of California

§4.329 b. Management and Confidential Employees

The public employer may adopt reasonable rules and regulations that provide for the designation of confidential and management employees, and may restrict such employees from representing other employees of the employer. Govt C §3507.5. See also *Public Employees of Riverside County, Inc. v County of Riverside* (1977) 75 CA3d 882, 142 CR 521; *Organization of Deputy Sheriffs v County of San Mateo* (1975) 48 CA3d 331, 338, 122 CR 210.

© The Regents of the University of California

§4.330 c. Professional Employees

Professional employees have the right to be represented separately from nonprofessional employees by an employee organization. "Professional employees" refers to employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, *e.g.,* attorneys, physicians, and registered nurses. Govt C §3507.3. See also *International Fed'n of Prof. & Tech. Eng'rs v City & County of San Francisco* (2000) 79 CA4th 1300, 94 CR2d 790 (construing scope of Govt C §3507.3).

© The Regents of the University of California

§4.331 d. Unrepresented Employees

The Meyers-Milias-Brown Act (MMBA) specifically states individual employees have the right to "represent themselves individually." Govt C §3502. However, once an employer has recognized an employee organization as an exclusive representative, the individual employee is limited to providing input to the employer on matters within the scope of representation. The statutory right to represent oneself does not equate to a right to bargain and "is at best the right to a non-enforceable grievance procedure." *Relyea v Ventura County Fire Protection Dist.* (1992) 2 CA4th 875, 3 CR2d 614.

© The Regents of the University of California

§4.332 3. Agency Shop Agreements

An "agency shop" agreement may be negotiated between a recognized employee association and the city. It is an agreement that requires the employees in the bargaining unit to either join the association or pay the organization a service fee for representation services. Govt C §3502.5(a).

An agency shop arrangement must be placed in effect, without a negotiated agreement, on:

- A signed petition of 30 percent of the employees in the applicable bargaining unit requesting an agency shop agreement and an election to implement an agency fee arrangement; and
- The approval by a majority of employees who cast ballots and vote in a secret ballot election in favor of the agency shop arrangement.

The petition can be filed only after the recognized employee organization has requested the public agency to negotiate on an agency shop arrangement and, beginning seven working days after the public agency received the request, the two parties have had 30 calendar days to attempt good faith negotiations in an effort to reach agreement. Govt C §3502.5. An election may not be held more frequently than once a year. Govt C §3502(b). Similar provisions govern the rescinding of an agency shop agreement. Govt C §3502(d).

Employees who refuse to pay fees to an association based on bona fide religious objections must pay an equivalent amount to a nonreligious and non-labor charitable fund. Govt C §3502.5(c).

NOTE: An agency shop arrangement does not apply to management employees. Govt C §3502.5(e). See §4.329.

© The Regents of the University of California

§4.333 4. Bargaining Unit Issues

The public agency employer has the exclusive right to determine appropriate bargaining units. *Covina-Azusa Fire Fighters Union, Local 2415 v City of Azusa* (1978) 81 CA3d 48, 59, 146 CR 155. In adopting an employer-employee relations resolution, the employer may include procedures for establishing bargaining units and resolving bargaining unit disputes. Such procedures are subject to the duty to meet and confer. Govt C §3507. See §4.335.

A public agency must grant exclusive or majority recognition to an employee organization after review and verification, by a neutral third party agreed to by the employee organization and the public agency, of a signed petition, authorization cards, or union membership cards, showing that a majority of the employees in an appropriate bargaining unit recognized as exclusive or majority representative of all or part of the same unit. If the public agency and the employee organization cannot agree on a neutral third party, the Division of Conciliation of the Department of Industrial Relations must be the neutral third party. Govt C §3507.1.

© The Regents of the University of California

§4.334 5. Required Notice

The Meyers-Milias-Brown Act (MMBA) generally requires the governing body to give reasonable notice of any proposed ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation. The notice must be given to each recognized employee organization that would be affected by the proposed action. The governing body must give that organization the opportunity to meet and confer with the proposing agency. See §4.335. The notice must be in writing and must be given to an official of the organization. Govt C §3504.5; *Vernon Fire Fighters v City of Vernon* (1980) 107 CA3d 802, 812, 165 CR 908.

NOTE: When a governing body decides an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body must provide notice and opportunity to meet at the earliest practicable time following the adoption of such ordinance, rule, resolution, or regulation. Govt C §3504.5. Such an emergency may be evidenced by an imminent and substantial threat to public safety. *Sonoma County Org. of Pub./Private Employees v County of Sonoma* (1991) 1 CA4th 267, 1 CR2d 850.

© The Regents of the University of California

§4.335 6. Meet and Confer Obligation

On the request of either party, the public employer and the employee association have a mutual obligation to promptly bargain in good faith to reach agreement on matters within the scope of representation. Govt C §3505; *Claremont Police Officers Ass'n v City of Claremont* (2006) 39 C4th 623, 630, 47 CR3d 69. The employer must also meet and confer on all decisions outside the scope of bargaining insofar as they affect matters relating to wages, hours, and terms and conditions of employment. 39 C4th at 633. On scope of representation, see §4.336.

NOTE: A public entity must allow a reasonable number of employee representatives a reasonable amount of time off without loss of pay or benefits to formally meet and confer on matters within the scope of representation. Govt C §3505.3.

© The Regents of the University of California

§4.336 a. Matters Within Scope of Representation

All matters relating to employment conditions and employer employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, are included within the scope of representation. Expressly excluded from the scope of representation are the merits, necessity, or organization of any service or activity provided by law or executive order. Govt C §3504. See *Berkeley Police Ass'n v City of Berkeley* (1977) 76 CA3d 931, 937, 143 CR 255.

© The Regents of the University of California

§4.337 (1) No Definitive Test

There is no definitive test for determining whether a matter is within the scope of representation. *Fire Fighters Union v City of Vallejo* (1974) 12 C3d 608, 620, 116 CR 507; *Solano County Employees' Ass'n v County of Solano* (1982) 136 CA3d 256, 261, 186 CR 147. See also *San Jose Peace Officer's Ass'n v City of San Jose* (1978) 78 CA3d 935, 945, 144 CR 638.

PRACTICE TIP: Courts do look to analogous provisions in the National Labor Relations Act (29 USC §§151-169) when interpreting the Meyers-Milias-Brown Act (MMBA). *Fire Fighters Union v City of Vallejo, supra*.

© The Regents of the University of California

§4.338 (2) Liberal Construction

The courts have liberally construed the scope of the terms and conditions of employment that are subject to meet and confer. See, *e.g., Los Angeles Police Protective League v City of Los Angeles* (1985) 166 CA3d 55, 60, 212 CR 251, overruled on unrelated grounds in *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 253 CR 426 (parking fees); *Solano County Employees' Ass'n v County of Solano* (1982) 136 CA3d 256, 186 CR 147 (policy on use of motorcycles); *Dublin Prof. Fire Fighters, Local 1885 v Valley Community Servs. Dist.* (1975) 45 CA3d 116, 119, 119 CR 182 (assignment of overtime); *Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles* (1973) 33 CA3d 1, 5, 108 CR 625 (work load).

© The Regents of the University of California

§4.339 b. Good Faith Requirement

The requirement that parties meet and confer in good faith has been interpreted by the courts to mean that the good faith necessary to be shown is a subjective attitude that requires a genuine desire to reach agreement. *Placentia Fire Fighters v City of Placentia* (1976) 57 CA3d 9, 25, 129 CR 126. Indicia of bad faith have been developed in litigation arising under the MMBA. See, *e.g., Stationary Eng'rs v San Juan Suburban Water Dist.* (1979) 90 CA3d 796, 803, 153 CR 666, disapproved on other grounds in *County Sanitation Dist. No. 2 v Los Angeles County Employees' Ass'n* (1985) 38 C3d 564, 570 n9, 214 CR 424 (dilatory tactics).

© The Regents of the University of California

§4.340 7. Management Rights and Restrictions

Certain rights, often termed "management rights," are not within the scope of bargaining because they are intrinsic to the right to manage. Management may not be required to bargain over actions taken under such rights unless they have a significant impact on wages, hours, or other terms and conditions of employment and the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining over the intended action. Management rights clauses are typically contained in a city's employer-employee relations resolution, the personnel rules, or the municipal code. *Claremont Police Officers Ass'n v City of Claremont* (2006) 39 C4th 623, 636, 47 CR3d 69; *Building Material & Constr. Teamsters' Union v Farrell* (1986) 41 C3d 651, 663, 224 CR 688; *San Jose Peace Officer's Ass'n v City of San Jose* (1978) 78 CA3d 935, 945, 144 CR 638; *Berkeley Police Ass'n v City of Berkeley* (1977) 76 CA3d 931, 937, 143 CR 255.

The supreme court in *Claremont Police Officers Ass'n v City of Claremont, supra*, provides the following three-part test for whether an action is within "management rights":

- Does the decision have a significant and adverse effect on wages, hours, or working conditions of bargaining unit members? If no, there is no duty to negotiate. If yes, then ask:
- Does the significant and adverse effect arise from the implementation of a fundamental managerial or policy decision? If no, meet and confer applies. If yes, apply the following balancing test:
- Is the employer need for unencumbered decision making in managing its operations outweighed by the benefit to employer-employee relations of bargaining over the issue in question? In making this analysis, the court may consider whether the transactional cost of the bargaining process outweighs its value.

PRACTICE TIP: A city's employer-employee relations ordinance or resolution or any memorandum of understanding should contain a broad management rights provision to affirm the city's right to manage the merits, necessity, or organization of its services or activities.

© The Regents of the University of California

§4.341 8. Impasse

If the good faith meeting and conferring leads only to an impasse, a public agency not subject to interest arbitration may implement its last best final offer, but may not implement a memorandum of understanding. Govt C §3505.4. Impasse resolution procedures adopted by the public agency must be exhausted before implementation.

NOTE: "Impasse" is not defined in the MMBA, but is an important concept. "Impasse" is, however, defined in the statute governing employer-employee relations for school districts and establishing the Public Employment Relations Board. As used in this statute, " 'Impasse' means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in position are so substantial or prolonged that future meetings would be futile." Govt C §3540.1(f).

PRACTICE TIP 1: If the city council anticipates an impasse, it should instruct its negotiating team to make its last best and final offer one that the city council would implement after an impasse hearing.

PRACTICE TIP 2: A city's employer-employee relations ordinance or resolution should establish a dispute resolution or impasse procedure that authorizes the city council to ultimately resolve disputes or impasses between employee organizations and the city.

© The Regents of the University of California

§4.342 a. No Binding Arbitration for Law Enforcement Officers and Firefighters

Following impasse, binding arbitration of economic issues affecting employee organizations representing law enforcement officers and firefighters is not required. Although the California Supreme Court held that the previous binding arbitration legislation was an unconstitutional delegation of local government control to private parties (*County of Riverside v Superior Court (Riverside Sheriff's Ass'n)* (2003) 30 C4th 278, 132 CR2d 713), subsequent legislation (SB 440 (2003)) attempted to restore binding arbitration by providing that an arbitrator's decision is binding unless overturned by a unanimous vote of the governing board. See CCP §§1299.7, 1299.9. The First District Court of Appeal recently held, however, that SB 440 was also unconstitutional. *County of Sonoma v Superior Court* (2009) 173 CA4th 322, 93 CR3d 39.

© The Regents of the University of California

§4.343 b. Other Employees

The Meyers-Milias-Brown Act (MMBA) does not specify any particular impasse procedure except the parties may agree to appoint a mediator to help them reach agreement. Govt C §3505.2. Procedures for the resolution of disputes may be adopted as part of the city's employer-employee relations rules and regulations. Govt C §3507.

© The Regents of the University of California

§4.344 9. Unilateral Changes

A unilateral change in violation of the Meyers-Milias-Brown Act (MMBA) occurs when an employer takes any action to change the status quo on a matter within the scope of bargaining without having given proper notice and an opportunity to bargain. Such action by an employer is a *per se* violation of the duty to meet and confer. *Vernon Fire Fighters v City of Vernon* (1980) 107 CA3d 802, 823, 165 CR 908. On the meet and confer requirement, see §§4.335-4.339. However, once an employer offers reasonable written notice and an opportunity to bargain, if the employee organization does not respond, the employer may unilaterally adopt a rule or regulation. *Stationary Eng'rs v San Juan Suburban Water Dist.* (1979) 90 CA3d 796, 802, 153 CR 666, disapproved on other grounds in *County Sanitation Dist. No. 2 v Los Angeles County Employees' Ass'n* (1985) 38 C3d 564, 570 n9, 214 CR 424. See also Zerger, California Public Sector Labor Relations §10.06[1] (1989).

NOTE: Adjustments made to employee benefits due to changes in employer obligations as mandated by current law do not require that an entire Memorandum of Understanding (MOU) be renegotiated. *Mendocino County Employees Ass'n v County of Mendocino* (1992) 3 CA4th 1472, 5 CR2d 353. On MOUs, see §4.346.

© The Regents of the University of California

§4.345 10. Unilateral Implementation Following Meet and Confer

A public employer who is unsuccessful in reaching a negotiated agreement after a good faith effort may unilaterally impose its last offer. Such imposition may not occur until negotiations and the impasse procedures have been exhausted. The unilateral imposition must reflect the city's last offer and that offer must be consistent with the history of negotiations. See Zerger, California Public Sector Labor Relations §10.07[4] (1989).

© The Regents of the University of California

§4.346 11. Memorandum of Understanding

The written negotiated agreement or contract between the employer and recognized representative of employees in a bargaining unit that sets out the terms and conditions of employment, *e.g.,* wages, hours, or fringe benefits, for a stated period of time is often called a "memorandum of understanding" or "MOU." The written agreement must be ratified by the governing body to be binding on the parties. Govt C §3505.1; *Glendale City Employees' Ass'n v City of Glendale* (1975) 15 C3d 328, 124 CR 513.

© The Regents of the University of California

§4.347 12. Unfair Labor Practices

Unfair labor practices include any action by an employer or an employee organization that violates any right protected by the Meyers-Milias-Brown Act (MMBA). Specific unfair practices are not listed in the MMBA, except the duty to bargain in good faith, which renders bad faith bargaining, *i.e.,* failure to timely meet and confer, an unfair labor practice. *Dublin Prof. Fire Fighters, Local 1885 v Valley Community Servs. Dist.* (1975) 45 CA3d 116, 118, 119 CR 182. The MMBA clearly prohibits interference with an employee's right to participate or not to participate in an organization. Govt C §3506.

© The Regents of the University of California

§4.348 13. Strikes

The Meyers-Milias-Brown Act (MMBA) has been interpreted as allowing public employees a limited right to strike. *County Sanitation Dist. No. 2 v Los Angeles County Employees' Ass'n* (1985) 38 C3d 564, 585, 214 CR 424. However, strikes that impact the delivery of essential services and create a substantial likelihood that serious harm will be experienced unless immediate action is taken create an emergency situation in which employers may unilaterally adopt a rule or regulation affecting the strike. See *Sonoma County Org. of Pub./Private Employees v County of Sonoma* (1991) 1 CA4th 267, 1 CR2d 850. See §4.323 (Public Employment Relations Board (PERB) jurisdiction over public employee strikes).

NOTE: Strikes by firefighters are specifically prohibited (Lab C §1962) and strikes by police officers have been determined to be illegal per se (see *City of Santa Ana v Santa Ana Police Benevolent Ass'n* (1989) 207 CA3d 1568, 255 CR 688). But see CCP §1299.4(d) (law enforcement officers and firefighters cannot be permitted to engage in strikes that endanger public safety).

© The Regents of the University of California

§4.349 14. Mediation

The Meyers-Milias-Brown Act (MMBA) (Govt C §§3500-3511) provides for, but does not require, the submission of matters on which agreement cannot be reached to a mediator, mutually selected by the parties. The cost for mediation is to be shared equally between the parties. Govt C §3505.2. The California State Mediation and Conciliation Service normally provides mediators to public agencies at no charge.

PRACTICE TIP: A city should consider including in the employer-employee relations ordinance or resolution a procedure for mediation or fact finding to resolve disputes or impasses occurring during labor negotiations.

© The Regents of the University of California

XII. CALIFORNIA WORKERS' COMPENSATION LAW

§4.350 A. Workers' Compensation Law Generally

California workers' compensation law is a comprehensive system of benefits for employees who have sustained work-related injuries or illnesses. It is a "no fault" system that provides benefits without regard to the fault of the employee or the employer.

The system is designed to provide an injured worker with treatment and benefits automatically and promptly as soon as the employer learns about the injury. The law establishes expedited dispute resolution procedures in contested cases. The law is described in state statutes, administrative regulations, and case law. See, *e.g.,* Lab C §§3200-3604.

PRACTICE TIP: For a more detailed analysis of workers' compensation principles, see California Workers' Compensation Practice (4th ed Cal CEB 2000); Hanna, California Law of Employee Injuries and Workers' Compensation (Matthew Bender); Herlick, California Workers' Compensation Law (Butterworth Legal Publishers, 5th ed 1994); Larson, Larson's Workers' Compensation Law (Matthew Bender, 1952); St. Clair, California Workers' Compensation Law and Practice (California Compensation Seminars, 5th ed 1996).

© The Regents of the University of California

§4.351 1. Workers' Compensation Law Is Specialized Area

Workers' compensation law is a special area of practice unfamiliar to most municipal attorneys and administrators. In most cities, the administration of workers' compensation claims is handled by a third party administrator (TPA) and outside workers' compensation counsel. Nevertheless, important roles remain for the "generalist" attorney or staff member. TPAs and outside counsel may lack the in-house knowledge necessary to thoroughly investigate claims and defenses (*e.g.,* the availability of light duty), and to coordinate workers' compensation cases with other legal matters (disability retirement, labor and employment matters, civil actions, discrimination claims) that may evolve from the same set of facts.

© The Regents of the University of California

§4.352 2. Workers' Compensation as Sole and Exclusive Remedy

The right to receive workers' compensation benefits is the sole and exclusive remedy available to an employee against the employer for a work-related injury. Lab C §3602(a). There are statutory and judicially recognized exceptions to this rule. See Lab C §3602(b); *Gantt v Sentry Ins.* (1992) 1 C4th 1083, 4 CR2d 874. For example, a claim of employment discrimination based on disability due to a work-related injury can be pursued under the Fair Employment and Housing Act. *City of Moorpark v Superior Court* (1998) 18 C4th 1143, 77 CR2d 445. The workers' compensation law is the sole remedy, however, for alleged emotional distress resulting from torts (such as intentional infliction of emotional distress) that occur in the workplace. *Miklosy v Regents of Univ. of Cal.* (2008) 44 C4th 876, 80 CR3d 690.

© The Regents of the University of California

§4.353 3. Interactive Process Under Discrimination Laws Imposes Separate Obligation

The obligation to engage in the interactive process with an employee about claimed disabilities and workplace needs is an independent requirement that stems from the federal ADA (42 USC §§12101-12213) and the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996). The analysis of whether "modified duty" is available under workers' compensation rules does not satisfy this independent, statutory obligation. In other words, even if a public agency employer is not obligated to provide modified duty under workers' compensation rules, the employer may nonetheless have an obligation to provide a reasonable accommodation. Govt C §12940(n); *Claudio v Regents of Univ. of Cal.* (2005) 134 CA4th 224, 35 CR3d 837.

© The Regents of the University of California

B. Work-Related Injury: Prerequisite for Recovering Workers' Compensation Benefits

§4.354 1. Injury Required

To qualify for workers' compensation benefits, an employee must have an injury that "arises out of employment" or that occurs during the "course of employment." Lab C §3600. The test is whether the work caused the employee's injury or illness. A pre-existing condition that was not caused by the employee's work but was aggravated by work, is also considered a work-related injury. *Argonaut Ins. Exch. v Industrial Acc. Comm'n (Bellinger)* (1958) 49 C2d 706, 321 P2d 460. See *Granado v WCAB* (1968) 69 C2d 399, 71 CR 678. An injury may be physical or psychiatric. See Lab C §§3208, 3208.3.

The injury may be due to a specific incident or exposure, or to the cumulative effect of activities over time, or a combination of the two. Lab C §§3208.1-3208.2.

© The Regents of the University of California

§4.355 a. Burden of Proof

The burden of proving that an injury is work-related is on the employee. Lab C §5705.

PRACTICE TIP: The employee's burden is lightened—some would say lightened considerably—by the principles that workers' compensation law must be liberally construed for the purpose of protecting injured workers, and that reasonable doubts will be resolved in favor of the employee. Lab C §3202.

© The Regents of the University of California

§4.356 b. Presumptions

Some injuries are presumed work-related. Heart trouble, hernia, pneumonia, and cancer are presumed to be work-related for certain safety personnel. Other presumptions applicable to some employees include tuberculosis, blood-borne infectious diseases, meningitis, and back injuries. See Lab C §§3212-3213.2.

PRACTICE TIP: These presumptions are rebuttable in theory, but difficult to rebut in practice. See *Geoghegan v Retirement Bd.* (1990) 222 CA3d 1525, 272 CR 419.

© The Regents of the University of California

§4.357 c. Special Proof Problems

Special problems of proof apply to psychiatric injuries. Generally, the employee must show that the psychiatric injury is due to actual events of employment or as a compensable consequence of a physical injury. See Lab C §3208.3. Defenses include good faith personnel action and a requirement of 6 months of employment.

© The Regents of the University of California

§4.358 2. Only Employees Entitled to Benefits

Only "employees" are entitled to workers' compensation benefits. Detailed rules guide the analysis of who is or is not an employee. Lab C §3351. Elected and appointed paid officials are generally included in the definition of employee. Lab C §3351. Volunteers are generally not employees unless the legislative body or case law has declared that they are. Lab C §3363.5. Disputed cases depend heavily on the facts.

© The Regents of the University of California

§4.359 3. Affirmative Defenses

The legislature has established certain specific, affirmative defenses to a claimed industrial injury. Lab C §3600. These defenses include:

- intoxication;
- self-inflicted injury;
- voluntary suicide;
- injury caused by altercation in which injured employee was initial physical aggressor;
- injury caused by felonious act that results in conviction;
- injury caused by voluntary off-duty recreational injury.

All of these defenses are heavily dependent on the facts. For example, suicide caused by a work-related psychiatric condition may be compensable, and injury incurred in an off-duty softball game may be compensable if the employer required or encouraged the employee to participate.

© The Regents of the University of California

§4.360 C. Workers' Compensation Benefits

Workers' compensation benefits are supposed to be paid automatically, without the necessity of litigation, and most claims are not litigated. On litigated claims, see §§4.382-4.399. The employer is required to provide benefits without delay unless it has a good faith argument that no benefits are payable.

PRACTICE TIP: An employer should not refuse to pay benefits on an asserted claim unless it believes, in good faith, that there is sufficient evidence to withstand a penalty petition (see §§4.374-4.378).

© The Regents of the University of California

§4.361 1. Employer-Paid Medical Treatment

The employer must pay all medical expenses "reasonably required to cure or relieve the effects of the injury." Lab C §4600. This includes "medical, surgical, chiropractic, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, including artificial members." Lab C §4600. Medical treatment has also been found to include physical therapy, gym membership, home nursing, and housekeeping, and a specially equipped van for a paraplegic.

Treatment modalities must be in accordance with the American College of Occupational and Environmental Medicine guidelines. Lab C §4616(e). These guidelines are presumed to be correct with regard to the nature, extent, and scope of medical treatment. Lab C §4600.

NOTE: California law prohibits a limit on chiropractic, occupational therapy, or physical therapy visits for post-surgical physical, medical, and rehabilitative services. Lab C §4604.5.

Within one working day after an employee files a claim form, the employer must authorize all medical treatment consistent with American College of Occupational Environmental Medicine Guidelines for an alleged industrial injury and continue until the claim is accepted or rejected. Liability for treatment while a claim is under investigation is limited to $10,000. Lab C §5402(c).

© The Regents of the University of California

2. Treatment Provider

§4.362 a. Pre-designated Physician

An employee may pre-designate his or her personal physician for treatment of industrial injuries if

- the employee has notified his or her employer in writing, before the injury, that the physician has been selected,
- the physician agrees in writing to be the primary treating physician for work- related injuries, and
- the physician agrees to accept the workers' compensation fee schedule for compensation for physician services.

The pre-designated physician must have provided prior treatment and maintain records of treatment before the industrial injury. Pre-designation of a physician is only available to employees whose employer provides non-occupational group health coverage or a group health plan or policy. Lab C §4600.

© The Regents of the University of California

§4.363 b. Employer Physician

If the employee does not pre-designate a physician, the employer may exercise initial control of treatment for 30 days but the employee may request to change physicians after that time. Lab C §§4600-4601. An employer may maintain control of treatment by contracting with a certified health care organization under conditions described in the law. Lab C §4600.3. An employer may also maintain ongoing control of treatment by establishing a medical provider network for the treatment of injured employees. Lab C §4616.

© The Regents of the University of California

§4.364 3. Employee May Not Refuse Treatment

An employee may not unreasonably refuse medical treatment. Lab C §4056.

© The Regents of the University of California

D. Disability Benefits

§4.365 1. Temporary Disability Benefits

Temporary disability benefits compensate the employee for wage loss during the period after an injury when the employee is recovering from the injury and unable to work. Lab C §§4650-4664.

An employee is temporarily totally disabled if he or she cannot work at all. An employee is temporarily partially disabled if he or she can perform some type of modified work.

PRACTICE TIP: One of the most important tools available to an employer who wishes to limit its workers' compensation liability is to provide light duty to partially disabled employees. Providing light duty, consistent with the employee's medical restrictions, may allow the employer to terminate temporary disability benefits. *Meyers v Industrial Acc. Comm'n (Titsworth)* (1940) 39 CA2d 665, 103 P2d 1025. Providing light duty is also a defense to a disability retirement application and, in addition, may provide a defense against ADA claims. *O'Toole v Retirement Bd.* (1983) 139 CA3d 600, 188 CR 853. An employer's obligation to engage in the interactive process and provide reasonable accommodations in the workplace is an independent obligation under the ADA and the California Fair Employment and Housing Act. Govt C §12940(n).

© The Regents of the University of California

§4.366 a. When Temporary Disability Benefits Cease

Temporary disability benefits are payable until:

- The employee has been released to return to work; or
- The employee's medical condition has become "permanent and stationary" or reached the "maximum medical improvement."

NOTE: The employee becomes permanent and stationary when he or she has reached maximal expected improvement. Lab C §4652.

The total temporary disability payments for a single injury cannot extend more than 104 weeks within any period of 2 years from the first payment, except for certain injuries. Lab C §4656.

© The Regents of the University of California

§4.367 b. Amount of Temporary Disability Benefits

Temporary disability benefits are two-thirds of the employee's "average weekly earnings," with a maximum and minimum limit. For injuries occurring on or after January 1, 2006, for maximum wage earners (most public employees), the rate is $840 per week. Lab C §4653. For injuries occurring on or after January 1, 2005, commencing January 1, 2007, the limits are increased annually by the percentage increase of the State Average Weekly Wage. Lab C §4453(a)(10).

Local safety officers, juvenile probation officers/counselors, and district attorney investigators who are members of the Public Employees' Retirement System (PERS) are entitled to full salary for up to 1 year in lieu of temporary disability benefits. See Lab C §4850. Many local safety employees who are not members of PERS are granted similar benefits under city charters or local labor agreements.

© The Regents of the University of California

§4.368 2. Permanent Disability Benefits

Permanent disability refers to an employee's residual disability once the healing period is over and the employee's condition is permanent and stationary, or the employee has reached the maximum medical improvement.

An employer is only liable for the permanent disability that it caused. Lab C §§4663-4664. For example, an employee injures his back while working for employer 1, and then injures it again working for employer 2. Employer 2 is only liable for the increase in permanent disability that it caused. In this way, permanent disability is "apportioned" between employers.

© The Regents of the University of California

§4.369 a. Permanent Disability Rating

The extent of permanent disability is expressed as a percentage from 0 to 100, referred to as a permanent disability "rating." One hundred percent permanent disability represents permanent, total disability; anything less than 100 represents permanent partial disability. The percentage assigned to a particular employee depends on the nature of the injury, the occupation at the time of the injury, and the employee's age at the time of injury, with consideration given to an employee's diminished future earning capacity. Lab C §4660(a).

The employee's ultimate rating depends heavily on the description of the employee's impairment based on the American Medical Association's guides to the evaluation of permanent impairment. Lab C §4660. In most cases, the descriptions of the employee's disability in the medical reports are translated into a "standard" disability rating, which is then adjusted upward or downward based on the employee's age and occupation. Lab C §4660.

PRACTICE TIP: The issue of an employee's permanent disability rating is not the same as the issue of whether the employee is disabled for the performance of his or her usual duties in the disability retirement setting. An employee may have a substantial permanent disability rating and still be capable of performing his or her usual duties. *Winn v Board of Pension Comm'rs* (1983) 149 CA3d 532, 197 CR 111; *Hosford v Board of Admin.* (1978) 77 CA3d 854, 143 CR 760; *Harmon v Board of Retirement* (1976) 62 CA3d 689, 133 CR 154.

© The Regents of the University of California

§4.370 b. Permanent Partial Disability

An employee with a permanent partial disability is entitled to a certain number of weeks of indemnity payments, depending on the percentage of disability and whether the employee returns to work at modified, alternative, or similar job duties. Lab C §§4658, 4659(c).

An employer has an independent obligation under the ADA and the California Fair Employment and Housing Act (FEHA) to engage in the interactive process and identify possible reasonable accommodations in the workplace. Govt C §12940(n).

© The Regents of the University of California

§4.371 c. Individual Jurisdiction Pension Plan Limits

In some jurisdictions with their own pension plans, the pension plan provides that an employee is not entitled to permanent disability and industrial disability retirement benefits for the same condition. In those jurisdictions, the employee's industrial disability retirement allowance may be reduced by the amount of any permanent disability benefits paid for the same condition. *City & County of San Francisco v Workers' Compensation Appeals Bd. (Engler)* (1968) 267 CA2d 771, 73 CR 429.

© The Regents of the University of California

§4.372 d. Supplemental Job Displacement Benefits

An employee who cannot return to his or her usual duties because of a work-related injury that causes permanent partial disability is entitled to benefits to assist him or her in returning to gainful employment in the form of vocational rehabilitation for injuries before 2004 (Lab C §139.5) and supplemental job displacement benefits for injuries on or after January 1, 2004. Lab C §4658.5.

The supplemental job displacement benefit is a non-transferable voucher for education related to retraining or skill enhancement or both at state-approved or state-accredited schools.

The amount of supplemental job displacement benefits is limited by the percentage of the permanent partial disability award. Lab C §4658.5.

© The Regents of the University of California

§4.373 E. Death Benefits

Death benefits are payable to the dependents of an employee who dies from a work-elated injury or illness. Lab C §§4700-4709. Heirs are not, however, constitutionally entitled to receive workers' compensation benefits. *Six Flags, Inc. v WCAB* (2006) 145 CA4th 91, 93, 51 CR3d 377.

The amount of the death benefits varies based on the date of injury, the extent of dependency (total versus partial), and the number of dependents. Lab C §4702.

© The Regents of the University of California

F. Penalties for Violations of Workers' Compensation Laws

§4.374 1. Labor Code Governs

The Labor Code imposes an increase in the amount of the benefit under the workers' compensation laws if payment has been unreasonably delayed or refused. Lab C §5814. This penalty applies to the entire class of benefits that was not timely paid. However, the penalty amount must be 10-25 percent of the benefit unreasonably withheld up to a limit of $10,000. Lab C §5814.

PRACTICE TIP: To rebut a penalty petition, the employer must be prepared to show that it refused to pay benefits because of a "genuine doubt from a medical or legal standpoint as to liability for benefits." *Kerley v Workers' Compensation Appeals Bd.* (1971) 4 C3d 223, 93 CR 192.

© The Regents of the University of California

§4.375 2. Multiple Penalties

Multiple penalties may be imposed when an employer unreasonably delays payment of several types of benefits, or when there are separate and distinct acts of unreasonable delay in payment of a class of benefits. *Gallamore v Workers' Compensation Appeals Bd.* (1979) 23 C3d 815, 153 CR 590.

© The Regents of the University of California

§4.376 3. Late Payments

An automatic 10-percent increase may be imposed on late indemnity payments. Lab C §4650(d).

© The Regents of the University of California

§4.377 4. Serious and Willful Misconduct of Employer

If the employee's injury is a result of the employer's serious and willful misconduct, compensation is increased 50 percent. Lab C §4553. Insurance does not cover this penalty.

© The Regents of the University of California

§4.378 5. Serious and Willful Misconduct of Employee

The compensation recoverable by an employee will be reduced by 50 percent if the injury was due to the employee's serious and willful misconduct. Lab C §4551.

PRACTICE TIP: This claim is often asserted as a defense but is rarely successful.

© The Regents of the University of California

§4.379 G. Penalties for Discrimination Against Injured Employee

Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed a claim for compensation is guilty of a misdemeanor and the employee's compensation will be increased by one-half, but in no event more than $10,000. Lab C §132a.

In addition, the employee can be restored to employment with retroactive pay and benefits. Insurance cannot cover liability for a Lab C §132a violation.

NOTE: The provisions of Lab C §132a have been construed broadly to cover any discrimination based on a work-related injury. See *Judson Steel v Workers' Compensation Appeals Bd. (Maese)* (1978) 22 C3d 658, 150 CR 250.

© The Regents of the University of California

§4.380 1. Fair Employment and Housing Act Claim

In addition to claiming benefits under Lab C §132a before the Workers' Compensation Appeals Board, an employee may pursue a disability discrimination claim and/or a failure to accommodate claim under the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996). *City of Moorpark v Superior Court* (1998) 18 C4th 1143, 77 CR2d 445. Alternatively, the employee can allege a violation of public policy based on FEHA. 18 C4th at 1157.

© The Regents of the University of California

§4.381 2. Defenses

An employer can defend a discrimination claim by showing that the action it took was based on "reasonable business necessity." *Warnock v WCAB* (1997) 62 CCC 406; *Bloom v WCAB* (1997) 62 CCC 680.

© The Regents of the University of California

§4.382 H. Litigation

Workers' compensation benefits are supposed to be paid automatically, without the necessity of litigation, and most claims are not litigated. When they are litigated, the Workers' Compensation Appeals Board has exclusive jurisdiction over "the recovery of compensation, or concerning any right or liability arising out of or incidental thereto." Lab C §5300.

© The Regents of the University of California

§4.383 1. Typical Issues

Typical contested issues are industrial causation, permanent disability and extent of partial permanent disability, entitlement to temporary disability, entitlement to future medical care, and apportionment.

© The Regents of the University of California

§4.384 2. Expert Medical Opinion

Resolution of the issues depends critically on expert medical opinion. Medical-legal reports are generally submitted by one or more of the following:

- The employee's treating doctor(s),
- Qualified medical examiners (QMEs) selected by the employee and/or the employer from a panel of QMEs provided by the Industrial Medical Council, or
- An agreed medical examiner selected by the parties jointly.

Detailed rules govern the process of obtaining medical-legal reports. Two features of the system, however, must be emphasized:

- The opinions of the employee's treating physicians are given great weight by the Workers' Compensation Appeals Board. However, the treating physician's presumption of correctness has been repealed and no longer applies to any workers' compensation proceeding. See former Lab C §4062.9.
- The employer is generally liable for all medical/legal costs "reasonably, actually and necessarily incurred" to prove or disprove a contested claim. Lab C §§4620-4621. These costs are the employer's responsibility whether or not the employee's claim is successful. *Turudich v Industrial Accident Comm'n* (1965) 237 CA2d 455, 47 CR 21.

PRACTICE TIP: Medical reports are entitled to confidentiality protection. Lab C §3762(c). Employers are limited to medical information consisting of diagnosis, medical treatment, and work restrictions necessary to modify the employee's job.

© The Regents of the University of California

§4.385 3. Claim Presentation Requirement

The Labor Code imposes detailed requirements on the presentation of a claim by an employee, and the employer's required response. Lab C §§5400-5401.

PRACTICE TIP: Typically, the employee serves a claim on the employer, which triggers the employer's obligations. But employer knowledge of the injury from any source may also trigger the employer's obligations, without service of a claim. Lab C §5402(a). The employer's prompt investigation and response is critical. See §4.386.

© The Regents of the University of California

§4.386 4. Investigation and Response

The employer has 90 days to reject liability. The 90-day period begins to run on the date a claim is filed or on the first day that the employer has notice of the injury from any source. If the employer does not reject liability within 90 days after a claim is filed, the law imposes a presumption that the claim has been accepted. Lab C §5402(b). This presumption can only be rebutted by evidence that could not have been obtained by exercising reasonable diligence during the first 90 days.

© The Regents of the University of California

§4.387 5. Discovery

Discovery commences as soon as the employer has notice of the injury. The employer has a continuing obligation to serve on the employee all medical records in its possession. 8 Cal Code Regs §§10608, 10622, 10979. The employer must advise its insurance company of any additional information affecting the claim. Lab C §3761(b).

© The Regents of the University of California

6. Methods of Resolution

§4.388 a. Compromise and Release

The parties may settle any asserted liability under the workers' compensation law by compromise and release. Lab C §§5000-5006.

NOTE: For injuries before January 1, 2003, settlement of vocational rehabilitation (supplemental job displacement) benefits is prohibited without a finding that a good faith dispute exists that could deprive the employee of any workers' compensation benefits. Former Lab C §§4646, 5100.6; *Thomas v Sports Chalet, Inc.* (1977) 42 CCC 625. For injuries after January 1, 2003, parties may settle vocational rehabilitation benefits in an amount not to exceed $10,000.

The desired effect of a compromise and release is usually a full release of all workers' compensation claims arising out of a given injury, including future medical care and vocational rehabilitation (supplemental job displacement benefits), in exchange for a lump sum paid to the employee. Under a compromise and release, the employer does not admit liability.

PRACTICE TIP: Compromise and releases are generally used only when the employee is separating from service. An employer is reluctant to pay a premium to buyout these issues if there is a possibility that the employee will return to work and aggravate his or her condition, leading to further liability.

© The Regents of the University of California

§4.389 b. Stipulations With Request for Award

The parties may stipulate to any disputed issues. When the stipulations resolve all of the issues necessary for the issuance of an award by the Workers' Compensation Appeals Board (WCAB), the parties enter into "Stipulations with Request for Award." When the stipulations are approved by the WCAB, they become a binding contract on both parties. *Huston v WCAB* (1979) 95 CA3d 856, 157 CR 355.

An employee who intends to continue working, and/or anticipates the need for significant medical treatment, will probably want an award that protects his or her right for future medical treatment instead of giving up that right for a lump sum. A stipulation is also desirable for a dependent in a death case who wants the protection of an award by a court.

A stipulation is desirable for the employer when the employee will return to work, because it protects the employer's right to credit for prior permanent disability in the event of a future claim. It also allows the employer to spread its payment over time, rather than paying a lump sum.

© The Regents of the University of California

§4.390 c. Judicial Decision

If the parties cannot settle, the issues are framed and the matter is set for trial. After all evidence has been presented, a workers' compensation judge issues a findings and award and/or order resolving the disputed issues.

© The Regents of the University of California

§4.391 7. Resolution of Penalties

On approval of a Compromise and Release or a Stipulations with Request for Award and after the issuance of a Finding and Award, it is conclusively presumed that any accrued claims for penalties have been resolved whether the settlement documents specifically so state or whether a penalty issue was raised before trial. Lab C §5814(c).

© The Regents of the University of California

§4.392 8. Statutes of Limitations; Tolling

The workers' compensation law provides several different statutes of limitations for the presentation of different types of claims (*e.g.,* injury claims, supplemental job displacement claims, death benefits). See Lab C §§5400-5413.

Generally, an employee has 1 year from the date of injury to file a claim if no benefits (*e.g.,* medical treatment, temporary disability) have been provided by the employer.

PRACTICE TIP: The strength of the employer defense that the employee did not timely file a claim is diminished by the fact that the statute of limitations must be liberally construed in favor of the employee, and that the employee may not know his or her condition is work-related for some time after the injury, perhaps not until a medical expert finds that it is work-related.

© The Regents of the University of California

§4.393 I. Related Litigation

The same set of facts that give rise to a workers' compensation claim may—and often are—the basis of other types of litigation against the city.

© The Regents of the University of California

§4.394 1. Disability Retirement

Most, if not all, public pension plans offer disability retirement benefits to employees who are "incapacitated for performance of duty." Some plans offer enhanced pension benefits if the disabling condition is work-related. The interplay of workers' compensation and disability retirement cases presents problems of collateral estoppel and offsets that differ from city to city.

© The Regents of the University of California

§4.395 a. Determine Effect of Workers' Compensation Board Decision

It is necessary to first determine whether the decision of the Workers' Compensation Appeals Board (WCAB) on industrial causation is binding in the retirement proceeding. Compare *French v Rishell* (1953) 40 C2d 477, 254 P2d 26, with *Geoghegan v Retirement Bd.* (1990) 222 CA3d 1525, 272 CR 419.

In determining whether a psychiatric injury is industrially caused for the purposes of determining the entitlement to a disability retirement, the WCAB must use the Government Code substantial cause standard rather than the Labor Code predominant cause standard. *Pearl v Workers' Compensation Appeals Bd.* (2001) 26 C4th 189, 109 CR2d 308. The WCAB may, however, use Labor Code procedural standards.

For local safety officers who are contract members of the Public Employees' Retirement System, see Govt C §21166.

© The Regents of the University of California

§4.396 b. Consider Possibility of Offset

Determine whether your jurisdiction can offset industrial disability retirement benefits against workers' compensation benefits. If so,

- determine whether the conditions at issue in the two proceedings match up;
- consider whether a global resolution of all claims is appropriate, and
- consider whether providing light duty is appropriate and possible as a defense to the retirement proceeding, temporary disability benefits or Lab C §4850 pay, and vocational rehabilitation benefits.

© The Regents of the University of California

§4.397 2. Subrogation

If the employee's work-related injury was caused by a third party, the employer can sue the third party, or intervene in the employee's lawsuit against the third party, to recover its workers' compensation expenses. Lab C §3850.

PRACTICE TIP: Look for subrogation potential in motor vehicle accidents, injuries due to "slip and falls," injuries due to products, and injuries due to medical malpractice. However, a public safety officer generally cannot sue a third party for injuries caused when confronting a hazard that the public safety officer was hired to confront. *Lipson v Superior Court* (1982) 31 C3d 362, 182 CR 629. But see CC §1714.9 (exceptions when injuries are caused by willful acts of third party).

© The Regents of the University of California

§4.398 3. Federal Causes of Action

Federal causes of action may be available under the Equal Employment Opportunity Act of 1972 (42 USC 2000e) and the ADA (42 USC §§12101-12213). An employee may have related discrimination or accommodation claims. The city's response to requests for accommodations under the ADA and to discrimination claims may be closely related to the employee's workers' compensation and disability retirement claims.

PRACTICE TIP: Counsel handling the various claims should coordinate on the defense of the claims, on opportunities for a global settlement, and on a comprehensive release if settlement is achieved.

© The Regents of the University of California

§4.399 4. State Causes of Action

State causes of action may be available, including those under the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996). The considerations here are essentially the same as for federal claims (see §4.398), but the definition of "disability" is broader in that it need only "limit" a major life activity rather than constitute a "substantial limitation" as required under the ADA (42 USC §§12101-12213).

© The Regents of the University of California

5

Finance and Economic Development

I. INTRODUCTION §5.1

II. REVENUES
- A. Constitutional Authority Over Fiscal Affairs §5.2
  - 1. Police Power §5.3
  - 2. Public Works Power §5.4
  - 3. Municipal Affairs Doctrine §5.5
  - 4. Local Taxation Authority §5.6
  - 5. Vehicle License Fees §5.7
  - 6. Proposition 13 §5.8
  - 7. Proposition 62 §5.9
  - 8. Proposition 218 §5.10
  - 9. Appropriations Limit §5.11
  - 10. Debt Limit §5.12
  - 11. Prohibited Gift of Public Funds §5.13
  - 12. Legislature May Not Delegate Taxing Power §5.14
- B. Taxes §5.15
  - 1. Power of Taxation §5.16
  - 2. Distinguishing Police Power; Revenue-Raising Activity §5.17
  - 3. Property Tax
    - a. Property Tax Before 1978 §5.18
    - b. Property Tax After 1978 Passage of Proposition 13 §5.19
    - c. Exceptions to Proposition 13's General 1-Percent Tax Limitation §5.20
    - d. Characteristics of a Property Tax §5.21
    - e. Property Exempted From Taxation §5.22
    - f. Possessory Interest Tax Authorized §5.23
    - g. Taxation of City Property §5.24
    - h. Legislative Apportionment of Taxes §5.25
  - 4. Sales and Use Tax
    - a. State Preemption of Sales and Use Taxes §5.26
    - b. Definitions: Sales Tax and Use Tax §5.27
    - c. Maximum Tax Rate §5.28
    - d. Proceeds From Sales and Use Tax §5.29
    - e. Sales Tax Sharing Among Governmental Entities §5.30
    - f. Transactions and Use Taxes Combined With Authorization to Increase Sales Tax for Transit and Other Specified Purposes §5.31
    - g. Transactions and Use Tax for General Purposes §5.32
    - h. Transactions and Use Tax for Specific Purposes §5.33
  - 5. Payroll Tax §5.34
  - 6. Business License Fees and Taxes §5.35
    - a. State Preemption Might Be Possible §5.36
    - b. Revenue-Raising Versus Regulation §5.37
    - c. Required Apportionment Between Intra-City and Out-of-City Business Activity §5.38
      - (1) Apportionment Methodology §5.39
      - (2) Burden of Proof on Taxpayer Who Challenges Disproportionate Tax §5.40
    - d. Must Be Reasonable Connection With Taxing Jurisdiction §5.41
    - e. Amount of Tax §5.42
    - f. Discrimination Against Inter-State or Inter-City Commerce §5.43
    - g. Minimum or Flat Taxes Unapportioned to Activity Within City §5.44
    - h. Required Nexus or Minimum Contacts §5.45
    - i. No Discrimination in Class §5.46
  - 7. Utility Users' Tax §5.47
    - a. Collection of Utility Users' Tax §5.48
    - b. Utility Users' Tax Litigation §5.49
      - (1) Federal Excise Tax Challenges to Utility Users' Taxes on Telephony §5.50
      - (2) Mobile Telecommunications Sourcing Act Challenges to Utility Users' Taxes on Telephony

§5.51
8. Transient Occupancy Tax §5.52
a. Exemptions Under Transient Occupancy Tax §5.53
b. Tax Clearance Certificate May Be Requested §5.54
c. Collection of Transient Occupancy Tax §5.55
d. Online Travel Company Litigation §5.56
9. Other Excise Taxes §5.57
a. Authority for Excise Taxes §5.58
b. Property Taxes Distinguished From Excise Taxes §5.59
c. Development Tax §5.60
d. Admissions Tax §5.61
10. Parcel Tax §5.62
a. Parcel Tax Distinguished From Property Tax §5.63
b. Parcel Tax as Excise Tax §5.64
(1) Basis of Parcel Tax §5.65
(2) Proportionality Requirement §5.66
11. Transfer Taxes
a. Documentary Transfer Taxes §5.67
b. Real Property Transfer Taxes §5.68
12. Special Taxes §5.69
a. Special Taxes Defined
(1) Label Not Dispositive §5.70
(2) Special Purpose May Not Be Necessary §5.71
(3) Tax Versus Other City Charges: Fees Distinguished §5.72
(4) Tax Versus Other City Charges: Assessments Distinguished §5.73
(5) Tax Versus Other City Charges: Record Necessary to Overcome Challenge on Lack of Voter Approval §5.74
b. Mandatory Accountability Measures Necessary for Special Tax Measures §5.75
c. Mello-Roos Community Facilities Act of 1982 §5.76
(1) Voting Mechanics §5.77
(2) Authorized Facilities §5.78
(3) Authorized Services §5.79
(4) Joint Community Facilities Agreements §5.80
(5) Formation of a Community Facilities District §5.81
(6) Levying the Mello-Roos Special Tax §5.82
(7) Collection of the Mello-Roos Special Tax §5.83
(8) Exemptions to the Mello-Roos Special Tax §5.84
(9) Changes to Community Facilities District §5.85
(10) Bonds: Issuance and Limitations §5.86
(11) Challenges to the Validity of Special Tax Levy or Bond Issuance §5.87
d. Police and Fire Protection §5.88
(1) Implementing Ordinance—Mandatory Provisions §5.89
(2) Implementing Ordinance—Optional Provisions §5.90
(3) Impact on Other Methods of Funding Police and Fire Services §5.91
e. Funding for Libraries §5.92
13. Tax Refunds; Class Actions for Refunds §5.93
C. Limitations on Exercise of Taxing Authority; Procedural Issues
1. Equal Protection and Due Process Requirements §5.94
a. Uniformity §5.95
b. Rational Basis §5.96
2. First Amendment; No Discrimination on Protected Speech §5.97
3. Proposition 13 Limitations §5.98
a. Constitutionality of Proposition 13 §5.99
b. Special Taxes Limitations §5.100
4. Tax Exemptions
a. Exemptions on Property §5.101
b. Exemptions on Insurance Companies §5.102
c. Exemptions on Banks §5.103
d. Exemptions on Financial Corporations (Savings and Loans) §5.104
5. Proposition 62 Limitations §5.105
a. Proposition 62 Procedures for Enacting Taxes §5.106
b. Proposition 62 "Window Period" Taxes §5.107
c. Restriction on Real Property Transaction Sales Taxes §5.108
d. Reduction in Property Tax Allocations for Failure to Comply With Proposition 62 §5.109
6. Proposition 218 §5.110

a. New Definitions of "General" and "Special" Taxes Under Proposition 218 §5.111
b. Taxes Enacted Before Passage of Proposition 218 §5.112
c. Limitation on Taxes on Property §5.113
d. Tax Increases Requiring Voter Approval §5.114
e. Procedure for Adopting General Taxes
(1) Action by Legislative Body Required §5.115
(2) Voter Approval Required §5.116
(3) Other Statutory Requirements Might Be Applicable §5.117
f. Procedure for Adopting Special Taxes
(1) Action by Legislative Body Required §5.118
(2) Voter Approval Required §5.119
(3) Initiative Adoption and Repeal of Taxes §5.120
D. Benefit Assessments and Assessment Districts
1. Nature and Purpose of a Benefit Assessment §5.121
2. Annual Versus Installment (Bonded) Assessments §5.122
3. Assessment's Geographic Scope §5.123
4. Property-Based Versus Business-Based Assessments §5.124
5. Assessments: Distinction From Fees and Taxes §5.125
6. Assessment Laws §5.126
a. Application of Str & H C §§3110-3117.5 §5.127
b. Application of Proposition 218 §5.128
c. Special Assessment Investigation, Limitation and Majority Protest Act of 1931 (1931 Act) §5.129
d. Ralph M. Brown Act §5.130
e. Specific Assessment Laws
(1) Improvement Act of 1911 (1911 Act) §5.131
(2) Municipal Improvement Act of 1913 (1913 Act) §5.132
(3) Improvement Bond Act of 1915 (1915 Act) §5.133
(4) Landscaping and Lighting Act of 1972 (1972 Act) §5.134
(5) Benefit Assessment Act of 1982 (1982 Act) §5.135
(6) Business Improvement Districts §5.136
7. Formation of Assessment Districts §5.137
a. Preparation of Engineer's Report §5.138
b. Resolution of Intention and Recordation of Boundary Maps §5.139
c. Notice, Protest, and Hearing; Levy of Assessment §5.140
d. Recordation and Cash Collection §5.141
e. Issuance of Improvement Bonds and Data Transmittal §5.142
f. Subsequent Proceedings §5.143
8. Proposition 218 §5.144
a. Special Benefit §5.145
b. Procedural Requirements §5.146
(1) Public Hearing and Notice Requirements §5.147
(2) Protest by Ballot Allowed §5.148
(3) Assessment Ballot Proceedings May Be Conducted by Mail §5.149
c. Assessment of Public Property §5.150
d. Burden of Proof on Local Agency §5.151
e. Statute of Limitations §5.152
f. Exemptions From Procedural Requirement for Assessments
(1) Assessments Existing on November 6, 1996 §5.153
(2) Reassessment Under Streets and Highways Code §5.154
(3) Non-Property-Based Assessments §5.155
(4) All Other Assessments Not Exempted §5.156
g. Use of Initiatives to Reduce or Repeal Assessments §5.157
E. Charges, Rates, and Fees §5.158
1. Authority to Impose Fees, Charges, and Rates §5.159
2. Amount of Fee
a. Must Bear Relationship to Costs §5.160
b. Indirect Costs May Be Included §5.161
c. General Fund Transfers §5.162
3. Development Fee Requirements §5.163
4. Development Processing Fees, Recovery of Costs of Providing Public Services, and User Fees
a. Development Processing Fees
(1) Development Processing Fees Must Bear Relationship to Cost §5.164
(2) Procedural Requirements and Effective Dates §5.165
b. Water, Sanitation, Solid Waste, and Sewer Fees and Rates §5.166
c. Recovery of Costs of Providing Public Services §5.167

5. Rates
a. Authority §5.168
b. Rate-Setting Procedures §5.169
c. Preferential Rates for City Residents Allowed §5.170
d. Collection and Nonpayment §5.171
6. Charges §5.172
7. Effect of Bankruptcy Automatic Stay on Collection §5.173
8. New Fees and Charges Under Proposition 218 §5.174
a. Fees and Charges Imposed as an Incident of Property Ownership §5.175
b. Substantive Restriction on Property-Related Fees and Charges §5.176
c. Burden of Proof §5.177
d. Procedural Requirements
(1) Notice Requirements §5.178
(2) Hearing Requirements §5.179
e. Voter Approval Requirements
(1) New or Increased Fees and Charges §5.180
(2) Procedural Requirements §5.181
(3) Voting Requirements §5.182
f. Proposition 218 Effective Date §5.183
g. Exemptions to Proposition 218 Requirements §5.184
(1) Development Fees Exempted §5.185
(2) Electrical and Gas Services Exempted §5.186
F. Franchise Fees §5.187
1. Electric and Telephone Poles and Wires and Gas and Oil Pipelines
a. Application of Broughton Act §5.188
b. Alternative Procedure Under Franchise Act of 1937 §5.189
c. No Application to Charter Cities §5.190
d. Surcharge in Lieu of Franchise Fees §5.191
e. Oil Pipeline Franchise Fees §5.192
2. State Video Franchise Fees §5.193
3. Refuse Collection Franchise Fees §5.194
4. Recycling, Household Hazardous Waste, and Other Waste Management Activities §5.195
G. Fines and Forfeitures §5.196
1. Fines "Available for Distribution"
a. Amounts Paid §5.197
b. Amount Available for Distribution §5.198
c. Installment Payments §5.199
2. Exception to General Distribution Statute §5.200
3. Forfeitures of Bail §5.201
4. Parking Fines and Forfeitures §5.202
a. Liability for Penalties and Amounts §5.203
b. Apportionment Among Agencies §5.204
5. Administrative Process for Fines and Forfeitures
a. Administrative Investigation and Review Process §5.205
b. Administrative Hearing §5.206
c. Administrative Review §5.207
d. Trial De Novo by Court §5.208
e. Collection of Unpaid Parking Penalties §5.209
(1) Collection with Vehicle Registration §5.210
(2) As Judgment for Civil Debt §5.211
f. Equipment and Registration Tab Violations §5.212
6. Criminal Justice Penalties §5.213
H. State Subventions
1. Shared Revenue §5.214
2. Tax Reimbursements §5.215
3. Tax Collection Services §5.216
I. Grants §5.217
J. Gifts §5.218
K. Debt Financing §5.219
1. Bonds
a. Types of Bonds §5.220
b. General Obligation Bonds §5.221
c. Limited Obligation Bonds §5.222
(1) Revenue Bonds Generally §5.223
(2) Revenue Bonds: Relationship to Debt Limit §5.224

(3) Revenue Bonds: Need for Voter Approval §5.225
(4) Revenue Bonds: Revenue Bond Law of 1941 §5.226
(5) Assessment Bonds §5.227
(6) Tax Increment Bonds §5.228
(7) Special Tax Bonds §5.229
2. Certificates of Participation (COPs) §5.230
a. Certificates of Participation (COPs) Form
(1) Lease Transaction §5.231
(2) Installment Sale Transaction §5.232
b. Certificates of Participation (COPs) References §5.233
3. Sale Lease-Back or Lease-Back Agreements §5.234
a. Sale Lease-Back or Lease-Back Requirements §5.235
b. Equipment Leases §5.236
4. Marks-Roos Public Financing Authority Bonds §5.237
a. Financing Mechanism: Bond Pooling §5.238
b. Financing Mechanism: Lease and Installment Sale Financing §5.239
c. Financing Mechanism: Loans §5.240
5. Tax-Exempt or Taxable Debt Financing §5.241
6. Disclosure Obligations of the City §5.242
a. Original Disclosure §5.243
b. Continuing Disclosure §5.244
c. Actions Relating to Borrowing $100,000 or More §5.245
L. State-Mandated Cost Reimbursement
1. Basic Obligation
a. Constitutional Expression §5.246
b. Statutory Expression §5.247
2. Intent and Scope
a. Protect Taxpayers and Prevent Shifting of Financial Responsibility §5.248
b. Reimbursement for Unique Requirements Placed on Local Government §5.249
3. Exceptions to Reimbursement
a. Constitutional §5.250
b. Statutory §5.251
4. The Legislative Process and Mandates
a. Legislative Counsel §5.252
b. Fiscal Committees §5.253
c. Reimbursement Provisions §5.254
d. Funded Versus Unfunded Mandates §5.255
5. Administrative Procedures
a. Commission on State Mandates §5.256
b. Test Claim Process §5.257
c. Controller's Claiming Instructions §5.258
d. Exclusive Remedy §5.259
6. Judicial Review
a. Judicial Review of Commission on State Mandates Actions §5.260
b. Judicial Review of Legislative Refusal to Fund Mandate §5.261
7. References on State-Mandated Cost Reimbursements §5.262
M. Rental of Property §5.263

III. EXPENDITURES
A. Budgets §5.264
B. Investments
1. Permitted Investments §5.265
a. Charter Cities §5.266
b. Local Agency Investment Fund §5.267
2. Investment Policy §5.268
3. Investment Authority
a. City Council §5.269
b. City Treasurer §5.270
c. City Manager §5.271
4. Reporting Requirements §5.272
5. Deposits §5.273
C. Appropriations, Warrants, and Payments
1. Appropriations §5.274
2. Warrants and Payments
a. The Warrant Process §5.275

b. Local Practices §5.276
D. Limitations on Expenditures
1. Municipal Purpose Doctrine—Gifts of Public Funds Prohibited §5.277
a. Gift Versus Public Purpose §5.278
b. Specific Examples Regarding Prohibited Gifts §5.279
2. Retroactive Compensation; Unauthorized Agreements §5.280
3. Gann Limit §5.281
a. Formula to Limit Appropriations §5.282
b. Statutory Provisions §5.283
c. Case Law Interpretations
(1) State and Federal Mandates §5.284
(2) Redevelopment §5.285
(3) Assessment Districts §5.286
(4) Pension Contributions §5.287
d. References on Appropriations Limit §5.288
4. Debt Limitation §5.289
a. Purposes of Debt Limitation §5.290
b. Exceptions to the Debt Limitation
(1) Obligations Imposed by Law §5.291
(2) Special Fund Doctrine §5.292
(3) Service Contracts and Leases §5.293
(4) Excluded Obligators §5.294
c. Statutory Provisions §5.295
d. Miscellaneous Election Issues §5.296

IV. ECONOMIC DEVELOPMENT §5.297
A. Types of Economic Development Assistance §5.298
B. Constraints on Economic Development
1. Statutory Prohibitions §5.299
2. Prevailing Wages §5.300

V. REDEVELOPMENT
A. Purpose of Redevelopment Law
1. Redevelopment Defined §5.301
2. Authority §5.302
3. History §5.303
4. Agency Powers and Authority §5.304
B. Redevelopment Agencies
1. Agencies of the State §5.305
2. Legal Status §5.306
3. Types of Redevelopment Governing Boards
a. Separate Agency §5.307
b. Legislative Body as the Agency §5.308
c. Changing From Separate Agency to Combined Agency §5.309
d. Separate Community Development Commission §5.310
4. Advisory Bodies
a. Legislative Body With Commission §5.311
b. Community Development Committee §5.312
5. Staffing §5.313
6. Powers §5.314
7. Meetings §5.315
C. Plan Adoption Procedures §5.316
1. Survey Area §5.317
2. Project Area Selection and Preliminary Plans
a. Initial Feasibility Study §5.318
b. Blight Defined §5.319
c. Inclusion of Non-Blighted Property §5.320
d. Initial Designation of Project Area and Preliminary Plan §5.321
3. Relations With Affected Taxing Entities
a. Statement of Preparation §5.322
b. Property Tax Assessed Value §5.323
c. Preliminary Report §5.324
d. Apportionment of Taxes Among Affected Taxing Entities
(1) Consultation and Exclusivity of Payments §5.325
(2) Apportionment of Taxes §5.326

(3) Special Apportionment to "Basic Aid School Districts" §5.327
(4) Allocation to School Districts §5.328
4. Report to Council §5.329
5. Hearings and Meetings
a. Other Entity Review and Report §5.330
b. Hearings on Approval of Plan
(1) Hearing Requirement §5.331
(2) Notice Timing and Contents §5.332
c. Modification of Plan Possible §5.333
6. Adoption of Plan
a. Legislative Body Must Consider and Respond to Objections §5.334
b. Adoption Procedures §5.335
(1) Eminent Domain Program §5.336
(2) Necessary Vote to Approve §5.337
7. Post-Adoption Notification §5.338
8. Interagency Cooperation
a. Joint Projects §5.339
b. Delegation Possible §5.340
9. Plan Challenges: Pre-Adoption, Post-Adoption, and Failure to Challenge §5.341
D. Plan Amendment
1. Purpose and Timing for Plan Amendment §5.342
2. Procedure for Plan Amendment §5.343
3. Extension of Time Limits §5.344
4. Statement of Land in Area §5.345
E. Plan Implementation
1. Owner and Tenant Participation §5.346
a. Good Faith and Reasonableness Required §5.347
b. Participation and Preference Rights
(1) Not Property-Specific §5.348
(2) Subject to Reasonable Conditions §5.349
(3) Form of Participation §5.350
c. Participation and Preference Rules §5.351
2. Property Acquisition and Timing of Acquisition §5.352
a. Restrictions on Voluntary Acquisitions §5.353
b. Requirements for and Restrictions on the Use of Eminent Domain §5.354
c. Forced Sale or Exemption From Eminent Domain §5.355
d. Relocation Assistance Required §5.356
e. Possibility of Developer Reimbursement of Relocation Payments §5.357
3. Disposition and Participation Agreements
a. Distinction Between Disposition and Development Agreements (DDA) and Owner Participation Agreements (OPA) §5.358
b. Disposition and Development Agreements (DDA) §5.359
(1) Exclusive Negotiation Agreement With Selected Developer §5.360
(2) Scope of Development Defined Under Exclusive Negotiation Agreement (ENA) §5.361
(3) Content of Disposition and Development Agreement (DDA) §5.362
(4) Requirement to Pay Prevailing Wages §5.363
(5) California Environmental Quality Act (CEQA) Compliance Necessary §5.364
(6) Approval of Disposition and Development Agreement (DDA) §5.365
c. Owner Participation Agreements (OPAs)—Contents and Requirements §5.366
4. Cooperation Agreements and Their Contents §5.367
5. Required Miscellaneous Provisions
a. Five-Year Implementation Plans Required §5.368
b. Infrastructure Improvements Findings Necessary §5.369
c. Sales Tax and Redevelopment Limitation §5.370
d. Prohibition on Relocating Vehicle Dealerships and Big Box Retailers §5.371
6. Commercial Rehabilitation Loans §5.372
7. Other Handbook References on Implementation of Plan §5.373
F. Project Area Committees (PACs) §5.374
1. Project Area Committee (PAC) Formation Procedures
a. Content and Notice §5.375
b. Project Area Committee (PAC) Required Notice and Hearings
(1) Required Meetings and Hearings §5.376
(2) Timing of Meetings and Hearings §5.377
(3) Who Must Be Notified of Meetings and Hearings §5.378
(4) Failure to Comply With Required Procedure §5.379

c. Membership of Project Area Committees (PACs) §5.380
d. Method for Selecting Project Area Committee (PAC) Members §5.381
e. Operating Without a Project Area Committee (PAC) §5.382
2. Project Area Committee (PAC) Duration
a. Consultation for 3 Years §5.383
b. When a Plan Is Amended §5.384
3. Project Area Committee (PAC) Responsibilities
a. Residential Housing and Other Matters Affecting Project Area Residents §5.385
b. Advice, Consultation, Report, and Recommendation §5.386
c. Conflict of Interest Laws Apply §5.387
d. Open Meeting Law Compliance Required §5.388
e. Staff Assistance §5.389
f. Project Area Committee (PAC) Reports §5.390
g. Amendments §5.391
G. Financing Redevelopment Activities
1. Tax increment Financing
a. Nature of Tax Increment Revenues §5.392
b. Theory of Tax increment Financing §5.393
c. Use of Tax Increment Funds §5.394
2. Financing Under Mello-Roos Community Facilities Act of 1982 §5.395
3. Other Potential Financing Sources §5.396
4. Appropriations May Provide Financing §5.397
5. Taxing Authority May Provide Financing §5.398
6. Financial Reports Required §5.399
H. Housing Requirements
1. Replacement Housing
a. Applicability §5.400
(1) Replacement Housing §5.401
(2) Type, Timing, and Amount of Replacement Housing §5.402
(3) Post-1989 and Post-2002 Housing Requirements §5.403
(4) Income and Affordable Housing Cost Definitions §5.404
(5) Priority to Displaced Persons and Families of Low and Moderate Income §5.405
(6) Insufficient Suitable Housing §5.406
(7) Time Limit for Making Permanent Housing Available §5.407
b. All Plans and Amendments §5.408
2. New and Rehabilitated Housing
a. Applicability §5.409
b. Housing Developed by an Agency §5.410
c. Housing Developed by Entity or Person Other Than the Agency §5.411
d. Definition of "Substantial Rehabilitation" §5.412
e. Purchase of Affordability Covenants §5.413
f. Relationship to Replacement Requirements §5.414
g. Affordable Housing Plan §5.415
h. Applicability to Owner-Occupied Housing §5.416
3. Required Set-Aside of Funds for Housing §5.417
a. Findings That Avoid Set-Aside Requirement
(1) Necessary Finding: No Need §5.418
(2) Necessary Finding: Less Than 20-Percent Need §5.419
(3) Necessary Finding: Substantial Progress §5.420
b. After Finding: Transfer of 20-Percent Set-Aside Obligation Possible §5.421
c. Written Findings Necessary §5.422
d. After Finding: Exception for Existing Obligations §5.423
e. Required Statement of Existing Obligations or Programs §5.424
f. Existing Obligations Defined §5.425
g. Must Plan to Eliminate Deficit Under Existing Obligations Exception §5.426
h. Amendment of Ordinance to Comply With Set-Aside Requirements §5.427
4. Use of Low- and Moderate-Income Housing Fund Monies
a. Permitted Uses §5.428
b. Planning and Administrative Expenses §5.429
c. Location Where Funds Used §5.430
d. Restrictions and Covenants on Use of Land §5.431
e. Excess Surplus Requirement §5.432
I. Special Issues
1. Conflicts of Interest and Disclosure of Economic Interests
a. Political Reform Act of 1974 (PRA) Applies §5.433

b. Prohibition Against Acquiring Land in Project Area §5.434
c. Prohibition Against Incompatible Offices §5.435
2. Merger of Project Areas Possible §5.436
3. Transfer of Powers Possible by Court Order §5.437
J. Other References on Redevelopment
1. Other Handbook References §5.438
2. Other References §5.439

VI. MUNICIPAL BANKRUPTCY
A. Statutory Authority
1. Historical Background §5.440
2. Eligibility for Filing
a. Bankruptcy Code §109(c) §5.441
b. Definition of Municipality §5.442
c. State Authorization §5.443
d. Municipal Insolvency Evaluation §5.444
B. Case Administrators
1. Commencement of the Case
a. Filing Procedures and Publication §5.445
b. Municipal Bankruptcy Court Jurisdiction §5.446
c. Order for Relief Not Automatic §5.447
d. Retention of State Control Over Municipality §5.448
2. Automatic Stay Applies
a. Statutory Authority §5.449
b. Exclusion for Pledged Special Revenues §5.450
3. Plan Confirmation §5.451
a. Who May File a Plan §5.452
b. Contents of Plan §5.453
c. Confirmation Requirements §5.454
C. Special Issues—Labor Contracts
1. Background §5.455
2. Labor Contracts in Chapter 9 §5.456

© The Regents of the University of California

§5.1 I. INTRODUCTION

This chapter deals generally with municipal revenues and financing, state cost reimbursements, expenditures, and municipal bankruptcy. In particular:

- Part II (§§5.2-5.263) covers revenues, including: Constitutional authority over fiscal affairs (§§5.2-5.14); taxes (§§5.15-5.93); limitations on the exercise of taxing authority and procedural issues (§§5.94-5.120); benefit assessments and assessment districts (§§5.121-5.157); fees, charges, and rates (§§5.158-5.186); franchise fees (§§5.187-5.195); fines and forfeitures (§§5.196-5.213); state subventions (§§5.214-5.216); grants (§5.217); gifts (§5.218); debt financing (§§5.219-5.245); state-mandated cost reimbursements (§§5.246-5.262); and rental of property (§5.263).
- Part III (§§5.264-5.296) covers expenditures, including budgets (§5.264); investments (§§5.265-5.273); appropriations, warrants, and payments (§§5.274-5.276); and limitations on expenditures (§§5.277-5.296).
- Part IV (§§5.297-5.300) covers economic development.
- Part V (§§5.301-5.439) covers redevelopment, including its purposes (§§5.301-5.304); the agencies involved (§§5.305-5.315); plan adoption procedures (§§5.316-5.341); plan amendments (§§5.342-5.345); plan implementation (§§5.346-5.373); project area committees (PACs) (§§5.374-5.391); financing (§§5.392-5.399); housing requirements (§§5.400-5.432); special issues (§§5.433-5.437); and, references (§§5.438-5.439).
- Part VI (§§5.440-5.456) covers municipal bankruptcy.

For further discussion of topics covered in this chapter, including Proposition 218; bonds; the Mello-Roos Community Facilities Act of 1982; redevelopment agencies; eminent domain; blight; and the California Environmental Quality Act, see Advising California Nonprofit Corporations (3d ed Cal CEB 2009); California Land Use Practice (Cal CEB 2006); California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001); Condemnation Practice in California (3d ed Cal CEB 2005); Practice Under the California Environmental Quality Act (2d ed Cal CEB 2008).

© The Regents of the University of California

II. REVENUES

§5.2 A. Constitutional Authority Over Fiscal Affairs

The California Constitution is the principal source of revenue and expenditure authority and constraint. A general law city has only those powers expressly conferred by the legislature, together with powers that are necessary and indispensable. *Irwin v City of Manhattan Beach* (1966) 65 C2d 13, 20, 51 CR 881. See generally *Myers v City of Pismo Beach* (1966) 241 CA2d 237, 240, 50 CR 402 (no inherent power of municipal taxation); *City of Grass Valley v Walkinshaw* (1949) 34 C2d 595, 600, 212 P2d 894 (power to tax may be implied from authority to incur bonded indebtedness); *Law v City & County of San Francisco* (1904) 144 C 384, 77 P 1014 (charter provisions for bonded indebtedness prevail over general laws); *Ex Parte Braun* (1903) 141 C 204, 74 P 780 (power to tax is derived from the Constitution, general laws, or the charter); *Willmon v Powell* (1928) 91 CA 1, 11, 266 P 1029 (absent constitutional restriction, a city charter may expressly authorize issuance of bonds for municipal purposes); *City of Inglewood v Kew* (1913) 21 CA 611, 617, 132 P 780 (compliance with statutory provisions to issue bonds is mandatory). For general overview of pertinent constitutional provisions applicable to all revenue and expenditure matters discussed in this chapter, see §§5.3-5.14.

© The Regents of the University of California

§5.3 1. Police Power

Article XI, §7, of the California Constitution grants cities authority to make and enforce all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. The police power is the constitutional authority to impose regulatory fees. *Sinclair Paint Co. v State Bd. of Equalization* (1997) 15 C4th 866, 64 CR2d 447; *County of Plumas v Wheeler* (1906) 149 C 758, 87 P 909.

© The Regents of the University of California

§5.4 2. Public Works Power

Article XI, §9, of the California Constitution authorizes cities to establish, purchase, and operate public works to furnish inhabitants with light, water, power, heat, transportation, or means of communication. The "public works power" includes the constitutional authority to impose rates and charges to finance these municipal services.

© The Regents of the University of California

§5.5 3. Municipal Affairs Doctrine

Matters relating to municipal finance have been historically identified as "municipal affairs" subject to charter city enactments under Cal Const art XI, §5, although certain state interests are sufficiently compelling to justify incursions into local authority over municipal finance. See generally *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 283 CR 569 (need for level playing field for state and federally chartered savings and loans justified preemption of Los Angeles' business license tax on state-chartered thrifts).

© The Regents of the University of California

§5.6 4. Local Taxation Authority

Except as provided in the municipal affairs doctrine, there is no constitutional grant of authority to tax. Rather, Cal Const art XIII, §24 provides that the legislature "may not impose taxes for local purposes but may authorize local governments to impose them." Statutory authority regulating local government revenue and fiscal affairs is extensive, far too extensive to cover in a short introduction. The characterization of revenue matters as a municipal affair has been significantly changed by *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 283 CR 569. In that case, the court shifted the analysis from the nature of the municipality's action (imposing a business license tax) to the impact of this action (whether the increased tax burden on financial corporations was of "sufficient extramural dimension" to warrant preemption by state law). Because the power to tax is not provided as a direct grant of authority from the Constitution, specific authorization must be found before proceeding. There are many examples of specific authority, including the transient occupancy tax, documentary transfer tax, and Bradley-Burns Uniform Local Sales and Use Tax Law (Rev & T C §§7200-7226). In addition, Govt C §37100.5 broadly authorizes general law cities to impose any tax that a charter city might impose, *i.e.,* any tax that is neither preempted by state or federal law nor in contravention of a constitutional requirement.

© The Regents of the University of California

§5.7 5. Vehicle License Fees

The vehicle license fee (an excise tax on the use of roadways collected as a percentage of the value of registered motor vehicles) is a constitutionally protected source of revenue to cities and counties. All revenue from taxes imposed under the Vehicle License Fee Law (Rev & T C 10701-11006) must be distributed to cities and counties. The legislature has the authority to determine the method of distribution and to establish the rate of the tax. Cal Const art XI, §15. See also Rev & T C §§10701-11006. In 2004, California voters approved Proposition 1A (now codified at Cal Const arts XI, §15 and XIII, §25.5), which prohibits the state from reducing the Vehicle License Fee below the then-current rate of.65 percent of the market value of the vehicle unless it allocates to cities and counties an amount equal to the decrease in the Vehicle License Fee. Cal Const art XI, §15(a).

© The Regents of the University of California

§5.8 6. Proposition 13

Proposition 13 (Cal Const art XIIIA) limits cities' ability to tax in two ways: (1) Article XIIIA, §4, of the California Constitution prevents cities from levying special taxes without two-thirds voter approval; and (2) Article XIIIA, §1, of the California Constitution prevents cities from levying an ad valorem tax on real and personal property, with the exceptions for bonded debt stated in §1(b). Rather, this section provides for a countywide property tax of 1 percent of assessed value apportioned to taxing jurisdictions in the county by the legislature.

NOTE: An ad valorem tax is one based on the value of something, such as a tax on the assessed value of real property.

© The Regents of the University of California

§5.9 7. Proposition 62

Government Code §§53720-53730 were adopted as a statutory initiative in 1986 (Proposition 62) to require voter approval of general and special taxes. Although the majority of these provisions have since been duplicated by the constitutional provisions of Proposition 218, a few provisions on the manner in which taxes are proposed are distinct and enforceable against general law cities, counties, and special districts, but not charter cities. See §§5.105-5.109.

On Proposition 218, see §5.10.

© The Regents of the University of California

§5.10 8. Proposition 218

Proposition 218 (Cal Const arts XIIIC-XIIID) includes detailed procedures for the imposition of all local government taxes (both general and special), benefit assessments on real property, and property-related fees and charges. Proposition 218 does not affect laws relating to the imposition of fees or charges as a condition of property development, assessments not based on property ownership, or a broad range of fees and charges that fall outside the class of "property-related fees and charges" defined by the measure. See §§5.110-5.120.

© The Regents of the University of California

§5.11 9. Appropriations Limit

A city's ability to appropriate (*i.e.,* authorize the expenditure of) money it collects from the proceeds of taxes is subject to a constitutionally defined limit, commonly known as the Gann Limit. Cal Const art XIIIB, §1. Revenues from regulatory licenses and user charges or fees in excess of the reasonable costs of providing the regulation, product or service are included in the proceeds of taxes and interest earned on tax proceeds. Cal Const art XIIIB, §8(c). See §§5.281-5.288.

© The Regents of the University of California

§5.12 10. Debt Limit

With many exceptions for such things as lease financings and leases with non-appropriation clauses, the constitutional debt limit prohibits a city from incurring indebtedness beyond the city's ability to pay the debt back from revenues received in the same fiscal year in which the debt is incurred. Cal Const art XVI, §18. See §§5.289-5.296.

© The Regents of the University of California

§5.13 11. Prohibited Gift of Public Funds

The California Constitution prohibits the legislature from making or authorizing gifts of public funds. Cal Const art XVI, §6. Because charter cities do not obtain their authority from the legislature, this rule applies to charter cities only if their charters contain a similar restriction, as many do. *Sturgeon v County of Los Angeles* (2008) 167 CA4th 630, 637, 84 CR3d 242. An example of a prohibited gift of public funds is an appropriation to pay a street contractor that rests on moral, but not legal, grounds. *Conlin v Board of Supervisors of the City & County of San Francisco* (1893) 99 C 17, 33 P 753, aff'd (1896) 114 C 404, 46 P 279. However, the prohibition does not preclude expenditures and disbursements for public purposes even if a private person incidentally benefits. *Redevelopment Agency v Shepard* (1977) 75 CA3d 453, 457, 142 CR 212. The Attorney General has opined that public funds of a general law city may not be expended to reimburse city council members for their expenses in purchasing meals for third parties at meetings held to discuss legislation or other matters of benefit to the city. If the charter so authorizes, public funds of a charter city may be expended for such purposes. 85 Ops Cal Atty Gen 210 (2002). See §§5.277-5.280.

© The Regents of the University of California

§5.14 12. Legislature May Not Delegate Taxing Power

The legislature may not delegate to any private party or body the power to make, control, appropriate, supervise, or interfere with a city's improvements, money, property, to levy taxes or assessments, or to perform municipal functions. Cal Const art XI, §11(a); *Howard Jarvis Taxpayers' Ass'n v Fresno Metro. Projects Auth.* (1995) 40 CA4th 1359, 48 CR2d 269 (disallowing delegation of taxing power to non-government body); *County of Riverside v Superior Court (Riverside Sheriff's Ass'n)* (2003) 30 C4th 278, 132 CR2d 713 (striking down statute requiring binding arbitration of labor disputes with local peace officers).

© The Regents of the University of California

§5.15 B. Taxes

It has long been recognized that a municipality must be able to raise money in order to be more than "a body without life, incapable of acting, and serving no useful purpose." McQuillin, Municipal Corporations §39.01 (3d rev ed 1988).

© The Regents of the University of California

§5.16 1. Power of Taxation

All cities, whether charter or general law, have the power to tax. Cal Const art XI, §5 (charter cities); Govt C §37100.5 (general law cities). Special districts may or may not have the power to tax depending on their authorizing statutes. Cal Const art XIII, §24 (local agency's power to tax established by statute). Issues most likely to arise in this area are constitutional limitations on taxation, such as Proposition 13 (Cal Const art XIIIA) and Proposition 218 (Cal Const arts XIIIC-XIIID), and preemption (as in the Bradley-Burns Uniform Local Sales and Use Tax Law; see §5.26).

A "general tax" is a tax the proceeds of which are available for any and all governmental purposes in the discretion of the city council. Cal Const art XIIIC, §1(a). Placement of the tax in the general fund is an indicator that it is a general tax. The imposition of general taxes is also subject to the provisions of Proposition 62 (Govt C §§53720-53730) and Proposition 218 that require, among other things, a two-thirds vote of the legislative body (except as to charter cities; see Note below), a majority vote of the voters voting in an election on the tax, and the consolidation of such an election with a regularly scheduled general election for members of the city council (unless the council unanimously declares emergency justifying placing the tax before the voters at a special election). Govt C §53724; Cal Const art XIIIC, §2(b). See §§5.105-5.120.

NOTE: The requirement of a two-thirds vote by the legislative body for general taxes under Govt C §53724 does not apply to charter cities if their charter or municipal code provides a lesser requirement. *Traders Sports, Inc. v City of San Leandro* (2001) 93 CA4th 37, 112 CR2d 677.

The supermajority vote requirement for a "special tax" is not imposed on a tax measure simply because it appears on the same ballot with a separate advisory measure for voters' preference on how to spend the new tax revenues. *Coleman v County of Santa Clara* (1998) 64 CA4th 662, 75 CR2d 516. On taxation limitations, see §§5.94-5.120.

PRACTICE TIP: *Coleman* was decided before the adoption of Proposition 218, which attempted to strengthen the definition of "special tax" by stating that a tax is a "special" tax if it is earmarked for a specific purpose even if the proceeds of the tax are placed in the general fund. However, while taxpayer advocates have frequently objected to this "Measure A, Measure B" strategy, to date they have not litigated it, and many public lawyers believe that Proposition 218 does not undermine the logic of the *Coleman* decision.

© The Regents of the University of California

§5.17 2. Distinguishing Police Power; Revenue-Raising Activity

Distinguished from the tax power is the police power. The most common example of a financial expression of the police power is a regulatory fee—a fee imposed to fund a regulatory program such as a building permit fee; however, cities also have the ability to prohibit conduct entirely and to prescribe penalties or fines as a means of enforcing their laws. Perhaps one of the primary issues arising in this category of municipal authority is the calculation of a regulatory fee. If a fee exceeds the estimated cost of the service or regulatory program, it may be declared a tax and subjected to voter-approval requirements. *Sinclair Paint Co. v State Bd. of Equalization* (1997) 15 C4th 866, 64 CR2d 447. See §§5.160-5.162. Courts have sustained revenue-raising activities under the police power. *Trent Meredith, Inc. v City of Oxnard* (1981) 114 CA3d 317, 327, 170 CR 685.

© The Regents of the University of California

3. Property Tax

§5.18 a. Property Tax Before 1978

Under the California Constitution and the California Revenue and Taxation Code, all property in California not otherwise free from tax under federal law or California law is subject to taxation "in proportion to its full value." Cal Const art XIII, §1; Rev & T C §201. This constitutional provision has been interpreted to mean that a non-ad valorem property tax was unconstitutional. *Thomas v City of East Palo Alto* (1997) 53 CA4th 1084, 62 CR2d 185. But see *Neecke v City of Mill Valley* (1995) 39 CA4th 946, 46 CR2d 266 (upholding non-apportioned parcel tax as excise tax on privilege of consuming municipal services).

© The Regents of the University of California

§5.19 b. Property Tax After 1978 Passage of Proposition 13

The passage of Proposition 13 (Cal Const art XIIIA) dramatically changed property taxation in California. It limited ad valorem property taxes to 1 percent of the full cash value of the property. The 1-percent tax is collected by the counties and is apportioned to the taxing agencies in the counties, including cities. Cal Const art XIIIA, §1(a); Rev & T C §§95-100.95. Assessed valuation is based on 1976 values and, thereafter, on the appraised value of property when purchased, newly constructed, or a change in ownership occurs. Cal Const art XIIIA, §2. In the absence of a purchase, new construction, or change in ownership, the assessed value increases in an amount equal to the lesser of the increase in the consumer price index or 2 percent. Cal Const art XIIIA, §2. As a result, newcomers to a neighborhood often pay taxes on assessed valuations that are much greater than those on similar properties that have not resold in recent years.

Proposition 13's methods for assessing property taxes (often referred to by commentators as the "welcome, stranger" reassessment rule) have been upheld against claims that it violated the right to travel and equal protection. See *Nordlinger v Hahn* (1992) 505 US 1, 120 L Ed 2d 1, 112 S Ct 2326; *Amador Valley Joint Union High Sch. Dist. v State Bd. of Equalization* (1978) 22 C3d 208, 149 CR 239.

© The Regents of the University of California

§5.20 c. Exceptions to Proposition 13's General 1-Percent Tax Limitation

The 1-percent limit does not apply to ad valorem property taxes or special assessments to pay interest on three kinds of indebtedness (Cal Const art XIIIA, §1(b)):

(1) Indebtedness approved by the voters before July 1, 1978;

(2) Indebtedness for the acquisition or improvement of real property approved by the voters after July 1, 1978, by a two-thirds vote; and

(3) Certain bonded debt of school districts for new schools.

© The Regents of the University of California

§5.21 d. Characteristics of a Property Tax

The characteristics of a property tax are:

- It taxes ownership in all its incidents; the tax is levied without regard to the use of the property. *Douglas Aircraft Co. v Johnson* (1939) 13 C2d 545, 550, 90 P2d 572.
- It recurs annually on a fixed date. *City of Huntington Beach v Superior Court* (1978) 78 CA3d 333, 340, 144 CR 236.
- Generally, it triggers no personal liability, but is secured by a lien on the property taxed. *City of Huntington Beach v Superior Court, supra*.
- It is a tax on ownership per se without conditions. In contrast, an excise tax is a tax on the privilege of exercising one or more incidents of ownership. *City of Huntington Beach v Superior Court, supra* (upholding charter city's documentary transfer tax). Before the passage of Proposition 218, a parcel tax (designed to raise revenue for the support of general municipal services and imposed without regard to use of the property or municipal services) was held to be a non-ad valorem property tax prohibited by Cal Const art XIII, §1, which requires property be taxed on the basis of value. *Thomas v City of East Palo Alto* (1997) 53 CA4th 1084, 62 CR2d 185. Proposition 218 now allows a parcel tax to be imposed as a special tax with two-thirds vote. Cal Const art XIIID, §3. See also *Neecke v City of Mill Valley* (1995) 39 CA4th 946, 46 CR2d 266 (upholding non-ad valorem parcel tax as excise tax on use of municipal services).

© The Regents of the University of California

§5.22 e. Property Exempted From Taxation

Some kinds of property are exempt from taxation. These include:

- Property owned by the state (see Cal Const art XIII, §3(a));
- Most property owned by local government (see Cal Const art XIII, §§3(b), 11);
- Libraries and museums (see Cal Const art XIII, §3(d));
- Property used for certain kinds of schools (see Cal Const art XIII, §3(d)-(e)); and
- Churches (see Cal Const art XIII, §3(f)).

NOTE: An excise tax imposed on taxpayers who are exempt from the payment of a property tax may be seen as an unconstitutional tax on a tax-exempt entity. *Sacramento Mun. Util. Dist. v County of Solano* (1997) 54 CA4th 1163, 63 CR2d 286 (striking down business license tax on electricity produced by public agency).

© The Regents of the University of California

§5.23 f. Possessory Interest Tax Authorized

State law authorizes counties to tax, on an ad valorem basis, private possessory interests in real property owned by governmental entities. See Rev & T C §107. The purpose of such taxation is to protect the public domain from private profit without tax liability. *United Air Lines v County of San Diego* (1991) 1 CA4th 418, 427, 2 CR2d 212. See also *U.S. v County of San Diego* (9th Cir 1992) 965 F2d 691.

PRACTICE TIP: Public agencies should include a clause in any lease, concession, or other contract regarding the use of public property that may create a taxable possessory interest notifying the private party that it may be subject to a possessory interest tax under Rev & T C §107.6.

© The Regents of the University of California

§5.24 g. Taxation of City Property

A city must pay property tax on property that it owns outside its boundaries. Cal Const art XIII, §11. The amount of such tax is, however, subject to the limits of Proposition 13. *City & County of San Francisco v County of San Mateo* (1995) 10 C4th 554, 565, 41 CR2d 888.

© The Regents of the University of California

§5.25 h. Legislative Apportionment of Taxes

Article XIIIA of the California Constitution authorizes the legislature to apportion the property tax between taxing jurisdictions in the county (cities, special districts, school districts, community college districts, and the county). See generally Rev & T C §§95-100.95. A court has upheld the legislature's authority to direct the county auditor to transfer property tax previously allocated to cities and counties to other local taxing entities. *County of Los Angeles v Sasaki* (1994) 23 CA4th 1442, 29 CR2d 103.

© The Regents of the University of California

4. Sales and Use Tax

§5.26 a. State Preemption of Sales and Use Taxes

The legislature has preempted the field of sales and use taxation in the name of statewide uniformity. See generally Rev & T C §§7200-7226 (Bradley-Burns Uniform Local Sales and Use Tax Law); Rev & T C §7203.5 (authorizing "other substantially different" taxes); *Rivera v City of Fresno* (1971) 6 C3d 132, 139, 98 CR 281, overruled on other grounds in *Yamaha Corp. v State Bd. of Equalization* (1998) 19 C4th 1, 15, 78 CR2d 1 (utility tax on purchase of gas not preempted by Bradley-Burns). Cities must impose sales taxes in accordance with state law. See Rev & T C §7202(c). Furthermore, cities may only impose a sales and use tax if the county in which they are located imposes a sales and use tax. Rev & T C §§7202(h); 53 Ops Cal Atty Gen 292 (1970). In 2004, California voters approved Proposition 1A, which limits the legislature's authority to prevent cities and counties from imposing sales and use taxes or from changing the method of distributing revenue from such taxes. See Cal Const art XIII, §25.5.

© The Regents of the University of California

§5.27 b. Definitions: Sales Tax and Use Tax

The following are significant property tax definitions:

- A sales tax is a tax imposed for the privilege of selling tangible personal property at retail. Rev & T C §7202(h)(1).
- A use tax is a tax imposed on the storage, use, or other consumption in the city of tangible personal property purchased from a retailer without being subject to sales tax. Rev & T C §7202(h)(1).

© The Regents of the University of California

§5.28 c. Maximum Tax Rate

A city's sales and use tax rate adopted under the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev & T C §§7200-7226) cannot exceed 1 percent. Rev & T C §7202(h)(1). However, a city may adopt local sales and use taxes under special statutory authorizations that may result in a total sales and use tax rate greater than 1 percent. See, *e.g.,* Govt C §§26290-26293.4 (San Joaquin County Regional Justice Facility Financing Act); Rev & T C §7285 (county authority to adopt transactions and use tax for "general purposes" at rate of.25 percent or multiple thereof); §7261 (county-wide transportation taxes); §7288.1 (public education, drug abuse and crime prevention, and health care). An uncodified section of Stats 1987, ch 1257 limits the combined rate of special statutory authorizations to 2.25 percent.

© The Regents of the University of California

§5.29 d. Proceeds From Sales and Use Tax

Except for the special sales and use taxes authorized by specific statutes, all money received from city-imposed sales and use taxes must be paid to the general fund, or, if imposed under statutory authority to repay bonds (*e.g.,* Govt C §§50665.1-50670.4), into a special fund or funds for such purpose or purposes as established by ordinance. Govt C §43401. Revenues from that portion of the sales tax imposed by state law for the Local Public Safety Fund (Cal Const art XIII, §35) may be spent only on public safety services (Govt C §30052) and may be forfeited if the city decreases funding for such services below that amount funded in fiscal year 1992-1993. Govt C §§30052, 30056.

© The Regents of the University of California

§5.30 e. Sales Tax Sharing Among Governmental Entities

Agreements to share sales and use tax proceeds among cities and counties may be accomplished by voter approval or a two-thirds vote of the legislative body of each participating jurisdiction. Cal Const art XIII, §29. See also Govt C §§55700-55707.

© The Regents of the University of California

§5.31 f. Transactions and Use Taxes Combined With Authorization to Increase Sales Tax for Transit and Other Specified Purposes

The Transactions and Use Tax Law provides authorization for cities and certain special districts to levy transactions and use taxes, subject to approval by the local legislative body and the electorate. See Rev & T C §§7251-7279.6. In the event that the authorized transactions and use tax is levied by a special district or by a city for specific purposes, it will be considered a "special tax" that must be approved by two-thirds of the voters voting on the issue. See *Rider v County of San Diego* (1991) 1 C4th 1, 2 CR2d 490.

PRACTICE TIP: Transactions and use taxes are, in common parlance, "sales taxes" but are technically distinct from sales tax under the Bradley-Burns Uniform Local Sales and Use Tax Law (Bradley-Burns) (Rev & T C §§7200-7226) because they have a slightly different tax base. Sales of motor vehicles, for example, are taxable if they are to be registered in the city that imposes the transactions and use tax regardless of the point of sale. See Rev & T C §7261(f). By contrast, the Bradley-Burns sales tax is imposed based on the location (or situs) of the sale.

© The Regents of the University of California

§5.32 g. Transactions and Use Tax for General Purposes

A city may levy, increase, or extend a transactions and use tax "for general purposes at a rate of 0.25 percent or a multiple thereof, if the ordinance proposing that tax is approved by a two-thirds vote of all members of that governing body and the tax is approved by a majority vote of the qualified voters of the city." Rev & T C §7285.9. The authority of a city to impose transactions and use taxes under any provision of law is subject to the rate limitation specified in Rev & T C §7251.1 (currently 2 percent). Rev & T C §7285.92.

© The Regents of the University of California

§5.33 h. Transactions and Use Tax for Specific Purposes

A city may also levy, increase, or extend a transactions and use tax for specific purposes. The tax may be levied, increased, or extended at a rate of 0.25 percent or a multiple thereof if:

- The ordinance proposing that tax is approved by a two-thirds vote of all members of the governing body and is subsequently approved by a two-thirds vote of the qualified voters of the city voting in an election on the issue;
- The transactions and use tax conforms to the Transactions and Use Tax Law, Part 1.6 (Rev & T C §§7251-7279.6); and
- The ordinance includes an expenditure plan describing the specific projects for which the revenues from the tax may be expended. Rev & T C §7285.91.

The authority of a city to impose transactions and use taxes under any provision of law is subject to the rate limitation specified in Rev & T C §7251.1 (currently 2 percent). Rev & T C §7285.92.

© The Regents of the University of California

§5.34 5. Payroll Tax

Although cities may not levy an income tax, that does not "prohibit the levy or collection of any otherwise authorized license tax upon a business measured by or according to gross receipts." Rev & T C §17041.5. Thus, cities may levy an employee license tax based on gross earnings in the jurisdiction. Cities may not tax earnings in a way that discriminates against non-residents. Govt C §50026. See also *County of Alameda v City & County of San Francisco* (1971) 19 CA3d 750, 97 CR 175.

Under their home rule powers, charter cities may impose a license tax on employees based on their gross earnings in the jurisdiction but it must be meaningfully different than an income tax. For example, a tax that is not graduated and authorizes none of the deductions typical of an income tax was upheld. *Weekes v City of Oakland* (1978) 21 C3d 386, 146 CR 558.

General law cities may levy any tax that may be levied by a charter city. See Govt C §37100.5; *Fenton v City of Delano* (1984) 162 CA3d 400, 208 CR 486 (upholding utility users tax).

NOTE: Cities may not impose a tax on the sale or consumption of alcoholic beverages. Rev & T C §32010. However, a payroll expense tax (excise tax) that is applicable to all businesses having payrolls within a city and that is neither specifically imposed on the sale of alcoholic beverages nor measured by the gross receipts from such sale is not an illegal tax when assessed against alcoholic beverage sellers, notwithstanding the prohibition on local taxes on alcohol established by Cal Const art XX, §22. *A.B.C. Distrib. Co. v City & County of San Francisco* (1975) 15 C3d 566, 125 CR 46. Further, a payroll expense tax is not a tax on income if "the tax is imposed … by reason of [the] employment of labor within the city …, measured by the expense incurred by [a business] in conducting this aspect of their business. The fact that the tax is measured by wages paid to the employees would not convert the tax to an income tax." 15 C3d at 576.

© The Regents of the University of California

§5.35 6. Business License Fees and Taxes

Subject to applicable constitutional requirements for voter approval, a general law city may levy business license taxes for revenue purposes and business license fees for regulatory purposes. Govt C §37101; Bus & P C §§16000-16004. Charter cities may impose business license taxes subject to the restrictions of the state and federal constitutions and their own charters. See Cal Const art XI, §5.

© The Regents of the University of California

§5.36 a. State Preemption Might Be Possible

The levy and collection of taxes is a "municipal affair." *Fox Bakersfield Theatre Corp. v City of Bakersfield* (1950) 36 C2d 136, 222 P2d 879. However, aspects of local taxation may under some circumstances acquire a "super-municipal" dimension, transforming an otherwise municipal concern into a statewide concern. *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 283 CR 569 (state interest in level playing field for state and federally chartered savings and loan institutions justified state preemption of charter city tax on state-chartered thrifts).

© The Regents of the University of California

§5.37 b. Revenue-Raising Versus Regulation

A city may enforce a business licensing ordinance on those doing business in the city when such ordinance was enacted solely to raise money for municipal purposes; such taxation is not excluded merely because the state has occupied the field of regulation of the business involved. Moreover, a city business tax ordinance may provide for criminal penalties in the form of fines, forfeitures, and penalties. *Arnke v City of Berkeley* (1960) 185 CA2d 842, 8 CR 645.

PRACTICE TIP: Regulatory fees are limited by the cost of administering the regulatory program; to avoid this limitation, the language of an ordinance should state that the ordinance "is not intended for the purpose of regulation" or, if the ordinance is both a regulatory and a revenue measure, that the ordinance is intended primarily for the purpose of regulation but also as a revenue measure.

© The Regents of the University of California

§5.38 c. Required Apportionment Between Intra-City and Out-of-City Business Activity

A city may tax a business that is partially located outside the city's jurisdictional boundaries only if the business license tax fairly reflects that proportion of activity carried on in the city. Bus & P C §16000. Apportionment is required by the California Constitution's provisions forbidding extraterritorial application of laws and guaranteeing equal protection and by comparable provisions of the federal Constitution. *City of Los Angeles v Shell Oil Co.* (1971) 4 C3d 108, 93 CR 1, cert denied (1971) 404 US 831.

© The Regents of the University of California

§5.39 (1) Apportionment Methodology

The apportionment must be based on a measure that "fairly reflects that proportion of the taxed activity that is actually carried on within the taxing jurisdiction." *City of Los Angeles v Shell Oil Co.* (1971) 4 C3d 108, 124, 93 CR 1, cert denied (1971) 404 US 831. The measure of the license fee must be based on events occurring wholly in the city (*e.g.,* gross receipts from intra-city sales or storage) or the ratio of in-city to out-of-city business activities. *General Motors Corp. v City of Los Angeles* (1971) 5 C3d 229, 242, 95 CR 635. See also *City of San Jose v Ruthroff & Englekirk Eng'rs, Inc.* (1982) 131 CA3d 462, 183 CR 391.

© The Regents of the University of California

§5.40 (2) Burden of Proof on Taxpayer Who Challenges Disproportionate Tax

A taxpayer who contends that a city's business license tax improperly taxes significant extraterritorial values bears the burden of proof. *Volkswagen Pac., Inc. v City of Los Angeles* (1972) 7 C3d 48, 58, 101 CR 869. The taxpayer must show by "clear and cogent evidence" that such fee does not fairly reflect the intra-city proportion of the relevant taxed activity. *City of Los Angeles v Moore Bus. Forms, Inc.* (1966) 247 CA2d 353, 362, 55 CR 820. See also *Park 'N Fly of San Francisco, Inc. v City of South San Francisco* (1987) 188 CA3d 1201, 234 CR 23.

© The Regents of the University of California

§5.41 d. Must Be Reasonable Connection With Taxing Jurisdiction

There must be a reasonable connection between the tax and the taxing jurisdiction. The measure of taxation must not be "capricious, arbitrary or discriminatory." See *Security Truck Line v City of Monterey* (1953) 117 CA2d 441, 256 P2d 366, in which the court invalidated a tax on each vehicle of firm, finding that a better measure would have been number of deliveries or the tonnage carried by trucks. A business tax may be based on the preceding year's calendar gross receipts. *Web Serv. Co. v Spencer* (1967) 252 CA2d 827, 61 CR 493.

© The Regents of the University of California

§5.42 e. Amount of Tax

There is no requirement that an excise tax levied for revenue by a municipality be reasonable in amount. The only restrictions on the exercise of a power to impose a tax are the constitution, the charter for charter cities, and the statutes for general law cities. *Fox Bakersfield Theatre Corp. v City of Bakersfield* (1950) 36 C2d 136, 222 P2d 879. There is, of course, the overriding limitation of federal due process and takings jurisprudence that a tax may not be confiscatory. *City of Berkeley v Oakland Raiders* (1983) 143 CA3d 636, 192 CR 66.

© The Regents of the University of California

§5.43 f. Discrimination Against Inter-State or Inter-City Commerce

The Dormant Commerce Clause doctrine of the United States Constitution and related principles of the California Constitution require that local taxes not discriminate for or against economic activity that crosses jurisdictional lines. See *American Trucking Ass'ns, Inc. v Smith* (1990) 496 US 167, 110 L Ed 2d 148, 110 S Ct 2323 (discussion of Dormant Commerce Clause); *General Motors Corp. v City & County of San Francisco* (1999) 69 CA4th 448, 453, 81 CR2d 544; *General Motors Corp. v City of Los Angeles* (1995) 35 CA4th 1736, 42 CR2d 430. The United States Supreme Court has used an "internal consistency" test that assumes a challenged tax is applied by every other locality or state and then examines the treatment of intra-city and extra-city or intra-state and extra-state economic activity to see if there is any theoretical advantage or disadvantage for inter-state or inter-city commerce. 35 CA4th at 1739.

PRACTICE TIP: Any tax that includes more than one measure of tax or that provides a credit for payment of another local tax should be carefully reviewed for compliance with the "internal consistency" test. Some dual-measure taxes can be defended based on clarifying regulations or rulings that eliminate any risk of benefit or detriment to inter-city activity.

© The Regents of the University of California

§5.44 g. Minimum or Flat Taxes Unapportioned to Activity Within City

Minimum or flat taxes unapportioned to activity within the city are prohibited. See *City of San Jose v Ruthroff & Englekirk Eng'rs, Inc.* (1982) 131 CA3d 462, 183 CR 391 (invalidating minimum tax on engineering firm with office outside city whose employees spent total of 12 hours in city during taxable year, even though firm had contract to perform services for project in city).

© The Regents of the University of California

§5.45 h. Required Nexus or Minimum Contacts

In order for a municipality to properly tax an entity, the latter must have a substantial presence within the city's jurisdictional borders. See *Mobil Oil Corp. v Comm'r of Taxes* (1980) 445 US 425, 437, 100 S Ct 1223, 63 L Ed 2d 510. See also *Moorman Mfg. Co. v Bair* (1978) 437 US 267, 272, 57 L Ed 2d 197, 98 S Ct 2340, in which the court required a "minimal connection" between the interstate activities and the taxing state, and a rational relationship between the income attributed to the state and the intrastate values of the enterprise.

© The Regents of the University of California

§5.46 i. No Discrimination in Class

No constitutional rights are violated if the burden of a license tax falls equally on all members of a class, though other classes have lighter burdens or are wholly exempt. The classification must be reasonable, must be based on substantial differences between the pursuits separately grouped, and must not be arbitrary. See US Const amend XIV (equal protection clause); *Fox Bakersfield Theatre Corp. v City of Bakersfield* (1950) 36 C2d 136, 222 P2d 879. See also *Jensen v Franchise Tax Board* (2009) 178 CA4th 426, 100 CR3d 408 (rejecting equal protection challenge to Proposition 63 arising from income tax increase on "millionaires" to fund mental health services).

For discussion of First Amendment issues arising from taxation of expressive activity, see §5.97.

© The Regents of the University of California

§5.47 7. Utility Users' Tax

Subject to constitutional requirements for voters' approval, cities may tax use of utilities such as gas, electricity, telephone, water, and cable television. Charter cities may impose a utility users' tax under their home rule authority. See Cal Const art XI, §5. General law cities may levy any tax that may be levied by a charter city. Govt C §37100.5; *Fenton v City of Delano* (1984) 162 CA3d 400, 208 CR 486 (upholding general law city utility users tax).

© The Regents of the University of California

§5.48 a. Collection of Utility Users' Tax

Charter cities' constitutional power to tax carries with it the corollary power to use reasonable means to effect collection, including compelling public and private utility providers to collect the tax. See *City of Modesto v Modesto Irrig. Dist.* (1973) 34 CA3d 504, 110 CR 111. See also Pen C §424 (felony to refuse to pay public money received when one bears a duty to pay it). A city requiring another public entity to collect its utility users' tax must compensate that public entity for the cost of doing so. See *Edgemont Community Servs. Dist. v City of Moreno Valley* (1995) 36 CA4th 1157, 42 CR2d 823. There is no corollary duty to pay private utility providers their costs, although it is common to exempt those utilities from tax in exchange for their collection services. The relationship between local governments and private utilities with respect to such taxes is governed by Pub Util C §799.

© The Regents of the University of California

§5.49 b. Utility Users' Tax Litigation

Utility users' taxes on telephony have been the subject of numerous challenges in California. For examples of such litigation, see §§5.50-5.51.

© The Regents of the University of California

§5.50 (1) Federal Excise Tax Challenges to Utility Users' Taxes on Telephony

Some utility users' taxes in California reference the Federal Excise Tax (FET) (26 USC §§4251-4254), limiting the application of the local utility users' taxes to telephone charges that are "subject to" the FET. The IRS has stated that the FET does not apply to most common billing plans currently in use, such as "one-rate" plans (which provide a mix of local and long-distance calling for a flat rate or fixed fee for unlimited dialing), but that its conclusion does not prohibit states or local governments from imposing or collecting telecommunication taxes. See Notice 2006-50, 2006-1 Cum Bull 1141.

PRACTICE TIP: Many cities have since submitted revised utility user tax ordinances for voter approval under Proposition 218 to de-link them from the FET provisions. Local governments imposing taxes that reference the FET should clarify the legislative intent of those ordinances, perhaps with voter approval, to make clear that the local tax base is not as narrow as the base of the FET as narrowed by Notice 2006-50, 2006-1 Cum Bull 1141.

© The Regents of the University of California

§5.51 (2) Mobile Telecommunications Sourcing Act Challenges to Utility Users' Taxes on Telephony

The Mobile Telecommunications Sourcing Act (MTSA) (4 USC §§116-126), enacted in 2000, gave state and local governments authority to impose a tax on all cellular telephone airtime, regardless of whether calls originate or terminate in the city, provided that the account to which those calls are billed has a billing address in the city or is otherwise primarily used there. See *AB Cellular LA, LLC v City of Los Angeles* (2007) 150 CA4th 747, 753, 59 CR3d 295. However, many cities in California may not implement the MTSA nexus rules without voter approval because of Proposition 218 (Cal Const arts XIIIC-XIIID), which requires voter approval of tax increases. Government Code §53750(h) defines "increase" to include a change of administrative methodology which has the effect of increasing any taxpayer's tax liability. See *AB Cellular LA,* 150 CA4th at 753. See also §§5.110-5.114 on Proposition 218 limitations on utility users' taxes.

PRACTICE TIP: In light of these and other issues (including rapid and ongoing change in telecommunications technology), taxing agencies that rely on dated utility users' taxes on telephony may want to seek voter approval of an updated ordinance that does not rely on the FET provisions. The ordinance should also include updated broad, generic definitions of communication modes.

© The Regents of the University of California

§5.52 8. Transient Occupancy Tax

Cities and counties may tax persons staying 30 days or less in hotels, motels, and similar lodgings, including mobile homes. See Rev & T C §§7280-7283.51. Some taxes are expressed as a flat rate per night, but most are expressed as a percentage of room rents. Redevelopment agencies may impose a transient occupancy tax under Rev & T C §7280.5. Imposing or increasing a transient occupancy tax is subject to constitutional voter approval requirements. The tax is imposed on the hotel guest; the hotel has a duty to collect and transmit the funds to the taxing agency because the tax is on "the privilege of occupying a … lodging" (Rev & T C §7280), not on the business of renting that lodging.

PRACTICE TIP 1: Take care in drafting transient occupancy tax ordinances. See *Britt v City of Pomona* (1990) 223 CA3d 265, 272 CR 724 (finding that the distinction between taxed transients and untaxed apartment dwellers was unconstitutionally vague). But see *Patel v City of Gilroy* (2002) 97 CA4th 483, 118 CR2d 354 (upholding ordinance because it gave fair notice of its collection and reporting requirements and provided reasonably adequate standards to guide enforcement). See also *City of San Diego v De Leeuw* (1993) 12 CA4th 10, 15 CR2d 98 (interpreting duty of hotel purchaser to remit taxes collected by predecessor). A transient occupancy tax ordinance that includes criminal penalties for violations will be subject to greater scrutiny for unconstitutional vagueness and restrictions on the freedom of expression or freedom of movement. See *Patel v City of Gilroy, supra*.

PRACTICE TIP 2: If the ordinance specifies that the tax is imposed on the actual occupant, a business may not rent a room in its name for more than 30 days to avoid the tax. See *Gowens v City of Bakersfield* (1961) 193 CA2d 79, 13 CR 820.

PRACTICE TIP 3: There are areas of dispute related to room costs, meals, and the costs that may be included in a room rate. For example, the California Board of Equalization may tax the imputed value of breakfasts included in a room rate.

PRACTICE TIP 4: The ordinance imposing a transient occupancy tax should provide that if a remittance is not paid when due (typically monthly), the schedule for making future remittances is automatically shortened to a weekly or even daily schedule to prevent the hotelier from using tax proceeds to operate the business. Frequent audits, tough penalty enforcement, and prompt collections are important.

PRACTICE TIP 5: The ordinance imposing a transient occupancy tax should provide that the operator hold such tax proceeds in trust for the city.

© The Regents of the University of California

§5.53 a. Exemptions Under Transient Occupancy Tax

Special requirements apply to time-shares (see Rev & T C §7280(b)) and campgrounds (see Rev & T C §7280(b)-(c)). The tax applies to state employees traveling on business even if their room charges are paid directly by their governmental employer. See 75 Ops Cal Atty Gen 86 (1992); 46 Ops Cal Atty Gen 16 (1965). However, the transient occupancy tax does not apply to federal employees and employees of any instrumentality of the federal government. See *U.S. v New Mexico* (1982) 455 US 720, 735, 71 L Ed 2d 580, 102 S Ct 1373 (finding federal government immunity from state or local taxation is only appropriate "when the levy falls on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned"); *California Credit Union League v City of Anaheim* (9th Cir 1996) 95 F3d 30, vacated and remanded (1997) 520 US 1261, 138 L Ed 2d 191, 117 S Ct 2429 (federal credit union employees traveling on business are "constituent parts" of their credit union and thus immune from transient occupancy tax); *U.S. v City of Spokane* (9th Cir 1990) 918 F2d 84, 87-88 (finding Red Cross to be an instrumentality of the United States). If the city elects to exempt employees and officers of state, federal, or foreign governments, it must create a standard form to claim the exemption. Rev & T C §7280(e).

© The Regents of the University of California

§5.54 b. Tax Clearance Certificate May Be Requested

A purchaser of property, the owner of which is required to collect the transient occupancy tax, may request the city to issue a tax clearance certificate that will detail the amount of the tax due and owing. Rev & T C §7283.5. The tax clearance certificate represents conclusive evidence of the tax liability associated with the property as of the date specified on the certificate, and failure to provide a certificate on request relieves the purchaser of any liability for tax obligations incurred before the purchase. Rev & T C §7283.5(c), (d)(3).

© The Regents of the University of California

§5.55 c. Collection of Transient Occupancy Tax

Charter cities' constitutional power to tax carries with it the corollary power to use reasonable means to effect collection, including having others collect the tax and remit it to city. See *City of Modesto v Modesto Irrig. Dist.* (1973) 34 CA3d 504, 110 CR 111. Cities may allow the operator to keep a portion of the tax as a collection fee. See 48 Ops Cal Atty Gen 109 (1966). When an operator has a duty to collect and remit the tax, it is a felony to refuse to pay it over. Pen C §424.

A 4-year statute of limitations applies to the collection of transient occupancy taxes. Rev & T C §7283.51. This statute of limitations does not apply to a charter city unless the city's charter references state transient occupancy tax law. Stats 2004, ch 936, §4.

© The Regents of the University of California

§5.56 d. Online Travel Company Litigation

In recent years there have been a number of lawsuits throughout California and the nation relating to the collection of transient occupancy taxes by online travel companies (OTCs). The primary issue involves OTCs paying tax based on the discounted room price instead of on the higher retail room price that the tenant actually pays.

Because many California cities have similar transient occupancy tax laws, most of the California lawsuits have been held in abeyance pending the outcome of the writs appealing the administrative hearing in the lead case, *Priceline.com Inc. v City of Anaheim* (LA Super Ct, 2010, JCCP 4472). That litigation is now winding its way through the trial and appellate courts relative to the issues of "liability," the "amount owed," use of "contingency fee counsel," and the "pay first, litigate later" requirement for tax refunds.

As to the "liability" and "amount owed" issues, the superior court held that, because OTCs do not constitute hotel "operators," hotel "proprietors" or "managing agents" of a hotel, as each term is defined by its usual and ordinary meaning, OTCs are not liable for the collection of transient occupancy taxes or payment thereof under the Anaheim ordinance imposing the tax. See *Priceline.com Inc. v City of Anaheim* (LA Super Ct, Feb. 1, 2010, JCCP 4472) Opinion and Order on the Online Travel Companies' Motion for Judgment Granting Writ of Mandate and the City of Anaheim's Motion to Deny Online Travel Companies' Writs of Administrative Mandamus.

> The result of the statutory interpretation … is consistent with the purpose and structure of the transient occupancy tax as a privilege tax based on commercial activity taking place in the [City]. The hotel transaction is taxed by the [City] because the hotel's physical location is in the City. The revenue gained by the entity that provides the physical location (hotel) for occupancy within the [City] is the amount paid to the hotel. It is not unreasonable to base a local tax on the revenue of the commercial business that provides the local amenity. Based on the language of the City's ordinance, Anaheim has done just that..

Priceline.com Inc. Feb. 1, 2010 Opinion and Order at 24.

A local entity could, as a matter of policy and drafting, construct a different scheme for taxation of transient occupancy. If a city decides to base a transient occupancy tax on the total amount paid by the transient for the hotel room, there seems to be no reason why such a tax scheme could not be drafted and considered. *Priceline.com Inc.* Feb. 1, 2010 Opinion and Order at 25.

As to the "contingency fee counsel" issue, the Fourth District Court of Appeal held that government lawyers may receive assistance from contingency fee lawyers as co-counsel in ordinary civil actions, including actions involving transient occupancy tax disputes. *Priceline.com Inc. v City of Anaheim* (2010) 180 CA4th 1130, 103 CR3d 521.

As to the "pay first, litigate later" issue, the Second District Court of Appeal held that, under the "pay first" rule of Cal Const art XIII, §32, OTCs are not required to pay transient occupancy taxes levied by a city before litigating the taxes validity because §32 applies to actions against the state or an officer of the state. *City of Anaheim v Superior Court* (2009) 179 CA4th 825, 830, 102 CR3d 171. Although a local government is not precluded from inserting a "pay first" requirement in a taxing statute as long as the statute comports with due process, Anaheim had not done so. 179 CA4th at 831. The city could not rely on a public policy argument to impose a "pay first" requirement because the taxes the city sought to collect from the OTC did not represent a "predictable income stream" on which the city had come to rely. 179 CA4th at 832.

© The Regents of the University of California

§5.57 9. Other Excise Taxes

Excise taxes include the sales and use tax, business license tax, utility user tax, transient occupancy tax, real property transfer tax, admissions tax, and development (or bedroom) tax. The phrase "excise tax" is most commonly used in reference to a type of parcel tax. Excise taxes are sometimes referred to as license or privilege taxes. A definition of excise tax is provided at 71 Am Jur 2d, State and Local Taxation §28.

> In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and which embraces every form of burden not laid directly upon person or property. The obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking.

See also *Pesola v City of Los Angeles* (1975) 54 CA3d 479, 126 CR 580.

© The Regents of the University of California

§5.58 a. Authority for Excise Taxes

The source of excise taxing authority for a charter city is the city's general home rule powers and the city's charter. Cal Const art XI, §5. The general authority for a general law city to levy an excise tax is Govt C §37100.5 (general law city may impose any tax a charter city may impose) and §50075 (authority to impose special taxes with voter approval). For specific statutory authority for some taxes, see, *e.g.,* §§5.60-5.61. The excise taxes are subject to constitutional requirements for voter approval. Excise taxes are subject to limitations on the taxing power generally as discussed in §§5.94-5.120.

© The Regents of the University of California

§5.59 b. Property Taxes Distinguished From Excise Taxes

It is often crucial to distinguish an excise tax from a property tax. If a tax is categorized by a court as a property tax, it may be struck down as a violation of Cal Const art XIIIA, §1, limiting property taxes to 1 percent of full cash value. See *Flynn v San Francisco* (1941) 18 C2d 210, 115 P2d 3; *City of Oakland v Digre* (1988) 205 CA3d 99, 252 CR 99. These issues arise most frequently in relation to parcel taxes.

A property tax is a tax on property ownership per se. A tax on the exercise of an incident of ownership, such as the power to sell property, is an excise tax. *Brunton v Superior Court* (1942) 20 C2d 202, 124 P2d 831 (tax on privilege of drilling for oil); *Flynn v San Francisco* (1941) 18 C2d 210, 115 P2d 3 (excise tax on ownership of trucks used in business in city); *Douglas Aircraft Co. v Johnson* (1939) 13 C2d 545, 90 P2d 572 (state use tax); *City of Oakland v Digre* (1988) 205 CA3d 99, 252 CR 99 (invalidating parcel tax which was not sufficiently tied to use of municipal services); *City of Huntington Beach v Superior Court* (1978) 78 CA3d 333, 144 CR 236 (upholding charter city documentary transfer tax).

Courts have looked at the following factors to determine whether a tax is an excise rather than a property tax (see generally *Flynn v San Francisco, supra*; *City of Oakland v Digre, supra*; *City of Huntington Beach v Superior Court, supra*):

- Name given to tax on enactment (instructive, but not controlling);
- Property tax is collected regularly; excise tax is collected on exercise of an incident of ownership (*e.g.,* transfer or use);
- Property tax generally is imposed on owner; excise tax may be imposed on occupant or other person exercising an incident of ownership;
- If the tax is imposed on the use of services, an excise tax is imposed in proportion to the extent of the use of those services (but see discussion in §§5.64-5.66 as to parcel taxes); and
- A property tax is secured by a lien on property rather than a personal debt and is collected with other property taxes; an excise tax is a personal debt.

© The Regents of the University of California

§5.60 c. Development Tax

A development or bedroom tax is an excise tax on the privilege or activity of development and/or on the availability or use of municipal services. The tax is generally imposed only on new construction and collected with building permit fees. The tax rate is generally based on number of units, number of bedrooms, or square footage.

The source of authority to levy a development tax for a charter city is the city's general home rule powers and the city's charter. Cal Const art XI, §5. The general authority for a general law city to levy such a tax is Govt C §37100.5 (general law city may impose any tax a charter city may) and §50075 (power to impose special taxes with two-thirds voter approval). The constitutional voter approval requirement of Cal Const art XIIIA must be satisfied to adopt a development tax. See §§5.94-5.120.

Several cases have upheld the validity of excise taxes on development. See *The Pines v City of Santa Monica* (1981) 29 C3d 656, 175 CR 336; *Westfield-Palos Verdes Co. v City of Rancho Palos Verdes* (1977) 73 CA3d 486, 141 CR 36; *Assoiated Home Builders of the Greater East Bay, Inc. v City of Newark* (1971) 18 CA3d 107, 95 CR 648. Such taxes are not a development fee and therefore not subject to or prohibited by Govt C §§66000-66008, also referred to as AB 1600. *Centex Real Estate Corp. v City of Vallejo* (1993) 19 CA4th 1358, 24 CR2d 48.

Development impact fees differ from development taxes. Development fees must be adopted under Govt C §§66000-66008 and are intended to mitigate the impacts of development. Development fees must not exceed the cost of providing the services or facilities necessitated by the development; proceeds from development fees must be spent on such services or facilities. See §§5.163-5.167. In contrast, development taxes are imposed for revenue-raising purposes.

PRACTICE TIP: A development tax ordinance should expressly state that it is adopted for general fund revenue-raising purposes and it is not a fee intended to mitigate the impacts of development. See *California Bldg. Indus. Ass'n v Governing Bd.* (1988) 206 CA3d 212, 253 CR 497 (school district development "tax" was actually development impact fee because district lacked statutory power to tax and tax was not "on a district" within meaning of Proposition 13).

© The Regents of the University of California

§5.61 d. Admissions Tax

An admissions tax is imposed on a consumer for the privilege of attending a show, performance, display, or exhibition. The tax rate is generally based on either one or more flat rates per ticket or on a percentage of the admission price. The tax is included in the price of the ticket, collected by the ticket seller, and remitted by the seller to the city.

Subject to constitutional voter approval requirement, the source of authority to levy an admissions tax for a charter city is the city's general home rule powers and the city's charter. Cal Const art XI, §5. The general authority for a general law city to levy such a tax is Govt C §37100.5 (general law city may impose any tax a charter city may impose) and §50075 (authorizing special taxes with two-thirds voter approval).

In *Fox Bakersfield Theatre Corp. v City of Bakersfield* (1950) 36 C2d 136, 222 P2d 879, the court upheld an admissions tax imposed on businesses. However, more recent cases have struck down admissions taxes that are borne solely or primarily by activities protected by the First Amendment on an "as applied" basis. See *United Artists Communications, Inc. v City of Montclair* (1989) 209 CA3d 245, 257 CR 124, cert denied (1989) 493 US 918; *Festival Enters., Inc. v City of Pleasant Hill* (1986) 182 CA3d 960, 227 CR 601. These cases suggest that a city must have substantial businesses or events that do not involve First Amendment rights that would bear a significant portion of the tax burden to enact an admissions tax, or demonstrate a compelling interest, other than the mere need to raise revenue, if a tax targets First Amendment businesses. *Sacramento Cable Television v City of Sacramento* (1991) 234 CA3d 232, 286 CR 470.

© The Regents of the University of California

§5.62 10. Parcel Tax

A parcel tax is an excise tax on the privilege of consuming municipal services and is generally an annual tax that is based on either a flat rate per non-vacant parcel or a rate that varies depending on use, and size or number of units, or both, on each parcel. Proposition 218 requires that a parcel tax be adopted as a special tax unless the tax can be shown to be something other than a tax on a parcel or on a person as an incident of property ownership. See Cal Const art XIIID, §3.

Subject to constitutional requirements for voter approval, the source of authority to levy a parcel tax for a charter city is the city's general home rule powers and the city's charter. Cal Const art XI, §5. The general authority for a general law city to levy such a tax is Govt C §37100.5 (general law city may impose any tax charter city may impose) and §50075 (authorizing special taxes with two-thirds voter approval).

© The Regents of the University of California

§5.63 a. Parcel Tax Distinguished From Property Tax

An ad valorem parcel tax violates the 1-percent limit on ad valorem property taxes of Proposition 13. Cal Const art XIIIA, §1. See §§5.8, 5.19. A non-ad valorem property tax may be approved by the voters as a special tax under Cal Const art XIIIA, §4 and Cal Const art XIIID, §3(a)(2). See *Heckendorn v City of San Marino* (1986) 42 C3d 481, 229 CR 324 (parcel tax rate based on parcel's zoning was not ad valorem).

© The Regents of the University of California

§5.64 b. Parcel Tax as Excise Tax

Parcel taxes are generally adopted as excise taxes. For a discussion of excise taxes generally, see §§5.57-5.61.

© The Regents of the University of California

§5.65 (1) Basis of Parcel Tax

Ordinances adopting parcel taxes commonly provide they are an excise tax based on the availability or use of municipal services or facilities, or both. The justification for the tax may rely on a variety of existing facilities and services (see, *e.g., City of Oakland v Digre* (1988) 205 CA3d 99, 252 CR 99 (invalidating parcel tax as insufficiently tied to use of services)) or new facilities that are being financed through the imposition of a special parcel tax (*e.g.,* as part of a Mello Roos community facilities district under Govt C §§53311-53368.3, discussed in §§5.76-5.87). The taxpayer need not actually use the services, but can be required to pay the tax based on the mere availability of the services. *City of Glendale v Trondsen* (1957) 48 C2d 93, 308 P2d 1. But see discussion concerning proportionality in §5.66. An excise tax generally is levied against an activity that can be foregone without loss of ownership; most parcel taxes imposed as excise taxes do not bear this characteristic. *City of Oakland v Digre, supra*.

© The Regents of the University of California

§5.66 (2) Proportionality Requirement

A tax is generally imposed for revenue rather than regulatory purposes and need not bear any relation to the benefit conferred on the taxpayer or the burden placed on the public by the taxpayer. See*, e.g., Trent Meredith, Inc. v City of Oxnard* (1981) 114 CA3d 317, 327, 170 CR 685. The requirement that a parcel tax be "proportional" to the use of city services was raised in *City of Oakland v Digre* (1988) 205 CA3d 99, 252 CR 99, to distinguish excise taxes on certain uses of property from taxes on property ownership alone. Some municipal parcel taxes have a broad scope that does not necessarily provide a direct link between the taxpayer and the use of city services. Such a parcel tax is distinguishable from other types of excise taxes that are imposed at the time of use for the privilege of using a specific service. See*, e.g., City of Glendale v Trondsen* (1957) 48 C2d 93, 308 P2d 1 (excise tax for availability of trash collection services); *Douglas Aircraft Co. v Johnson* (1939) 13 C2d 545, 90 P2d 572 (state use tax); *Ingels v Riley* (1936) 5 C2d 154, 53 P2d 939 (motor vehicle license fee for use of state roadways).

Because *City of Oakland v Digre* (1988) 205 CA3d 99, 252 CR 99, invalidated the Oakland parcel tax at issue in the case, it is important for drafters and defenders of parcel taxes to distinguish the case. Possible bases for distinguishing *Digre* from other cases are:

- *Digre* held that proportionality is one of several factors to be reviewed (see discussion of excise taxes in §5.59), but did not hold that proportionality alone is determinative;
- Oakland stated that its tax was based on *use* of municipal services rather than *availability*, so *Glendale* may be distinguishable; and
- Oakland taxed vacant parcels, suggesting its tax was not an excise tax on the use of city services but a disguised tax on property ownership per se "regardless of whether the property is used as a residence." 205 CA3d at 106. See *Neecke v City of Mill Valley* (1995) 39 CA4th 946, 46 CR2d 266 (rejecting special tax challenge to parcel tax, but not squarely addressing property tax / excise tax distinction).

PRACTICE TIPS: The following strategies may help a city characterize a parcel tax as an excise tax rather than a property tax. The law does not require that all or any of these strategies be used.

PRACTICE TIP 1: State explicitly in the ordinance that the tax is an excise tax for revenue-raising purposes, specify what activity or privilege the tax is imposed on, and ensure that the structure of the tax bears a meaningful relation to that basis (*e.g.,* if the tax is imposed on the basis of the consumption of municipal services, consider exempting vacant property or reducing the tax on such property to a fair measure of the services provided to it).

PRACTICE TIP 2: Articulate that the tax is on use rather than ownership of the property.

PRACTICE TIP 3: Specify that the tax is a personal debt—not a lien on the property; do not have the tax collected as an item on the property tax bill. Consider collecting the tax as an item on water, sewer, or garbage bills for ease of collection.

PRACTICE TIP 4: Impose the tax on the occupant of property rather than the owner.

PRACTICE TIP 5: Consider exempting or discounting the tax on vacant parcels.

PRACTICE TIP 6: If the tax is based on the use of municipal services or facilities, adopt a rate schedule that makes the tax roughly proportional to the probable use of such services or facilities by each class of property (*e.g.,* vary the tax based on the number of dwelling units on a residential property or on the square footage of improvements of non-residential property).

PRACTICE TIP 7: If possible, collect the tax whenever the privilege being taxed is exercised rather than at regular time periods.

© The Regents of the University of California

11. Transfer Taxes

§5.67 a. Documentary Transfer Taxes

A documentary transfer tax is an excise tax imposed on the deed, instrument, or writing by which interests in real property are transferred. The tax is in proportion to the consideration or value of the property or interest conveyed (exclusive of liens and encumbrances) and applies if such consideration exceeds $100. Rev & T C §11911(a).

The Documentary Transfer Tax Act (Rev & T C §11911-11935) authorizes a city in a county that has imposed a tax under the provisions of the act to impose by ordinance a documentary transfer tax at half the county rate. See Rev & T C §11911(b). Failure to do so cedes the entire tax to the county but does not reduce taxes paid by those involved in real estate transactions. Rev & T C §11911(c).

A city is allowed to impose a tax of one-half of the county tax rate of 55 cents for each $500 or fraction of the consideration or value. Rev & T C §11911(b).

The amount of tax paid under a city documentary transfer tax ordinance is a credit against the county tax due, but only if the city tax is in conformity with state law. Rev & T C §§11911(c), 11931.

The Documentary Transfer Tax Act exempts from tax any instruments by which an exempt governmental agency has acquired title. There are a number of other statutory exemptions dealing with reorganizations, partnerships, orders of the Securities and Exchange Commission, transfers between spouses, and debt instruments. Rev & T C §§11921-11930.

© The Regents of the University of California

§5.68 b. Real Property Transfer Taxes

Some charter cities have enacted a real property transfer tax that imposes a tax on the conveyance of real property based on the value of the property in addition to the amount authorized by Rev & T C §§11911. Courts have determined that such charter city taxes do not violate either Proposition 13 (Cal Const art XIIIA) (*Cohn v City of Oakland* (1990) 223 CA3d 261, 272 CR 714) or Proposition 62 (Govt C §53725), which prohibits a transaction tax on the sale of real property (*Fielder v City of Los Angeles* (1993) 14 CA4th 137, 17 CR2d 630). Although Govt C §37100.5 gives a general law city the authority to impose the same type of taxes that a charter city imposes, a general law city is subject to the restrictions of Proposition 62 (Govt C §53725), which specifically prohibit a transaction tax on the sale of real property. Accordingly, while charter cities may consider additional real property transfer taxes beyond the Rev & T C §11911 rate, general law cities may not. All cities should adopt the tax authorized by the Revenue and Taxation Code unless they wish to transfer their share of that tax to the county.

© The Regents of the University of California

§5.69 12. Special Taxes

Cities "by a two-thirds vote of the qualified electors … may impose special taxes." Cal Const art XIIIA, §4; Cal Const art XIIIC, §2(d). This provision has been construed not as a grant of authority to impose special taxes but as a restriction on the power to do so. *City & County of San Francisco v Farrell* (1982) 32 C3d 47, 53, 184 CR 713. The provisions of Govt C §50075, however, give cities the power to impose special taxes, subject to the constitution's two-thirds vote requirement. The restriction on local taxes in Cal Const art XIIIA, §4 was considered necessary to ensure effective property tax relief. *Amador Valley Joint Union High Sch. Dist. v State Bd. of Equalization* (1978) 22 C3d 208, 231, 149 CR 239. The imposition of special taxes is also subject to the requirements of Proposition 62 (Govt C §§53720-53730) and Proposition 218 (Cal Const arts XIIIC-XIIID). See §§5.105-5.120.

© The Regents of the University of California

a. Special Taxes Defined

§5.70 (1) Label Not Dispositive

The label given to a charge is not dispositive; rather, in case of a dispute, a court will look to the charge's purpose and effect. *City of Oakland v Digre* (1988) 205 CA3d 99, 105, 252 CR 99; *Mills v County of Trinity* (1980) 108 CA3d 656, 661, 166 CR 674. Nonetheless, labels are given some consideration and should therefore be chosen with care. Labeling something an "excise" tax will bolster defense of a claim that that tax is something else, such as an illegal ad valorem property tax. See, *e.g., Ingels v Riley* (1936) 5 C2d 154, 160, 53 P2d 939.

© The Regents of the University of California

§5.71 (2) Special Purpose May Not Be Necessary

Proposition 218 defines a "special tax" as "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." Cal Const art XIIIC, §1(d).

By comparison, a "general tax" is any tax imposed for general government purposes. Cal Const art XIIIC, §1(a). The courts have determined that a tax is general only when its revenues are available for expenditure for any and all governmental purposes. *Howard Jarvis Taxpayers Ass'n v City of Roseville* (2003) 106 CA4th 1178, 132 CR2d 1. However, the mere reference to one possible use of general tax proceeds for a specific municipal purpose (police and fire) does not necessarily transform a general tax into a special tax. *Fenton v City of Delano* (1984) 162 CA3d 400, 208 CR 486.

In *Coleman v County of Santa Clara* (1998) 64 CA4th 662, 75 CR2d 516, the 6th District Court of Appeal applied a two-part test for identification of a "special tax":

(1) Is the entity that imposes the tax a general-purpose entity (like a city) or a special-purpose entity that can impose only special taxes by its very nature?

(2) If the tax is imposed by a general-purpose entity, are the proceeds "legally obligated" for a "special purpose"?

Coleman upheld a so-called "Measure A / Measure B" proposal that combined a general tax (Measure B) with an advisory question (Measure A) advising the county board of supervisors to spend the proceeds of the tax on a specified list of transportation improvements. Because the tax was not legally restricted to the uses specified in the companion advisory measure, the court found it to be a general tax.

© The Regents of the University of California

§5.72 (3) Tax Versus Other City Charges: Fees Distinguished

Special taxes require two-thirds voter approval. See §5.69. Any charge imposed by a city, however labeled, could be characterized as a "tax" for some purposes, but for the purpose of determining whether a two-thirds vote of the electorate is required for its adoption, the term "tax" does not include a charge that "does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." See Govt C §50076. The term "special taxes" does not include "regulatory fees" that are "reasonably commensurate with the cost of regulatory activity from those at whose instance the activity is conducted." *Mills v County of Trinity* (1980) 108 CA3d 656, 663, 166 CR 674. It does not matter if a fee does not benefit those charged as long as the fee is commensurate with the burden imposed by the activity of those charged. *Sinclair Paint Co. v State Bd. of Equalization* (1997) 15 C4th 866, 64 CR2d 447 (approving fees assessed on persons contributing to environmental lead contamination to administer the Childhood Lead Poisoning Prevention Act); *Pennell v City of San Jose* (1986) 42 C3d 365, 375, 228 CR 726 (approving a charge imposed on landlords to administer a city's rent control ordinance); *Collier v City & County of San Francisco* (2007) 151 CA4th 1326, 1349, 60 CR3d 698 ("California courts have not required governments to prove a link between their expenditure of fee revenues and their receipt of those revenues from particular fee payers"). A fee to fund the cost to implement a tax is itself a tax. *Weisblat v City of San Diego* (2009) 176 CA4th 1022, 98 CR3d 366.

PRACTICE TIP: The imposition of every charge or fee should be supported by evidence (perhaps in a staff report) showing that the revenues raised will not exceed the cost of providing the service or regulation unless it is absolutely clear that the fee in question may be set at any rate the market will bear (like fees for proprietary activities, such as renting out meeting halls). Follow statutory authority for levy of a particular fee or charge.

© The Regents of the University of California

§5.73 (4) Tax Versus Other City Charges: Assessments Distinguished

A special tax, which requires a two-thirds voter approval, does not include a special assessment. Cal Const art XIIIC, §1(d) (defining "special tax"), Cal Const art XIIID, §2(b) (defining "assessment"), §3(a) (listing special taxes and assessments separately among authorized impositions on property ownership); *Knox v City of Orland* (1992) 4 C4th 132, 14 CR2d 159. On special assessments, see §§5.121-5.157.

© The Regents of the University of California

§5.74 (5) Tax Versus Other City Charges: Record Necessary to Overcome Challenge on Lack of Voter Approval

In case of a challenge to a charge imposed by a city without two-thirds voter approval, the burden will be on the city to demonstrate that the charge is either a fee or a general tax. Cal Const art XIIID, §§4(f), 6(b)(5). Thus, before imposing a charge that is not going to be submitted to a vote, "the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payors' burdens on or benefits from the regulatory activity." *Collier v City & County of San Francisco* (2007) 151 CA4th 1326, 1346, 60 CR3d 698; *San Diego Gas & Elec. Co. v San Diego County Air Pollution Control Dist.* (1988) 203 CA3d 1132, 1146, 250 CR 420.

PRACTICE TIP: The two-thirds voter approval requirement for a special tax will not necessarily be avoided simply by placing revenue from a tax in a city's general fund. Courts will look to the purpose of the charge. If the intention of a charge, as opposed to a tax, is to fund a "specific project or program," the record should show that the charge is "reasonably commensurate" with the cost of a regulatory activity or services being provided. Such a record may establish that a charge is a fee rather than a tax.

© The Regents of the University of California

§5.75 b. Mandatory Accountability Measures Necessary for Special Tax Measures

The legislature has imposed mandatory accountability provisions that must be reflected in local special tax measures submitted to the voters. Govt C §§50075.1-50075.5. Each such measure must state the "specific purposes" of the tax, include a requirement that the proceeds of the measure be devoted only to those purposes, provide for "the creation of an account into which the proceeds shall be deposited," and require annual reporting of amounts collected and expended and of "the status of any project required or authorized to be funded" by the measure. Although the measure purports to apply to charter cities, an argument can be made that these issues are municipal affairs as to which the local charter is controlling. See generally *Harman v City & County of San Francisco* (1972) 7 C3d 150, 101 CR 880.

PRACTICE TIP: Compliance with this procedure is recommended to make clear that the revenue measure is, in fact, a special tax, and to clarify for voters what the proceeds of the tax will be used for.

© The Regents of the University of California

§5.76 c. Mello-Roos Community Facilities Act of 1982

The Mello-Roos Community Facilities Act of 1982 (Mello-Roos) (Govt C §§53311-53368.3) provides a method of financing public facilities, infrastructure, and services in connection with new development. Mello-Roos authorizes certain local agencies (including cities) to form community facilities districts (also referred to as Mello-Roos districts) to finance a wide range of public facilities and services through imposition of special taxes approved by a two-thirds vote of the qualified electorate of the district.

© The Regents of the University of California

§5.77 (1) Voting Mechanics

The vote is either by registered voters or by landowners, depending on whether there are 12 or more registered voters in the proposed district before formation. Govt C §53326(b). Mail ballots are authorized. Govt C §53326(d). Once established, a community facilities district is a legally constituted governmental entity distinct from the local agency that created it even if the members of the local agency and the district are the same. Govt C §53317(b).

PRACTICE TIP: Because of the difficulty of obtaining two-thirds voter approval of special taxes, Mello Roos taxes are commonly imposed in the development context, with the vote of property owners, and before the resulting developments are inhabited.

© The Regents of the University of California

§5.78 (2) Authorized Facilities

A community facilities district may be used to finance the purchase, construction, improvement, expansion, or rehabilitation of any real or tangible property with an estimated useful life of 5 or more years. Govt C §53313.5. Authorized facilities include (Govt C §53313.5):

- park, recreation, and open space facilities;
- school sites and buildings;
- libraries;
- child care facilities;
- water transmission and distribution facilities;
- natural gas pipeline facilities;
- telephone, electrical, and cable television facilities;
- flood and storm protection services; and
- any other governmental facilities that the legislative body creating the district is authorized to contribute revenue to, construct, own, or operate.

In addition, a community facilities district may pay for work necessary to bring buildings (including privately owned buildings) into compliance with seismic safety standards or regulations. Govt C §53313.5.

© The Regents of the University of California

§5.79 (3) Authorized Services

Subject to certain restrictions, a community facilities district may also finance a limited number of services, including (Govt C §53313):

- police protection services, including the provision of services for jail or other detention facilities;
- fire protection and suppression services;
- ambulance and paramedic services;
- the operation and maintenance of flood and storm protection services;
- cleanup of hazardous substances;
- recreation services, library services, and the operation and maintenance of museums and cultural facilities;
- maintenance and lighting of parks, parkways, streets, roads, and open spaces; and
- maintenance of elementary and secondary school sites and structures.

A community facilities district tax approved by a landowner vote may only finance new services or an increase in the level of services that existed at the time the district was formed. Govt C §53313.

© The Regents of the University of California

§5.80 (4) Joint Community Facilities Agreements

A community facilities district may be formed by an entity other than a city, *e.g.,* a school district or special district, to finance facilities to be owned by a city if the entity and the city enter into a joint community facilities agreement or a joint exercise of powers agreement before formation of the community facilities district. Govt C §53316.2.

PRACTICE TIP: In reviewing a proposed joint community facilities district with another entity forming a community facilities district, ensure that the terms of the agreement clarify that the city is not responsible for the formation of the community facilities district, the levy and collection of the special taxes, or the issuance of bonds secured by such special taxes. The entity forming the district should agree to indemnify the city for any of the following:

- claims arising from the formation of the district;
- the authorization of the levy of special taxes and the issuance of bonds;
- the administration of the district and any bonds;
- the levy of special taxes and the issuance of bonds; and
- initial and continuing disclosure related to any bonds.
- The city should also review the goals and policies regarding the use of community facilities districts of the entity proposing to form the community facilities district to determine if its goals and policies are consistent with the city's goals and policies. The city may be wary of entering into a joint community facilities agreement with an entity that would permit the levy of special taxes at rates that would result in the aggregate taxes and assessments levied on properties in the proposed district to exceed 2 percent of the projected sales prices of the homes in the district.

© The Regents of the University of California

§5.81 (5) Formation of a Community Facilities District

The statute specifies a number of procedural steps to form a community facilities district. After formation of the district, the special tax is voted on by the qualified electors of the district. The qualified electors are either landowners or registered voters if there are more than 12 registered voters in the district. Govt C §§53313-53365.7. Within 15 days after approval of the special tax by the qualified electors, the district must record a notice of special tax lien against the land within the district. Govt C §53328.3. From the date of recordation, all persons are considered to have notice of the tax lien. Govt C §53328.3.

PRACTICE TIP: Financing under the Mello-Roos Community Facilities Act of 1982 (Mello-Roos) (Govt C §§53311-53368.3) allows for flexibility in both the facilities that may be financed and how the burden or costs are to be spread. It also requires the cooperation of both landowners and a city in proceedings to form a district to finance facilities or services for newly developing areas. If, for example, the city council does not approve the proposed community facilities district, the city will not conduct the proceedings. At the same time, if the landowners do not agree to the proposed community facilities district, they will not vote for it. Consequently, before proceedings take place, negotiations typically take place between city staff and property owners to establish agreements regarding the boundaries of the proposed district, the facilities or services, or both, to be financed, the amount of the bond authorization, and the rate and method of apportioning the special taxes. Because of the two-thirds vote requirement, Mello-Roos financing is generally available to large undeveloped parcels with fewer than 12 registered voters. Community facilities districts do have the potential for creating issues following formation as one group of citizens pays more taxes compared to landowners outside the district. In addition, if the real estate economy changes significantly after the formation of the district, the real property that secures the special tax may not be of sufficient value to cover delinquencies because the sales value of the real property has declined. Most agencies retain consultants specializing in the design of the rate and method of apportionment of a Mello-Roos special tax because of the importance and complexity of the task.

On Mello-Roos financing, see §5.76.

© The Regents of the University of California

§5.82 (6) Levying the Mello-Roos Special Tax

The special tax is levied by ordinance once and can be adjusted annually by resolution. There is some flexibility in designing the special tax formula. The tax must be apportioned in a fair and reasonable manner, but it cannot be an ad valorem tax (*i.e.,* based on the assessed value of land). Unlike a special assessment, a special tax under the Mello-Roos Community Facilities Act of 1982 (Mello-Roos) (Govt C §§53311-53368.3) need not be, but may be apportioned on the basis of any benefit to property. On approval of a Mello-Roos special tax by the voters, the legislative body may levy the tax in any amount up to the rate authorized in the resolution of formation. Govt C §53340. On Mello-Roos financing, see §5.76.

© The Regents of the University of California

§5.83 (7) Collection of the Mello-Roos Special Tax

Once levied, the special tax under the Mello-Roos Community Facilities Act of 1982 (Mello-Roos) (Govt C §§53311-53368.3) is collected twice a year along with the property tax. The special tax is subject to the same penalties, foreclosure procedures, and sale and lien priorities in the event of delinquency as those for ad valorem property taxes. Govt C §53340. Alternatively, the special tax may be collected separately from the property tax bill, such as by direct billing of the property owners (and this may be required in the initial tax year if the tax is imposed after the deadline for placing it on the county tax roll). In the event of delinquency, special taxes levied to pay debt service on bonds secured by such special taxes may be collected by judicial foreclosure proceedings. Govt C §§53356.1-53356.6. On Mello-Roos financing, see §5.76.

PRACTICE TIP: Bond covenants typically obligate the taxing entity to pursue judicial foreclosure when delinquencies reach a stated level.

© The Regents of the University of California

§5.84 (8) Exemptions to the Mello-Roos Special Tax

Properties or entities of the state, federal, or other local governments are exempt from the special tax unless such entity acquires a property after the tax has lawfully been imposed on it. Govt C §§53317.3, 53340(c). On financing under the Mello-Roos Community Facilities Act of 1982 (Mello-Roos) (Govt C §§53311-53368.3), see §5.76.

© The Regents of the University of California

§5.85 (9) Changes to Community Facilities District

After establishment of a community facilities district and approval of a special tax, new facilities or services may be added, or the maximum special tax increased or decreased. Any such changes require procedures similar to formation, including adoption of an initial resolution, notice to landowners or residents, a public hearing, a vote by the legislative body to put the issue on the ballot, and an election requiring a minimum of two-thirds voter approval. Govt C §§53330-53338.5.

© The Regents of the University of California

§5.86 (10) Bonds: Issuance and Limitations

A community facilities district may issue bonds secured by the levy of special taxes to finance authorized facilities (including facilities to be used to provide services), but bonds may not be issued to fund authorized services. Govt C §§53313, 53345-53365.7. Proceedings to authorize such bonds are typically undertaken simultaneously with formation of a community facilities district. An authorization to issue bonds must be approved by two-thirds of the qualified electors. Govt C §§53345-53365.7. Bonds secured by community facilities district special taxes are of the same force, value, and use as bonds issued by any municipality and interest on such bonds is exempt from state tax. Generally, such bonds would also be exempt from federal tax.

© The Regents of the University of California

§5.87 (11) Challenges to the Validity of Special Tax Levy or Bond Issuance

Any action challenging special taxes or bonds under the Mello-Roos Community Facilities Act of 1982 (Mello-Roos) (Govt C §§53311-53368.3) must be commenced within 30 days after voter approval of the levy of the special tax or bond issuance. Govt C §§53341, 53359. On Mello-Roos financing, see §5.76.

© The Regents of the University of California

§5.88 d. Police and Fire Protection

Any local agency that provides fire or police services can propose by ordinance the levy of a special tax other than an ad valorem property tax for approval by two-thirds of the voters. Cal Const art XIIIC, §2(d); Govt C §§53970, 53978.

© The Regents of the University of California

§5.89 (1) Implementing Ordinance—Mandatory Provisions

The special tax must be levied on "a parcel, class of improvement to property, or use of property basis, or a combination thereof" to which specific fire protection or prevention services or police protection services are made available. Govt C §53978(b). The ordinance submitted for voter approval must specify the amount of each such special tax or the maximum amount that can be annually levied. Govt C §53978(b).

© The Regents of the University of California

§5.90 (2) Implementing Ordinance—Optional Provisions

The amount of each special tax may vary among parcels, improvements, or uses based on the availability of police and fire services. Govt C §53978(c). Any such distinctions must have a rational basis and must not discriminate against any protected minority group. See US Const amend XIV (equal protection clause); Cal Const art I, §7; *City of San Jose v Donohue* (1975) 51 CA3d 40, 123 CR 804. The legislative body can provide that a special tax must be collected in the same manner and subject to the same penalties as taxes collected by or on behalf of the agency. If the county collects the tax, it may deduct its reasonable costs to do so. Govt C §53978(d).

© The Regents of the University of California

§5.91 (3) Impact on Other Methods of Funding Police and Fire Services

A general tax does not become a special tax under Govt C §53978 merely because some of its proceeds will be used for police and fire services. *Fenton v City of Delano* (1984) 162 CA3d 400, 208 CR 486. But see Cal Const art XIIIC, §1(d) (defining "special tax" for purposes of Proposition 218).

© The Regents of the University of California

§5.92 e. Funding for Libraries

Subject to voter approval, a city, county, city and county, or library district may impose a special tax for the purpose of providing library facilities and services described in Ed C §§18010-18032. Govt C §53717. Because this is a special tax and not a special assessment, there is no requirement that the tax be apportioned on the basis of benefit to any property. If a library tax is based on benefit received by parcels of real property, the special tax will not be construed to be a property tax. Govt C §53717.2.

© The Regents of the University of California

§5.93 13. Tax Refunds; Class Actions for Refunds

Tax refunds are subject to the claim procedures of the Government Claims Act (Govt C §910) unless the Revenue and Tax Code or other statute prescribes more specific procedures. Govt C §905.

Whether a claims ordinance can prohibit class action lawsuits with respect to tax refunds is currently being decided by the courts. Under Govt C §910, class action lawsuits are permitted. *City of San Jose v Superior Court* (1974) 12 C3d 447, 457, 115 CR 797. In *Batt v City & County of San Francisco* (2007) 155 CA4th 65, 65 CR3d 716, the First Appellate District upheld San Francisco's ordinance prohibiting class action lawsuits for tax refunds. But in *County of Los Angeles v Superior Court (Oronoz)* (2008) 159 CA4th 353, 71 CR3d 485, the Second Appellate District disagreed, and held that Los Angeles' claims ordinance prohibiting class action lawsuits for tax refunds was ineffective because only the Government Claims Act applies to tax claims, and class claims are permissible under that statute. However, in *Ardon v City of Los Angeles* (review granted Sept. 9, 2009, S174507; superseded opinion at 174 CA4th 369, 94 CR3d 245), the Second Appellate District reversed itself, overruling *Oronoz*, and held that class action lawsuits are not permissible in tax refund cases under the Government Claims Act. California Supreme Court review of *Ardon* is pending.

© The Regents of the University of California

C. Limitations on Exercise of Taxing Authority; Procedural Issues

§5.94 1. Equal Protection and Due Process Requirements

The courts have established principles for review of tax statutes and ordinances when the constitutional challenge is based on the equal protection clause or the due process clause, or both. *City of San Jose v Donohue* (1975) 51 CA3d 40, 123 CR 804. "It may be stated as a general rule that the due process clause of the federal constitution, Amend[ment] 14, is satisfied in matters of taxation if, at some stage before a tax becomes irrevocably fixed the taxpayer is given the right, of which he shall have notice, to contest the validity or amount of the tax before a board or tribunal provided for that purpose." *People v Sonleitner* (1960) 185 CA2d 350, 356, 8 CR 528.

© The Regents of the University of California

§5.95 a. Uniformity

Absolute uniformity or equality in the application of tax measures can never be obtained. *Willingham Bus Lines, Inc. v Municipal Court for the San Diego Judicial Dist. of San Diego County* (1967) 66 C2d 893, 59 CR 618.

© The Regents of the University of California

§5.96 b. Rational Basis

A tax statute or ordinance that distinguishes between parties does not violate the equal protection or due process clause if the distinction rests on a rational basis. *Jensen v Franchise Tax Board* (2009) 178 CA4th 426, 100 CR3d 408 (rejecting equal protection challenge to Proposition 63 income tax increase on "millionaires" to fund mental health services). It must be presumed to rest on that basis if there is any conceivable state of facts that would support it. *Ladd v State Bd. of Equalization* (1973) 31 CA3d 35, 106 CR 885. Administrative convenience and expense in the collection or measurement of a tax are alone sufficient justification for treating some taxpayers differently from others. *Carmichael v Southern Coal & Coke Co.* (1937) 301 US 495, 81 L Ed 1245, 57 S Ct 868.

© The Regents of the University of California

§5.97 2. First Amendment; No Discrimination on Protected Speech

Cities have the power to license for the purpose of generating revenue. This includes the taxation of First Amendment activities. However, those engaged in protected speech may not be singled out for discriminatory treatment in the absence of governmental interests of compelling importance that cannot be achieved without differential taxation. *Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue* (1983) 460 US 575, 75 L Ed 2d 295, 103 S Ct 1365; *Times Mirror Co. v City of Los Angeles* (1987) 192 CA3d 170, 237 CR 346.

The entertainment industry may be properly subdivided and separately classified if the classification is founded on natural, intrinsic, or fundamental distinctions that are reasonably related to the object of the legislation. *Times Mirror Co. v City of Los Angeles* (1987) 192 CA3d 170, 237 CR 346.

On regulating speech (and related First Amendment issues), see §§9.118-9.153; on validity of admissions taxes, see §5.61.

© The Regents of the University of California

§5.98 3. Proposition 13 Limitations

Proposition 13 (Cal Const art XIIIA) limits cities' ability to tax in two ways: (1) Article XIIIA, §4, of the California Constitution requires two-thirds voter approval for special taxes; and (2) Article XIIIA, §§1-4, of the California Constitution prevent cities from levying certain taxes on real property even with two-thirds voter approval. Article XIIIA, §1 limits any ad valorem tax on real property to 1 percent of assessed valuation and provides that only counties may levy this property tax (although cities and special districts share in the proceeds). Article XIIIA, §4 provides that cities may impose special taxes, with the exception of ad valorem taxes on real property or transaction or sales taxes on the sale of real property, with two-thirds voter approval. A documentary transfer tax is not a "transaction or sales tax" prohibited by this provision. *Cohn v City of Oakland* (1990) 223 CA3d 261, 263, 272 CR 714. On documentary transfer taxes, see §5.67.

On making a record to establish that a charge is not a special tax, see §5.74. On making a record to establish that a tax is a parcel tax and not an invalid ad valorem property tax, see §5.21. For Proposition 218's prohibition of general parcel taxes, see §5.113.

© The Regents of the University of California

§5.99 a. Constitutionality of Proposition 13

Proposition 13's methods for assessing property taxes have been upheld against constitutional attacks. See *Nordlinger v Hahn* (1992) 505 US 1, 120 L Ed 2d 1, 112 S Ct 2326 (rejecting an equal protection challenge); *Amador Valley Joint Union High Sch. Dist. v State Bd. of Equalization* (1978) 22 C3d 208, 149 CR 239.

© The Regents of the University of California

§5.100 b. Special Taxes Limitations

Article XIIIA, §4, of the California Constitution applies only to special taxes. See *City & County of San Francisco v Farrell* (1982) 32 C3d 47, 184 CR 713; *Coleman v County of Santa Clara* (1998) 64 CA4th 662, 75 CR2d 516 (upholding a sales tax increase for general government purposes on the same ballot as an advisory measure stating the voters' preference for use of the sales tax increase); *Cohn v City of Oakland* (1990) 223 CA3d 261, 263, 272 CR 714 (upholding Oakland's general real property transfer tax).

© The Regents of the University of California

4. Tax Exemptions

§5.101 a. Exemptions on Property

Some property is exempt from tax. This includes:

- Property owned by the state (Cal Const art XIII, §3(a));
- Most property owned by local government (Cal Const art XIII, §§3(b), 11);
- Libraries and museums (Cal Const art XIII, §3(d));
- Property used for certain kinds of schools (Cal Const art XIII, §3(d)-(e));
- Churches (Cal Const art XIII, §3(f)); and
- Certain federal instrumentalities (see, *e.g.,* 12 USC §§531 (Federal Reserve Bank), 1768 (federal credit unions), 1825 (Federal Deposit Insurance Corporation).

An excise tax imposed on an entity that is exempt from property taxes may be unconstitutional. *Sacramento Mun. Util. Dist. v County of Solano* (1997) 54 CA4th 1163, 63 CR2d 286.

© The Regents of the University of California

§5.102 b. Exemptions on Insurance Companies

Insurance companies are subject to a tax provided by the California Constitution that is in lieu of all other taxes, even those that are not on insurance premiums. Cal Const art XIII, §28; *Mutual Life Ins. Co. of New York v City of Los Angeles* (1990) 50 C3d 402, 267 CR 589 (insurance companies have broad exemption from state and local taxes, except for property taxes and motor vehicle taxes and fees).

PRACTICE TIP: While a title insurance company's insurance business may be exempt, when acting as an escrow company, escrow services are not exempt.

© The Regents of the University of California

§5.103 c. Exemptions on Banks

Banks are subject to a tax by the state that is in lieu of all other taxes. See Cal Const art XIII, §27; Rev & T C §§23181-23182.

© The Regents of the University of California

§5.104 d. Exemptions on Financial Corporations (Savings and Loans)

Certain other financial institutions are also subject to a state tax that is in lieu of all other taxes, even charter city taxes. Rev & T C §23182; *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1991) 54 C3d 1, 283 CR 569.

© The Regents of the University of California

§5.105 5. Proposition 62 Limitations

Proposition 62 is a statute adopted by initiative imposing a voter approval requirement on general and special taxes. See Govt C §§53720-53730. See also *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 45 CR2d 207 (finding Proposition 62's voter-approval requirement for general and special taxes constitutional and disapproving earlier court of appeal decisions to the contrary). Proposition 62 applies to counties, cities, cities and counties, any public or municipal corporation, and special districts. Govt C §53720. Proposition 62 does not apply to charter cities. See *Traders Sports, Inc. v City of San Leandro* (2001) 93 CA4th 37, 112 CR2d 677; *Fielder v City of Los Angeles* (1993) 14 CA4th 137, 17 CR2d 630; *Fisher v County of Alameda* (1993) 20 CA4th 120, 24 CR2d 384. Much of Proposition 62 is now redundant after the adoption of Proposition 218 (Cal Const arts XIIIC-XIIID), and only a few provisions are of independent significance, and only as related to general law cities, counties, and special districts. Only those aspects of Proposition 62 not duplicated by Proposition 218 are discussed in §§5.106-5.109. On Proposition 218, see §§5.110-5.120.

© The Regents of the University of California

§5.106 a. Proposition 62 Procedures for Enacting Taxes

Proposition 62 requires taxes to be proposed by ordinance or resolution. The ordinance or resolution must include the type of tax, the rate of tax, and the method of collection and, if a special tax, the purpose for which its imposition is sought. Govt C §53724(a).

© The Regents of the University of California

§5.107 b. Proposition 62 "Window Period" Taxes

Proposition 62 required a vote on taxes enacted between August 1, 1985, and November 4, 1986 (the so called "window period" before Proposition 62 was enacted). See Govt C §53727(b). The "window period" voter-approval requirement has been held unconstitutional. *City of Westminster v County of Orange* (1988) 204 CA3d 623, 251 CR 511. The California Supreme Court distinguished *Westminster* in finding that the voter-approval requirements of Proposition 62 are valid. But see *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 45 CR2d 207. See §§5.110-5.120 on Proposition 218.

© The Regents of the University of California

§5.108 c. Restriction on Real Property Transaction Sales Taxes

Proposition 62 prohibits local governments other than charter cities from imposing local transaction taxes or sales taxes on the sale of real property. Govt C §53725; *Traders Sports, Inc. v City of San Leandro* (2001) 93 CA4th 37, 112 CR2d 677 (Proposition 62 inapplicable to charter cities). A variation on this restriction is also contained in Proposition 13 (see Cal Const art XIIIA, §4); however, that section applies only to special taxes. See *City & County of San Francisco v Farrell* (1982) 32 C3d 47, 184 CR 713. See §§5.110-5.120 on Proposition 218 specifically applying certain voting requirements to the adoption of general taxes by charter cities.

© The Regents of the University of California

§5.109 d. Reduction in Property Tax Allocations for Failure to Comply With Proposition 62

Government Code §53728 states that if any local government or district imposes any tax without complying with Proposition 62, its property tax revenue allocation must be reduced one dollar for each dollar attributable to such tax. The provision does not say how the lost tax dollars are allocated, presumably to all other beneficiaries of the property tax proportionately. Although this penalty has frequently been litigated, the penalty has never been upheld in a published appellate decision. See *Barratt Am., Inc. v City of Rancho Cucamonga* (2005) 37 C4th 685, 37 CR3d 149 (excessive building permit fees based on UBC valuation table were illegal but did not trigger Proposition 62 property-tax-forfeiture remedy).

© The Regents of the University of California

§5.110 6. Proposition 218

Proposition 218 added Cal Const arts XIIIC and XIIID and makes numerous changes to local government finance law, particularly in the areas of taxes, and adds a newly defined class of "property-related fees" and assessments. See §§5.144-5.157, 5.174-5.186 on the effect of Proposition 218 on property-related fees and assessments. Proposition 218 applies to counties, cities, cities and counties (including charter cities), any public or municipal corporation, and special districts. The Proposition 218 Omnibus Implementation Act (Stats 1997, ch 38) offers clarifications of the provisions of Proposition 218. This act amends Elec C §4000, Govt C §54954.6, and Str & H C §9525, and adds Govt C §§53739, 53750, 53753, and 53753.5.

PRACTICE TIP: The League of California Cities has published the Proposition 218 Implementation Guide (2007), which provides extensive commentary on the measure and case law, interpreting it through 2007. Copies of the guide are available through the League's publication unit at 1400 K Street, 4th Floor, Sacramento, CA 95814, telephone (916) 658-8257, fax (916) 658-8220, or on its website at www.cacities.org.

© The Regents of the University of California

§5.111 a. New Definitions of "General" and "Special" Taxes Under Proposition 218

Proposition 218 defines a "general tax" as any tax imposed for general governmental purposes. See Cal Const art XIIIC, §1(a). Proposition 218 defines "special tax" as any tax imposed for specific purposes including taxes imposed for specific purposes and placed into a general fund. See Cal Const art XIIIC, §1(d). The primary consequence of this change in the definition of "special tax" is to embody in the California State Constitution the prohibition of *Rider v County of San Diego* (1991) 1 C4th 1, 2 CR2d 490, on general taxes imposed by single-purpose public agencies.

PRACTICE TIP: Even though Proposition 218 defines the terms "assessments" and "fees and charges," it does not define the word "tax." Thus, look to previously existing law on distinctions among taxes, fees, and assessments.

© The Regents of the University of California

§5.112 b. Taxes Enacted Before Passage of Proposition 218

Proposition 218 requires any general tax imposed, extended or increased between January 1, 1995, and November 6, 1996, without voter approval to be submitted to the voters within 2 years. Cal Const art XIIIC, §2(c). The election for these "window period" taxes is subject to all the restrictions described below relating to general taxes. Cal Const art XIIIC, §2(c). Unlike the similar window period provisions of Proposition 62, Proposition 218 is applicable to charter cities. This provision has not, to the knowledge of the League of California Cities, been litigated.

PRACTICE TIP: As a practical matter, the election for the window period taxes must have occurred by the November 3, 1998, general election. See Elec C §324(a)(1). However, given the rule of *Howard Jarvis Taxpayers Ass'n v City of La Habra* (2001) 25 C4th 809, 107 CR2d 369, that a new cause of action to challenge a tax arises each time it is collected, this issue is of continuing concern for any local government that has not obtained voter approval of a tax adopted or increased during the Proposition 218 window period.

© The Regents of the University of California

§5.113 c. Limitation on Taxes on Property

Article XIIID, §3, of the California Constitution creates a closed list of permissible taxes "upon any parcel of property or upon any person as an incident of property ownership." Only the property tax provided for under Proposition 13 and special taxes approved by two-thirds of voters are authorized. Thus, general parcel taxes approved by a majority vote are no longer authorized.

© The Regents of the University of California

§5.114 d. Tax Increases Requiring Voter Approval

Although Proposition 218 (Cal Const arts XIIIC-XIIID) does not define the term "increase" for purpose of defining the changes in taxes, assessments, fees, and charges that require voter approval or property-owner approval, the Proposition 218 Omnibus Implementation Act does define that term. In general, a change that creates a new taxpayer liability or an increased tax liability is a tax "increase" for which voter approval is required, unless the change results from non-government conduct such as a change in the use of land. Implementation of a pre-Proposition 218 or voter-approved inflation protection device is not a tax "increase" that requires voter approval. Govt C §§53739, 53750(h)(2)(A). The first case to discuss Govt C §53750(h)'s definition of tax "increase" is *AB Cellular LA, LLC v City of Los Angeles* (2007) 150 CA4th 747, 59 CR3d 295 (considering whether tax administrator's directives that phone carriers impose utility user tax consistently with the Mobile Telecommunications Act of 2000 constitute tax "increase" under Govt C §53750(h)).

© The Regents of the University of California

e. Procedure for Adopting General Taxes

§5.115 (1) Action by Legislative Body Required

Proposition 62 requires general taxes to be proposed by ordinance or resolution. Govt C §53724(a). The ordinance or resolution must include the type of tax, the rate of tax, and the method of collection. Govt C §53724(a). A proposed tax may state "a range of rates or amounts." If a range of rates is approved, the governing body may impose up to the maximum amount approved without additional voter approval. Govt C §53739. A proposed tax may also provide for inflationary adjustments to the rate or amount, unless the tax is to be determined by using a percentage calculation. Govt C §53739. Proposition 62 also states that enactment of general taxes requires a two-thirds vote of the legislative body. See Govt C §53724(b).

Given the extent to which Proposition 218 has reiterated Proposition 62's rules, the primary remaining effect of Proposition 62 with respect to the procedure by which taxes are adopted is the requirement that two-thirds of the legislative body of a general law city, county, or special district propose a general tax increase to the electorate. This requirement is not applicable to charter cities. *Traders Sports, Inc. v City of San Leandro* (2001) 93 CA4th 37, 112 CR2d 677. See §5.105.

© The Regents of the University of California

§5.116 (2) Voter Approval Required

Both Proposition 218 and Proposition 62 require that general taxes be approved by a majority of voters. See Cal Const art XIIIC, §2(b); Govt C §53723; *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 45 CR2d 207 (upholding voter-approval provisions of Proposition 62).

The election to approve a general tax must be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by unanimous vote of the members of the governing body present when the vote is taken. Cal Const art XIIIC, §2(b); 75 Ops Cal Atty Gen 47 (1992), citing *Tidewater Southern Ry., Co. v Jordan* (1912) 163 C 105, 124 P 716 (unanimous vote of the governing body means such a vote of those present). No such restriction is placed on special taxes and these may be approved at any election.

PRACTICE TIP 1: Proposition 218 provides no definition of the term "emergency" that justifies calling a special election on a general tax, but a plausible argument may be made that this term ought to be interpreted similarly to the scope of a city's power to act by urgency ordinance under Govt C §36937. See *Crown Motors v City of Redding* (1991) 232 CA3d 173, 179, 283 CR 356 (courts normally will not investigate the truth of facts declared by a city council). See also *National Indep. Bus. Alliance v City of Beverly Hills* (1982) 128 CA3d 13, 180 CR 59 (urgency business license tax ordinance adopted immediately before effective date of Proposition 13).

PRACTICE TIP 2: Although the Elections Code authorizes a mail ballot for a general or special tax, an election to elect the legislative body may not be conducted wholly by mail in cities with more than 1000 registered voters. Elec C §4000.

A city charter provision that would require a super majority vote to authorize the levy of a general tax or the increase in an existing general tax is preempted by Cal Const art XIIIC, §2(b). *Howard Jarvis Taxpayers Ass'n v City of San Diego* (2004) 120 CA4th 374, 15 CR3d 457.

© The Regents of the University of California

§5.117 (3) Other Statutory Requirements Might Be Applicable

Note that Proposition 218 does not rescind specific statutory requirements for special tax elections, for example, provisions for elections in community facilities (Mello-Roos Community Facilities Act of 1982 (Mello-Roos) districts. See generally Govt C §§53311-53368.3. Thus, compliance with statutory requirements is necessary, as well.

© The Regents of the University of California

f. Procedure for Adopting Special Taxes

§5.118 (1) Action by Legislative Body Required

Under Govt C §50077, a city may place a special tax on the ballot by ordinance or resolution, adopted after notice and a public hearing. Proposition 62 requires that the ordinance or resolution proposing the tax include the type of tax, its rate, the method of collection, the date on which the election on the tax will be held, and the purpose for which the special tax will be used. Govt C §53724(a). A proposed tax may state "a range of rates or amounts." If a range of rates is approved, the governing body may impose up to the maximum amount approved without additional voter approval. Govt C §53739. A proposed tax may also provide for inflationary adjustments to the rate or amount, unless the tax is to be determined by using a percentage calculation. Govt C §53739.

© The Regents of the University of California

§5.119 (2) Voter Approval Required

Special taxes are adopted on approval of two-thirds of the voters. Cal Const art XIIIA, §4; Cal Const art XIIIC, §2(d). See also Govt C §53722; *Santa Clara County Local Transp. Auth. v Guardino* (1995) 11 C4th 220, 45 CR2d 207 (finding the voter-approval provisions of Proposition 62 to be valid as applied to the county). Proposition 218 does not restrict when an election may be called on a special tax, as it does for general taxes. An election may be conducted wholly by mail if it does not fall on the date of a statewide election and it is authorized by the governing body of the local agency. Elec C §4000.

© The Regents of the University of California

§5.120 (3) Initiative Adoption and Repeal of Taxes

Before the adoption of Proposition 218 in 1996, the provisions of Cal Const art II, §§8-9 prevented the use of an initiative or referendum to repeal a tax. Article XIIIC, §3, of the California Constitution now provides that "[t]he power of initiative to affect local, taxes, assessments, fees and charges shall be applicable to all local governments." The measure also establishes a very low signature requirement for fiscal initiatives to propose or repeal fiscal legislation such as taxes or fee—5 percent of the number of voters of the jurisdiction who cast votes in the most recent gubernatorial election. Cal Const art II, §8(b); Cal Const art XIIIC, §3. Although this small number of signatures is sufficient to place a fiscal initiative on the ballot, it is not sufficient to authorize a special election that, for a general law city, is authorized by Elec C §9214 only if 15 percent of all registered voters of the jurisdiction petition for such an election. See 85 Ops Cal Atty Gen 151 (2002).

In *Bighorn-Desert View Water Agency v Verjil* (2006) 39 C4th 205, 46 CR3d 73, the California Supreme Court resolved some of the questions raised by Cal Const art XIIIC, §3, but left others to be decided by future cases. For example, the court made clear that all property-related fees—including water, sewer, and government trash service charges—may be reduced or repealed by initiative. 39 C4th at 216. On the other hand, the court reserved for another day whether the fees and charges that are subject to initiative repeal or reduction by Cal Const art XIIIC, §3 are limited to property-related fees governed by Cal Const art XIIID or whether other fees can be reduced by voters, as well. Similarly, the court stated that it was not deciding whether voters acting by initiative must comply with statutes requiring rate-setting bodies to set water rates high enough to cover the cost to provide an adequate and safe water supply. 39 C4th at 221. Nor does the *Bighorn-Desert View Water Agency* decision address rate covenants in revenue bonds. These promises are binding contracts protected by the impairment of contracts clause of the federal Constitution and a rate-reduction initiative that violated such a covenant would likely be invalid. Such covenants typically obligate utilities to set rates at levels sufficient to pay interest and principal on the bonds and to maintain (but not operate) the utility infrastructure that is part of the security for the bond. Finally, although the court ruled that an initiative under Proposition 218 cannot make new rules for the adoption of revenue measures and therefore invalidated a provision that required two-thirds voter-approval for future rate increases, the court also noted that a rate reduction initiative, once adopted by voters, can be amended by the local agency's legislative body only to the extent the initiative measure expressly allows it to do so. 39 C4th at 220. Thus, a rate-reduction initiative will often become a rate cap as well.

© The Regents of the University of California

D. Benefit Assessments and Assessment Districts

§5.121 1. Nature and Purpose of a Benefit Assessment

Benefit assessments (also called "special assessments") are levied to pay for identified public improvements or services that specially benefit the properties or businesses subject to the assessment. Fees and taxes may be used to finance the same things as may be financed by benefit assessments. The key distinctions among these several types of financial measures are how they must be justified legally, the process by which they are approved, and who pays for them. Districts are discussed in §§5.131-5.136 and §§5.144-5.157.

Dozens of statutes authorize assessments for various purposes. The most commonly used of these laws are described in §§5.126-5.136. When a general law city levies an assessment, it typically selects an assessment law under which it will proceed, and it then follows the procedures and limitations set by that law. Charter cities may follow this same route, but they often enact local ordinances and proceed under the local ordinance rather than a generally available assessment law. Local assessment laws are typically drafted to incorporate one or more of the statewide laws, but may include revisions to the incorporated law either streamlining procedures or permitting the financing of improvements or services not authorized under the state law. See *J.W. Jones Co. v City of San Diego* (1984) 157 CA3d 745, 203 CR 580. Generally, such charter city assessment ordinances must comply with Cal Const art XVI, §19.

© The Regents of the University of California

§5.122 2. Annual Versus Installment (Bonded) Assessments

Some assessment laws, particularly laws designed to fund services, authorize annual assessments. A city typically must levy such assessments each year, conducting new proceedings for each year in which the assessment is imposed. Typically, the procedures for levying an assessment after the first year are less extensive than in the initial year. Other assessment laws, particularly those that finance construction of infrastructure, are designed so that the entire cost of the project is assessed in a single year. Although technically, the entire amount of such assessments is levied in the first year (and becomes a lien against property in the first year), the assessment laws typically permit such assessments to be collected in annual installments over time. These installments are sometimes collected by a jurisdiction over several years until the funds needed for a project are in hand, but more typically the installments represent interest and principal payments due on bonds issued to finance the assessment. The ability to bond an assessment is one of the main advantages of assessment financing, because it permits property owners to obtain a needed public facility, but to pay for that facility over time while accruing interest only at the relatively low rate applicable to government-debt.

© The Regents of the University of California

§5.123 3. Assessment's Geographic Scope

A jurisdiction typically levies an assessment in a defined area known as an "assessment district." An assessment district can include only a small portion of the levying jurisdiction, but its boundaries may also be city-wide. The assessment laws generally require that each assessment district include all properties (or businesses) that will benefit from the improvements or services to be funded by the assessment. Although assessment districts are called "districts," they are not legal entities with an existence separate from the entity that creates them. Accordingly, creation of an assessment district is not subject to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Cortese-Knox-Hertzberg Act) (Govt C §§56000-57550), although creation of a county service area, a similar funding device, is subject to the Cortese-Knox-Hertzberg Act. See, *e.g.,* Govt C §56663. For most bonded assessments and some annual assessments, boundaries of the assessment district are recorded on a boundary map under Str & H C §§3110-3117.5. Boundaries of other districts are shown on maps filed in the office of the city clerk.

© The Regents of the University of California

§5.124 4. Property-Based Versus Business-Based Assessments

Virtually all assessments are levied against real property. Such assessments are generally collected on the property tax roll, secured by a lien against the assessed property, and subject to the requirements of Cal Const art XIIID (Proposition 218). Assessments levied in connection with some business improvement districts, however, are levied on businesses, not real property. Such business-based assessments are usually collected along with business license taxes and are not secured by a lien against real property. *Evans v City of San Jose* (1992) 3 CA4th 728, 4 CR2d 601. Assessments against businesses without respect to property ownership are not subject to the requirements of Proposition 218. *Howard Jarvis Taxpayers Ass'n v City of San Diego* (1999) 72 CA4th 230, 84 CR2d 804.

© The Regents of the University of California

§5.125 5. Assessments: Distinction From Fees and Taxes

The key distinction between an assessment and other revenue measures, such as fees and taxes, is that an assessment is levied as a charge for the *special benefit* that a property (or business) will derive from the improvement or service provided by the assessment. The classification of a charge as an assessment, rather than a tax or a fee, is important because Propositions 13 and 218 provide for drastically different substantive procedural and voter-approval requirements for assessments than for taxes and fees. The legal distinctions between assessments, taxes, and fees are discussed in §§5.144-5.157, 5.174-5.186 (discussing Proposition 218).

© The Regents of the University of California

§5.126 6. Assessment Laws

When a jurisdiction levies an assessment, it chooses the assessment statute (or charter city ordinance) to apply. See §5.121. These assessment laws govern the procedures for establishing each kind of assessment and govern how assessment proceeds may be spent. In addition to the chosen assessment law, certain state laws and constitutional provisions apply to assessments generally. There are literally dozens of assessment statutes authorizing particular agencies to impose assessments for particular purposes. Only statutes of wide application by cities are discussed in §§5.127-5.136.

© The Regents of the University of California

§5.127 a. Application of Str & H C §§3110-3117.5

Streets and Highways Code §§3110-3117.5 provide technical requirements for boundary maps and recorded assessment notices. Although applicable by its own terms to all assessments, most assessment laws authorizing annual assessments (as opposed to installment or bonded assessments) provide that the provisions of Str & H C §§3110-3117.5 do not apply to assessments imposed under those statutes. See*, e.g.,* Str & H C §22507. On installment and bonded assessments generally, see §§5.122, 5.140-5.142.

© The Regents of the University of California

§5.128 b. Application of Proposition 218

Article XIIID of the California Constitution includes substantive and procedural requirements for all assessments on real property. These requirements are interpreted by the Proposition 218 Omnibus Implementation Act (Govt C §§53750-53756). When Proposition 218 applies, its notice, protest, and hearing provisions supersede any statutory notice, protest, and hearing provisions for new and increased assessments, other than Str & H C §§3110-3117.5. Govt C §53753(a). The legislature has repealed most pre-Proposition 218 notice, protest, and hearing provisions, so this point is increasingly of historical interest only.

© The Regents of the University of California

§5.129 c. Special Assessment Investigation, Limitation and Majority Protest Act of 1931 (1931 Act)

Streets and Highways Code §§2800-3012 (Special Assessment Investigation, Limitation and Majority Protest Act of 1931) (1931 Act) include a number of provisions nominally applicable to all assessments. Many assessment laws, including all of the common annual assessment laws, include exemptions from these requirements, however.

© The Regents of the University of California

§5.130 d. Ralph M. Brown Act

Government Code §54954.6, a portion of the Ralph M. Brown Act, includes procedures for the adoption of assessments. However, under Govt C §54954.6(h), these requirements do not apply if the requirements of Proposition 218 apply. As Proposition 218 applies to all assessments on real property, the Brown Act provision has practical consequence only for assessments that are not on real property, such as certain business improvement district assessments.

© The Regents of the University of California

e. Specific Assessment Laws

§5.131 (1) Improvement Act of 1911 (1911 Act)

The Improvement Act of 1911 (1911 Act) (Str & H C §§5000-6794) provides for the construction of certain public improvements together with limited acquisition of necessary property, the levy of assessments and the issuance of bonds. The 1911 Act as a procedure act has fallen into disuse because the bonds for refinancing the cost of improvements are issued only after completion of the project, thereby requiring the contractor to finance the work. Bonds authorized by the 1911 Act, however, are sometimes issued under the procedures of the Municipal Improvement Act of 1913 (1913 Act) (Str & H C §§10000-10706). See §5.132.

© The Regents of the University of California

§5.132 (2) Municipal Improvement Act of 1913 (1913 Act)

The Municipal Improvement Act of 1913 (1913 Act) (Str & H C §§10000-10706) provides for the acquisition or construction of certain public improvements, the acquisition of necessary property for the improvements, and the levy of assessments for the costs. It is the primary "procedural" assessment act used today. It has no bond procedures and bonds must be issued under either the Improvement Act of 1911 (1911 Act) (Str & H C §§5000-6794) or the Improvement Bond Act of 1915 (1915 Act) (Str & H C §§8500-8887). See Str & H C §§10600-10706. On the 1911 Act, see §5.131; on the 1915 Act, see §5.133.

© The Regents of the University of California

§5.133 (3) Improvement Bond Act of 1915 (1915 Act)

The Improvement Bond Act of 1915 (1915 Act) (Str & H C §§8500-8887) authorizes the issuance of assessment bonds, but does not authorize the imposition of assessments themselves. Bonds may be issued under the 1915 Act secured by assessments levied under certain procedural acts such as the Municipal Improvement Act of 1913 (1913 Act) (Str & H C §§10000-10706) and the Landscaping and Lighting Act of 1972 (1972 Act) (Str & H C §§22500-22679). Bonds issued under the 1915 Act are the most commonly issued assessment bonds. See Str & H C §§8500-8887. On the 1913 Act, see §5.132; on the 1972 Act, see §5.134.

© The Regents of the University of California

§5.134 (4) Landscaping and Lighting Act of 1972 (1972 Act)

The Landscaping and Lighting Act of 1972 (1972 Act) (Str & H C §§22500-22679) authorizes assessments to install, construct, and maintain landscaping, lighting, and park and recreational facilities, including graffiti removal. It has no bond procedures, although bonds may be issued under the Improvement Bond Act of 1915 (1915 Act) (Str & H C §§8500-8887). See Str & H C §§22500-22679. On the 1915 Act, see §5.133.

© The Regents of the University of California

§5.135 (5) Benefit Assessment Act of 1982 (1982 Act)

The Benefit Assessment Act of 1982 (1982 Act) (Govt C §§54703-54720) authorizes assessments to operate and maintain drainage, flood control, street lighting and street maintenance services and to install and improve drainage and flood control facilities. It has no bond procedures.

© The Regents of the University of California

§5.136 (6) Business Improvement Districts

The Parking and Business Improvement Area Law of 1989 (1989 Law or Business-Based BID Law) (Str & H C §§36500-36551) authorizes assessments against businesses (often collected with business license taxes) to finance improvements and activities to improve specific business areas and to promote tourism in those areas. Similar improvements and activities may be financed through assessments against real property and businesses, or both, under the Property and Business Improvement District Law of 1994 (1994 Law or PBID Law). Str & H C §§36600-36671. Because 1989 Law assessments are not on real property, they are not subject to Proposition 218. *Evans v City of San Jose* (1992) 3 CA4th 728, 4 CR2d 601; *Howard Jarvis Taxpayers Ass'n v City of San Diego* (1999) 72 CA4th 230, 84 CR2d 804.

© The Regents of the University of California

§5.137 7. Formation of Assessment Districts

The procedure for establishing an assessment district is governed by the assessment statute or ordinance under which the district is formed, and under other generally applicable law, including Proposition 218 (Cal Const art XIIIC and art XIIID). However, the process typically involves the steps discussed in §§5.138-5.143. Proceedings may be initiated by petition signed by the persons proposed to be assessed or by resolution of the legislative body.

© The Regents of the University of California

§5.138 a. Preparation of Engineer's Report

An assessment engineer must prepare a report for presentation to the legislative body containing the information required by the applicable assessment law, usually:

- A description of the improvements or services to be financed;
- An estimate of the cost of the improvements or services (and incidental expenses such as costs for financing, assessment engineering, collection, and notice and protest requirements);
- An assessment diagram depicting the boundaries of the assessment district and the parcels in it;
- A description of the method of apportioning the assessments against properties in the assessment district; and
- An assessment roll listing the parcels to be assessed and the proposed assessment against each.

The engineer's report must also include information required by Proposition 218 (Cal Const arts XIIIC-XIIID). Under Proposition 218, all assessments must be supported by a "detailed engineer's report" prepared by a registered professional engineer. Cal Const art XIIID, §4(b). No court case has defined what "detailed" means; however, such reports typically include information explaining how each requirement of Proposition 218 has been satisfied by the proposed assessment.

© The Regents of the University of California

§5.139 b. Resolution of Intention and Recordation of Boundary Maps

Before sending notice of a proposed assessment and conducting a public hearing on the assessment, the legislative body approves one or more required resolutions that declare it's intention to levy the assessment, order the preparation of an engineer's report, preliminarily approve an engineer's report, schedule a public hearing, and take other actions required by the applicable assessment statute or charter city ordinance.

When required (usually for installment and bonded assessments), the jurisdiction records the boundary map of the proposed district.

© The Regents of the University of California

§5.140 c. Notice, Protest, and Hearing; Levy of Assessment

Notice, protest, and hearing requirements for new, extended, or increased assessments are governed by Proposition 218 (Cal Const art XIIIC-XIIID) (other than assessments not on real property, which are exempt from Proposition 218 and therefore governed by Govt C §54954.6). See §5.10. These involve mailed protest ballots to all assessed property owners, a 45-day protest period, and a public hearing at which protests are counted and the presence or absence of a majority protest is determined. Cal Const art XIIID, §4(c)-(e); Govt C §53753.

After complying with the notice, protest, and hearing requirements, and if a majority protest is not received from the property owners, the legislative body may adopt a resolution to establish the assessment district and levy the assessment.

© The Regents of the University of California

§5.141 d. Recordation and Cash Collection

When applicable (usually for bonded assessments), the jurisdiction records the assessment roll with the county recorder. Upon recordation, the assessment becomes a lien against the assessed properties.

For bonded assessments, notice is given to the property owners that they have 30 days to pay their assessments in cash if they choose. If the assessments are not paid within this time, the city may issue bonds secured by all assessments that remain unpaid and the assessment will be collected over time via the property tax roll.

© The Regents of the University of California

§5.142 e. Issuance of Improvement Bonds and Data Transmittal

For bonded assessments, the city issues bonds secured by the unpaid assessments. Annual assessment installments are collected on the property tax roll and used to pay debt service on the bonds.

If an assessment (or assessment installment) is to be collected on the tax roll for a year, the jurisdiction must transmit the amount of charge on the tax roll to the County Assessor by a fixed date in August (generally August 10 but the date varies from county to county, so it is important to check for local deadlines).

© The Regents of the University of California

§5.143 f. Subsequent Proceedings

For an annual assessment, proceedings must be held by the legislative body each year. Such proceedings generally require the adoption of intention resolutions, the preparation of an engineer's report, the holding of a noticed public hearing, and the adoption of a resolution levying the assessment. However, unless the assessment will be increased from a prior year or extended beyond a sunset date, the procedures of Proposition 218 (Cal Const arts XIIIC-XIIID) (including the mailed protest ballot) are not required. Furthermore, most of the assessment laws provide for somewhat abbreviated proceedings after the first year. For an installment or bonded assessment, detailed proceedings are not required after the first year. This is because the installments are not technically new assessments against the property, but installments against a one-time assessment that has already been levied.

On one-time, installment, or bonded assessments, see generally §§5.122, 5.140-5.142.

© The Regents of the University of California

§5.144 8. Proposition 218

Proposition 218 (Cal Const arts XIIIC-XIIID) affects most special assessments in five primary ways:

(1) It subjects assessments to repeal or reduction by initiative unless they have been bonded, triggering the protection against impairment of contracts in the federal constitution (see Govt C §5854);

(2) It establishes procedural requirements for the levy of assessments, including the requirement for majority property owner approval by mail ballot;

(3) It requires a local agency to separate the general benefits from the special benefits conferred on a parcel, and to only assess for the special benefit under a narrowed definition of "special benefit";

(4) It forbids the use of assessments on private property to fund the portion of the special benefit of a project or program that accrues to public property and can be argued to limit the general rule of intergovernmental tax immunity to allow assessment of government property; and

(5) It shifts the burden of proof to the government agency in legal actions to contest the validity of an assessment.

© The Regents of the University of California

§5.145 a. Special Benefit

Proposition 218 provides that only "special benefits" are assessable. Under prior law, only properties receiving special benefit were assessable, but the fact that some incidental general benefit also resulted from a capital improvement or maintenance did not invalidate an assessment apportioning some or all of the general benefit to specially benefited properties in the assessment district. Under Proposition 218, the costs associated with general benefit must be paid from other resources of the local agency. See Cal Const art XIIID, §4(a). Proposition 218 also shifts the burden of proof to the local government to show that assessments are justified by special benefit and imposed proportionately to that special benefit. Cal Const art XIIID, §4(f). Proposition 218 made several changes to the definition of "special benefit." Taking this change into account, pre-Proposition 218 authorities regarding special benefits may not be helpful in determining the presence or absence of special benefit. *Silicon Valley Taxpayers' Ass'n, Inc. v Santa Clara County Open Space Auth.* (2008) 44 C4th 431, 451, 79 CR3d 312. A notable and unusual case finding that a road improvement had no general benefit is *City of Saratoga v Hinz* (2004) 115 CA4th 1202, 9 CR3d 791 (eminent domain case involving a taking funded by assessment to facilitate making a previously private street part of public street system). For a post-*Silicon Valley* treatment of the special benefit requirement, see *Dahms v Downtown Pomona Prop. & Bus. Improvement Dist.* (2009) 174 CA4th 708, 96 CR3d 10.

PRACTICE TIP: The League of California Cities has published the Proposition 218 Implementation Guide (2007), which provides extensive commentary on the measure and case law interpreting it through 2007. Copies of the guide are available through the League's publication unit at 1400 K Street, 4th Floor, Sacramento, CA 95814, telephone (916) 658-8257, fax (916) 658-8220, or on its website at www.cacities.org.

© The Regents of the University of California

§5.146 b. Procedural Requirements

Proposition 218 establishes detailed requirements for the imposition by a local agency of a "new or increased" special assessment. See Cal Const art XIIID, §4(c)-(e); Govt C §53753. Government Code §53750(h) defines those changes in an assessment that do (and do not) constitute an "increase" sufficient to trigger a new majority protest proceeding under Proposition 218. Important exemptions from these requirements for certain pre-1997 assessments are granted by Cal Const art XIIID, §5, discussed further in §§5.153-5.156.

PRACTICE TIP: Any new or increased assessment that is subject to the notice and hearing provisions of Cal Const art XIIIC or XIIID is exempt from the notice and hearing requirements of the Ralph M. Brown Act, Govt C §54954.6. Govt C §54954.6(h).

© The Regents of the University of California

§5.147 (1) Public Hearing and Notice Requirements

Proposition 218 requires the following for the imposition of a new or increased assessment:

- **Forty-five days' mailed notice to the record owner of each parcel.** This requirement is set forth in detail in Govt C §53753.
- **Compliance with notice, protests, and hearing requirements.** The notice, protest, and hearing requirements of Govt C §53753 supersede any statutory provisions affecting new or increased assessments that were in existence on July 1, 1997. Thus, an agency need only comply with these requirements and not those contained in the specific statutory provisions under which an agency is levying the assessment. Most of the more commonly used assessment statutes have been amended to be consistent with Proposition 218, but to the extent inconsistencies remain, Proposition 218 (Cal Const arts XIIIC-XIIID) and its implementing legislation control. Notwithstanding Govt C §53753, however, an agency must still comply with Str & H C §§3100-3124 when appropriate. Govt C §§53753, 54954.6(h).
- **Detailed notice.** The notice must cover (Govt C §53753(b)):
- Total assessment for the entire assessment district,
- Assessment amount on each owner's parcels,
- Duration of proposed assessment,
- Reason for assessment,
- Basis on which amount of proposed assessment was calculated,
- Date, time, and place of public hearing,
- Summary of voting procedures, and
- Effect of a majority protest.
- **Notice of assessment amount.** A proposed assessment may state "a range of rates or amounts." If a range of rates is approved, the governing body may impose up to the maximum amount approved without a new majority protest proceeding. Govt C §53739. A proposed assessment may also provide for inflationary adjustments to the rate or amount, unless the assessment is itself determined by using a percentage calculation. Govt C §53739.
- **Conduct of public hearing.** The agency must conduct a public hearing to consider all objections or protests to the proposed assessment. At the public hearing, any person shall be permitted to present written or oral testimony. Govt C §53753(d).

© The Regents of the University of California

§5.148 (2) Protest by Ballot Allowed

A majority protest "ballot" must accompany the mailed notice of hearing. Sealed ballots must be returned before conclusion of the public hearing and tabulated after the conclusion of the public hearing. See Govt C §53753(e) (requiring ballots to remain secret until the close of public hearing and to be made public after they are tallied).

No assessment may be imposed if a "majority protest" exists. The legislative body may no longer override a majority protest as some assessment statutes had previously permitted. A majority protest exists for purposes of Proposition 218 if ballots submitted in opposition exceed ballots submitted in favor of assessment. The protest is weighted according to proportional financial obligations of the affected property (*i.e.,* the amount of the assessment). See Cal Const art XIIID; Govt C §53753(c), (e).

These procedures have been upheld against a constitutional challenge alleging that they violate due process and equal protection by conferring greater voting power on property owners who are to pay larger assessments. *Not About Water Comm. v Solano County* (2002) 95 CA4th 982, 116 CR2d 526, disapproved on other grounds in *Silicon Valley Taxpayers' Ass'n, Inc. v Santa Clara County Open Space Auth.* (2008) 44 C4th 431, 450 n6, 79 CR3d 312.

© The Regents of the University of California

§5.149 (3) Assessment Ballot Proceedings May Be Conducted by Mail

Assessment ballot proceedings may be conducted wholly by mail when authorized by the governing body of the local agency, and when the election is held on an established mailed-ballot election date. Elec C §4000. In such case, the proceeding must be denominated an "Assessment Ballot Proceeding" rather than an election, and the ballots denominated "Assessment Ballots." Elec C §4000. The assessment ballot procedures do not constitute elections for purposes of the Elections Code. Govt C §53753(e)(4).

PRACTICE TIP: Because the procedures for handling assessment protest ballots are not stated by Proposition 218 or its implementing legislation (Cal Const arts XIIIC-XIIID) in great detail, it is highly advisable to adopt a resolution, sometimes referred to as a "rules of the road" resolution. This resolution should explain how the agency will handle: ballots cast other than on the official ballots mailed to property owners; lost, spoiled, or duplicate ballots; persons who wish to divide their ballots among multiple owners of a property; treatment of tenants who are obligated by leases to pay the assessment; and other procedural matters of note. Circulate this resolution with ballots. A well-drawn resolution can prevent litigation on these peripheral procedural issues.

© The Regents of the University of California

§5.150 c. Assessment of Public Property

Proposition 218 states that public property "shall not be exempt from assessment unless the [levying] agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact received no special benefit." See Cal Const art XIIID, §4(a). Notwithstanding this stricture, property of the federal government is immune from assessment under the United States Constitution's Supremacy Clause. See *Novato Fire Protection Dist. v U.S.* (9th Cir 1999) 181 F3d 1135. Section 1310.5 of the State Administrative Manual (available online at http://sam.dgs.ca.gov/default.htm) informs state agencies of their obligations for assessments imposed on state property under Proposition 218. There are two competing interpretations of art XIII D, §4(a)'s requirement that public property be assessed:

(1) One interpretation is that it is an exception to the usual rule of inter-governmental tax immunity; and

(2) The other interpretation suggests that it merely prohibits an assessing agency from requiring private property owners to fund the portion of the cost of a program or project that specially benefits public property and requires the assessing agency to use other revenues for that purpose.

This issue has yet to be determined by a published appellate decision.

© The Regents of the University of California

§5.151 d. Burden of Proof on Local Agency

Proposition 218 eliminates the presumption in favor of the local agency's determinations. *Dawson v Town of Los Altos Hills* (1976) 16 C3d 676, 129 CR 97. Based on the record created before the legislative body, local agencies now will be required to show that (see Cal Const art XIIID, §4(f)):

- A valid method was used to identify the special benefit to be received from an improvement;
- All parcels that received a special benefit had been identified and included in the district;
- The cost of the improvement has been reasonably apportioned among the benefited parcels according to special benefits; and
- The costs attributable to general benefits to the public at large are not paid from special assessments.

These determinations are subject to the independent judgment standard of judicial review. *Silicon Valley Taxpayers' Ass'n, Inc. v Santa Clara County Open Space Auth.* (2008) 44 C4th 431, 79 CR3d 312.

© The Regents of the University of California

§5.152 e. Statute of Limitations

Any action challenging the validity of an assessment against real property for public improvements, the proceedings for which are prescribed by the legislative body of a charter city, must be filed within 30 days of the initial levying of the assessment. CCP §329.5. See *Barratt Am., Inc. v City of San Diego* (2004) 117 CA4th 809, 12 CR3d 132 (holding that Proposition 218 did not repeal CCP §329.5). When bonds have issued, the statute of limitations is commonly the 60 days specified in the validation statutes. CCP §860. But see *Bonander v Town of Tiburon* (2009) 46 C4th 646, 94 CR3d 403 (30-day rule applies to 1913 Act assessments).

© The Regents of the University of California

f. Exemptions From Procedural Requirement for Assessments

§5.153 (1) Assessments Existing on November 6, 1996

Assessments "existing" on November 6, 1996, the effective date of Proposition 218, that fall within one of the following four exceptions identified in Cal Const art XIIID, §5 are exempt from the procedures and approval processes in Cal Const art XIIID, §4:

(1) Any assessment imposed exclusively to finance the capital cost or maintenance and operation expenses for sidewalks, streets, sewers, water, flood control, drainage systems, or vector control. Cal Const art XIIID, §5(a). This exemption includes assessments for street lights under the Landscaping and Lighting Act of 1972 (Str & H C §§22500-22679). *Howard Jarvis Taxpayers Ass'n v City of Riverside* (1999) 73 CA4th 679, 86 CR2d 592.

(2) Any assessment imposed under a petition signed by the persons owning all of the parcels subject to the assessment at the time the assessment is initially imposed. Cal Const art XIIID, §5(b).

(3) Any assessment the proceeds of which are exclusively used to pay bonded indebtedness of which the failure to pay would violate the contract impairment clause of the United States Constitution. Cal Const art XIIID, §5(c).

(4) Any assessment that previously received a majority vote approval from the voters voting in an election on the issue of the assessment. Cal Const art XIIID, §5(d).

© The Regents of the University of California

§5.154 (2) Reassessment Under Streets and Highways Code

Any reassessment that is approved and confirmed under Str & H C §9525 (regarding refunding assessment bonds) is not an assessment within the meaning of Cal Const art XIIID. Str & H C §9525.

© The Regents of the University of California

§5.155 (3) Non-Property-Based Assessments

The provisions of Proposition 218 do not apply to assessments that are imposed on businesses rather than parcels of property (*e.g.,* assessments levied under the Parking and Business Improvement Area Law of 1989 (1989 Law) or a similar charter city ordinance). *Howard Jarvis Taxpayers Ass'n v City of San Diego* (1999) 72 CA4th 230, 84 CR2d 804. On the 1989 Law, see §5.136.

© The Regents of the University of California

§5.156 (4) All Other Assessments Not Exempted

All other existing, new, or increased assessments must comply with the provisions of Proposition 218 as of July 1, 1997. See Cal Const art XIIID, §5.

PRACTICE TIP: If an agency has once complied with the notice, protest, and hearing requirements of Govt C §53753, or the assessment was exempt from such requirements, there is no need to comply with those requirements in subsequent fiscal years unless the assessment methodology is changed, or the amount of the proposed assessment exceeds the assessment formula range stated when the assessment was approved by property owners in a Proposition 218 majority protest proceeding or as it existed in November 1996 when Proposition 218 was adopted. Govt C §53753.5. Notwithstanding this rule, assessments exempt from Proposition 218's approval procedures under Govt C §53753.5(b)(1), (b)(2), or (b)(4) are subject to the procedures and approval process provided in Cal Const art XIIID, §4 if and when they are increased. Govt C §53753.5. Agencies should leave a "grandfathered" assessment in place and propose a new assessment in addition to that pre-existing assessment when an increase is required in order to make clear that rejection of the increase does not endanger the existing assessment. Alternatively, this same result can be accomplished by careful wording of the assessment increase proposal.

© The Regents of the University of California

§5.157 g. Use of Initiatives to Reduce or Repeal Assessments

Proposition 218 provides that the initiative power may be used to reduce or repeal any local tax, assessment, fee, or charge. See Cal Const art XIIIC, §3. For discussion of open issues involving Proposition 218 initiatives, see §5.120.

© The Regents of the University of California

§5.158 E. Charges, Rates, and Fees

Charges, rates, and fees may be imposed by agencies. These terms are defined in a number of ways under California statutory provisions. Often the terms are synonymous. See*, e.g.,* Govt C §54314 (Revenue Bond Law of 1941), §66000(b) (AB 1600); Pub Util C §210; Wat C §§20541, 34034; Pub Res C §13015; Health & S C §4955.

© The Regents of the University of California

§5.159 1. Authority to Impose Fees, Charges, and Rates

A city has the authority to impose fees, charges, and rates under its police power. As long as the local enactments are not in conflict with general laws, the power to impose valid regulatory fees is not dependent on any legislatively authorized taxing power, but exists under the direct grant of police power under Cal Const art XI, §7. *County of Plumas v Wheeler* (1906) 149 C 758, 87 P 909. It is this grant of authority that allows cities to impose regulatory fees. See also *Associated Home Builders of the Greater East Bay, Inc. v City of Walnut Creek* (1971) 4 C3d 633, 94 CR 630.

Authority to impose fees, charges, and rates also is given by statute. "In addition to other powers, a legislative body may perform all acts necessary or proper to carry out the provisions of this title." Govt C §37112 (Title 4 of Government Code, specifying general powers of general law cities).

© The Regents of the University of California

2. Amount of Fee

§5.160 a. Must Bear Relationship to Costs

A fee may not exceed the estimated reasonable cost of providing the service or facility for which the fee is charged. A fee that does exceed such cost may be considered a special tax. *City of Dublin v County of Alameda* (1993) 14 CA4th 264, 281, 17 CR2d 845; *Carlsbad Mun. Water Dist. v QLC Corp.* (1992) 2 CA4th 479, 485, 3 CR2d 318. See Govt C §50076 (excluding cost-justified fees from definition of "special tax"). In addition, fees, charges, and rates must be reasonable, fair, and equitable in nature and proportionately representative of the costs incurred by the regulatory agency. *Associated Homebuilders of the Greater East Bay, Inc. v City of Livermore* (1961) 56 C2d 847, 17 CR 5; *United Bus. Comm'n v City of San Diego* (1979) 91 CA3d 156, 165, 154 CR 263.

© The Regents of the University of California

§5.161 b. Indirect Costs May Be Included

In fixing a fee, it is proper and reasonable to take into account not only the expense of direct regulation, but also all the incidental consequences that may be likely to subject the public to cost. *United Bus. Comm'n v City of San Diego* (1979) 91 CA3d 156, 165, 154 CR 263, quoting *County of Plumas v Wheeler* (1906) 149 C 758, 87 P 909.

© The Regents of the University of California

§5.162 c. General Fund Transfers

Calculations supporting any transfers to the general fund from a utility fund subject to Proposition 218 (such as fees for water, sewer, and government-provided trash services) must demonstrate the utility fees or charges do not exceed the reasonable costs of providing that service, and describe the extent of any benefit the utility enterprise is receiving from general fund operations or assets. Govt C §50076. See also *Howard Jarvis Taxpayers Ass'n v City of Roseville* (2002) 97 CA4th 637, 119 CR2d 91 (concluding that property-related in-lieu fees are subject to Proposition 218); League of California Cities, Proposition 218 Implementation Guide (2007), available on the League's website at www.cacities.org. For non-Proposition 218 fees, this showing is not required. *Hansen v City of San Buenaventura* (1986) 42 C3d 1172, 233 CR 22 (city entitled to rate of return on water services to non-city residents). See also *Howard Jarvis Taxpayers Ass'n v City of Roseville* (2002) 97 CA4th 637, 649, 119 CR2d 91 ("*Hansen*'s observations, however, were made 10 years before Proposition 218 added article XIII D to the state Constitution").

© The Regents of the University of California

§5.163 3. Development Fee Requirements

"Development fees" are defined by Govt C §66010 (a provision of the Mitigation Fee Act, commonly referred to as "AB 1600") to include fees imposed in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project. Development fees do not include fees for processing applications for governmental regulatory actions or approvals. If the agency imposing the fee does not "approve" the project subject to the fee, or if the fee is not imposed in connection with the "approval" of a project, the fee is not a development fee as defined in Govt C §66010. *Capistrano Beach Water Dist. v Taj Dev. Corp.* (1999) 72 CA4th 524, 85 CR2d 382 (water capacity and connection fees). Development impact fees are exempt from Proposition 218, as are connection fees. Cal Const art XIIID, §1(b); *Richmond v Shasta Community Servs. Dist.* (2004) 32 C4th 409, 9 CR3d 121.

© The Regents of the University of California

4. Development Processing Fees, Recovery of Costs of Providing Public Services, and User Fees

a. Development Processing Fees

§5.164 (1) Development Processing Fees Must Bear Relationship to Cost

Fees for building and use permits, zoning variances and changes, building inspections, map applications and planning services, and water or sewer connections may not exceed the reasonable cost of providing the service, unless the fee in excess of that amount is approved by two-thirds of voters. Govt C §§66013-66014.

© The Regents of the University of California

§5.165 (2) Procedural Requirements and Effective Dates

Before approving certain new or increased fees, a city must (Govt C §66016):

- Hold at least one public hearing;
- Publish notice of the hearing twice at least 10 days before the hearing;
- Send notice of the meeting at least 14 days in advance to any interested person who has filed a written request; and
- Make available to the public at least 10 days before the meeting data indicating the amount of estimated cost required to provide the service for which the fee or charge is levied and the revenue sources anticipated to provide the service, including general fund revenues.

See also Govt C §66018 (public hearing requirements applicable to adoption or increase of fees for which no specific statutory notice requirement applies).

Any action adopting or increasing a fee or charge for development projects may not take effect for at least 60 days unless adopted as an urgency measure by four-fifths vote. Govt C §66017.

© The Regents of the University of California

§5.166 b. Water, Sanitation, Solid Waste, and Sewer Fees and Rates

Water, sanitation, and sewer fees under Health & S C §§5470-5474.10 must be established by ordinance and adopted by a two-thirds vote, and may not be established by resolution unless acting under the Revenue Bond Law of 1941 or other authority. Govt C §54344 (Revenue Bond Law of 1941); Health & S C §5471; *Pinewood Investors v City of Oxnard* (1982) 133 CA3d 1030, 184 CR 417; *Kennedy v City of Ukiah* (1977) 69 CA3d 545, 138 CR 207. Setting of charges for solid waste handling services is a local concern. Pub Res C §40059.

PRACTICE TIP: Public entities must comply with Proposition 218's notice and majority protest requirements for charges related to water, sewer, and government-provided trash service. *Bighorn-Desert View Water Agency v Verjil* (2006) 39 C4th 205, 46 CR3d 73. On those requirements, see §§5.146-5.149.

© The Regents of the University of California

§5.167 c. Recovery of Costs of Providing Public Services

Generally, a general law city may not recover in a tort action costs for providing public services and exercising the police power absent authorizing legislation, although such legislation might be a local ordinance. *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 223 CR 846; *City of Flagstaff v Atchinson, Topeka & Santa Fe* (9th Cir 1983) 719 F2d 322, 323. For an example of state authorizing legislation that authorizes a city to collect reasonable costs incurred in responding to an emergency caused by a person who is under the influence of drugs or alcohol, see Govt C §§53150-53159.

© The Regents of the University of California

5. Rates

§5.168 a. Authority

A local agency may operate, maintain, repair, or manage all or any part of a revenue-producing enterprise. It may prescribe, revise, and collect charges for the services, facilities, or water furnished by the enterprise. Govt C §§54342, 54344 (Revenue Bond Law of 1941). Specific kinds of enterprises and activities may be governed by specific statutes. See*, e.g.,* Govt C §§54984-54984.9 (Uniform Standby Charge Procedures Act), which provides procedures for the levy and collection of water and sewer availability charges.

© The Regents of the University of California

§5.169 b. Rate-Setting Procedures

A resolution or ordinance setting or revising rates authorized by the Revenue Bond Law of 1941 (Govt C §§54300-54700), a statute commonly relied on for water and sewer rates, must be adopted in accordance with the procedures of that statute, which requires (Govt C §54354.5):

- Notice of hearing to be given by the city clerk, containing a copy of the proposed resolution or ordinance; and
- Publishing of the notice at least once each week for 2 weeks before a hearing in a newspaper published in the local agency (the first publication must be 15 days before the date of the hearing).

Cities may also rely on their authority under the state constitution to establish rates for the services they provide. Cal Const art XI, §9. See §§6.3-6.4 (water rates) and §6.12 (sewer rates). Thus, the 1941 Act is mandatory only if the rates imposed are used to service debt issued under the 1941 Act; those procedures provide a useful "safe harbor" in other circumstances, as a court may be more reluctant to invalidate procedures long established by the legislature and on which millions of dollars of bonds have been issued than a more recent ordinance.

© The Regents of the University of California

§5.170 c. Preferential Rates for City Residents Allowed

The rates charged to residents may be lower than the rates charged to non-residents if the lower rates reflect support provided to the utility by residents from other sources such as property taxes. *Hansen v City of San Buenaventura* (1986) 42 C3d 1172, 233 CR 22. But see *Howard Jarvis Taxpayers Ass'n v City of Roseville* (2002) 97 CA4th 637, 119 CR2d 91 (*Hansen* is not applicable to property-related fees subject to Proposition 218).

© The Regents of the University of California

§5.171 d. Collection and Nonpayment

In providing for the collection of rates, a city may grant discounts for prompt payment, require deposits or the prepayment of charges, or require guarantees by the owner of the property. Govt C §54347. Cities may provide for penalties for nonpayment or may discontinue any or all service for which the bill is rendered. Govt C §§54346, 54348.

Cities may require charges for sewer services be collected and billed with charges for other utility services; they may also contract with a privately owned public utility for collection of the rates. Govt C §§54345, 54346.1 (Revenue Bond Law of 1941).

© The Regents of the University of California

§5.172 6. Charges

A city may impose a charge for the purpose of raising revenue for access to its personal property, such as its community services recreation guide or city-wide newsletter. Standards for the use of such property should be developed and approved by city council resolution. The standards should be reviewed for First Amendment implications. On the First Amendment, see §§9.118-9.153. Because the city's role in making such services available is not an exercise of its police power or its power as a government per se, but as a market participant engaged in what were historically called "proprietary activities," no legal limits apply to these charges. A city may charge whatever the market will bear. *City of Oakland v Burns* (1956) 46 C2d 401, 407, 296 P2d 333 ("When a governmental entity is authorized to exercise a power purely proprietary, the law leans to the theory that it has full power to perform it in the same efficient manner as a private person would").

© The Regents of the University of California

§5.173 7. Effect of Bankruptcy Automatic Stay on Collection

The filing of a bankruptcy petition by a debtor to the city may inhibit the city's ability to recover costs or other revenues. The filing of a bankruptcy petition operates as an automatic stay of any effort to collect debts before commencement of the bankruptcy action (see 11 USC §362) including in certain circumstances the filing of a notice of tax lien. *Pinkstaff v U.S.* (9th Cir 1992) 974 F2d 113. In some circumstances, debts incurred after the bankruptcy petition is filed (such as utility service fees) may be collected as administrative expenses of the bankruptcy estate. 11 USC §§503, 507. The automatic stay generally does not prohibit a city from commencing or continuing an action or proceeding to enforce the city's police or regulatory power. 11 USC §362(b)(4). But see *Island Club Marina Ltd. v Lee County* (Bankr ND Ill 1984) 38 BR 847 (building permit is asset of debtor and cannot be revoked while debtor is in bankruptcy). Although a city may enforce its police or regulatory powers, it may not be able to recover the costs incurred in an action to do so in light of the automatic stay provisions. 11 USC §362(b)(5). Bankruptcy does not discharge or stay criminal restitution debts owed to cities or affect criminal actions. *Kelly v Robinson* (1986) 479 US 36, 93 L Ed 2d 216, 107 S Ct 353; *People v Goebel* (1987) 195 CA3d 418, 238 CR 242.

© The Regents of the University of California

§5.174 8. New Fees and Charges Under Proposition 218

Proposition 218 creates a new subset of fees and charges known as "property-related fees." A fee or charge subject to Proposition 218 is a "levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." See Cal Const art XIIID, §2(e).

The California Supreme Court initially construed this term narrowly to include only fees that cannot be avoided other than by selling property. In *Apartment Ass'n of Los Angeles County, Inc. v City of Los Angeles* (2001) 24 C4th 830, 102 CR2d 719, the court found a fee on residential landlords to fund Housing Code enforcement not to be property-related because it was imposed on the voluntary act of engaging in the residential rental market and not on property ownership alone. In *Richmond v Shasta Community Servs. Dist.* (2004) 32 C4th 409, 9 CR3d 121, the court found that a water connection fee charged to new development was not a "property-related fee" subject to Proposition 218 because it was triggered by voluntary decisions to develop property. Dicta in that case suggested that ordinary water and sewer service charges do constitute property-related fees. *Richmond,* 32 C4th at 426. In *Bighorn-Desert View Water Agency v Verjil* (2006) 39 C4th 205, 46 CR3d 73, the court elevated the dicta in *Richmond* to a holding and concluded that "a public water agency's charges for ongoing water delivery … are fees and charges within the meaning of [Cal Const] article XIII D." *Bighorn-Desert,* 39 C4th at 216. The court's rationale also suggests that charges for sewer and refuse collection service provided by a local agency may be "property-related fees." Further, in *Pajaro Valley Water Mgmt. Agency v Amrhein* (2007) 150 CA4th 1364, 59 CR3d 484, the court held a groundwater extraction charge used for programs to replenish the groundwater basin was a property-related fee subject to Proposition 218 at least in part because such a charge for water delivered to rural households for domestic use was not meaningfully different, in the court's view, than metered fees to urban domestic water users. A groundwater recharge fee only on non-domestic uses of water might well have passed muster as a regulatory fee not subject to Proposition 218 under the *Apartment Association* holding.

PRACTICE TIP: The League of California Cities has published the Proposition 218 Implementation Guide (2007), which provides extensive commentary on the measure and case law interpreting it through 2007. Copies of the guide are available through the League's publication unit at 1400 K Street, 4th Floor, Sacramento, CA 95814, telephone (916) 658-8257, fax (916) 658-8220, or on its website at www.cacities.org.

© The Regents of the University of California

§5.175 a. Fees and Charges Imposed as an Incident of Property Ownership

The phrase "property related fees and charges" appears in the title of Cal Const art XIIID, §6 and in Cal Const art XIID, §6(c) (relating to voter approval). However, the phrase is not defined anywhere in Proposition 218. Proposition 218 does, however, define the following:

- "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment imposed by an agency on a parcel or on a person as an incident of property ownership, including user fees or charges for property-related services. See Cal Const art XIIID, §2(e).
- "Property ownership" includes tenancies of real property when tenants are directly liable to pay the assessment, fee, or charge in question. See Cal Const art XIIID, §2(g).
- "Property-related service" means a public service having a direct relationship to property ownership. See Cal Const art XIIID, §2(h); *Bighorn-Desert View Water Agency v Verjil* (2006) 39 C4th 205, 46 CR3d 73 (sewer and water are property-related services).

Proposition 218 provides the following: "Reliance by an agency on any parcel map, including but not limited to assessor's parcel map may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of [Cal Const art XIIID]." Cal Const art XIIID, §6(b)(5). See *Apartment Ass'n of Los Angeles County, Inc. v City of Los Angeles* (2001) 24 C4th 830, 102 CR2d 719 (concluding that city ordinance imposing inspection fee on apartment owners is not subject to Cal Const art XIIID). See also *Howard Jarvis Taxpayers Ass'n v City of Fresno* (2005) 127 CA4th 914, 26 CR3d 153 (charter-authorized general fund transfer from water and sewer funds was prohibited by Proposition 218 and not justified as voter-approved tax); *Howard Jarvis Taxpayers Ass'n v City of Salinas* (2002) 98 CA4th 1351, 121 CR2d 228 (property-tax-roll fee based on amount of impervious coverage on each parcel in the city to fund storm water programs was subject to Proposition 218); *Howard Jarvis Taxpayers Ass'n v City of Roseville* (2002) 97 CA4th 637, 119 CR2d 91 (in-lieu franchise fee imposed on city-operated utilities for the benefit of general fund violated Proposition 218).

PRACTICE TIPS: The following guidelines may be helpful in determining whether a fee or charge is subject to the provisions of Proposition 218.

PRACTICE TIP 1: A fee or charge is subject to Proposition 218 if it must be paid by a person simply as a result of property ownership and for no other reason (for example, requesting service other than water, sewer, or refuse collection services from a public agency may trigger a fee without making that fee property-related).

PRACTICE TIP 2: If a property owner cannot avoid payment of the fee or charge by declining the service for which a fee or charge is paid, but must sell the property to avoid the fee or charge, it is likely subject to Proposition 218.

PRACTICE TIP 3: The fact that a fee or charge is enforced via a lien or charge on the parcel, as distinguished from being a lien on the parcel only in the event of a default in payment, supports an argument that the fee is subject to Proposition 218, but this factor is not dispositive as the supreme court rejected this claim in *Apartment Ass'n of Los Angeles County, Inc. v City of Los Angeles* (2001) 24 C4th 830, 844, 102 CR2d 719.

PRACTICE TIP 4: Water and sewer service charges for ongoing water service via an existing connection, as distinguished from connection and other charges triggered by voluntary development and other decisions of property owners, are property-related fees under *Bighorn-Desert View Water Agency v Verjil* (2006) 39 C4th 205, 46 CR3d 73. See also *Pajaro Valley Water Mgmt. Agency v Amrhein* (2007) 150 CA4th 1364, 59 CR3d 484.

PRACTICE TIP 5: Charges for trash service provided by government agencies (as opposed to such services provided by a franchised private hauler) are likely to be subject to Proposition 218 under the logic of *Bighorn*. If an agency wishes to characterize its trash rates as non-government rates imposed by a franchised hauler and therefore exempt from Proposition 218, it should not set those rates (but may regulate them to prevent the franchisee from exploiting its monopoly status).

© The Regents of the University of California

§5.176 b. Substantive Restriction on Property-Related Fees and Charges

Article XIIID, §6(b), of the California Constitution provides that a property-related fee may not be "extended, imposed or increased by any agency unless it meets all of the following requirements":

- Revenue derived from the fee or charge must not exceed the funds required to provide the property-related service.
- Revenue from the fee or charge must not be used for any purpose other than that for which the fee or charge was imposed.
- The amount of the fee or charge imposed on any parcel or person as an incident of property ownership must not exceed the proportional cost of the service attributable to the parcel.
- The fee or charge may not be imposed for service unless the service is actually used by or immediately available to the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Stand-by charges must be classified as assessments and must not be imposed without compliance with the proportionality requirements and property-owner mailed ballot protest proceedings for assessments.
- No fee or charge may be imposed for general governmental service, such as police, fire, ambulance, or libraries where the service is available to the public in substantially the same manner as to property owners.

The first two requirements, that fees must not exceed the cost of service and that proceeds must be used to provide the service, are discussed in *Howard Jarvis Taxpayers Ass'n v City of Fresno* (2005) 127 CA4th 914, 26 CR3d 153 and *Howard Jarvis Taxpayers Ass'n v City of Roseville* (2002) 97 CA4th 637, 119 CR2d 91. However, very little guidance is available as to the meaning of the "proportional cost" requirement of Cal Const art XIIID, §6(b)(3), although *Silicon Valley Taxpayers' Ass'n, Inc. v Santa Clara County Open Space Auth.* (2008) 44 C4th 431, 79 CR3d 312 discusses the proportionality requirement of art XIIID, §4(a) for assessments. One court interpreted the requirement of art XIIID, §6(b)(4) that a service be "immediately available" to a property owner. A fee for that service was proper and did not need to be approved as an assessment if the means to initiate service was entirely in the property owner's control—in that case, the property owner needed only to pay a delinquent bill to have the provider unlock his meter. *Paland v Brooktrails Township Community Servs. Dist.* (2009) 179 CA4th 1358, 102 CR3d 270. There is no citable authority regarding the scope of art XIIID, §6(b)(5)'s prohibition on the use of property related fees to fund general government services.

Given the language of Cal Const art XIIID, §6(b), it was argued that these provisions do not apply to a pre-Proposition 218 property-related fee until such time as that fee is "extended, imposed, or increased." This construction, however, was rejected by the Court of Appeal in *Howard Jarvis Taxpayers Ass'n v City of Fresno* (2005) 127 CA4th 914, 26 CR3d 153, which relies on Cal Const art XIIID, §6(d)'s provision that "[b]eginning July 1, 1997, all fees or charges shall comply with this section."

© The Regents of the University of California

§5.177 c. Burden of Proof

In any legal action protesting the validity of a fee or charge, the burden is on the agency to demonstrate compliance with Proposition 218. See Cal Const art XIIID, §6(b)(5).

© The Regents of the University of California

d. Procedural Requirements

§5.178 (1) Notice Requirements

A local agency must take the following steps to impose a property-related fee or charge:

- The agency must identify the parcels on which a fee or charge is proposed for imposition. Cal Const art XIIID, §6(a)(1).
- The amount of the fee or charge proposed to be imposed on each parcel must be calculated by the agency in light of cost-justification requirements of Cal Const art XIIID, §6(b). Cal Const art XIIID, §6(a)(1).
- The agency must provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel on which the fee or charge is proposed for imposition. Cal Const art XIIID, §6(a)(1). This notice can be included in another mailing, such as a monthly utility bill. Govt C §§53750(i)-(j), 53755(a).

The notice to record owners of property must contain (Cal Const art XIIID, §6(a)(1)):

- The amount of the proposed fee or charge;
- The basis on which the proposed fee or charge was calculated;
- The reason for the fee or charge; and
- The date, time, and location of a public hearing on the proposed fee or charge.

© The Regents of the University of California

§5.179 (2) Hearing Requirements

The local agency must conduct a public hearing on the proposed fee or charge at least 45 days after mailing the notice described in §5.178. The hearing must be conducted as follows (Const art XIIID, §6(a)(2)):

- At the public hearing, the agency must consider all written protests against the fee or charge; and
- If a written protest against a proposed fee or charge is presented by a majority of owners of the identified parcels, the agency may not impose the fee or charge.

A written protest requires a majority of all affected property owners to protest the fee under the traditional "silence equals consent rule" and such a majority protest is therefore rare. Cal Const art XIIID, §6(a)(2). Only one protest per parcel may be counted in determining whether a majority protest exists. Govt C §53755(b).

PRACTICE TIP: Because the procedures for counting protests are not stated in Proposition 218 or its implementing legislation (see Govt C §§53755-53756) in great detail, it is highly advisable to adopt a resolution, sometimes referred to as a "rules of the road" resolution, setting forth, *e.g.,* how the agency will count protests, how it will treat those cast by other than property owners listed on the assessor's roll, and whether multiple owners and tenants must divide their protests (or whether one protest counts for all tenants and owners). A well-drawn resolution can prevent litigation on these peripheral procedural issues.

© The Regents of the University of California

e. Voter Approval Requirements

§5.180 (1) New or Increased Fees and Charges

New or increased fees and charges subject to Proposition 218, except for sewer, water, and refuse collection services, must also be approved by a majority of property owners or two-thirds of registered voters. See Cal Const art XIIID, §6(c). Government Code §53750(h) establishes when an existing fee is deemed an "increase" for purposes of Cal Const art XIIID, §6(c). Significant exceptions to the definition of "increase" appear in Govt C §53750(h)(2).

© The Regents of the University of California

§5.181 (2) Procedural Requirements

An election to approve new fees and charges must be conducted not less than 45 days after the public hearing required by Cal Const art XIII D, §6(a). Cal Const art XIIID, §6(c). Proposition 218 does not specify procedures for the conduct of the property-related fees and charges election. However, the agency may adopt procedures that are similar to those Proposition 218 requires for assessments. See Cal Const art XIIID, §§4, 6(c); Elec C §4000(c)(9) (allowing election to be conducted by mail).

© The Regents of the University of California

§5.182 (3) Voting Requirements

The agency has two options on who may vote on a property-related fee or charge (Cal Const art XIIID, §6(c)):

(1) A property owner vote that requires a "majority vote of the property owners of the property subject to the fee or charge," but it would appear that a majority is to be calculated on the basis of one vote per legal parcel; or

(2) A two-thirds vote of the electorate residing in the affected area.

Proposition 218 does not define the phrase "majority … of the property owners of the property subject to the fee or charge." It would appear that a "majority" is to be calculated on the basis of one vote per legal parcel. See Govt C §53755(b). An agency may adopt rules similar to those for mailed-ballot assessment protest proceedings to govern such elections. See Cal Const art XIIID, §6(c). The California Supreme Court is considering whether property owner elections under Cal Const art XIIID, §6(c) are subject to the voting secrecy requirement of Cal Const art II, §7. The decision in the case, *Greene v Marin County Flood Control & Water Conserv. Dist.* (review granted June 24, 2009, S172199; superseded opinion at 171 CA4th 1458, 91 CR3d 27), is expected in 2010.

© The Regents of the University of California

§5.183 f. Proposition 218 Effective Date

Proposition 218 provides that "[b]eginning July 1, 1997, *all* fees and charges shall comply with this section." (Emphasis added.) Cal Const art XIIID, §6(d). Although it had been argued previously that the language of Cal Const art XIIID, §6(a) and (c) limited the actual force of the measure to fees that are adopted, imposed, or increased after July 1, 1997, the Court of Appeal has concluded otherwise. *Howard Jarvis Taxpayers Ass'n v City of Fresno* (2005) 127 CA4th 914, 26 CR3d 153. Thus, all fees, whether adopted before or after the 1997 compliance date of Proposition 218 (see Cal Const art XIIID, §6(d), are subject to the substantive rules of Cal Const art XIIID, §6(b). However, a pre-Proposition 218 fee that meets those substantive requirements need not be subjected to the adoption procedures specified by art XIIID, section 6(a) and (c) unless and until it is increased or extended by the repeal of a sunset. See Govt C §53750 (defining "extended" and "increased") and *McBrearty v City of Brawley* (1997) 59 CA4th 1441, 1449, 69 CR2d 862, disapproved on other grounds in *Howard Jarvis Taxpayers Ass'n v City of La Habra* (2001) 25 C4th 809, 107 CR2d 369 (mere continued collection of existing tax is not "imposition, extension or increase" sufficient to trigger election requirement of Proposition 62 because to rule otherwise would make for perpetual election season).

© The Regents of the University of California

§5.184 g. Exemptions to Proposition 218 Requirements

In addition to the important exceptions created by the narrow definition of the class of property-related fees subject to Proposition 218 in the first instance (as discussed in §5.175), the measure specifically exempts two kinds of fees, discussed in §§5.185-5.186, from its requirements.

© The Regents of the University of California

§5.185 (1) Development Fees Exempted

Proposition 218 does not "[a]ffect existing laws relating to the imposition of fees or charges as a condition of property development." Cal Const art XIIID, §1(b). Because this exception refers to "existing laws" and not to "existing fees," it seems clear that development fees imposed subsequent to the 1996 adoption of Proposition 218 are nonetheless exempt from its provisions provided that the statutory or charter authority for those fees predated Proposition 218. Although the lower court in *Richmond v Shasta Community Servs. Dist.* (2004) 32 C4th 409, 9 CR3d 121, had decided on this ground, the California Supreme Court did not, so no appellate authority is available on the scope of the term "development fees." In the absence of a definition of this term in Proposition 218's text, the general legal definition is likely to control. See, *e.g.,* Govt C §66000 (Fee Mitigation Act) (Govt C §66000-66008) or Stats 1987, ch 927).

© The Regents of the University of California

§5.186 (2) Electrical and Gas Services Exempted

Proposition 218 provides that "fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership." Cal Const art XIIID, §3(b).

© The Regents of the University of California

§5.187 F. Franchise Fees

The revenue paid to a municipality from a franchisee is in effect "rental" or "tolls" for the use of its streets. *San Francisco Oakland Terminal Rys. v Alameda County* (1924) 66 CA 77, 82, 225 P 304. This section addresses franchise fees as a revenue source. For material relating to cities' powers and procedures to enact franchises, see §§6.49-6.105.

© The Regents of the University of California

1. Electric and Telephone Poles and Wires and Gas and Oil Pipelines

§5.188 a. Application of Broughton Act

The Broughton Act (Pub Util C §§6001-6092) allows franchise payments of 2 percent of the franchise's gross annual receipts arising from the use, operation, or possession of a franchise. Pub Util C §6006. This section applies to intrastate utilities (electric and telephone poles and wires, as well as gas pipes) but does not apply to cable television systems. See Pub Util C §6001.

The California Supreme Court has upheld the statute and established a methodology for allocating franchise payments. See *Tulare County v City of Dinuba* (1922) 188 C 664, 680, 206 P 983 (holding that the percentage is calculated on miles of distribution system in franchised area). The court of appeal rejected a county's efforts to recalculate the 2 percent in *County of Sacramento v PG&E* (1987) 193 CA3d 300, 238 CR 305.

© The Regents of the University of California

§5.189 b. Alternative Procedure Under Franchise Act of 1937

The Franchise Act of 1937 (Pub Util C §§6201-6302) creates an alternative procedure to grant electrical, oil, gas, and water franchises. Pub Util C 6204. Like the Broughton Act (Pub Util C §§6001-6092), the Franchise Act of 1937 provides for a franchise fee of 2 percent of a franchisee's gross annual receipts arising from the use, operation, or possession of the franchise but no less than 1/2 percent of gross annual receipts derived from the sale of electricity or 1 percent of gross annual receipts derived from the sale of gas or water, as the case may be, within city limits. Pub Util C §6231.

© The Regents of the University of California

§5.190 c. No Application to Charter Cities

With the exception of oil pipeline fees (see §5.192), the Broughton Act (Pub Util C §§6001-6092) and the Franchise Act of 1937 franchise fee restrictions do not apply to charter cities. See §§5.188-5.189. Thus, charter cities may set fees in excess of the 2-percent limit. Pub Util C §6205.

© The Regents of the University of California

§5.191 d. Surcharge in Lieu of Franchise Fees

A transportation customer (*i.e.,* a person purchasing gas or electricity from a third person, but receiving transportation service from a franchised utility or non-utility natural gas or electricity energy transporter) is required to pay a municipal surcharge for the use of public lands. The surcharge replaces, but does not increase, franchise fees and thus transfers the burden to pay from the franchisee to those to whom it provides transportation services. Pub Util C §§6350-6354.1.

© The Regents of the University of California

§5.192 e. Oil Pipeline Franchise Fees

On and after January 1, 1990, the fees imposed on a pipeline system that is a common carrier and transmits oil or oil products are limited to the formula in Pub Util C §6231.5, which establishes a rate per lineal foot based on diameter of the pipeline. This formula applies to charter cities as well as general law cities. Pub Util C §§6001.5, 6205.1. The statutory formula does not apply to non-public utility pipelines for industrial gas or oil.

© The Regents of the University of California

§5.193 2. State Video Franchise Fees

The maximum cable community franchise television franchise fee is 5 percent of gross receipts from the grantee's operations in the city. Govt C §53066(c). This restriction applies to charter and general law cities. *Cox Cable San Diego, Inc. v City of San Diego* (1987) 188 CA3d 952, 233 CR 735. See also 47 USC §542(b); *Group W Cable, Inc. v City of Santa Cruz* (ND Cal 1988) 679 F Supp 977.

Unless there is no local franchisee or the city opts to require a lesser amount, a state video franchisee must pay 5 percent of gross revenues to the city, or the percentage paid by local cable franchises, whichever is less. Pub Util C §5840(q)(1). Cities may also, by ordinance, impose an additional fee up to the maximum statutorily permitted percentage rate for public, educational, and government ("PEG") channel facilities. Pub Util C §5870(n). See also Paul Valle-Riestra, Telecommunications: The Governmental Role in Managing the Connected Community (Solano Press Books, 2002). For further discussion of state video franchises, see §§6.65-6.68.

© The Regents of the University of California

§5.194 3. Refuse Collection Franchise Fees

A city may contract for the collection or disposal of solid waste under terms and conditions prescribed by its legislative body. Pub Res C §49300. The city council has discretion to determine whether solid waste handling services are provided under a wholly exclusive, partially exclusive, or nonexclusive franchise. Pub Res C §40059. There do not appear to be any statutory restrictions on the amount a city can charge the franchisee as a franchise or collection fee, and thus such fees are subject to negotiation between cities and franchisees and, presumably, passed on to customers. But see Pub Res C §49031 (procedures to adopt refuse fees charged to consumers to fund compliance with state recycling mandates ("AB 939 fees")).

© The Regents of the University of California

§5.195 4. Recycling, Household Hazardous Waste, and Other Waste Management Activities

Statutory law does not explicitly authorize franchises for recycling, household hazardous waste, and other waste management activities, but an implicit acknowledgment of the power to do so is found in Pub Res C §47109.

© The Regents of the University of California

§5.196 G. Fines and Forfeitures

The distribution of court fines and bail forfeitures is determined by state law. See Pen C §§1463, 1463.001-1463.002. Since July 1, 1998, the distribution of base fines for arrests in a city is as follows: the county receives the amount specified in Pen C §1463.002, with the remainder going to the city. See Pen C §1463.001(b)(3).

© The Regents of the University of California

1. Fines "Available for Distribution"

§5.197 a. Amounts Paid

The amount paid by a defendant includes the fine (see, *e.g.,* Veh C §23536 (driving under the influence)) and various penalties and assessments (see, *e.g.,* Pen C §1464; Govt C §76000; Veh C §§23645, 42006), and may include restitution (see Pen C §1202.4). These "add-ons" are changed by the legislature frequently and may exceed the amount of the fine. Unless modified by a judge, often under a plea agreement, the base fine is derived from the Uniform Bail and Penalty Schedule as adopted by the Judicial Council (infractions) (Veh C §40310, Cal Rules of Ct 4.102) or county judges (misdemeanors and felonies) (Pen C §1269b(b)). Judicial Council Bail and Penalty Schedules are available online at www.courtinfo.ca.gov/reference/4_13crim.htm.

© The Regents of the University of California

§5.198 b. Amount Available for Distribution

The amount available for distribution to the city and the county under Pen C §§1463.001-1463.002 is the amount of the fine less $20 to the state Restitution Fund for victims (if the fine relates to driving under the influence) (see Pen C §1463.18); and less those penalties and assessments and amounts payable to county alcohol programs (see Pen C §§1463.16, 1463.25). On blood, breath, and urine analysis, see Pen C §1463.14.

© The Regents of the University of California

§5.199 c. Installment Payments

The total fines and assessments may be paid in installments. Pen C §1205(d). Each installment payment is prorated among the state, county, and city. See Pen C §1462.5; Govt C §71380. See also State Controller's Manual of Accounting and Audit Guidelines for Trial Courts (2009), available at www.controller.ca.gov/Files-ARD-Local/LocRep/Appendix_C_v21.pdf.

© The Regents of the University of California

§5.200 2. Exception to General Distribution Statute

A different distribution occurs when (see Pen C §1203.1(k); *Los Angeles County v Emme* (1940) 42 CA2d 239, 108 P2d 695):

- The fine is collected by a probation officer; and
- The fine is paid as a condition of probation. When this occurs, all fines collected are deposited in the county's general fund. Pen C §1203.1(k).

The provisions of Pen C §1203.1 apply when the defendant is on probation (as defined in Pen C §1203(a)), but not when the defendant is on "conditional sentence" (formerly referred to as "summary" or "court" probation). *City of Victorville v County of San Bernardino* (1991) 233 CA3d 1312, 285 CR 206.

© The Regents of the University of California

§5.201 3. Forfeitures of Bail

If the defendant fails to appear, cash bail is distributed under Pen C §1463.009.

If a bond is posted in lieu of cash bail, on the defendant's failure to appear and the surety's failure to make good on the bond, summary judgment automatically is entered against the surety. Pen C §1306. The amount collected by the county under the summary judgment is distributed under Pen C §1463.001. *City of Los Angeles v County of Los Angeles* (1989) 216 CA3d 916, 265 CR 461.

© The Regents of the University of California

§5.202 4. Parking Fines and Forfeitures

Violations of local, state, and federal regulations that are not misdemeanors about the standing or parking of vehicles are subject to only civil penalties and are governed by the civil administrative process in Veh C §§40200-40230. As civil matters, there is no right to confront adverse witnesses. The notice of parking violation, or a copy of it, is considered a record kept in the ordinary course of business of the issuing agency and the processing agency and is prima facie evidence of the facts contained in it. Veh C §40202. If the parking violation is contested, the ticketing agency bears the burden to prove the violation by a preponderance of the evidence.

Agencies issuing parking tickets may elect to contract for the processing of parking tickets with other governmental issuing agencies in that county (other than the California Highway Patrol, the California State Police, or other state law enforcement agency), or with private vendors.

© The Regents of the University of California

§5.203 a. Liability for Penalties and Amounts

With certain exceptions, the vehicle's registered owner and driver, renter, or lessee are jointly liable for parking penalties. Veh C §§40200 (liability), 40209 (exceptions). An owner who pays any parking penalty may seek recovery from the driver, renter, or lessee. The amounts of penalties, administrative fees, and other related charges for parking violations are generally to be established by the governing body of the issuing agency, although several exceptions exist. See*, e.g.,* Veh C §§42001.5 (minimum fine for parking in a bus loading zone); 42001.13 (minimum fine for parking in spaces designated for disabled person). But, to the extent possible, issuing agencies in a county must standardize penalties. See Veh C §40203.5.

© The Regents of the University of California

§5.204 b. Apportionment Among Agencies

State law apportions revenues for parking violations and surcharges between issuing agencies and the counties. See Veh C §40200.3.

© The Regents of the University of California

5. Administrative Process for Fines and Forfeitures

§5.205 a. Administrative Investigation and Review Process

Within 21 days from the issuance of a parking citation, or 14 days from the mailing of a notice of a delinquent parking violation, a person by written request, telephone, or in person may request review by the processing agency. Veh C §40215. The processing agency has the discretion to refer that review to the issuing agency. The results of the investigation must be mailed to the person seeking review.

© The Regents of the University of California

§5.206 b. Administrative Hearing

Anyone dissatisfied with the results of the investigation may request a hearing by depositing the full amount of the parking penalty with the processing agency and providing a written explanation to the agency as to why the parking violation is being contested. The investigation and administrative review procedures are detailed in Veh C §40215.

The processing agencies must also adopt and provide a procedure to relieve the indigent from the deposit requirement. See Veh C §40215(b).

© The Regents of the University of California

§5.207 c. Administrative Review

The person contesting the ticket has the right to elect a review by mail or personal conference. Minors have the same appearance rights and tickets issued to minors may be processed as tickets issued to adults. An examiner who conducts a review must be designated by the issuing agency's governing body or chief executive officer. The examiner must be independent from the enforcement agency and the citation collection process. An examiner's employment, performance evaluation, or compensation cannot be linked to the fines he or she collects. Examiners must have a minimum of 20 hours of training. The review is to be conducted in accordance with written procedures established by the imposing or processing agency and must ensure a fair and impartial review. An agency's final decision may be given by the examiner directly to the person contesting the ticket or by first-class mail. See Veh C §40215.

© The Regents of the University of California

§5.208 d. Trial De Novo by Court

Within 30 days following the mailing of the agency's examiner's decision, a parking ticket contestant may appeal to the superior court. Although the hearing is de novo, the processing agency's file in the case must be received into evidence and a copy of the notice of parking violation is considered prima facie evidence of the facts provided. The appeal requires a $25 filing fee, which, if the contestant is successful, must be refunded by the processing agency along with any parking penalty deposited with the agency by the contestant. If the court rules in favor of the agency and the contestant has not previously deposited the penalty, the agency may begin collection efforts. See Veh C §40230.

© The Regents of the University of California

§5.209 e. Collection of Unpaid Parking Penalties

Once the contestant has allowed an administrative or court decision to become final by failing to timely exhaust appeals, the processing agency may pursue one or more of the collection procedures discussed in §§5.210-5.211. Generally, only one of these collection options may be pursued at any given time.

© The Regents of the University of California

§5.210 (1) Collection with Vehicle Registration

The processing agency may file an itemization of unpaid parking penalties and service fees with the Department of Motor Vehicles (DMV) for collection on re-registration of the vehicle. See Veh C §40220(a).

© The Regents of the University of California

§5.211 (2) As Judgment for Civil Debt

When unpaid penalties and fees against any person or owner exceed $400, proof of that civil debt may be filed with the court with the same effect as a civil judgment. This option requires 21 days' mailed notice explaining that a judgment will be entered and, after the 21 days, will have the same effect as an entry of judgment against a judgment debtor. The notice must also advise the debtor that execution may be levied and other steps may be taken to satisfy the judgment. A first paper filing fee is required of the agency at the time entry of civil judgment is requested. See Veh C §40220(b). This option is also available if the vehicle's registration has not been renewed more than 60 days after its renewal date and the citation has not been collected by the DMV. See Veh C §40220(c).

© The Regents of the University of California

§5.212 f. Equipment and Registration Tab Violations

Equipment and registration tab violations added to the parking citation must be handled as parking violations except the penalties are specified by the Uniform Bail and Penalty Schedule. See Veh C §40225. See §5.197.

© The Regents of the University of California

§5.213 6. Criminal Justice Penalties

A penalty of $2.50 must be imposed by resolution on each parking citation for both a county criminal justice facilities construction fund and a courthouse construction fund unless the city wants to fund those penalties from its share of ticket proceeds. Govt C §76000. The bail schedule is to be increased by these penalties. Govt C §76000(b). A city that processes its own parking fines by contract is to pay these penalties to the county treasurer. Govt C §76000(b).

© The Regents of the University of California

H. State Subventions

§5.214 1. Shared Revenue

Various taxes and fees are levied by the state and county governments and are subvened to the cities. These subventions are authorized by the state Constitution. These include:

- Cigarette and tobacco products tax (see Rev & T C §§30001-30482);
- Motor vehicle license fees (see Rev & T C §§10701-11006);
- Liquor license fees (see Bus & P C §§23300-25762); and
- Motor vehicle fuel tax (see Rev & T C §§7301-8526).

© The Regents of the University of California

§5.215 2. Tax Reimbursements

Local entities are reimbursed for revenue lost as a result of various tax exemptions and reductions, such as the homeowners' property tax exemption (see Cal Const art XIII, §25) and the reduction of property tax on certain open space lands (see Govt C §§16140-16154).

© The Regents of the University of California

§5.216 3. Tax Collection Services

Several taxes are collected by the state and counties on behalf of cities and transferred to the cities. These include:

- Local share of real property taxes (see Rev & T C §§95-100.95); and
- Sales tax revenues (see Rev & T C §7200).

The fact that another agency collects a tax on behalf of a city does not give that agency the right to withhold the collected taxes, or require an appropriation in order for that agency to remit the monies to the city. However, subject to certain procedural requirements and resolution of pertinent disputes, an agency can offset against the amount of taxes it has collected for a city the amount owed to the agency for services it has rendered. See*, e.g.,* Govt C §907.

© The Regents of the University of California

§5.217 I. Grants

Cities often receive funds from various state and federal grants. Ordinarily, these funds must be used only for the purpose of carrying out the specific state or federal program. For example, federal Community Development Block Grants (CDBG) (see 24 CFR §§570.1-570.913) provide for the development of viable urban communities, decent housing, suitable living environments, and the expansion of economic development opportunities.

For related material, see the following:

- Intergovernmental Relations, Federal and State Grants (§§1.95-1.96);
- Drug Testing, Drug-Free Workplace (§§4.109, 4.115);
- Federal Discrimination Laws, Rehabilitation Act of 1973 (§4.117);
- State Discrimination Laws, Govt C §11135 (§4.165); and
- Contracts, Federally-Funded Projects (§§7.129-7.169, 7.190).

© The Regents of the University of California

§5.218 J. Gifts

A city may accept or reject any gift, bequest, or devise made to or for the city, or to or for any of its officers in their official capacities or in trust for any public purpose. Govt C §37354. If such a gift, bequest, or devise does not limit the uses to which the property received or the income or increase from it may be put, it may be put to any uses the city desires. Govt C §37355. There are Political Reform Act consequences that flow from the decision as to whether the gift is to the city or to an official. See 2 Cal Code Regs §§18944-18944.2. Gifts to a city are considered charitable contributions and are tax deductible, so long as the gift is for entirely public purposes. 26 USC §170(c)(1).

Acceptance of gifts may be regulated and limited by charter provisions. See*, e.g., Egan v City & County of San Francisco* (1913) 165 C 576, 585, 133 P 294. A gift is void if the conditions attached to it violate a charter provision. *O'Melveney v Griffith* (1918) 178 C 1, 171 P 934.

On acquisition of public property by gift, see §§8.65-8.68.

© The Regents of the University of California

§5.219 K. Debt Financing

Cities may finance capital projects, including the acquisition or construction of various facilities, through the issuance and sale of municipal securities. Securities are sold and the proceeds are used for the cost of such acquisition or construction. The California Debt Issuance Primer published in March 2006 by the California Debt and Investment Advisory Commission provides an excellent introduction to debt financing for cities in California. The Primer is available online at www.treasurer.ca.gov/Cdiac/debtpubs/primer.pdf.

© The Regents of the University of California

1. Bonds

§5.220 a. Types of Bonds

Municipal bonds are typically categorized according to the source of the funds for repayment and generally fall into one of two categories:

(1) general obligation bonds, and

(2) limited obligation bonds.

© The Regents of the University of California

§5.221 b. General Obligation Bonds

General obligation bonds pledge a city's general funds and "full faith and credit" (*i.e.,* the property taxing power) as security for payment of principal and interest to bond holders. The general framework for issuing such bonds is the Municipal Improvement Bond Act of 1901 (Govt C §§43600-43638). Two-thirds voter approval is necessary for the issuance of general obligation bonds and they may only be used to fund the acquisition or improvement of real property. Cal Const art XIIIA, §1(b); Cal Const art XVI, §18; Govt C §43614. General obligation bonds are payable from additional ad valorem property taxes levied specifically for debt service and from the city's general fund. Cal Const art XIIIA, §1(b).

© The Regents of the University of California

§5.222 c. Limited Obligation Bonds

Limited obligation bonds pledge a specified dollar amount from a specified source or combination of sources of revenue as security for payment of principal and interest to bond holders. See generally Govt C §§50665.1-50670.4. A city may also restrict the pledge to revenues received by the city from a specified geographical area in the city. Govt C §50655.5(f)(2). Generally, there are four types of limited obligation bonds:

(1) Revenue bonds;

(2) Assessment bonds;

(3) Tax increment bonds; and

(4) Special tax bonds.

© The Regents of the University of California

§5.223 (1) Revenue Bonds Generally

Revenue bonds pledge a specific source of revenue (*e.g.,* water or sewer user charges) that is related to the facilities to be financed. This revenue is pledged as security for the bonds and the bonds are payable only from the pledged source of revenue. A city does not obligate other funds or revenues for the payment of the bonds. However, the city may elect to make payments from other sources.

© The Regents of the University of California

§5.224 (2) Revenue Bonds: Relationship to Debt Limit

Typically revenue bond financing is not classified as debt for purposes of the California Constitution because a specific stream of revenues is being pledged and it falls within the "Special Fund" exception to the constitutional debt limit (Cal Const art XVI, §18). On the constitutional debt limit, see §§5.12, 5.289-5.296. Therefore, voter approval is not required. *City of Santa Clara v Von Raesfeld* (1970) 3 C3d 239, 90 CR 8. See also *Rider v City of San Diego* (1998) 18 C4th 1035, 77 CR2d 189; *City of Oxnard v Dale* (1955) 45 C2d 729, 290 P2d 859; *Garrett v Swanton* (1932) 216 C 220, 13 P2d 725, overruled on other grounds by *City of Oxnard v Dale* (1955) 45 C2d 729, 290 P2d 859; *Board of Supervisors v Dolan* (1975) 45 CA3d 237, 119 CR 347. On the special fund doctrine, see §5.292.

© The Regents of the University of California

§5.225 (3) Revenue Bonds: Need for Voter Approval

Voter approval is not constitutionally required for revenue bonds. A number of statutes authorize the issuance of revenue bonds backed by various revenue streams. Some require voter approval of the debt. The Revenue Bond Law of 1941 is commonly used and requires majority voter approval of debt. See §5.226.

© The Regents of the University of California

§5.226 (4) Revenue Bonds: Revenue Bond Law of 1941

Under the Revenue Bond Law of 1941 (Govt C §§54300-54700), a city may issue bonds for the acquisition or construction of an enterprise. An enterprise may include (see Govt C §54309):

- revenue-producing facilities and systems to provide garbage collection service;
- sewer or water service, sanitary and storm drainage sewers;
- parking facilities;
- ferry service;
- public hospitals;
- airports;
- harbors;
- golf courses; or
- generation, production, or transmission of electric energy but not distribution of electricity.

See also Govt C §§54309.1 and 54310.

After establishing an enterprise, a city typically creates an enterprise fund in which to deposit enterprise revenues. See Govt C §54519. The fund secures payment of interest and principal of the bonds. Govt C §54420. A city may also use this fund to pay maintenance and operation costs of the enterprise. See Govt C §§54425-54426. A city may use any surplus funds from this account, including interest, for any other lawful purpose. Govt C §54425. But see §§5.174-5.186 (discussing Proposition 218 restriction on the use of proceeds of property-related fees such as fees for water, sewer, and government-provided trash service).

© The Regents of the University of California

§5.227 (5) Assessment Bonds

Assessment bonds are issued to finance acquisition or construction of various improvements. These bonds are more fully discussed in §§5.121-5.157 about special benefit assessments and districts.

© The Regents of the University of California

§5.228 (6) Tax Increment Bonds

Tax increment bonds are issued by redevelopment agencies for redevelopment purposes. For a discussion of redevelopment and tax increment financing, see §§5.392-5.394.

© The Regents of the University of California

§5.229 (7) Special Tax Bonds

Under the Mello-Roos Community Facilities Act of 1982 (Govt C §§53311-53368.3), cities may form community facilities districts to fund public improvements and facilities. Community facilities districts may issue bonds secured by special taxes levied on property in the district. See Govt C §§53311-53317.5. On Mello-Roos financing, see §§5.76-5.87.

© The Regents of the University of California

§5.230 2. Certificates of Participation (COPs)

Certificates of participation (COPs) are securities that represent fractional interests in payments to be made by a city to a second party (usually a joint powers agency or a special purpose nonprofit corporation) under a lease or installment sale. COPs use a lease or an installment sale transaction to finance the construction of public facilities or improvements. A lease transaction is used if repayment of the COPs is to be secured by a pledge of any legally available funds of the city, *i.e.,* its general fund. If structured properly, COPs do not constitute "debt" for purposes of the state constitution. See*, e.g., Dean v Kuchel* (1950) 35 C2d 444, 218 P2d 521; *City of Los Angeles v Offner* (1942) 19 C2d 483, 122 P2d 14. Because COPs using a lease transaction often rely on an annual appropriation from the city's general fund, the interest rate and the cost of financing often depend on whether the improvements to be financed and the property that is the basis for the underlying lease are essential to the functioning of the city. An installment sale transaction is frequently used if repayment of the COPs is to be secured solely from enterprise revenues. COPs using either a lease or an installment sale transaction do not require an election.

© The Regents of the University of California

a. Certificates of Participation (COPs) Form

§5.231 (1) Lease Transaction

A certificates of participation (COPs) financing secured by a pledge of any legally available funds of the city typically takes the form of a lease transaction. In such a case, a city enters into a lease with a nonprofit public benefit corporation, a public financing authority formed by the city, or similar entity. The lessor corporation or authority acquires the site and, with the assistance of the city, constructs a project on the site. The lessor then leases the improvements to the city. To avoid debt limitation issues, the obligation to make lease payments must be abated during any time that the city does not have substantial use and enjoyment of the leasehold estate. See §5.235 for a list of the requirements applicable to such lease transactions.

The lessor's rights to receive payments under the lease are then assigned to a trustee by a trust agreement. The trustee executes and delivers COPs, which evidence rights to participate in those lease payments. The COPs are securities essentially similar to bonds and the lease payments are the security that is pledged for payment of the debt. However, unlike a bond, the COPs are not themselves promissory debt instruments. Instead, they evidence an undivided proportional right of the owner to receive a share of the lease payments (comprised of principal and interest) made under the lease.

© The Regents of the University of California

§5.232 (2) Installment Sale Transaction

A certificates of participation (COPs) financing secured by a pledge of enterprise revenues or another special fund other than the general fund may be structured as an installment sale. In this case, the city enters into an installment sale or purchase agreement with a nonprofit public benefit corporation or public financing authority to acquire the facilities to be financed. The installment payments are the security that is pledged for the payment of the COPs. Unlike a lease structure, however, the requirement for the city to make installment payments is not abated during any period that the city may not have use or enjoyment of the facilities being financed. If the installment sale is not a contingent obligation—and most are not—it must be paid solely from a special fund to avoid characterization as a debt. See §5.231 for discussion of a lease transaction.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/5 Finance and Economic Development/§5.233 b. Certificates of Participation (COPs) References

§5.233 b. Certificates of Participation (COPs) References

- Mouton, *Certificates of Participation,* 1 Land Use Forum 185 (Spring 1992); and
- Public Securities Association, A Guide to Certificates of Participation (1991).

© The Regents of the University of California

§5.234 3. Sale Lease-Back or Lease-Back Agreements

Cities may enter into sale lease-back or lease lease-back agreements either as part of a certificates of participation (COPs) issue (see §§5.230-5.232) or as a installment lease obligating a city to make annual payments from its general fund. Bonds issued by a city's public financing authority or a "captive" nonprofit corporation may also be repaid from the stream of payments made under the lease agreements.

© The Regents of the University of California

§5.235 a. Sale Lease-Back or Lease-Back Requirements

The important points in any long-term lease-back transaction are the following (see *Rider v City of San Diego* (1998) 18 C4th 1035, 77 CR2d 189; *Dean v Kuchel* (1950) 35 C2d 444, 218 P2d 521; *City of Los Angeles v Offner* (1942) 19 C2d 483, 122 P2d 14; *Krenwinkle v Los Angeles* (1935) 4 C2d 611, 51 P2d 1098); *Ruane v City of San Diego* (1968) 267 CA2d 548, 73 CR 316):

(1) Rent must be abated when a city does not occupy or have beneficial use of the property.

(2) The obligation of a city to make payments must be on an annual basis and subject to appropriation (*i.e.,* if the city council does not budget the funds for payment, payment is not due). Acceleration of rental payments in the event of non-appropriation or in the event of default is not permitted because to do otherwise would violate the constitutional debt limitation. A covenant to annually appropriate is common. Further, acceleration of payments in the event of default is not a valid provision of a financing lease.

(3) Fair market rent should be paid for the property, taking into consideration the nature and use of the property and any option to purchase.

© The Regents of the University of California

§5.236 b. Equipment Leases

Equipment leases with a term beyond one fiscal year are subject to the same debt limit considerations as long-term leases of real property. Such leases are also subject to abatement during interruptions in the use of the equipment caused by damage or destruction. An alternative approach is to reserve the unrestricted right to terminate the lease at or before the end of each fiscal year. The effect of reserving this right (sometimes referred to as "a non-appropriation right") is to restrict the lease to a 1-year obligation, which is also not subject to the constitutional debt limit. See §§5.12, 5.289-5.296.

© The Regents of the University of California

§5.237 4. Marks-Roos Public Financing Authority Bonds

The Marks-Roos Local Bond Pooling Act of 1985 (Govt C §§6584-6599.3) provides a city and its related entities several mechanisms to finance and refinance public capital improvements. Implementation of these mechanisms requires the formation of a public financing authority under a joint powers agreement, often between a city and its redevelopment agency. The joint powers agreement may authorize the issuance of bonds for projects outside of the jurisdiction of the participating agencies only in limited circumstances. Govt C §6586.5(b). See 83 Ops Cal Atty Gen 82 (2000). A joint powers agency is usually not an entity subject to the constitutional debt limit and its bonds do not require voter approval. See *Rider v City of San Diego* (1998) 18 C4th 1035, 77 CR2d 189.

© The Regents of the University of California

§5.238 a. Financing Mechanism: Bond Pooling

Bond pooling involves the sale of public financing authority bonds and the use of the proceeds to purchase city or redevelopment agency bonds. Repayments of the city or redevelopment agency bonds are used to repay the public financing authority bonds. A common form of bond pooling involves the purchase by the public financing authority of several of a city's special assessment bonds or special tax bonds in order to implement a consistent development program or to accomplish a refinancing of outstanding city bonds.

© The Regents of the University of California

§5.239 b. Financing Mechanism: Lease and Installment Sale Financing

A public financing authority is authorized to issue its bonds to finance or refinance a public capital improvement for lease or installment sale to a city. This is an alternative method of accomplishing the financing described under Certificates of Participation (see §§5.230-5.232) and Sale Lease-Back or Lease-Back Agreements (see §§5.234-5.236).

© The Regents of the University of California

§5.240 c. Financing Mechanism: Loans

A public financing authority is authorized to issue bonds to provide loans to a redevelopment agency to finance redevelopment activities. This mechanism permits the combining of loans to several redevelopment project areas in one bond issue.

© The Regents of the University of California

§5.241 5. Tax-Exempt or Taxable Debt Financing

Whether the debt of a city may be issued on a taxable or tax-exempt basis (*i.e.,* whether interest paid on the bonds, certificates of participation (COPs), or lease is excluded from income for federal or California income tax purposes) depends on the use of the proceeds and the security for repayment. Bond counsel or tax counsel will assist the city in making this determination.

© The Regents of the University of California

§5.242 6. Disclosure Obligations of the City

Although municipal securities issued by cities are exempt from the registration requirements of the Securities Act of 1933 (15 USC §§77a-77aa), SEC Rule 15c2-12 (17 CFR §240.15c2-12) (the Rule) under the Securities Exchange Act of 1934 (15 USC §§78a-78oo) indirectly regulates disclosure practices for municipal securities. Sale of municipal securities is also subject to the anti-fraud rules of §10(b) of the Securities Exchange Act of 1934 (15 USC §78j(b)).

© The Regents of the University of California

§5.243 a. Original Disclosure

Information about a municipal securities offering is generally distributed to prospective purchasers of such securities and the municipal market place by a preliminary official statement (POS), which is prepared before the sale of the securities to the underwriter, and a final official statement (FOS), which is dated as of the date of the sale. SEC Rule 15c2-12 (17 CFR §240.15c2-12) (the Rule) defines an FOS as a document or set of documents prepared by an issuer of municipal securities or its representatives that is complete as of the date delivered to a participating underwriter and that gives information on the terms of the proposed issue material to evaluation of the offering. The Rule makes it unlawful for any participating underwriter (*i.e.,* a broker, dealer, or municipal securities dealer) to purchase municipal securities from an issuer with an aggregate principal amount of $1 million dollars or more, unless the participating underwriter complies with the following requirements:

- Before bidding for, purchasing, offering, or selling municipal securities, a participating underwriter must obtain and review an official statement that the issuer considers final as of its date (with the exception of certain specified information, such as interest rates, that are determined at the time of sale).
- The participating underwriter must contract with the issuer to receive the required number of copies of the FOS from the issuer within 7 business days after any final agreement to purchase the municipal securities.
- The participating underwriter must reasonably determine that the issuer, in a written undertaking for the benefit of the holders of the securities (commonly referred to as a continuing disclosure agreement), has agreed to file through the Electronic Municipal Market Access (EMMA) website maintained by the Municipal Securities Rulemaking Board (MSRB):
- Annual financial information or operating data of the kind included in the official statement and as specified in the continuing disclosure agreement;
- The audited financial statement for the issuer; and
- Notice of the occurrence of certain reportable events specified in the Rule.

© The Regents of the University of California

§5.244 b. Continuing Disclosure

A city that enters into a continuing disclosure agreement as described in §5.243 is required to comply with annual and event disclosure requirements contained in the agreement. The city is also required to provide notice of its failure to provide required annual or event disclosure. A city must disclose in the official statement for its securities any instances within the past 5 years in which the city failed to comply, in all material respects, with the disclosure requirements of any previous continuing disclosure agreement. The failure of a city to comply, in all material respects, with such disclosure requirements may adversely affect the value and marketability of the city's securities. The Securities and Exchange Commission (SEC) has stated that the failure of an issuer of municipal securities to comply with its continuing disclosure obligations should be a significant factor when a dealer formulates a recommendation regarding such securities.

PRACTICE TIP: Whatever method of financing is sought, it is important to obtain expert advice. A city typically wants to issue its debt on a tax-exempt basis (to obtain a lower interest rate). Therefore, bond counsel should be retained early in the process to assist the city in preparing the necessary documents and undertaking the necessary proceedings to issue tax-exempt securities. Additionally, with the advent of the disclosure requirements under SEC Rule 15c2-12 (17 CFR §240.15c2-12), a city should retain disclosure counsel to prepare the official statement and continuing disclosure agreement on behalf of the city. Traditionally, the official statement has been prepared by underwriter's counsel who is not in privity of contract with the city. Disclosure counsel, on the other hand, is retained by the city and is contractually responsible to the city for the preparation of the official statement. Given the heightened regulation of disclosure and the very severe consequences (including potential criminal and personal liabilities) for failure in disclosure obligations, it is prudent for the city to retain expert legal counsel to advise the city regarding its disclosure obligations both when the debt is issued and during the payment period on that debt.

© The Regents of the University of California

§5.245 c. Actions Relating to Borrowing $100,000 or More

All city council actions relating to borrowing when the amount is $100,000 or more must be discussed, considered, and deliberated as a "separate item of business on the agenda." Govt C §53635.7. In effect, this means that approvals relating to bond issues in excess of $100,000 cannot be on the consent calendar.

© The Regents of the University of California

L. State-Mandated Cost Reimbursement

1. Basic Obligation

§5.246 a. Constitutional Expression

Whenever the legislature, governor, or any state agency mandates a new program or higher level of service on any local government, the state must provide a subvention of funds to reimburse local government for the costs of such program or increased level of service. See Cal Const art XIIIB, §6. See also *Los Angeles Unified Sch. Dist. v State* (1991) 229 CA3d 552, 280 CR 237 (regarding reimbursability of California OSHA regulations). Article XIIIB, §6, of the California Constitution provides that, for a mandate in which the costs of a city, county, or special district claim previously have been determined to be payable by the state under law, each fiscal year the legislature *must* either appropriate in the annual Budget Act the full payable amount that has not been previously paid, or suspend the operation of the mandate in the current fiscal year (*i.e.,* exonerate local government from implementing the mandate in that fiscal year). Payable claims for costs incurred in prior fiscal years that have not been paid may be paid over a term of years, as allowed by law. See Cal Const art XIIIB, §6(b). See also §5.255 regarding funded and unfunded mandates.

© The Regents of the University of California

§5.247 b. Statutory Expression

The provisions of Govt C §§17500-17630 implement Cal Const art XIIIB, §6. These provisions set out intent (Govt C §17500), adopt definitions (Govt C §§17510-17524), establish and empower the Commission on State Mandates (Commission) (Govt C §§17525-17533), establish Commission procedures for handling claims (Govt C §§17550-17571), establish a procedure for legislative determinations (Govt C §§17575-17581), provide method for payment of claims (Govt C §§17600-17617), and establish an apportionment system (Govt C §§17615-17617). The Revenue and Taxation Code previously contained all of these relevant provisions (sometimes called SB 90 for the 1972 legislation that first enacted these procedures). 1986 California Statutes, chapter ch 879 transferred almost all of the operative provisions to the Government Code, but some remain in the Revenue and Taxation Code. See Rev & T C §§2201-2246.2.

The state must reimburse each local agency and school district for all "costs mandated by the state." Govt C §17561(a). The phrase "costs mandated by the state" means any increased costs that a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, that mandates a new program or higher level of service of an existing program within the meaning of Cal Const art XIIIB. Govt C §17514. See *Department of Fin. v Commission on State Mandates* (2009) 170 CA4th 1355, 89 CR3d 93 (concerning school and special districts' hiring of police officers and incurring of costs of complying with Public Safety Officers Procedural Bill of Rights Act (POBR) (Govt C §§3300-3313), requirements of PSOBRA did not constitute costs mandated by state for local governments that voluntarily and without legal compulsion participated in program requiring increased costs). On the Commission on State Mandates, see §5.256.

© The Regents of the University of California

2. Intent and Scope

§5.248 a. Protect Taxpayers and Prevent Shifting of Financial Responsibility

In enacting the reimbursement requirement of Cal Const art XIIIB, §6, the voters intended to provide permanent protection for taxpayers from excessive taxation. *County of Fresno v State* (1991) 53 C3d 482, 486, 280 CR 92.

The voters intended to preclude the state from shifting financial responsibility for carrying out governmental functions to local entities ill-equipped to handle the task. *County of Fresno v State* (1991) 53 C3d 482, 487, 280 CR 92. But see *County of Sonoma v Commission on State Mandates* (2000) 84 CA4th 1264, 101 CR2d 784 (county sought reimbursement of property tax revenues that were shifted away from local governments and placed into Educational Revenue Augmentation Funds (ERAFs) for distribution to school districts). The court in *County of Sonoma* found that local agencies were not entitled to reimbursement for the following reasons:

- The decrease in revenue suffered by local agencies was not a reimbursable "cost" because revenues were reallocated, rather then actually expended by the local agency; and
- The state did not impose a "new program or higher level of service" because at the time the obligation became effective, the local agencies jointly funded schools with the state.

© The Regents of the University of California

§5.249 b. Reimbursement for Unique Requirements Placed on Local Government

The state must reimburse local government only for mandated programs that provide services to the public or that impose unique requirements on local governments. There need be no reimbursement for laws that apply generally to all state residents or entities. *County of Los Angeles v State* (1987) 43 C3d 46, 233 CR 38 (workers' compensation is not reimbursable mandate).

© The Regents of the University of California

3. Exceptions to Reimbursement

§5.250 a. Constitutional

The legislature may, but need not, reimburse local governments for the following mandates (see Cal Const art XIIIB, §6):

- Legislative mandates requested by the local agency affected;
- Legislation defining a new crime or changing an existing definition of crime; or
- Legislative mandates enacted before January 1, 1975, or executive orders or regulations initially implementing legislation enacted before January 1, 1975.

© The Regents of the University of California

§5.251 b. Statutory

The legislature has also directed the Commission on State Mandates to find no mandate under the following circumstances (Govt C §17556):

- The claim is submitted by a local agency or school district that requested the authority to implement the program specified in the statute;
- The executive order or statute "affirmed for the state that which had been declared existing law or regulation by action of the courts";
- The statute or executive order implements federal law, unless the statute or order mandates costs that exceed the federal mandate;
- The local agency or school district has authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service;
- The statute or executive order provides for offsetting savings to local agencies or school districts that result in no net costs or includes additional revenue specifically intended to fund the mandate;
- The statute or executive order imposes duties that were expressly included in a ballot measure approved by the voters in a statewide election; or
- The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction.

The exception for federal programs applies not only to direct federal mandates but also to federal programs that are technically voluntary but coercive in nature, that the state passes on to local governments. See *City of Sacramento v State* (1990) 50 C3d 51, 266 CR 139 (unemployment insurance). The fee "exception" has been upheld on the theory "that a local agency may not be reimbursed for costs" that are recoverable from sources other than taxes. *County of Fresno v State* (1991) 53 C3d 482, 280 CR 92. See *Department of Fin. v Commission on State Mandates* (2009) 170 CA4th 1355, 89 CR3d 93 for discussion of local agencies that voluntarily and without legal compulsion participate in a statutory program involving increased costs on the local agency. The exception for voter-approved mandates turns on the language of Cal Const art XIIIB, §6(a) ("Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government"). On the Commission on State Mandates, see §5.256.

© The Regents of the University of California

4. The Legislative Process and Mandates

§5.252 a. Legislative Counsel

In drafting a bill, Legislative Counsel determines whether the bill contains a mandate; if so, this must be stated in the Legislative Counsel digest of the bill. Govt C §17575. However, the Legislative Counsel's determination is not binding on the Commission on State Mandates in its determination on a claim. Govt C §17575; *City of San Jose v State* (1996) 45 CA4th 1802, 1817, 53 CR2d 521. On the Commission on State Mandates, see §5.256.

© The Regents of the University of California

§5.253 b. Fiscal Committees

If a bill contains a mandate, it must be referred to fiscal committees, where the committee staff, the Department of Finance, and the Legislative Analyst determine the bill's effect on local governments. See Govt C §§17576-17577.

© The Regents of the University of California

§5.254 c. Reimbursement Provisions

If a bill contains a mandate, it must contain reimbursement provisions; the bill can also state that there is no mandate or that the mandate is being disclaimed and why. Govt C §17579. If the bill states that there is no mandate, an agency seeking reimbursement must file a test claim with the Commission on State Mandates to challenge such determination. See §§5.256-5.257.

© The Regents of the University of California

§5.255 d. Funded Versus Unfunded Mandates

An "unfunded mandate" is a mandate for which the legislature has not made an appropriation. See Govt C §§17579 and 17581. When the legislature has appropriate funding for a mandate, local agencies seeking reimbursement must file a "reimbursement claim" with the Controller. See Govt C §§17551, 17560. See also Govt C §17579.

The legislature may suspend mandates in the state budget. See Govt C §17581. A local agency is not required to implement any statute or executive order (or portion thereof) identified in the state's budget act as one for which reimbursement is not being provided for that fiscal year. Govt C §17581. The mandates suspended vary from year to year. See also *Carmel Valley Fire Protection Dist. v State* (2001) 25 C4th 287, 105 CR2d 636 (Govt C §17581 and certain budget measures suspending the operation of administrative regulations did not violate the separation of powers clause of the California Constitution by encroaching on the power of the executive branch of government).

© The Regents of the University of California

5. Administrative Procedures

§5.256 a. Commission on State Mandates

The Commission on State Mandates (Commission) is a quasi-judicial body established by the state legislature to carry out a comprehensive procedure for resolving claims for reimbursement of state-mandated local costs under Cal Const art XIIIB, §6. Govt C §§17500, 17527, 17550. See *California Sch. Bds. Ass'n v State* (2009) 171 CA4th 1183, 1199, 90 CR3d 501. The Commission has the sole and exclusive authority to adjudicate test claims and its decisions are final subject only to timely judicial review. 171 CA4th at 1199. There is an alternative procedure for the legislature to determine mandates (see Govt C §§17572-17574.5), but legislative determinations under this procedure are not binding on the Commission. Govt C §17574.5.

The Commission is comprised of the following state officials: Director of Finance, Treasurer, Controller, and Director of the Governor's Office of Planning and Research. In addition, the Commission has a public member appointed by the governor, and two other members appointed by the governor from among three categories: a city council member; a county supervisor; or a school board member, but no more than one member can come from any single category. Govt C §17525.

© The Regents of the University of California

§5.257 b. Test Claim Process

A "test claim" is defined as the first claim filed with the Commission on State Mandates (Commission) alleging that a particular statute or executive order imposes costs mandated by the state. Govt C §17521. Test claims must contain the required contents and must be filed in the proper form within 12 months following the later of the effective date of a statute or executive order or an agency's incurring increased costs as a result of a statute or executive order. Govt C §§17551, 17553. Claims are called "test" claims because the first claim on a given issue is used to decide whether that statute or executive order is or is not a reimbursable mandate. Other claims on that issue are held in abeyance pending decision of the test claim. The Commission seeks state agency input and the claimant is given the right to rebut. The Commission holds a hearing, makes findings, and issues a decision. See 2 Cal Code Regs §§1181-1189.61, implementing statutory test claim requirements and establishing detailed hearing procedures.

If a mandate is found, the Commission then establishes parameters and guidelines for seeking reimbursement. The Commission makes a statewide cost estimate; it then prepares and submits a claim bill to the legislature for appropriation. Govt C §§17553-17571. Simply because the Commission determines that cost to be a mandate, does not mean the legislature will appropriate money to make reimbursement. In such circumstances, the claimant may seek a court order enjoining enforcement of the mandate and a declaration that it no longer has to obey the mandate. *Grossmont Union High Sch. Dist. v State Dep't of Educ.* (2008) 169 CA4th 869, 877, 86 CR3d 890. See also Govt C §17581.

© The Regents of the University of California

§5.258 c. Controller's Claiming Instructions

The Commission on State Mandates (Commission) submits the adopted parameters and guidelines to the Controller. Within 60 days, the Controller issues claiming instructions for each reimbursable mandate to assist local agencies and school districts in claiming costs to be reimbursed. See Govt C §17558. See also Govt C §§17615-17617 (apportionment system); state controller's website at www.sco.ca.gov/ard_mancost.html.

© The Regents of the University of California

§5.259 d. Exclusive Remedy

The procedures in Govt C §§17550-17617 are the exclusive procedure by which a local agency may claim reimbursement for state-mandated costs. Govt C §17552; *Central Delta Water Agency v State Water Resources Control Bd.* (1993) 17 CA4th 621, 641, 21 CR2d 453. However, see the alternative procedure for legislatively determined mandates in Govt C §§17572-17574.5 that is not binding on the Commission on State Mandates (Commission).

PRACTICE TIPS: If a city decides to seek reimbursement, follow the following tips:

PRACTICE TIP 1: Carefully examine all of the legislative history of a bill, including all committee reports, for indications of the existence of a mandate. Also try to determine whether Legislative Counsel issued any opinion to a legislator or other person on the bill (other than the Legislative Counsel Digest in the bill itself).

PRACTICE TIP 2: Seek advice from the Commission on State Mandates' staff on procedures, regulations, and claim history.

PRACTICE TIP 3: Exhaust all available administrative remedies, not just the Commission on State Mandates remedy. For example, if there is a tax refund procedure available, use it.

PRACTICE TIP 4: Pay close attention to the administrative and judicial filing deadlines.

PRACTICE TIP 5: Consider engaging a consultant with expertise regarding mandate reimbursements. For smaller agencies, and when the amount in issue is not large, it will frequently be more efficient to contract with such a consultant than to pursue a claim individually. The League of Cities is actively involved in the mandates process and it is useful to inform the League if your city intends to pursue a test claim.

© The Regents of the University of California

6. Judicial Review

§5.260 a. Judicial Review of Commission on State Mandates Actions

The Commission on State Mandates (Commission) may order reconsideration on petition by either party within 30 days after delivery or mailing of the Commission's statement of decision. It is not clear whether filing of a petition for reconsideration is an administrative remedy that must be exhausted before filing suit. A claimant or the state may seek a writ of mandate to set aside a decision of the Commission on the ground that the decision is not supported by substantial evidence. Govt C §17559.

© The Regents of the University of California

§5.261 b. Judicial Review of Legislative Refusal to Fund Mandate

If the legislature deletes funding for an established mandate from a local government claims bill (see Govt C §17612), a local agency or school district may file in superior court for declaratory relief that the mandate is unenforceable and for an injunction against its enforcement. Govt C §17612. See also *Carmel Valley Fire Protection Dist. v State* (1987) 190 CA3d 521, 234 CR 795 (remedies for local agencies prevailing on these cases include declaration of unconstitutionality, interest, and reimbursement from funds already appropriated by legislature for another purpose). But see *Carmel Valley Fire Protection Dist. v State* (2001) 25 C4th 287, 300, 105 CR2d 636 (neither executive agency nor court has power to require legislature to appropriate money). The courts have no authority to judicially compel the legislature to appropriate sufficient funds to satisfy reimbursement of a state mandate. *County of San Diego v State* (2008) 164 CA4th 580, 79 CR3d 489.

© The Regents of the University of California

§5.262 7. References on State-Mandated Cost Reimbursements

- See §1.97 on state mandates.
- Commission on State Mandates, Guide to the State Mandate Process (2003), available at www.csm.ca.gov/docs/Guidebook.pdf.

© The Regents of the University of California

§5.263 M. Rental of Property

A city may lease its real and personal property, such as by allowing advertisements in employee newsletters or on sides of city-owned buses. In deciding whether to raise funds through the latter, attention should be paid to whether the city is creating a new public forum. On public forums, see §§9.118-9.153 (relating to the First Amendment). As to real property, state law establishes the maximum terms for many types of leases. See Govt C §§37380-37396.

© The Regents of the University of California

III. EXPENDITURES

§5.264 A. Budgets

There is no statutory requirement that cities adopt budgets. However, cities generally may not incur debt or liability that exceeds in any year the income and revenue anticipated for that year without two-thirds voter approval. See Cal Const art XVI, §18. Adopting a budget enables cities to plan expenditures to match anticipated revenues. When required by ordinance or charter, a city must adopt a budget before the beginning of every fiscal year, estimating the city's future expenditures and revenues. Govt C §§53734, 53901.

PRACTICE TIP: When it is not possible to adopt a budget as required by ordinance or charter (for example, when a delayed state budget creates too much uncertainty to allow meaningful local budgeting), a "continuing resolution" authorizing continued expenditures under the prior year's budget or some other appropriation may be necessary to authorize city staff to expend city funds.

A budget appropriates all monies of the city into various funds for expenditure. The city may establish funds for any purpose, as long as it does not do so contrary to statute or charter.

PRACTICE TIP: It is generally advisable to maintain fund accounting consistently with generally accepted accounting principles (GAAP) and generally accepted audit standards. Advice regarding these requirements is usually available from a city's outside auditor or its internal finance staff.

An appropriation is an authorization to expend funds. An expenditure is the actual payment of the funds. If an expenditure is required that differs from the budget, a further appropriation is required either as a budget amendment or as a separate appropriation.

The general fund of a government agency may be expended for any lawful purpose of that agency. *Emery v San Francisco Gas Co.* (1865) 28 C 345, 370. When a city establishes a special fund for the payment of a particular class of claims, or for a particular class of expenditures or for a particular purpose, use of those funds for another purpose requires a legal conclusion that the establishment of the special fund was not legally required. *City of Long Beach v Morse* (1947) 31 C2d 254, 188 P2d 17 (tideland revenues may not be appropriated to non-tidelands uses).

Unless exempted by the county auditor, a city must file a copy of its budget with the auditor within 60 days after the beginning of its fiscal year. Govt C §§53734, 53901; *Newton v Brodie* (1930) 107 CA 512, 290 P 1058. Most local governments use a July 1 to June 30 fiscal year. For them, this filing is due by August 30th.

Because the adoption of a budget is a legislative function, a court is generally without power to interfere in the budgetary process. *Scott v San Bernardino* (1996) 44 CA4th 684, 698, 52 CR2d 161 (writ issued to compel funding of positions in city attorney's office because functions were mandated by charter).

© The Regents of the University of California

B. Investments

§5.265 1. Permitted Investments

State law permits a city having money in its treasury not required for its immediate needs to make the following investments (see Govt C §53601):

(a) The city's own bonds;

(b) United States Treasury bills, notes, and bonds;

(c) Registered state warrants;

(d) Registered treasury notes or bonds of any state;

(e) Other California local agency bonds;

(f) Bank issues based on federal obligations;

(g) Commercial bank time drafts (bankers' acceptances);

(h) Prime quality (highest letter and numerical rating by a nationally recognized statistical rating organization (NSRO));

(i) Negotiable certificates of deposits (CDs);

(j) Repurchase or reverse repurchase agreements for authorized investments (reverse repurchase agreements made after December 31, 1994, are subject to substantial restrictions and require prior approval of the city council);

(k) "A" rated medium-term corporate notes;

(l) Shares of beneficial interest issued by diversified management companies investing in previously authorized investments;

(m) Investments in accordance with the statutory provisions on issuance of bonds if monies are held by a trustee or a fiscal agent (this is an allowable investment for the city treasurer notwithstanding the provisions of Govt C §53635);

(n) Notes or bonds secured by first priority security interest (eligible securities) of the type listed in Govt C §53651;

(o) Any mortgage pass-through security, collateralized mortgage obligation, mortgage-backed or other pay-through bond, equipment lease-backed certificate, consumer receivable pass-through certificate, or consumer receivable backed bond of a maximum 5-year maturity, from "A"-rated issuers; and

(p) Shares of a beneficial interest issued by a joint powers authority that invests in the securities and obligations authorized in (a) through (n).

Purchased securities must be physically delivered to the purchasing city or to a bank trust department. See Govt C §53601.

© The Regents of the University of California

§5.266 a. Charter Cities

Charter cities have plenary authority over "municipal affairs." See Cal Const art XI, §5. Traditionally, since charter city financing has been a matter of local concern, charter cities have been able to set up their own investment policies and programs independent from the state. A charter city would only be constrained by basic constitutional limitations. However, in the rare instance when a city charter might omit any mention of specific investing or financing procedures, it appears that the general laws would govern such procedures. *McLeod v Board of Pension Comm'rs* (1970) 14 CA3d 23, 94 CR 58.

© The Regents of the University of California

§5.267 b. Local Agency Investment Fund

The Local Agency Investment Fund (LAIF) is a special fund in the state treasury created by state law. See Govt C §§16429.1-16429.4. This law permits a local government official, with the consent of the governing body of that agency, to remit money in its treasury not required for immediate needs to the state treasurer for deposit in this fund for investment purposes. Investment in the LAIF allows a city to choose the length of time its money will remain in the fund. Interest on the deposit is paid at the end of each quarter and the fees charged by the LAIF are limited to one-half of 1 percent of the earnings of the fund. To obtain further information, contact the Investment Division of the State Treasurer's office ((916) 653-3001).

© The Regents of the University of California

§5.268 2. Investment Policy

A city is not required to authorize the full range of investments allowed by state law. See Govt C §53601. A city council should work with the city treasurer or other official in determining what range of investments the policy should allow. For example, small cities may find it appropriate to limit city investments to the Local Agency Investment Fund (LAIF) (see Govt C §§16429.1-16429.4), passbook savings accounts, negotiable certificates of deposits (CDs), United States Treasury bills, notes, and bonds, or others. See permitted investments in §5.265. The investment policy will vary depending on the budget size, investment sophistication, and other characteristics of each city. The city should also evaluate the LAIF. See §5.267. The city may also specify the percentage of funds that may be invested in securities of various maturities. The California Municipal Treasurers Association has drafted a form investment policy that may assist a city in adopting its own policy. Many cities make their investment policies available online.

CAUTION: A city must invest its funds as a trustee acting in accordance with the prudent investor standard. See Govt C §53600.3.

© The Regents of the University of California

3. Investment Authority

§5.269 a. City Council

A city council may invest city funds not required for its immediate needs. See Govt C §53601 (listing permissible investments). See also §5.265. A city council may annually delegate this investment authority to its appointed or elected city treasurer by ordinance or resolution. If a city delegates investment authority to the city treasurer, the treasurer must make a monthly report of any investment transactions to the city council. See Govt C §53607. Once delegated, the governing body may not set conditions on contracts for investment management services executed by the treasurer. See 88 Ops Cal Atty Gen 62 (2005) (construing authority of county board of supervisors under statute analogous to Govt C §53607).

© The Regents of the University of California

§5.270 b. City Treasurer

The city treasurer is responsible for the safe deposit of all monies in the custody of the city. See Govt C §53635. In addition, the city treasurer may annually render to the city council (or any investment committee created by the city council) a statement of investment policy to be considered by the city council at a public meeting. See Govt C §53646(a)(2). The legislature recently eliminated this investment policy statement as a mandate, with encouragement to cities to continue although reimbursements may not be coming. See Govt C §53646(g).

PRACTICE TIP 1: Experts disagree about whether investment authority can be delegated to an official other than the treasurer, even though the delegee may be the treasurer's supervisor.

PRACTICE TIP 2: If such delegation is necessary or desirable in a specific case, the city council should specify explicitly that the city manager has the duty and authority to invest city funds. A city manager may have investment authority under Govt C §53635 if he or she is authorized by the city to receive payment of any monies. However, such a delegation would be subject to the restrictions on incompatible offices and holding dual offices. See *People ex rel Chapman v Rapsey* (1940) 16 C2d 636, 107 P2d 388; 22 Ops Cal Atty Gen 83 (1953).

For reporting requirements, see §5.272.

© The Regents of the University of California

§5.271 c. City Manager

A city's code usually lists the duties of the city manager. These duties normally require the city manager to supervise and administer all departments and personnel in the city and thus may create some responsibility with respect to the management of city investments. For discussion of delegation of duties of the city treasurer to the city manager, see §5.270.

© The Regents of the University of California

§5.272 4. Reporting Requirements

The city treasurer is encouraged to give certain reports on investments to the legislative body, and under certain circumstances to the California Debt and Investment Advisory Commission. Govt C §53646.

© The Regents of the University of California

§5.273 5. Deposits

Cities may make three types of deposits (Govt C §53632):

- inactive;
- active; and
- interest-bearing active.

Active deposits are deposits that are payable on demand; other deposits are "inactive deposits." Any deposits made by a city treasurer are subject to state law restrictions administered and enforced by the Local Agency Deposit Security Administration. See Govt C §§53630-53692; 2 Cal Code Regs §§16001.1.1-16010.1.3. In general, these require institutions accepting local deposits to provide greater security for those deposits than is required for ordinary bank deposits.

© The Regents of the University of California

C. Appropriations, Warrants, and Payments

§5.274 1. Appropriations

A specific appropriation is an act by which a named sum of money is set apart in the treasury and made available for the payment of particular claims or demands. The city may accomplish this by adopting a budget or passing an appropriations ordinance or resolution. If a proposed appropriation exceeds the amount estimated in the budget for such an expenditure, the city council should amend the budget to allow for such an appropriation. An appropriation may not be expended for anything other than a lawful public purpose of the city. Appropriations for a particular purpose cannot be used for a different purpose. *Rancho Santa Anita, Inc. v Arcadia* (1942) 20 C2d 319, 125 P2d 475.

For a discussion about city budgets, see §5.264.

© The Regents of the University of California

2. Warrants and Payments

§5.275 a. The Warrant Process

California cities are authorized to pay funds through the warrant process. A warrant is an order by which the drawer, usually the city council or city treasurer, authorizes the bank or other depository of city funds to pay a particular sum of money. A city may use facsimile signatures for any instrument of payment after filing a certification under Govt C §5501. If funds are available for the payment of an approved claim, the warrant becomes a check directing the bank or depository of city funds to pay the funds to the payee. When funds are unavailable, the warrant becomes an interest-bearing municipal obligation. Govt C §53911. See Govt C §§53910-53914.

© The Regents of the University of California

§5.276 b. Local Practices

A city may adopt such further practices for payment of warrants as it considers convenient, efficient, and in the public interest. Govt C §53910. To avoid city council approval of every minor equipment purchase or service payment, a city council often will delegate payment authority to certain city personnel, allowing them to authorize payment of a claim from a particular budget account. So long as the budget provides for such a payment, the city employee may authorize payment without city council approval. Usually, the city council will retain authority to approve payments exceeding a certain amount.

© The Regents of the University of California

D. Limitations on Expenditures

§5.277 1. Municipal Purpose Doctrine—Gifts of Public Funds Prohibited

The legislature has no power to authorize a city to make "any gift … of any public money or thing of value to any individual, municipal or other corporation whatever." Cal Const art XVI, §6. Because a charter city derives its powers from a charter under the constitution, rather than the legislature, this section does not apply to charter cities. *Los Angeles Gas & Elec. Corp. v City of Los Angeles* (1922) 188 C 307, 205 P 125. Gift prohibitions may, however, be included in a city's charter.

For related material, see §1.32.

© The Regents of the University of California

§5.278 a. Gift Versus Public Purpose

In determining whether an expenditure of public funds is a gift, the two primary questions to be considered are:

- whether the funds are to be used for a "public" or a "private" purpose, and
- whether the funds are to be used for a public purpose of the agency making the expenditure.

If they are for a "public" purpose of the city making the expenditure, they are not a gift within the meaning of Cal Const art XVI, §6. *County of Alameda v Janssen* (1940) 16 C2d 276, 106 P2d 11. A mere incidental benefit to an individual does not make a "public" purpose a "private" purpose. *American Co. v City of Lakeport* (1934) 220 C 548, 32 P2d 622. Thus, social welfare expenditures of counties are not illegal gifts. See, *e.g., City & County of San Francisco v Collins* (1932) 216 C 187, 13 P2d 912.

The determination of what constitutes a "public" purpose is primarily a matter for the legislature, and its discretion will not be disturbed by the courts so long as the determination has a reasonable basis. *Board of Supervisors v Dolan* (1975) 45 CA3d 237, 119 CR 347.

PRACTICE TIP: An excellent vehicle for articulating the public purpose of a city expenditure is a contract with the recipient of the funds that identifies the public purpose prompting the expenditure as the consideration for making it.

© The Regents of the University of California

§5.279 b. Specific Examples Regarding Prohibited Gifts

These are examples of court interpretations about alleged gifts of public funds:

- **No gift regarding retirement allowances.** The "gift-of-public-funds" prohibition does not prohibit the payment of pensions, even when granted retroactively. See *City of Downey v Board of Admin.* (1975) 47 CA3d 621, 121 CR 295. But see Cal Const art XI, §10(a) (prohibiting retroactive compensation), discussed in §4.29, and Cal Const art IV, §17 (also prohibiting retroactive compensation), discussed in §5.280.
- **No gift regarding housing.** Transfer of land from a housing authority to a private corporation for construction of a low- and moderate-income housing project is not a gift of public funds. *Winkelman v City of Tiburon* (1973) 32 CA3d 834, 108 CR 415.
- **No gift regarding public assistance.** Proposed bond issue for the relief of indigent sick and poor is not a gift of public funds. *City & County of San Francisco v Collins* (1932) 216 C 187, 13 P2d 912.
- **Gift found regarding settlement agreements.** When funds are expended under a settlement agreement in exchange for relinquishment of a wholly invalid claim, no "public" purpose is achieved. *Orange County Found. v Irvine Co.* (1983) 139 CA3d 195, 188 CR 552.
- **Gift found regarding payments to other agencies.** Payments of city funds to other public agencies for their purposes (with no benefit flowing back to the city and its citizens) are not valid expenses and are gifts of public funds. See *Santa Barbara County Water Agency v All Persons & Parties* (1957) 47 C2d 699, 306 P2d 875, overuled on other grounds by *Ivanhoe Irrig. Dist. v McCracken* (1958) 357 US 275, 2 L Ed 2d 1313, 78 S Ct 1174; *City of Oakland v Garrison* (1924) 194 C 298, 228 P 433; *Golden Gate Bridge & Highway Dist. v Luehring* (1970) 4 CA3d 204, 84 CR 291; *Ojai v Chaffee* (1943) 60 CA2d 54, 140 P2d 116. But see *White v State* (2001) 88 CA4th 298, 105 CR2d 714 (statutes enacted to assist Orange County in recovering from bankruptcy by reallocating sales and property taxes from Orange County local agencies to the County's general fund were not gifts of public funds; the same general group of taxpayers who paid these taxes will benefit from the transfer).

© The Regents of the University of California

§5.280 2. Retroactive Compensation; Unauthorized Agreements

The legislature has no power to authorize a city to grant extra compensation to any public officer, public employee, or contractor after service has been rendered or to authorize payment of a claim under an agreement made without authority of law. Cal Const art IV, §17. Because charter cities derive their powers from a charter under the constitution, rather than from the legislature, this section does not apply to charter cities. Cal Const art XI, §10(a) (also prohibiting retroactive compensation) (see §4.29). Similar prohibitions may, however, be included in a city's charter.

© The Regents of the University of California

§5.281 3. Gann Limit

Proposition 4, known as the Gann Limit, was approved by the voters in 1979. Proposition 4 added article XIIIB to the California Constitution. The goal of Proposition 4 was to limit the growth in appropriations of both state and local government to changes in the cost of living and population in order to control spending levels. See Cal Const art XIIIB. Proposition 4 also attempted to clarify the fiscal roles played by the various branches and levels of government and to ensure prompt return to the people of any surplus funds.

© The Regents of the University of California

§5.282 a. Formula to Limit Appropriations

Proposition 4 imposes appropriations limits to complement taxing limits imposed by Proposition 13. On Proposition 13, see §5.8. Proposition 4 restricts annual appropriations from the "proceeds of taxes" (a defined term; see Cal Const art XIIIB, §8(c)) to an amount set by a formula involving a base year with allowable adjustments (increases) based on increases in population and inflation. The formula is relatively easy to follow, but anomalies can result primarily from exemptions such as state mandates, debt service or indebtedness, treatment of special districts, and treatment of certain income as proceeds of taxes.

© The Regents of the University of California

§5.283 b. Statutory Provisions

These are the California statutes regarding the Gann Limit:

- **Statutory scheme:** The provisions of Cal Const art XIIIB are implemented by Govt C §§7900-7914.
- **Adoption of annual appropriations limit:** Each local agency is required to adopt an annual appropriations limit by resolution. Govt C §7910.
- **Determination of appropriations limit:** The appropriations limit is determined by a mathematical calculation that multiplies the base year limit by certain enumerated factors. Govt C §7902.
- **Distinguishing proceeds of taxes:** Because only proceeds of taxes are subject to the appropriations limit, attention must be given to what these proceeds of taxes include. See Govt C §7901(i).
- **Transfer of services:** An adjustment in each agency's appropriations limit is required when the financial responsibility for providing such services is transferred from one entity to another. Cal Const art XIIIB, §3(b).
- **Voter approval of Gann Limit Override:** The voters may approve an increase in an agency's appropriations (or Gann) limit by majority vote, but this approval must be renewed every 4 years. Cal Const art XIIIB, §4.

PRACTICE TIP: If a tax measure is placed before the voters that might cause the city to exceed its appropriations limit, the city may include a Gann Limit override in the tax ordinance. In future years, the override can be renewed by a stand-alone measure or, if the tax has a sunset date, may be combined with an extension of that date.

© The Regents of the University of California

c. Case Law Interpretations

§5.284 (1) State and Federal Mandates

City of Sacramento v State (1990) 50 C3d 51, 266 CR 139 holds that local costs of providing unemployment insurance coverage are not subject to mandates subject to subvention under Proposition 4 (see Cal Const art XIIIB, §6, discussed in §§5.246-5.262) but the "mandate" to bear these costs was a constitutional grant to tax and spend as necessary to pay for the insurance coverage notwithstanding the appropriations limit.

© The Regents of the University of California

§5.285 (2) Redevelopment

Huntington Park Redev. Agency v Martin (1985) 38 C3d 100, 211 CR 133, and *Bell Community Redev. Agency v Woosley* (1985) 169 CA3d 24, 214 CR 788, address the relationship between a city and its redevelopment agency as it relates to an allowable adjustment of appropriations limits and the transfer of financial responsibility for a particular program. *Bell* also spells out some of the nuances in the "bonded indebtedness" exception.

© The Regents of the University of California

§5.286 (3) Assessment Districts

County of Placer v Corin (1980) 113 CA3d 443, 170 CR 232, clarifies that special assessments are not "proceeds of taxes." For further discussion of assessments, see §§5.121-5.157.

© The Regents of the University of California

§5.287 (4) Pension Contributions

San Francisco Taxpayers Ass'n v Board of Supervisors (1992) 2 C4th 571, 7 CR2d 245, holds that contributions to employee pension funds are "appropriations subject to limitation" within the meaning of Cal Const art XIIIB. But see *Carman v Alvord* (1982) 31 C3d 318, 182 CR 506 (holding that under certain conditions a public entity's contribution to a pension fund was an "indebtedness" exempt from the taxing limits of art XIIIA (Proposition 13)).

© The Regents of the University of California

§5.288 d. References on Appropriations Limit

For related material, see §1.53, as well as the following references:

- Assembly Revenue and Taxation Committee, *Government Appropriations Limit: Article XIIIB of the Constitution,* chap 5 of Revenue and Taxation Reference Book 2008 (March 2009);
- League of California Cities, Uniform Guidelines for the Implementation of Article XIIIB of The California Constitution (1991); and
- Office of the Legislative Analyst, An Analysis of Proposition 4, the Gann "Spirit of 13" Initiative (Report 79-20, December 1979).

© The Regents of the University of California

§5.289 4. Debt Limitation

No city may incur any indebtedness exceeding in any year the income and revenues provided for such year without the consent of two-thirds of the voters. Cal Const art XVI, §18. But see Cal Const art XIIIA, §1 (discussed in §§5.8, 5.19-5.21), which limits the use of the taxing power to secure debt. On the debt limitation, see §§1.46-1.50.

© The Regents of the University of California

§5.290 a. Purposes of Debt Limitation

The three purposes of the constitutional debt limitation are::

- To avoid a situation in which the holders of an issue of bonds might compel an increase in taxes or foreclose on a city's assets (*City of Redondo Beach v Taxpayers, Property Owners, Citizens & Electors* (1960) 54 C2d 126, 5 CR 10; *County of Shasta v County of Trinity* (1980) 106 CA3d 30, 165 CR 18);
- To afford the taxpayers an opportunity to approve or disapprove long-term debt (*Palm Springs v Ringwald* (1959) 52 C2d 620, 342 P2d 898); and
- To end extravagant expenditures on public improvements (*Long Beach v Lisenby* (1919) 180 C 52, 179 P 198).

© The Regents of the University of California

b. Exceptions to the Debt Limitation

§5.291 (1) Obligations Imposed by Law

The debt limitation applies only to debts the city has voluntarily incurred, not to those imposed by law. Examples of obligations imposed by law include:

- Obligation of city to transfer money into a bond redemption fund under Improvement Bond Act of 1915 (*American Can v City of Lakeport* (1934) 220 C 548, 32 P2d 622).
- Obligation of counties to provide adequate facilities for courts (*County of Los Angeles v H. L. Byram* (1951) 36 C2d 694, 227 P2d 4).
- Obligation of city to provide police and fire protection (*City of La Habra v Pellerin* (1963) 216 CA2d 99, 30 CR 752. But see *City of Saratoga v Huff* (1972) 24 CA3d 978, 101 CR 32).
- Obligation of city to defend claims against public employees acting within the scope of employment. Govt C §§995 and 996; *Wright v Compton Unified Sch. Dist.* (1975) 46 CA3d 177, 120 CR 115.

© The Regents of the University of California

§5.292 (2) Special Fund Doctrine

The special fund doctrine is a judicially created exception to the debt limitation for obligations paid only from a special fund and for which the general fund or general tax levies are not liable. *City of Redondo Beach v Taxpayers, Property Owners, Citizens & Electors* (1960) 54 C2d 126, 5 CR 10. The special fund doctrine may not apply if there is a direct or indirect obligation of, or other loss to, the general fund should the special fund prove insufficient to pay the debt. *Garrett v Swanton* (1932) 216 C 220, 13 P2d 725, overruled on other grounds by *City of Oxnard v Dale* (1955) 45 C2d 729, 290 P2d 859. However, if a debt falls within the scope of the special fund doctrine, discretionary payments from the general fund do not preclude application of the doctrine. *Board of Supervisors v Dolan* (1975) 45 CA3d 237, 119 CR 347. Examples of the special fund doctrine include:

- Revenue bonds to construct sewer improvements (*City of Oxnard v Dale* (1955) 45 C2d 729, 290 P2d 859); and
- Bonds issued under the Marks-Foran Residential Rehabilitation Act of 1973 (Health & S C §§37910-37964), which by their terms do not obligate the general fund or require taxes.

© The Regents of the University of California

§5.293 (3) Service Contracts and Leases

The debt limit does not apply to obligations that provide for payments at different times as long as the annual payments do not exceed yearly income and the obligation only arises from year to year in separate amounts as the property or services are furnished (such as a lease with a clause allowing the city to terminate occupancy if the city council does not appropriate funding for rent in the annual budget). The debt limit does apply, however, to conditional sales contracts. *McFayden v Town of Calistoga* (1925) 74 CA 378, 240 P 523. See also *County of Sacramento v Assessment Appeals Bd.* (1973) 32 CA3d 654, 108 CR 434. Examples of long-term obligations that are not subject to the debt limit are:

- Lease with an option to buy, when title vests at end of lease term and that creates no immediate indebtedness for aggregate amount of rent (*Lagiss v County of Contra Costa* (1963) 223 CA2d 77, 35 CR 450);
- Ground lease of county property with a lease back to the county after construction of public facilities (*County of Los Angeles v Nesvig* (1965) 231 CA2d 603, 41 CR 918); and
- Contract for work done in the future to be paid in installments if the installments payable during the future year do not exceed that year's revenue (*Smilie v Fresno County* (1896) 112 C 311, 44 P 556).

For reconfirmation of prior case law, see *Rider v City of San Diego* (1998) 18 C4th 1035, 77 CR2d 189.

© The Regents of the University of California

§5.294 (4) Excluded Obligators

The debt limitation of Cal Const art XVI, §18 only applies to the entities named in §18, such as cities. It does not apply to a city's redevelopment agency, parking authority, or housing authority.

© The Regents of the University of California

§5.295 c. Statutory Provisions

In addition to the constitutional debt limitation, the Municipal Improvement Bond Act of 1901 limits the total indebtedness secured by general obligations of the city to a certain percentage of all real and personal property of the city. See Govt C §§43600-43638. See also §5.221.

© The Regents of the University of California

§5.296 d. Miscellaneous Election Issues

The requirement of two-thirds voter approval means two-thirds of those voting, not two-thirds of all qualified electors. *San Joaquin Light & Power Corp. v Madera* (1917) 175 C 229, 165 P 701.

Although the election must be a special election—one held for the purpose of voting on the indebtedness—it may be consolidated with a general election. *Howland v Board of Supervisors* (1895) 109 C 152, 41 P 864.

© The Regents of the University of California

§5.297 IV. ECONOMIC DEVELOPMENT

Although the basis of a city's authority to provide financial or other forms of assistance for purposes of economic development is not always clear, cities increasingly provide such assistance, usually citing the general police power authority conferred by Cal Const art XI, §7. Before agreeing to provide such assistance, however, a city should carefully consider whether the assistance contemplated would violate the prohibition against making a gift of public funds, or any specific statutory prohibitions, or trigger the requirement that prevailing wages be paid on the private development. See §5.298. In addition, a city should make appropriate findings based on evidence in the record, on the public purpose being furthered by the provision of the specific assistance, and that the amount of private benefit does not outweigh the public benefit. *Albright v City of South San Francisco* (1975) 44 CA3d 866, 118 CR 901.

© The Regents of the University of California

§5.298 A. Types of Economic Development Assistance

The following are types of assistance a city may render:

- **Subsidy or reduction of fees.** A city may agree to subsidize or reduce city fees that would otherwise be paid to the city. However, any subsidy or reduction that is more than a de minimis amount may trigger a requirement that prevailing wages be paid on the development, as described in §5.300. Moreover, depending on the nature of the fee, the city may need to fund the fee waiver from non-fee revenues to avoid an improper cross-subsidy of some fee-payers by others. See §§5.158-5.186.
- **Construction of off-site public improvements.** A city has the general authority to determine to construct or pay for off-site public improvements, even if they benefit a private development. Govt C §40401.

PRACTICE TIP: A city may agree to rebate or pay to a business all or a portion of the sales tax or transient occupancy tax generated by that business as an incentive for a business to operate or expand its operations in a city, subject to certain limitations described in §§5.299-5.300. See Govt C §53084.5.

- **Sale or lease of property.** A city may sell or lease its property subject to the requirements discussed in chap 8. However, if the property is leased or sold at below fair market rates, it may trigger a requirement that the private entity pay prevailing wages on the development, as described in §7.83.
- **Creation of financing authority.** A city may use its authority to participate in the formation of a financing authority to issue bonds, the proceeds of which can be used to construct facilities, such as hotels, that can be managed and operated by private entities. These arrangements are often quite complex and involve multiple layers of legal relationships; they are further discussed in §§5.219-5.245.

© The Regents of the University of California

B. Constraints on Economic Development

§5.299 1. Statutory Prohibitions

Local agencies (including chartered and general law cities and counties) and redevelopment agencies are prohibited from providing any form of financial assistance to a vehicle dealer or big box retailer, or a business entity that sells or leases land to a vehicle dealer or big box retailer, that is relocating from the jurisdiction of one local agency to another in the same market area. Govt C §53084; Health & S C §33426.7. Financial assistance includes, but is not limited to:

- use of public funds to pay for parking improvements;
- any tax incentive;
- sale or lease at less than fair market value or payment for; or
- forgiveness or reduction of fees.

A vehicle dealer is a retailer who is also a dealer as defined in Veh C §285. A big box retailer is one that generates sales tax and operates a store that exceeds 75,000 square feet of gross buildable area, notwithstanding the absence of a large parking area, prominent signage, or cash register sales (as opposed to telephone or catalog sales, as generated by a warehousing or distribution facility). Govt C §53084(b)(1); Health & S C §33426.7(b)(1). Se also *City of Carson v City of La Mirada* (2004) 125 CA4th 532, 541, 22 CR3d 815.

Additionally, local agencies are prohibited from entering into any form of agreement to pay or rebate sales tax revenue when (Govt C §53084.5.)

- The agreement results in a reduction in sales tax received by another local agency from a retailer within that agency's territorial jurisdiction; and
- The retailer maintains a physical presence within the territorial jurisdiction of that other agency.

This restriction does not apply if the retailer expands its operations so that it is conducting a comparable operation within both jurisdictions. Govt C §53084.5(a)(2).

© The Regents of the University of California

§5.300 2. Prevailing Wages

Providing public financial assistance to otherwise private projects triggers a requirement that prevailing wages be paid for any construction-related work on such projects. The California prevailing wage laws are set forth in Lab C §§1720-1815. The definition of work that is "paid for in whole or in part out of public funds" includes fees, costs, rents, insurance, or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of a contract that are paid, reduced, or charged at less than fair market value, waived, or forgiven by the public agency. Lab C §1720.

Labor Code §1720 provides several exceptions to the prevailing wage requirement. If a city agrees to pay for off-site public improvements in connection with a private project and the city contributes no more money, or other equivalent, to the project, then only the public improvement work is subject to prevailing wages. Lab C §1720(c)(2). If a city reimburses a developer or business for costs that would normally be borne by the public, or directly or indirectly subsidizes a private development that is de minimis in the context of the project, the private development is not subject to the prevailing wage requirement. However, Lab C §1720 does not define "de minimis." Under certain specified conditions, certain types of residential projects are exempt from the payment of prevailing wages. Lab C §1720(c)(4)-(c)(6), (d).

PRACTICE TIP: Subjecting a private project to a requirement to pay prevailing wage rates for all construction-related work may have significant detrimental financial impact on the project; it can easily outweigh the value of the subsidy. A requirement to pay prevailing wage rates may increase a project's construction cost between 10 percent and 40 percent, depending on the region and type of construction. Thus, local agencies should weigh the benefit of providing public assistance to a project against an increase in project costs if prevailing wages are triggered. To the extent possible, local agencies may wish to consider providing assistance within the confines of certain statutory exceptions, or safe harbors, set forth in Lab C §1720 to minimize or eliminate this problem.

If a project is determined to trigger prevailing wages after the fact, the local government can be liable for the unpaid wages and penalties. Lab C §1726. See *Landeros v Department of Corrections* (2002) 99 CA4th 271, 120 CR2d 867. Accordingly, the local government should consider requiring the private developer with whom it contracts to provide a project subsidy to indemnify the city for any such liabilities which may accrue.

© The Regents of the University of California

V. REDEVELOPMENT

A. Purpose of Redevelopment Law

§5.301 1. Redevelopment Defined

"Redevelopment" is defined in the Community Redevelopment Law (CRL) as the planning, development, replanning, redesign, clearance, reconstruction, rehabilitation, alteration, provision of open space, or any such combination. Health & S C §§33010, 33020-33021. Redevelopment under the CRL is to be undertaken in accordance with the authority and powers enumerated or implied under the CRL, and it may therefore be distinguished from the broader concept of "redevelopment" in the land use context.

© The Regents of the University of California

§5.302 2. Authority

Authority for community redevelopment in California is found in both the California Constitution and statutes. See Cal Const art XVI, §16; Health & S C §§33000-33855. The basic objective of the law and the fundamental purpose of redevelopment agencies are to eliminate "blight" in a redevelopment project area under a redevelopment plan. Blight is defined by statute. See Health & S C §§33030-33031. Natural disasters may also serve as a basis for creating a redevelopment area. Health & S C §34000. Special criteria may define blight on closed military bases. Health & S C §33492.10.

© The Regents of the University of California

§5.303 3. History

The Community Redevelopment Law (CRL) (Health & S C §§33000-33855) was enacted in 1945, although the present redevelopment structure was created in 1951 and 1952 when the California Constitution and the pertinent statutes were amended to provide for a tax increment allocation system. The concept of "tax increment" is discussed in §§5.316-5.341. The CRL does not contemplate wholesale condemnation and clearance, as older urban renewal programs did. Instead the CRL contemplates the use of redevelopment powers to assist the private sector to redevelop blighted areas by a combination of demolition and new construction, site assembly, owner participation, and rehabilitation.

© The Regents of the University of California

§5.304 4. Agency Powers and Authority

To eliminate blight, a redevelopment agency is given a broad array of powers, including an extraordinary use of the power of eminent domain. The redevelopment of blighted areas is a public use and purpose for which private property may be acquired. Health & S C §§33037, 33391. See also *Kelo v City of New London* (2005) 545 US 469, 489 n23, 162 L Ed 2d 439, 125 S Ct 2655; *In re Redevelopment Plan for Bunker Hill Urban Renewal Project 1B of Community Redev. Agency* (1964) 61 C2d 21, 66, 37 CR 74, cert denied sub nom *Babcock v Community Redev. Agency* (1964) 379 US 899, cert denied sub nom *Trautwein v Community Redev. Agency* (1964) 379 US 28; *Anaheim Redev. Agency v Dusek* (1987) 193 CA3d 249, 263, 239 CR 319. The extraordinary aspect of this authority of redevelopment agencies is the ability to take private property from one private owner for redevelopment by another private party rather than for a public use by a government agency. As such, redevelopment can be extraordinarily controversial.

© The Regents of the University of California

B. Redevelopment Agencies

§5.305 1. Agencies of the State

Redevelopment agencies are creatures of statute, which exist in every community in the state but are not operative until activated by ordinance. This ordinance is subject to referendum. Health & S C §§33100-33105. Redevelopment agencies carry out state policy and do not function as local entities. In effect, they are state agencies for local purposes. See *Andrews v City of San Bernardino* (1959) 175 CA2d 459, 346 P2d 457; *Walker v Salinas* (1976) 56 CA3d 711, 128 CR 832; *Kehoe v City of Berkeley* (1977) 67 CA3d 666, 673, 135 CR 700.

© The Regents of the University of California

§5.306 2. Legal Status

Redevelopment agencies are public bodies, corporate and political, in each community. Health & S C §33100. A "community" includes cities, counties, cities and counties, Indian tribes, and bands or groups that are incorporated or that otherwise exercise some local governmental powers. Health & S C §33002.

© The Regents of the University of California

3. Types of Redevelopment Governing Boards

§5.307 a. Separate Agency

On adoption of an ordinance declaring the need for the redevelopment agency to function, the mayor, with the approval of the legislative body, appoints as members of the redevelopment agency five resident electors. The legislative body may, by ordinance, increase the number of members appointed to the redevelopment agency to seven. Health & S C §33110.

© The Regents of the University of California

§5.308 b. Legislative Body as the Agency

Alternatively, the legislative body may declare itself to be the redevelopment agency by ordinance. Health & S C §33200. In such case, the community's legislative body is vested with all the rights, powers, duties, privileges, and immunities vested by the Community Redevelopment Law (CRL) in the redevelopment agency. A member of the legislative body may refuse to serve on the redevelopment agency board. If this occurs, the legislative body must appoint an elector of the community to serve the term of the replaced member. Health & S C §33200.

© The Regents of the University of California

§5.309 c. Changing From Separate Agency to Combined Agency

Under certain circumstances, a legislative body desiring to declare itself to be the redevelopment agency must hold a public hearing on a proposed ordinance declaring itself to be the redevelopment agency. This requirement applies when a separate appointive redevelopment agency has been in existence for at least 3 years. Health & S C §33200. The legislative body must also prepare a report to substantiate and explain the determination that it will declare itself to be the redevelopment agency. The ordinance must make findings that such action will serve the public interest and promote the public safety and welfare in a more effective manner and that there has been a full public disclosure of all reports and proposals relating to its intent to declare itself the redevelopment agency. Health & S C §33200.

© The Regents of the University of California

§5.310 d. Separate Community Development Commission

The legislative body may create a public body, corporate and political, known as the "community development commission." Health & S C §34110. The commission is created to give a community the option of operating its redevelopment agency and housing authority under a single operating entity. This enables the entity to exercise such powers relating to community development as may be delegated to it by the legislative body. Health & S C §34112. The legislative body must declare by ordinance the need for the commission to function (Health & S C §34115), and it may, at its option, declare a need for the commission to function only with respect to a redevelopment agency. This ordinance is subject to referendum. Health & S C §34115.5.

The mayor (or chairperson of the board of supervisors), with the approval of the legislative body, appoints the number of resident electors of the community as commissioners as the legislative body prescribes by ordinance. Health & S C §34130. Alternatively, the legislative body may, by ordinance, declare itself to be the commission. Health & S C §34120.

If the legislative body declares itself to be the redevelopment commission combined with the housing authority, it must appoint two tenants of the housing authority (if the authority has any tenants) as additional commissioners. Health & S C §34120(b).

© The Regents of the University of California

4. Advisory Bodies

§5.311 a. Legislative Body With Commission

If a legislative body has declared itself to be the redevelopment agency, it may create a "community redevelopment commission" by ordinance. Health & S C §33201. Such a commission must have at least seven members. Health & S C §33201. The function of the commission is to prepare a redevelopment plan for each redevelopment project area, hold and conduct hearings, adopt and submit the plan to the legislative body together with required reports, and perform such other advisory functions as may be delegated to it by the legislative body. Health & S C §33202.

© The Regents of the University of California

§5.312 b. Community Development Committee

If a legislative body has declared itself to be the community development commission, it may by ordinance create, as an advisory body to the commission, a "community development committee" of not more than seven members (or not more than nine members if housing authority members are appointed as an alternative to the appointment of tenants of the housing authority as commissioners). Health & S C §34120.5.

© The Regents of the University of California

§5.313 5. Staffing

A redevelopment agency may select, appoint, and employ such permanent and temporary officers, agents, counsel, and employees as it requires and may contract with the Department of Housing and Community Development or any other agency for necessary staff services. Health & S C §33126.

© The Regents of the University of California

§5.314 6. Powers

As a general matter, a redevelopment agency's powers may be exercised only within adopted project areas. However, a redevelopment agency can expend monies outside of a project area for low- and moderate-income housing or publicly owned facilities if certain findings are made. Health & S C §§33334.2(g), 33445, 33445.1. A redevelopment agency has broad authority to take a variety of actions, including but not limited to:

- Acquire real and personal property by negotiation or donation; or real property by eminent domain (Health & S C §33391);
- Sell or lease property to private parties for fair market value or for a discount based on the uses permitted by the redevelopment plan (*i.e.,* the "reuse value") (Health & S C §§33430-33433);
- Contract for public works in redevelopment project areas (Health & S C §§33440, 33445) and pay prevailing wages for projects exceeding $5000 (Pub Cont C §20688.2);
- Provide for site preparation work (demolition, hazardous substance remediation, clearance, and other work) for private developments (Health & S C §§33440, 33459) (Polanco Redevelopment Act);
- Insure, rent, manage, operate, repair, and clear property owned by the redevelopment agency, rehabilitate property in anticipation of resale, and hold property for a reasonable time pending disposition of property (Health & S C §§33400, 33402);
- Establish design controls to implement redevelopment plans and review demolition and building permits for conformity with a redevelopment plan and designs for development (Health & S C §§33020-33021, 33128);
- Increase, improve, and preserve the community's supply of low- and moderate-income housing (Health & S C §33334.2);
- Acquire, demolish, repair, and replace buildings, low and moderate housing, or other improvements damaged or destroyed due to a state or nationally declared emergency (Health & S C §§34000-34008); and
- Borrow, invest, and loan funds (Health & S C §§33601, 33603, 33740, 33750, 33760, 33777.5).

© The Regents of the University of California

§5.315 7. Meetings

Redevelopment agencies are local agencies for purposes of the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) and its open-meeting requirements therefore apply. See §§2.5, 2.36-2.118 regarding the Brown Act and open meeting requirements.

© The Regents of the University of California

§5.316 C. Plan Adoption Procedures

The Community Redevelopment Law (CRL) creates a statutory process for adopting redevelopment plans. The adoption of a redevelopment plan is a discretionary act subject to the California Environmental Quality Act (Pub Res C §§21000-21177). See *Dusek v Redevelopment Agency of the City of Anaheim* (1985) 173 CA3d 1029, 1036, 219 CR 346. The procedures require opportunity for citizens to provide input. Cities and counties may undertake joint redevelopment activity for project areas consisting of incorporated and unincorporated areas.

© The Regents of the University of California

§5.317 1. Survey Area

Designation of a survey area (a geographic area in which redevelopment is proposed) is the first step to determine whether a redevelopment project is feasible. Health & S C §§33310-33312. Designation of the survey area is significant because the final project area for the redevelopment plan must be within the designated boundaries of the survey area; territory cannot be added later without restarting the process.

In addition, any person, group, association, or corporation may request in writing that the legislative body designate a survey area or areas for study and may submit plans for the proposed redevelopment of those areas. Health & S C §33311.

Survey areas may be designated by resolution of the legislative body or, if authorized by the legislative body, by resolution of the planning commission or redevelopment agency board. Health & S C §33310. The resolution designating such area or areas must contain specified findings. Health & S C §33312.

© The Regents of the University of California

2. Project Area Selection and Preliminary Plans

§5.318 a. Initial Feasibility Study

An initial feasibility study is ordinarily conducted by independent consultants before any serious commitment is made to proceed with adoption of a redevelopment plan. This study is ordinarily used to help select the boundaries of the project area, focusing on the existence of blighting conditions in the area, the potential land uses and market demand for such uses, and financial feasibility. The elimination of "blighted" areas is the public purpose that courts have established as the justification for allowing a redevelopment agency to impose design controls and use restrictions, use its power of eminent domain, and expend public funds. *Redevelopment Agency v Hayes* (1954) 122 CA2d 777, 797, 266 P2d 105, cert denied (1954) 348 US 897.

© The Regents of the University of California

§5.319 b. Blight Defined

The existence of blight (see Health & S C §§33030-33039 (defining blight)) is the "sine qua non" of the process to adopt a redevelopment plan. Blight, which applies to the area as a whole and not necessarily to any particular property, exists in a predominantly urbanized (as set forth in Health & S C §33320.1) area that is characterized by one or more of the conditions listed in Health & S C §33031(a) and one or more of the conditions listed in Health & S C §33031(b). The conditions must be so prevalent and substantial, and described with "specific, quantifiable evidence," as to cause a reduction of (or lack of) proper use of the area to such an extent it constitutes a serious physical or economic burden on the community that cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment. Health & S C §§33030, 33352. See *Friends of Mammoth v Town of Mammoth Lakes Redev. Agency* (2000) 82 CA4th 511, 98 CR2d 334; *Beach-Courchesne v City of Diamond Bar* (2000) 80 CA4th 388, 95 CR2d 265. The inclusion of non-blighted properties in a project area is restricted. Health & S C §33320.1(a)(2). The predominantly urbanized requirement does not apply to an area characterized by the existence of antiquated subdivisions or to property within or near a closed military base. Health & S C §§33031(a), 33492.3, 33492.40.

© The Regents of the University of California

§5.320 c. Inclusion of Non-Blighted Property

Non-blighted properties may be included in a redevelopment project area only if necessary for the effective redevelopment of the project area. Health & S C §33321. Non-blighted parcels may not be included in a project area for the purpose of obtaining tax increments unless there is other substantial justification for their inclusion. Health & S C §33320.1(a)(2). If a project area contains non-contiguous sub-areas, each sub-area must either be blighted or necessary for effective redevelopment of the project area. See *Graber v City of Upland* (2002) 99 CA4th 424, 121 CR2d 649. Non-blighted, non-contiguous areas may be included in a project area if used predominantly for (Health & S C §33320.2):

- The relocation of owners or tenants from other non-contiguous areas in the same or other project areas; or
- The construction or rehabilitation of low- or moderate-income housing.

A project area also may not include agricultural land and open-space land that is enforceably restricted. See Health & S C §33321.5.

© The Regents of the University of California

§5.321 d. Initial Designation of Project Area and Preliminary Plan

The planning commission must make the initial designation of the project area boundaries, either on its own motion or at the request of the redevelopment agency. The planning commission must select a project area if:

- It is directed to do so by the legislative body; or
- A petition of a majority of private property owners in the area is submitted.

The planning commission must formulate a preliminary plan for the redevelopment of each selected project area. Health & S C §33322. A preliminary plan generally outlines the basic concept for redevelopment of the selected project area and is sufficient as a matter of law if it includes those matters described in Health & S C §33324. The planning commission must submit the preliminary plan to the redevelopment agency. Health & S C §33325.

© The Regents of the University of California

3. Relations With Affected Taxing Entities

§5.322 a. Statement of Preparation

After the preliminary plan has been received and accepted, the redevelopment agency must notify all taxing agencies in the proposed project area, the State Board of Equalization, and the State Department of Finance of its intent to adopt a redevelopment plan and identify the last equalized assessment roll it proposes to use for purposes of allocation of tax increment revenues ("the statement of preparation"). Health & S C §§33327-33328.1. On receipt of that information, the county fiscal officer and the State Board of Equalization must prepare and transmit to the redevelopment agency a report identifying six items required by Health & S C §33328.

© The Regents of the University of California

§5.323 b. Property Tax Assessed Value

Most importantly, the report contains the total amount of assessed value in the project area, the so-called "base year" tax roll. If the report is not received within the required time limits, the redevelopment agency may proceed with the adoption of the redevelopment plan. Health & S C §33328.

© The Regents of the University of California

§5.324 c. Preliminary Report

On receipt of the report of the county's fiscal officer (or after the time for preparation of that report has run) the redevelopment agency must prepare a preliminary report for each taxing agency that receives property tax revenues from the project area (the "affected taxing agencies"). The preliminary report must contain specified information and be transmitted to the affected taxing agencies within specified times. Health & S C §§33344.5-33344.6. Stats 2004, ch 158, §3 provided up to $1 million statewide to reimburse redevelopment agencies from the State Mandates Claims Fund for costs to comply with this statute.

© The Regents of the University of California

d. Apportionment of Taxes Among Affected Taxing Entities

§5.325 (1) Consultation and Exclusivity of Payments

After delivery of the preliminary report and environmental documents to the affected taxing entities, the redevelopment agency must consult with those "with respect to the plan and allocation of taxes" and provide a summary of these consultations in a "report to legislative body." Health & S C §33352.

The apportioned payments made as outlined under §§5.326-5.327 are the exclusive payments a redevelopment agency must make to the affected taxing entities during the life of the plan. Health & S C §33607.5(f)(1)(B).

© The Regents of the University of California

§5.326 (2) Apportionment of Taxes

Health and Safety Code §33607.5 creates a tax-increment sharing formula for all redevelopment project areas established on or after January 1, 1994, by establishing three overlapping tiers of payments to affected taxing entities:

(1) During each year the redevelopment agency receives the tax increment, it is required to pay the affected taxing entities 25 percent of the agency's net tax increment (*i.e.,* net after deduction of the 20 percent set aside for low- and moderate-income housing). Health & S C §33607.5(b).

(2) In addition, beginning in the eleventh fiscal year the redevelopment agency receives tax increment until the redevelopment agency ceases to receive tax increment, the redevelopment agency is required to pay the affected taxing entities, other than the community that adopted the redevelopment plan, 21 percent of its net tax increment generated by increases in the project areas' assessed value occurring after the tenth fiscal year in which the redevelopment agency receives tax increment. Health & S C §33607.5(c).

(3) In addition, beginning the 31st fiscal year the redevelopment agency receives tax increment and continuing so long as the redevelopment agency receives tax increment, the redevelopment agency is required to pay the affected taxing entities, other than the community that adopted the redevelopment plan, 14 percent of the net tax increment generated by increases in project areas, assessed valuation occurring after the 30th fiscal year in which the redevelopment agency receives tax increment. Health & S C §33607.5(d).

A portion of the payments to education entities will reduce state subventions to those entities, and the balance will be used for capital facilities. Health & S C §33607.5(a). The payments are subordinate to debt only if the redevelopment agency requests and the request is not disapproved by the affected taxing entity within 45 days. Health & S C §33607.5(e). In addition, the payments to an affected taxing entity are reduced by any amounts the redevelopment agency has paid for any public facility owned or leased by that affected taxing entity. Health & S C §33607.5(a)(2).

© The Regents of the University of California

§5.327 (3) Special Apportionment to "Basic Aid School Districts"

"Basic aid school districts" (*i.e.,* school or community college districts that do not receive state subventions because they have sufficient property tax revenue) receive payments equal to their share of the tax increment that would be generated by increasing the base year value by a percent equal to the lesser of (Health & S C §33676(b)(1)(A)-(B)):

- Eighty percent of the percentage growth in assessed value in the portion of the project area included in the district's jurisdiction; or
- The percentage growth in assessed value in the district's jurisdiction excluding the project area.

Payments made under Health & S C §33676(b) offset the portion of the payment to be made to the district under Health & S C §33607.5 (the automatic pass-through section) and Health & S C §33607.7 that reduces state subventions. Health & S C §33676(b)(4).

© The Regents of the University of California

§5.328 (4) Allocation to School Districts

Before 1984, Health & S C §33676 provided that, before the adoption by the legislative body of a redevelopment plan, any affected taxing agency may elect to be allocated all or any portion of the tax increment allocated to the agency attributable to increases in the assessed value of the taxable property in the redevelopment project area calculated annually under Rev & T C §110.1 (the annual 2-percent inflationary increase). In 1984, this section was amended to provide that before the adoption of a redevelopment plan, any affected taxing agency may elect and "every school and community college district shall elect" to be allocated the tax increment attributable to the annual 2- percent increase on the base year assessed value. In 1993, the section was further amended to simply require the tax increment attributable to the 2 percent growth in the base year assessed value to be allocated to the school and community college districts. Health & S C §33676(c).

Redevelopment agencies had taken the position that for redevelopment plans adopted between January 1, 1985, and December 31, 1993, school or community college districts that failed to affirmatively make the 2-percent election before the adoption of the redevelopment plan forfeited the right to that tax increment. This position was rejected by the Court of Appeal in *Santa Ana Unified Sch. Dist. v Orange County Dev. Agency* (2001) 90 CA4th 404, 409, 108 CR2d 770. The court held that absent an allocation agreement, the school district or community college district is entitled to make its 2-percent election even after the adoption of the redevelopment plan. This does not mean that the 2-percent election may be applied retroactively, *i.e.,* before the date of election.

© The Regents of the University of California

§5.329 4. Report to Council

The report to council is submitted to the legislative body with the redevelopment plan and contains 13 specified analyses of the project, including the basis for, scope of, and fiscal, environmental, and neighborhood impacts of, the redevelopment plan. The report contains information the legislative body considers in determining whether or not to adopt the redevelopment plan. The required contents of the report to council are listed in Health & S C §33352. See *Friends of Mammoth v Town of Mammoth Lakes Redev. Agency* (2000) 82 CA4th 511, 523, 98 CR2d 334 (discussing required contents of report and environmental impact report for proposed redevelopment plan).

© The Regents of the University of California

5. Hearings and Meetings

§5.330 a. Other Entity Review and Report

Before its submission to the legislative body, a redevelopment plan must be considered by the project area committee (PAC), if there is one (Health & S C §33347.5), and the planning commission (Health & S C §33346).

The planning commission must submit a report and recommendation about the redevelopment plan and determine whether the plan is consistent with the general plan. Health & S C §33346. The planning commission's failure to timely submit such a report constitutes a waiver and the legislative body may thereafter approve the plan. Health & S C §33347.

© The Regents of the University of California

b. Hearings on Approval of Plan

§5.331 (1) Hearing Requirement

Both the redevelopment agency (Health & S C §33348) and the legislative body (Health & S C §33360) must conduct noticed public hearings to approve the redevelopment plan. The legislative body and redevelopment agency (see §5.308) can hold a joint public hearing rather than two separate hearings. Health & S C §33355. The redevelopment agency must send a copy of the proposed plan to the State Department of Housing and Community Development and the State Department of Finance 45 days before the hearing. Health & S C §33360.5.

© The Regents of the University of California

§5.332 (2) Notice Timing and Contents

Notice of the hearing concerning a redevelopment plan must be published at least once a week for 4 consecutive weeks (28 days must elapse from the date of the first publication of the notice to the date of the hearing, not including the hearing date) in a newspaper of general circulation. Health & S C §33349(a).

The notice must include a legal description of the project and a statement of the goals and objectives of the redevelopment plan "in nontechnical language … using words with common and everyday meaning." Copies of the notice must be mailed by first-class mail to the residents and businesses in the project area at least 30 days before the hearing and to the last known assessee of each parcel of land in the project area. Health & S C §33349. Copies of the notice must be mailed to the affected taxing agencies by certified mail, return receipt requested. The notice must include a statement (or a listing or map of all affected properties) to the effect that property in the project area is to be subject to acquisition by purchase or condemnation, if applicable. Health & S C §33350.

© The Regents of the University of California

§5.333 c. Modification of Plan Possible

Once the redevelopment plan has been submitted to the legislative body, the legislative body may modify the plan or exclude property from the project area on the recommendation of the redevelopment agency (without additional public hearing). Health & S C §33363.5.

The planning commission, however, must first consider the change, render a report, and issue a recommendation on the change within 30 days. If the planning commission fails to file a report within that time frame, the legislative body may act on the plan without the report and recommendation. Health & S C §33363.5.

Any proposed changes must be considered by the legislative body at a public hearing reopened for that limited purpose. Health & S C §33363.5.

© The Regents of the University of California

6. Adoption of Plan

§5.334 a. Legislative Body Must Consider and Respond to Objections

The legislative body must consider written objections from property owners or affected taxing entities. The objections must be delivered to the clerk of the legislative body before or at the hearing. Health & S C §§33362-33363. The legislative body must address the written objections in detail and give reasons for not accepting specified objections and suggestions using good faith reasoned analyses in its response supported by facts. Health & S C §33363. The response must be adopted at least 1 week after commencement of the public hearing. Health & S C §33364.

© The Regents of the University of California

§5.335 b. Adoption Procedures

Following the redevelopment agency's public hearing or the joint public hearing of the agency and the legislative body, the redevelopment agency must approve the redevelopment plan and submit it to the legislative body. Health & S C §§33351, 33357. On a separate redevelopment agency, see §5.307.

The legislative body must adopt the redevelopment plan by ordinance, making explicit findings. The ordinance is subject to referendum. Health & S C §§33365, 33367.

© The Regents of the University of California

§5.336 (1) Eminent Domain Program

Redevelopment plans adopted after January 1, 2007, must describe the agency's program to acquire property by eminent domain. Health & S C §33342.5(a). Agencies may adopt the broadest condemnation powers authorized by law or may elect to limit condemnation authority. Health & S C §33342.5(b). For redevelopment plans adopted before January 1, 2007, see Health & S C §33342.7.

PRACTICE TIP: The provisions of Health & S C §§33334.5(a) and 33342.7 may be read to require an agency to adopt a "program" on acquisition of property by eminent domain even if the redevelopment plan does not contain this power or it has expired. Many jurisdictions have adopted programs stating that the redevelopment plan does not currently provide for the exercise of the power of eminent domain, and that if in the future such a power is added to the plan, then the program will also be amended to specify procedures the agency will follow.

© The Regents of the University of California

§5.337 (2) Necessary Vote to Approve

The redevelopment plan must be adopted by a majority vote of the legislative body unless either the planning commission or project area committee has recommended against approval. If either has recommended against adoption, approval must be by a two-thirds vote of the entire legislative body. Health & S C §33366.

© The Regents of the University of California

§5.338 7. Post-Adoption Notification

A copy of the ordinance adopting the redevelopment plan must be sent to the agency, and the agency is vested with responsibility for implementing the plan. Health & S C §33372.

Within 60 days after the adoption of the plan, the agency must record with the county recorder a legal description of the land within the project area, along with a statement that proceedings for the redevelopment of the project area have been instituted, and a description of the eminent domain program. Health & S C §33373. Notices must also be sent to various other entities. Health & S C §33375.

In addition, notices of determination under the California Environmental Quality Act (Pub Res C §§21000-21177) should be filed by the agency and legislative body.

© The Regents of the University of California

8. Interagency Cooperation

§5.339 a. Joint Projects

Two or more redevelopment agencies in different communities may jointly conduct redevelopment activities under the Community Redevelopment Law (CRL). The redevelopment agencies, planning commissions, and legislative bodies may hold either joint meetings and hearings or separately may designate the agency of one of the communities to act as the redevelopment agency for all the interested communities. Health & S C §33210.

If one agency is designated, it must obtain the report and recommendation of the planning commission of each community on the redevelopment plan and the finding of conformity to the general plan of each community before presenting the redevelopment plan to the respective legislative bodies for adoption. Health & S C §33211.

© The Regents of the University of California

§5.340 b. Delegation Possible

The legislative body of one community may delegate the redevelopment of an area in its jurisdiction to another community. The areas must be adjacent. Delegation becomes effective by the adoption of an ordinance by the authorizing legislative body. The community delegated the authority for redevelopment may proceed as though the area were in its own territorial jurisdiction. Health & S C §33213. Any redevelopment plan for that area must be approved by an ordinance enacted by the legislative bodies of both the authorizing community and the community to which the redevelopment authority was delegated. Health & S C §33213.

© The Regents of the University of California

§5.341 9. Plan Challenges: Pre-Adoption, Post-Adoption, and Failure to Challenge

An action attacking either the validity of a redevelopment plan or amendment to a redevelopment plan, or any finding or determination of the redevelopment agency or legislative body in connection with the adoption or amendment of a redevelopment plan, may not be brought before the adoption of a redevelopment plan or amendment. Health & S C §33500.

Once adopted, the plan or amendment must be challenged within 90 days after the date of adoption of the ordinance adopting or amending the plan. Health & S C §33500. The date of adoption is the date of its second reading. If an action is brought within the 90-day period, its process is governed by CCP §§860-870 (Validation Act). Health & S C §33501.

If no action is brought within this period, the redevelopment plan or amendment is conclusively presumed to be valid. CCP §869.

© The Regents of the University of California

D. Plan Amendment

§5.342 1. Purpose and Timing for Plan Amendment

An amendment or modification to a redevelopment plan can accomplish one or a multitude of goals. It may serve to add land, exclude land, change land uses, extend plan effective dates or the time in which eminent domain can be used, increase or decrease the total amount of indebtedness that can be incurred or tax increment that can be received, or complete a merger of project areas (see §5.436). Such amendments can take place any time after adoption of the plan, if it becomes necessary or desirable. Health & S C §33450.

© The Regents of the University of California

§5.343 2. Procedure for Plan Amendment

The procedure for amending a redevelopment plan for any purposes described in Health & S C §33354.6 is generally the same as the procedure for adopting a plan. Health & S C §33354.6 (see §§5.316-5.341). Plan amendments for purposes other than those just noted in §5.342 are governed by Health & S C §§33450-33458. For all amendments, the requirements of Health & S C §33367 (findings in the ordinance adopting the amendment) and Health & S C §33352 (reports and information that must be available) must only be met "to the extent warranted by the proposed amendment." Health & S C §33457.1. On mergers of redevelopment plans, see §5.436.

© The Regents of the University of California

§5.344 3. Extension of Time Limits

Redevelopment agencies are authorized to amend redevelopment plans whose time limits would otherwise be expiring to extend for a period of up to 10 years the time limits on the effectiveness of the redevelopment plan, the repayment of indebtedness, and the receipt of tax increment. Special findings and procedures apply to such amendments. Health & S C §33333.10.

PRACTICE TIP: Because of the lack of absolutely explicit requirements, whenever an ambiguity occurs, it would be wise to always opt for providing more public notice and more opportunity for public and taxing entity input and participation than a strict reading may otherwise require.

© The Regents of the University of California

§5.345 4. Statement of Land in Area

Within 60 days of any action amending a redevelopment plan, the redevelopment agency must record with the county recorder a statement that the redevelopment plan has been amended, along with a legal description of any territory added to the redevelopment project area. Health & S C §33456.

© The Regents of the University of California

E. Plan Implementation

§5.346 1. Owner and Tenant Participation

Each redevelopment plan must provide for the participation of owners in the redevelopment of the property if the owners agree to participate in accordance with the terms of the plan. Health & S C §33339. In addition, a redevelopment agency must extend reasonable preferences to displaced businesses to reenter the project area if the businesses otherwise meet the requirements of the redevelopment plan. Health & S C §33339.5.

© The Regents of the University of California

§5.347 a. Good Faith and Reasonableness Required

Although the Community Redevelopment Law (CRL) (Health & S C §§33000-33855) requires that property owners and business operators be given opportunities to participate in the redevelopment of a project area, neither the CRL nor case law defines the precise parameters of this requirement. The courts have determined that the duty of "good faith and reasonableness" is imposed on a redevelopment agency in implementing these provisions. See *Fellom v Redevelopment Agency of the City & County of San Francisco* (1958) 157 CA2d 243, 320 P2d 884.

The failure to exercise this duty of good faith and reasonableness can destroy the agency's ability to exercise the power of eminent domain against an aggrieved owner's property. See *Redevelopment Agency of the City of Huntington Park v Norm's Slauson* (1985) 173 CA3d 1121, 219 CR 365.

© The Regents of the University of California

b. Participation and Preference Rights

§5.348 (1) Not Property-Specific

The right to participation and preferences by property owners and business operators is not property-specific. See *In re Redevelopment Plan for Bunker Hill Urban Renewal Project 1B of Community Redev. Agency* (1964) 61 C2d 21, 66, 37 CR 74, cert denied sub nom *Babcock v Community Redev. Agency* (1964) 379 US 899, cert denied sub nom *Trautwein v Community Redev. Agency* (1964) 379 US 28. The agency can satisfy its obligations of participation and preference rights if it offers a property owner or business operator the right to participate in the redevelopment of any property in the project area. The agency is not required to offer the owner or business operator participation or preference rights for the property on which the owner or business operator is currently situated.

© The Regents of the University of California

§5.349 (2) Subject to Reasonable Conditions

In addition, the agency can impose reasonable terms and conditions on the right to participate. *In re Redevelopment Plan for Bunker Hill Urban Renewal Project 1B of Community Redev. Agency* (1964) 61 C2d 21, 59, 37 CR 74, cert denied sub nom *Babcock v Community Redev. Agency* (1964) 379 US 899, cert denied sub nom *Trautwein v Community Redev. Agency* (1964) 379 US 28. The broad outlines of these terms and conditions should be incorporated into the participation and preference rules adopted by the agency, discussed in §5.351. These terms and conditions can include the financial ability of the owner or operator (see *In re Redevelopment Plan for the Bunker Hill Urban Renewal Project 1B of the Community Redev. Agency , supra*), the land use proposed (see *In re Redevelopment Plan for the Bunker Hill Urban Renewal Project 1B of the Community Redev. Agency , supra*), an agreement by the owner or operator to begin and complete redevelopment within a reasonable time (*Huntington Park Redev. Agency v Duncan* (1983) 142 CA3d 17, 25, 190 CR 744), and such other conditions the agency may impose consistent with its duty of good faith and reasonableness.

© The Regents of the University of California

§5.350 (3) Form of Participation

"Participation" can take many forms. For example, participation can include a property owner becoming a tenant in another portion of the project area or the business operator can participate in a joint venture with a property owner or outside developer. The redevelopment agency should be open to creative means of permitting the widest possible participation. However, participation opportunities are not accorded as a matter of right. The ultimate selection of a developer rests with the agency based on the agency's development objectives and the qualifications of a particular developer.

© The Regents of the University of California

§5.351 c. Participation and Preference Rules

Within a reasonable period of time before the agency approves a redevelopment plan, the agency must adopt and make available for public inspection rules on participation and preferences in the redevelopment of the project area. Health & S C §33339.5. The Community Redevelopment Law (CRL) (Health & S C §§33000-33855) does not specify the content of the rules; typically however these rules contain the following:

- The definition of "participants" to be granted participation and preference rights. Participants are often defined as "persons or entities holding interests in property within the project area";
- Types of participation available (*e.g.,* retaining and redeveloping or rehabilitating property already owned, preferences in the acquisition of other property in the project area, an owner becoming a tenant and vice versa);
- Factors limiting participation opportunities (*e.g.,* the financial ability of the participants, the need to eliminate or modify a land use, the need to relocate utilities or realign streets);
- Priority factors to be considered if more than one participant wishes to participate on a particular site (*e.g.,* length of time in project area, type of interest owned, financial ability to perform); and
- The procedure for submitting proposals for participation and the requirement to enter into an owner participation agreement ensuring the proper redevelopment of the property.

PRACTICE TIP 1: In addition to complying with the generalized good faith and reasonableness standard in according participation and preference rights (see §§5.348-5.350), the agency must follow the specific requirements of the redevelopment plan and the participation and preference rules.

PRACTICE TIP 2: Regardless of whether required by the plan or the rules, the agency should send all requests for proposals (RFP) and requests for qualifications (RFQ) (see disposition and participation agreements in §§5.358-5.366) to owners and business operators who have expressed an interest in the redevelopment of the project area. In addition, the agency should consider every proposal made by a property owner or business operator, whether the proposal is solicited or not. If the agency chooses not to accept the proposal, it should give its reasons in writing to the owner or operator on the basis of objective, identifiable facts. This is especially true if the agency selects an alternative proposal that will require the acquisition of property from the owner or operator. In these situations, the agency should work with any owner or operator expressing an interest in participation, attempting to devise a method of participation that meets with the agency's goals and is within the capability of the owner or operator.

© The Regents of the University of California

§5.352 2. Property Acquisition and Timing of Acquisition

A redevelopment agency is authorized to acquire property by any voluntary means (*i.e.* purchase, gift, bequest) or by eminent domain. Health & S C §33391.

With the approval of the legislative body (usually the city), the agency may acquire by voluntary means property in the project area after the planning commission has formulated the preliminary plan but before the adoption of the redevelopment plan. Health & S C §33392. The agency may not, however, exercise the power of eminent domain before the adoption of the redevelopment plan. Legislative body approval is not required for agency acquisition after a plan is adopted. *Long Beach Community Redeployment Agency v Morgan* (1993) 14 CA4th 1047, 18 CR2d 100.

© The Regents of the University of California

§5.353 a. Restrictions on Voluntary Acquisitions

The agency may not acquire property from any of its members or officers except through eminent domain proceedings. Health & S C §33393. The agency may not offer to purchase property for less than its fair market value, unless the property owner offers it for sale at a specified price less than the fair market value and the agency offers to purchase it for that specified price, and no federal funds are involved in the transaction. Govt C §7267.2(d). The requirement that the agency offer an amount no less than the approved appraisal value is limited to acquisitions of property that require a resolution of necessity. *Melamed v City of Long Beach* (1993) 15 CA4th 70, 18 CR2d 729.

© The Regents of the University of California

§5.354 b. Requirements for and Restrictions on the Use of Eminent Domain

The following requirements and restrictions apply to the use of eminent domain:

- An agency may not acquire property from a public entity through eminent domain without the consent of the entity. Health & S C §33395.
- Without the consent of the owner, the agency may not acquire property on which an existing building will be maintained in its present form (*i.e.,* without rehabilitation) unless it is necessary to impose standards, restrictions, and controls on the property and the owner refuses or fails to consent to such standards. Health & S C §33394.
- The agency must commence eminent domain proceedings within the time limit established in the redevelopment plan. The time limit may not exceed 12 years, but the plan may be amended to extend the time limit. Health & S C §33333.2(a)(3)-(a)(4), (g)(2). However, the total number of years available for an agency to use the power of eminent domain cannot exceed the time limit on the effectiveness of a redevelopment plan. Health & S C §§33333.2(a)(2), 33333.6(b).
- The agency must comply with any other restrictions on the use of eminent domain established in the redevelopment plan. For example, the agency's program to acquire real property interests by eminent domain may exempt certain areas or types of property from condemnation. Health & S C §33342.5.
- The agency must comply with the owner participation and preference rights imposed by statute and by rules adopted by the agency, discussed in §§5.346-5.351. In *Redevelopment Agency of the City of Huntington Park v Norm's Slauson* (1985) 173 CA3d 1121, 219 CR 365, the agency was barred from condemning property due, in large part, to its complete failure to comply with owner participation requirements.
- The agency must comply with all the requirements of the Eminent Domain Law (CCP §§1230.010-1273.050).
- For redevelopment plans adopted before January 1, 2007, the legislative body must adopt an ordinance on or before July 1, 2007 that contains a description of the agency's program to acquire real property by eminent domain. Health & S C §33342.7. Redevelopment plans adopted on or after January 1, 2007, must describe the agency's program to acquire real property by eminent domain. Health & S C §33342.5.
- An agency may use eminent domain only to acquire real property interests. Contractual rights are not included within the grant of authority contained in Health & S C §33391. See *San Jose Parking, Inc. v Superior Court* (2003) 110 CA4th 1321, 2 CR3d 505.
- The Homeowners and Private Property Protection Act (Proposition 99, passed in 2008) prohibits agencies from taking by eminent domain any owner-occupied residence for the purpose of conveying it to a private person. Residences, even owner-occupied ones, may still be taken for the purpose of constructing public works of improvement or to protect the public health and safety, prevent repeated criminal activity, or remedy environmental contamination. See Cal Const art I, §19.

© The Regents of the University of California

§5.355 c. Forced Sale or Exemption From Eminent Domain

After 3 years have elapsed from the date of adoption of a redevelopment plan, an owner of property subject to condemnation may offer to sell his or her property to the agency for its fair market value. The agency then has 18 months to acquire the property or institute an eminent domain action. Health & S C §33399(a). If the agency fails to do so, the owner may institute an action for damages against the agency in inverse condemnation or obtain a writ of mandate to compel the agency, within such time as the court considers appropriate, to declare the property acquisition exempt, or to commence an eminent domain proceeding to acquire the property. Health & S C §33399.

PRACTICE TIP: Due to the short period of time in which the agency has to decide whether to acquire the property (18 months from receipt of letter plus the time provided by the court in the writ), it is imperative that an agency give immediate attention to any §33399 letters that it receives.

© The Regents of the University of California

§5.356 d. Relocation Assistance Required

A redevelopment agency must provide relocation assistance and make relocation payments in accordance with Govt C §§7260-7277. See Health & S C §33415. The definition of "displaced person" includes "persons displaced as a result of an owner participation agreement or an acquisition carried out by a private person for or in connection with a public use when the public entity is otherwise empowered to acquire the property to carry out the public use." Govt C §7260(c)(2). On relocation requirements, see §§8.14-8.25.

© The Regents of the University of California

§5.357 e. Possibility of Developer Reimbursement of Relocation Payments

If the agency has entered into an agreement with an owner-participant (or developer) and under that agreement the owner-participant or developer acquires property for redevelopment, the agency will be required to provide relocation benefits. In such cases, it is advisable for the agency to require the owner-participant or developer to reimburse the agency for the relocation payments.

PRACTICE TIP: It is common for an agency to acquire property using the developer's money. Typically, the developer posts a letter of credit with the agency on which the agency may draw as needed. The agreement providing for the posting of the letter of credit should also govern the disposition and development of the site (either an owner participation agreement or a disposition and development agreement. See §§5.358-5.366. In this way, the agency does not acquire property before it has a developer ready to redevelop it. In order to avoid successful challenges to the agency's right to take in any eminent domain proceedings, the agency must clearly retain its discretion on the adoption of resolutions of necessity or should adopt the requisite resolutions of necessity concurrently with the approval of the development agreement. *Redevelopment Agency of the City of Huntington Park v Norm's Slauson* (1985) 173 CA3d 1121, 219 CR 365.

© The Regents of the University of California

3. Disposition and Participation Agreements

§5.358 a. Distinction Between Disposition and Development Agreements (DDA) and Owner Participation Agreements (OPA)

Disposition and development agreements and owner participation agreements govern the terms and conditions of the redevelopment of a specific site in a redevelopment project area. The term disposition and development agreement (DDA) is used when the agreement is between the agency and an outside developer, *i.e.,* not an owner-participant. If the agreement is between the agency and an owner-participant, the agreement is called an owner participation agreement (OPA). The agreement is an OPA even if the agreement covers property other than or in addition to property currently owned by the owner-participant. The agency should be careful to comply with all requirements for the disposition of property even when approving an OPA if the OPA provides for the agency to convey property.

© The Regents of the University of California

§5.359 b. Disposition and Development Agreements (DDA)

Although the Community Redevelopment Law (CRL) (Health & S C §§33000-33855) does not require a bidding or other competitive process, developers are usually chosen through a request for proposals (RFP) or request for qualifications (RFQ) process. The agency may tailor this process to its particular needs as there are no "rules" (other than compliance with the owner participation and preference requirements) by which the agency must abide.

The RFP or RFQ should include, at a minimum, the scope of acceptable development on the site (*e.g.,* the agency is seeking proposals for a hotel or a mixed-use development with some affordable housing), the parameters of acceptable business terms (*e.g.,* the developer must be willing to advance the acquisition costs or accept a ground lease of the site), and a requirement that the developer submit evidence of its financial ability and development qualifications. If desired, the RFP or RFQ may attach the form of the "exclusive negotiation agreement" that the developers must execute and return to the agency together with an appropriate good faith deposit.

The RFP or RFQ should be distributed broadly and special care should be taken to distribute it to owner-participants and others who have expressed an interest in participating in the redevelopment of the project area.

The agency has broad discretion in selecting a developer, but that discretion should be exercised in the context of the RFP or RFQ. For example, if the responses are due by a certain date, the agency should not extend that date for one developer unless it extends the date for all developers.

© The Regents of the University of California

§5.360 (1) Exclusive Negotiation Agreement With Selected Developer

After selecting a developer, the agency and the developer usually enter into an exclusive negotiation agreement (ENA). The ENA usually sets a definite period of time in which the agency agrees to negotiate exclusively and in good faith with the developer on the disposition and development of the site.

The ENA also typically requires the deposit of an appropriate "good faith deposit" from the developer to secure the developer's obligation to negotiate in good faith with the agency. This good faith deposit is returned to the developer on the execution of a disposition and development agreement (DDA) or an owner participation agreement (OPA) (see §5.358) (or transformed into the good faith deposit under the DDA or OPA) or on the conclusion of unsuccessful, but good faith negotiations. If the good faith deposit is to be retained by the agency, it will be the agency's burden of proof to show the developer failed to negotiate in good faith.

PRACTICE TIP: Prudence dictates that the good faith deposit language should be drawn as a liquidated damages clause and not as a penalty.

Although the ENA should be formally approved by the agency, no public hearing is required.

© The Regents of the University of California

§5.361 (2) Scope of Development Defined Under Exclusive Negotiation Agreement (ENA)

The exclusive negotiation agreement (ENA) should also contain the proposed scope of the development and the parameters of the business terms of the transaction as derived from the request for proposals (RFP) or request for qualifications (RFQ) and the developer's response. The agency must reserve its discretion under the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) to approve the final scope of the project and it must also reserve its discretion to approve the sale after the required public hearings (Health & S C §§33431, 33433), and to approve any resolutions of necessity that may be required. So long as the agency so reserves its discretion in the ENA, the ENA will not itself be considered a project under CEQA and so approval of the ENA will not require CEQA compliance. 14 Cal Code Regs §15378(b)(4)-(5).

© The Regents of the University of California

§5.362 (3) Content of Disposition and Development Agreement (DDA)

The disposition and development agreement (DDA) should cover all aspects of the agency's disposition of the property, including the sales price, the method and timing of the conveyance, and the requirements regarding the redevelopment of the property. The following factors should be included:

- The sale price should be determined based on the reuse value of the property, *i.e.,* a value determined taking into account the development and use restrictions imposed on the property by the agency. This "reuse" value may often be less than the fair market value of the property. The agency is permitted to sell property for this "reuse" value under certain conditions. Health & S C §33433.
- The DDA must contain sufficient safeguards to ensure that the property conveyed to the developer will actually be redeveloped in the manner contemplated by the DDA. Although the precise nature of the safeguards varies from project to project, some mechanisms are commonly employed, as follows:
- The DDA should include a scope of development that sets in detail the nature of the improvements to be developed on the property.
- The DDA should include a schedule of performance that sets times of performance for every milestone obligation in the agreement.
- The DDA should set as a prerequisite to conveyance a requirement that the developer demonstrate to the agency that it is prepared on conveyance to begin construction of the improvements and capable of completing the construction within the agreed-on time. In order to satisfy this requirement, the developer should be required to submit evidence of a binding loan commitment together with a construction budget and information on the availability of equity to cover any gap between the construction budget and the available financing.
- In addition, the DDA should contain a right of reverter that provides that the fee interest reverts to the agency if the developer fails to complete the improvements described in the scope of development in a timely manner. See Health & S C §33438.

PRACTICE TIP: The right of reverter, together with all significant obligations of the developer, should be included in the grant deed or ground lease conveying the property to the developer. See Health & S C §§33437, 33439.

- The DDA should contain use covenants that ensure consistency with the redevelopment plan.
- The DDA must contain specified anti-discrimination provisions that should be covenants running with the land. Health & S C §§33435-33436. These provisions forbid the developer, its successors, and assigns from discriminating in the rental, sale, lease, use, enjoyment, or tenure of the property against persons on the basis of race, color, religion, sex, marital status, ancestry, or national origin.
- The DDA must state that prevailing wages will be paid to the workers on the private construction project. On the prevailing wage requirement, see §5.363.

PRACTICE TIP: To avoid later disputes, the form of grant deed the agency intends to use should be attached to the DDA. Redevelopment agencies and developers should be aware that the use of techniques historically used by development agencies to assist development projects, such as land write-downs, provision of public improvements, loans, and grants may trigger the requirement to pay prevailing wages on the private construction project which is being assisted.

© The Regents of the University of California

§5.363 (4) Requirement to Pay Prevailing Wages

In the past, assistance to a development project provided by a redevelopment agency did not trigger the requirement that workers on the private construction project be paid prevailing wages. SB 975 (2001) (Stats 2001, ch 938) has changed this. The legislation amends the definition of the terms "public works" and "paid for in whole or in part out of public funds" in Lab C §1720 to include, in addition to traditional public works contracts, projects when a city or development agency provides virtually any form of assistance, including the transfer of an asset of value for less than fair market price and the payment of fees, costs, rents, insurance, bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract that are paid, reduced, charged at less than fair market value, waived, or forgiven. SB 975 also added to Lab C §1720 certain exemptions related to:

- Private residential projects;
- Public improvement work that is required as a condition of regulatory approval;
- Affordable housing; and
- Tax credits for certain industrial property.

SB 972 (2002) (Stats 2002, ch 10.48) added provisions to Lab C §1720 that exempt from prevailing wage requirements certain private residential construction or rehabilitation projects. Private residential projects are exempt from prevailing wage requirements if they meet one or more of the following conditions, unless otherwise required by a public funding program:

- Self-help housing projects requiring at least 500 hours of homeowner construction work;
- Rehabilitation or expansion of temporary or transitional housing for homeless persons operated on a not-for-profit basis when total project costs do not exceed $25,000;
- Household mortgage or down payment assistance for single-family home rehabilitation assistance;
- New construction, expansion, or rehabilitation of facilities operated by nonprofit organizations on a not-for-profit basis to provide emergency or transitional shelter and ancillary assistance to homeless adults and children when the nonprofit organization provides, at no profit, at least 50 percent of the total project costs from non-public sources; or
- Public participation in the form of below-market-rate loans for projects restricting occupancy of at least 40 percent of the units by deed or agreement for at least 20 years to individuals or families earning no more than 80 percent of the area medium income.

For additional discussion on prevailing wages, see §§7.50-7.57, 7.82-7.94.

© The Regents of the University of California

§5.364 (5) California Environmental Quality Act (CEQA) Compliance Necessary

Environmental review should be conducted before approval of the disposition and development agreement (DDA), either a negative declaration or final environmental impact report (EIR), unless a statutory or categorical exemption applies. Keep in mind that the EIR prepared at the time the redevelopment plan was adopted is a program EIR. This allows it to be used for subsequent actions implementing the redevelopment plan so long as the EIR adequately analyzed the development of the property that is the subject of the DDA. 14 Cal Code Regs §15180; *Friends of Mammoth v Town of Mammoth Lakes Redev. Agency* (2000) 82 CA4th 511, 98 CR2d 334. See also California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177).

© The Regents of the University of California

§5.365 (6) Approval of Disposition and Development Agreement (DDA)

The agency may sell or lease property without public bidding provided the agency holds a public hearing on the disposition and development agreement (DDA), notice of which is published once a week for 2 weeks in a newspaper of general circulation in the county. Health & S C §33431.

If the property to be conveyed was acquired, in whole or in part, directly or indirectly, from tax increment, then the DDA must be approved by the "legislative body" (usually the city) by resolution after a public hearing. Health & S C §33433. Before this public hearing, the agency must make available for inspection the DDA and a report consisting of a summary of the DDA that sets the cost to the agency of the DDA, the estimated value of the property (at the highest and best use), and the purchase price or the present value of the lease payments to be paid by the developer. If the agency proposes to sell or lease the property for less than its value, then this summary report must contain an explanation of the reasons for the difference. In addition, the report must contain an explanation of how the sale or lease of the property will assist in the elimination of blight. An alternative process is available for "small housing projects." Health & S C §33433. On blight, see §5.319.

© The Regents of the University of California

§5.366 c. Owner Participation Agreements (OPAs)—Contents and Requirements

Owner participation agreements (OPAs) should clearly state that the agency, by entering into the agreement with the owner-participant, has satisfied its obligations to that owner regarding owner participation rights and preferences. OPAs that provide for the agency to convey property to the owner-participant should contain the same provisions as disposition and development agreements (DDAs) and are subject to the same approval process, including environmental review. See §§5.358-5.365.

Even OPAs that do not provide for the conveyance of property to the owner-participant should contain a scope of development, a schedule of performance, and the specified use covenant and anti-discrimination requirements. See §5.362.

In lieu of the right of reverter contained in DDAs, the agency should include in OPAs the agency's right (but not obligation) to purchase the property from the owner if the owner fails to develop the property in accordance with the terms of the OPA. On right of reverter, see §5.362.

All obligations of the owner-participant for the redevelopment of the property should be described in an agreement containing covenants recorded against the property covered by the OPA. Health & S C §§33437, 33439.

© The Regents of the University of California

§5.367 4. Cooperation Agreements and Their Contents

Cooperation agreements are agreements between a redevelopment agency and another public entity. Public entities are permitted to aid redevelopment by (Health & S C §33220):

- Conveying property (with or without consideration);
- Furnishing public facilities (*e.g.,* parks, playgrounds, sewer facilities) adjacent to or in project areas;
- Dedicating, replanning, or vacating streets; and
- Various other means.

In addition, the agency may accept financial assistance from public entities. Health & S C §33132. On the other hand, the agency may under certain circumstances finance the construction of public facilities. Health & S C §§33445, 33445.1. However, an agency is precluded, except under limited circumstances, from paying, directly or indirectly, with tax increment revenues for the construction or rehabilitation of a city hall or county administrative building. Health & S C §33445(g).

In accepting aid or financial assistance from other public entities, the redevelopment agency enters into a cooperation agreement with the public entity setting the terms and conditions of the assistance. Cooperation agreements can cover such diverse, cooperative projects as the rehabilitation of a library or the construction of a convention center or park. The aid given an agency need not be financial. For example, the agency may request the city to confirm in a cooperation agreement certain property in the project area is entitled to specified development rights.

PRACTICE TIP: If a public entity wishes to provide financial aid to an agency for which it wishes to be reimbursed, the aid should always be in the form of a loan. The provisions of Health & S C §33670 permit the agency to receive tax increment only to the extent it has debt. Accordingly, an outright gift of money would not be considered an agency debt for which the agency can receive tax increment.

© The Regents of the University of California

5. Required Miscellaneous Provisions

§5.368 a. Five-Year Implementation Plans Required

A redevelopment agency must adopt an implementation plan for all redevelopment plans every 5 years. For redevelopment plans adopted before January 1, 1994, the first implementation plan must have been adopted by December 31, 1994. However, the elements of the implementation plan that deal with Health & S C §§33334.2, 33334.4, 33334.6, and 33413 (low- and moderate-income housing) may be adopted every 5 years either in conjunction with the jurisdiction's housing element cycle or the implementation plan cycle. Health & S C §33490(a). For redevelopment plans adopted on or after January 1, 1994, the implementation plan adopted under Health & S C §33352(c) constitutes the initial implementation plan. The agency must adopt an implementation plan every 5 years commencing with the fifth year after the plan was adopted. Health & S C §33490(b).

© The Regents of the University of California

§5.369 b. Infrastructure Improvements Findings Necessary

Before approving the payment of agency funds for the installation of a public improvement or public facility, a redevelopment agency must make findings that the public improvements are of benefit to the project area by helping to eliminate blight within the project area or by providing low or moderate income housing, that no other reasonable means of financing the public improvements are available to the community, and that the payment is consistent with the implementation plan. Health & S C §33445. The redevelopment agency may also pay for public improvements outside the project area, under much more limited circumstances. Health & S C §33445.1. On blight, see §5.319.

© The Regents of the University of California

§5.370 c. Sales Tax and Redevelopment Limitation

A redevelopment agency may not provide any form of direct assistance to certain projects that generate sales or use taxes or when the development would be used for gambling or gaming of any kind, including bingo. Health & S C §33426.5. One court has held that a municipal services agreement between a redevelopment agency and an Indian tribe to provide municipal services to a gaming facility that the tribe planned to build in the redevelopment area did not violate this section. *Hesperia Citizens for Responsible Dev. v City of Hesperia* (2007) 151 CA4th 653, 60 CR3d 124. These prohibited projects include automobile dealerships that would be located on land not previously developed for urban uses and other developments that would generate sales or use taxes and be located on five or more acres not previously developed for urban use. However, redevelopment agency assistance for office, hotel, manufacturing, and industrial uses continues to be permitted. Health & S C §33426.5(b)(1).

© The Regents of the University of California

§5.371 d. Prohibition on Relocating Vehicle Dealerships and Big Box Retailers

In addition, a redevelopment agency may not provide any form of financial assistance to a vehicle dealership or big box retailer that is relocating from one community to another in the same market area. A vehicle dealer is a retailer who is also a dealer within the meaning of Veh C §285. A big box retailer includes any retailer whose physical space exceeds the statutory minimum physical size of 75,000 square feet of gross buildable area and generated sales tax, notwithstanding the absence of a large parking area, prominent signage, and cash register sales (as opposed to telephone or catalog sales, similar to a warehousing or distribution facility). *City of Carson v City of La Mirada* (2004) 125 CA4th 532, 541, 22 CR3d 815. See also Govt C §53084 (imposing parallel requirements on cities).

© The Regents of the University of California

§5.372 6. Commercial Rehabilitation Loans

A redevelopment agency has express authority to establish a program for the lending of funds to owners and tenants of commercial buildings for the rehabilitation of such buildings or structures. Health & S C §33444.5. A redevelopment agency may assist with the financing of facilities or capital equipment, including but not limited to pollution control devices, provided that such assistance is part of an agreement providing for the development or rehabilitation of property used for industrial or manufacturing purposes. Health & S C §33444.6(a). To provide such assistance, the agency must find, after a public hearing, such assistance is necessary for the economic feasibility of the development and that such assistance cannot be obtained on economically beneficial terms in the private market. Health & S C §33444.6(b).

© The Regents of the University of California

§5.373 7. Other Handbook References on Implementation of Plan

- On property acquisition, see §§8.1-8.79.
- On relocation assistance, see §§8.14-8.25.
- On obligation of owners of property for hazardous material, see §§11.236-11.239.

© The Regents of the University of California

§5.374 F. Project Area Committees (PACs)

A project area committee (PAC) must be formed early in the redevelopment process if a "substantial" number of low- and moderate-income persons reside in the project area and the redevelopment plan provides the agency authority to acquire any residential property through the use of eminent domain, or if the plan contemplates one or more public projects that will displace a substantial number of low- or moderate-income persons. Health & S C §33385. See also *Blue v City of Los Angeles* (2006) 137 CA4th 1131, 1145, 41 CR3d 10 (holding that the requirements of Health & S C §33385 only apply to property on which persons lawfully reside, and that a PAC is not required to be formed by a city amending its redevelopment plan when the amendment authorized acquisition of non-residential land on which persons may be trespassing or squatting).

The statute does not define the term "substantial number." Similarly, there is no case law that addresses this issue. Accordingly, determination of whether or not a PAC will be required in a given circumstance must be the result of common sense and prudence. Because the primary purpose of a PAC is to provide community input, especially in the areas of displacement and relocation assistance (see §§8.14-8.25), it is likely that courts will construe the triggering requirement liberally, finding a need for a PAC if it is possible that more than a few persons will likely be displaced as a result of the redevelopment plan's powers or program.

A PAC must be formed and approved by the legislative body as representative within 100 days after the selection of the project area boundaries. Health & S C §33385(d).

The boundaries of the project area are selected as part of the adoption of the preliminary plan (see Health & S C §33322), which is one of the first steps after designation of a survey area.

© The Regents of the University of California

1. Project Area Committee (PAC) Formation Procedures

§5.375 a. Content and Notice

The legislative body must adopt procedures that will govern the formation of a project area committee (PAC). These procedures must be adopted by resolution. Health & S C §33385(b).

The procedures adopted by the legislative body should, in addition to the notice provisions outlined below, specify the number of PAC members, the categories to be filled, and the method for selecting PAC members. The procedures must also provide that any challenge to an election or an electoral process must be filed before the legislative body within 15 days after the election. The challenge must be resolved by the legislative body within 30 days after the election. Health & S C §33385(d)(2).

The procedures to be adopted by the legislative body can require additional steps to be taken in the formation or selection of the PAC. This can include such items as providing flyer distribution, press releases, or other actions. Because the notice provisions refer to "all meetings, hearings, or plebiscites" conducted by the agency "or legislative body" "relative to the formation" and selection of the PAC, it is possible to argue that the notice provisions that must be included in the procedures to be adopted should be applied to the adoption of the procedures themselves.

PRACTICE TIP: It is prudent to include the meeting at which these procedures are to be adopted in the notice to be published and mailed. See Health & S C §33385(b)(4)(A).

© The Regents of the University of California

b. Project Area Committee (PAC) Required Notice and Hearings

§5.376 (1) Required Meetings and Hearings

The redevelopment agency must conduct at least one public meeting to explain the establishment of, functions of, and opportunity to serve on a project area committee (PAC). Copies of the adopted PAC formation procedures, the preliminary plan, or the redevelopment plan or part of it, and any other materials determined useful by the agency must be distributed at the meeting(s). Health & S C §33385(b)(2). Although the statute refers to distribution of "the redevelopment plan" at this meeting, if a new plan (as opposed to an amendment) is being considered, there will not be a pre-existing plan. The preliminary plan adopted by the planning commission under Health & S C §33322 or a clearly marked sample from some other appropriate redevelopment plan may be substituted.

© The Regents of the University of California

§5.377 (2) Timing of Meetings and Hearings

Notice of all "meetings, hearings, or plebiscites" conducted by the agency or legislative body "relative to the formation and selection" of the project area committee (PAC) must be provided in the same manner as specified in Govt C §65090(a). Health & S C §33385(b)(3). The notice must provide at least 10 days' prior notice. If there will be more than one meeting (for example, a meeting to explain the PAC and another meeting to select the PAC), a single publication of all meetings will comply (so long as publication is at least 10 days in advance of the first meeting). This notice requirement applies to "all" meetings and hearings, so plan carefully to avoid extra publication expenses and time constraints for "extra" or supplemental meetings.

© The Regents of the University of California

§5.378 (3) Who Must Be Notified of Meetings and Hearings

The same type of notice (of all meetings, hearings, or plebiscites relative to the formation and selection of a project area committee (PAC)) must also be mailed to all residents, community organizations, and businesses in the project area. Health & S C §33385(b)(4). This notice must be provided by first-class mail, but it may be addressed to "Occupant." This requirement "only applies" when the mailing addresses to individuals and business are obtainable at a "reasonable cost." "Reasonable cost" is not defined, but it will likely be considered within the context of the size of the project area, the estimated population, and the amount of the tax increment estimated to be generated. The agency may charge a fee to purchasers and lessees (as well as owner-participants) to recoup costs generated by this section. Health & S C §33385(i).

© The Regents of the University of California

§5.379 (4) Failure to Comply With Required Procedure

If the redevelopment agency has acted in good faith to comply with the written notice requirements, the failure to reach every resident or business does not "in and of itself" invalidate the project area committee (PAC) formation or any actions of the PAC.

© The Regents of the University of California

§5.380 c. Membership of Project Area Committees (PACs)

When applicable, a project area committee (PAC) must include:

- Residential owner-occupants;
- Residential tenants;
- Business owners; and
- Representatives of existing organizations in the project area.

No member of the PAC may be appointed by the legislative body or agency (nor any member thereof). Thus, apparently all PAC members must be elected. Health & S C §33385(c)-(d).

© The Regents of the University of California

§5.381 d. Method for Selecting Project Area Committee (PAC) Members

Project area committee (PAC) members must be "elected" under procedures established by the legislative body. Further limits on the discretion of the legislative body in this area are established concerning, for example, "crossover voting" when one category (*e.g.,* a business owner) is prohibited from voting in another category (*e.g.,* residential tenant). The legislative body may authorize crossover voting for community organizations, however. Health & S C §33385(d).

PRACTICE TIP: Because this is potentially an area ripe for challenge, a good record should be created that clearly demonstrates that reasonable discretion was used in the PAC selection process.

© The Regents of the University of California

§5.382 e. Operating Without a Project Area Committee (PAC)

If a project area committee (PAC) is not required, Health & S C §33385 still directs the agency to consult with and obtain the advice of residents and community organizations in an informal manner. Health & S C §33385(f). Further, the formation of a PAC does not preclude the formation of any other committee for a project area. Health & S C §33385(g). Accordingly, if an agency does not need to re-create a lapsed PAC for purposes of a plan amendment, the agency should nevertheless establish a complete record of consultation with the community in alternative ways, either by the creation of a committee that is not a PAC or by a series of well noticed public meetings and hearings, or both.

PRACTICE TIP: The legislative body should adopt a finding with supporting evidence that formation of a PAC is not required because the situations described in Health & S C §33385 are not met.

© The Regents of the University of California

2. Project Area Committee (PAC) Duration

§5.383 a. Consultation for 3 Years

A project area committee (PAC) is to provide consultation and advice to an agency "throughout the period of preparation of the redevelopment plan" and for 3 years after adoption of the plan. After that time, continuation of a PAC is subject to discretionary extensions by the legislative body on a yearly basis. Health & S C §33386.

© The Regents of the University of California

§5.384 b. When a Plan Is Amended

If the proposed amendment will enlarge the project area in which a substantial number of low- and moderate-income persons reside and will grant authority to the agency to exercise eminent domain on residential property in the added area, a project area committee (PAC) must be formed or expanded in compliance with Health & S C §33385. Health & S C §§33385.3(a)(2), 33385.5.

If a redevelopment plan is proposed to be amended to grant authority to use eminent domain over property on which persons reside, a PAC must be created, if one does not already exist. Health & S C §33385.3(a)(1).

PRACTICE TIP: With all amendments, the most prudent and safest approach to avoid litigation would be to re-form the PAC. However, other factors, such as cost and time, may militate against such re-formation for all amendments.

© The Regents of the University of California

3. Project Area Committee (PAC) Responsibilities

§5.385 a. Residential Housing and Other Matters Affecting Project Area Residents

On the direction and approval of the legislative body, the agency is to consult with the project area committee (PAC) and obtain the PAC's advice on "those policy matters that deal with the planning and provision of residential facilities or replacement housing for those to be displaced by project activities." The PAC also consults with the agency on "other policy matters which affect the residents of the project area." Health & S C §33386. Thus, although the PAC provides advice to the agency concerning housing matters, the topics on which the redevelopment agency and the PAC are to consult can extend broadly beyond that to other matters affecting residents.

© The Regents of the University of California

§5.386 b. Advice, Consultation, Report, and Recommendation

The law is clear that a project area committee (PAC) provides "advice" and "consultation" to the agency on "policy matters" dealing with the preparation of a redevelopment plan. The law also permits (but does not require) the PAC to provide a report and recommendation to the legislative body on the adoption or amendment of a redevelopment plan. Health & S C §§33347.5 (adoption), 33385.5 (amendment).

© The Regents of the University of California

§5.387 c. Conflict of Interest Laws Apply

Notwithstanding this clearly advisory intent and focusing on a provision requiring a super-majority requirement for adopting a redevelopment plan amendment over the objections of a project area committee (PAC), the Fair Political Practices Commission (FPPC) has determined that a PAC is a body with "decision-making authority" for purposes of the disclosure requirements and conflict of interest provisions under the Political Reform Act of 1974 (Govt C §§81000-91014). See *In re Rotman,* 10 FPPC Ops 1 (1987).

© The Regents of the University of California

§5.388 d. Open Meeting Law Compliance Required

The project area committee (PAC) must comply with the Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963). Health & S C §33385(h). On the Brown Act and open meeting laws, see §§2.5, 2.35-2.118.

© The Regents of the University of California

§5.389 e. Staff Assistance

Services to assist the project area committee (PAC) in its consultation may be provided either by funds or "equivalent resources." Health & S C §33388. Most legislative bodies provide these services through "equivalent resources," meaning the use of agency office space, equipment, supplies, and staffing for PAC-related functions.

The level and form of services is left to the reasonable discretion of the legislative body. Contemplated services include:

- Resources for office space;
- Equipment and supplies; and
- Adequate staffing for consultative purposes.

Funds and services may also be allocated for legal counsel; however, no funds may be allocated for litigation, except to enforce or defend the rights of the PAC. Health & S C §33388.

PRACTICE TIP: The legislative body should consider carefully whether to provide the PAC with legal counsel. In *North Hollywood Project Area Comm. v City of Los Angeles* (1998) 61 CA4th 719, 724, 71 CR2d 675, the court held that there was no inherent conflict of interest when a city council selects an attorney from the city attorney's office to provide legal services to the PAC.

PAC members cannot receive compensation for their activities. Health & S C §33385(c).

© The Regents of the University of California

§5.390 f. Project Area Committee (PAC) Reports

A project area committee (PAC) may, but is not required to, prepare a report and recommendation to the legislative body on the adoption of a redevelopment plan. Health & S C §33347.5. If the PAC makes a recommendation to oppose the adoption of the plan, the legislative body must adopt the plan by a two-thirds majority of the entire membership eligible to vote. Health & S C §33366.

© The Regents of the University of California

§5.391 g. Amendments

If a project area committee (PAC) exists at the time of an amendment to a redevelopment plan, the redevelopment agency must forward a copy of the proposed amendment to the PAC at least 30 days before the public hearing of the legislative body. Again, the PAC may, but is not required to, prepare a report and recommendation to the legislative body. However, if a PAC recommends against the adoption of the proposed amendment, the legislative body must adopt the amendment by a two-thirds majority of the entire membership eligible to vote on the amendment. Health & S C §33385.5.

© The Regents of the University of California

G. Financing Redevelopment Activities

1. Tax increment Financing

§5.392 a. Nature of Tax Increment Revenues

The major source of funding for redevelopment agencies comes from their right to receive the portion of property tax revenues collected in a redevelopment project area resulting from the increases in the assessed values of property occurring after the adoption of the redevelopment plan. Health & S C §33670. These funds are referred to as "tax increments."

© The Regents of the University of California

§5.393 b. Theory of Tax increment Financing

The theory of tax increment financing is that the increases in assessed values and thus the increase in property tax revenues, after a redevelopment plan is adopted, is largely attributable to the effects of redevelopment in eliminating blight and stimulating private reinvestment in the area. The tax increment revenues are therefore allocated to the redevelopment agency to pay for the redevelopment activities that generated the increase in assessed value. On blight, see §5.319.

© The Regents of the University of California

§5.394 c. Use of Tax Increment Funds

An agency may either use tax increment funds directly as they are collected, or an agency may leverage these monies by issuing tax allocation bonds (bonds backed by a pledge of future tax increment). Cal Const art XVI, §16; Health & S C §§33600-33689. Tax increments are allocated and paid to a redevelopment agency only to pay the "indebtedness" of the agency. The California Supreme Court has broadly defined the term "indebtedness." *Marek v Napa Community Redev. Agency* (1988) 46 C3d 1070, 251 CR 778. A "statement of indebtedness and a reconciliation statement" must be submitted to the county auditor as a prerequisite to the agency's receipt of such increment. Health & S C §33675.

© The Regents of the University of California

§5.395 2. Financing Under Mello-Roos Community Facilities Act of 1982

An agency may also provide funding for public improvements through Mello-Roos Community Facilities Act of 1982 financing. Govt C §§53311-53368.3. On Mello-Roos financing, see §§5.76-5.87.

© The Regents of the University of California

§5.396 3. Other Potential Financing Sources

Redevelopment agencies may also accept financial or other assistance from any public or private source. They may borrow or accept financial assistance from the state, the federal government, or any other public agency (including the city in which it exists) for a redevelopment project or borrow money from any private lending institution. Health & S C §§33600-33601. If an agency borrows from the city in which it exists, a cooperation agreement should be executed to ensure the agency's legal authority to repay such loan. On cooperation agreements, see §5.367. Any bonds issued by an agency for its corporate purposes must be approved by the legislative body. Health & S C §33640.

© The Regents of the University of California

§5.397 4. Appropriations May Provide Financing

The legislative body may appropriate to a redevelopment agency amounts necessary for the agency's administrative and overhead expenses (Health & S C §§33610-33615), and may establish a redevelopment revolving fund to be kept in its treasury. The money in that fund may be paid to the agency and expended by it for property acquisition and the clearance, relocation of occupants, and preparation of a project area for redevelopment. Health & S C §§33620-33626. The legislative body may provide conditions and restrictions on the agency in connection with the use of funds appropriated to the agency for administrative expenses. Health & S C §33612.

© The Regents of the University of California

§5.398 5. Taxing Authority May Provide Financing

Agencies are authorized to impose transient occupancy taxes if the city grants a credit for similar taxes it imposes. Rev & T C §7280.5. An agency can pledge such taxes to secure bonded indebtedness. Health & S C §33641(d). An agency may only impose, extend, or increase a tax in compliance with the provisions of Cal Const arts XIIIC-XIIID.

© The Regents of the University of California

§5.399 6. Financial Reports Required

Every redevelopment agency must prepare and present a report to its legislative body within 6 months after the end of the agency's fiscal year. The report must contain (Health & S C §§33080, 33080.1, 33080.5)

- an individual financial audit report for the previous fiscal year;
- the amount of tax increment spent on behalf of certain taxing entities, including an itemization of expenditures per capital improvement; and
- an opinion of the agency's compliance with laws, regulations, and administrative requirements governing activities of the agency.

© The Regents of the University of California

H. Housing Requirements

1. Replacement Housing

§5.400 a. Applicability

The replacement housing provisions discussed in §§5.401-5.403 apply only to redevelopment projects with respect to dwelling units destroyed or removed from the low-income and moderate-income housing market on or after January 1, 1996. Health & S C §33413(d)(1).

© The Regents of the University of California

§5.401 (1) Replacement Housing

An agency must rehabilitate, develop, construct, or cause to be rehabilitated, developed, or constructed, certain kinds of housing. The agency's obligation arises whenever dwelling units housing persons and families of low- or moderate-income are destroyed or removed from the low- and moderate-income housing market as part of a redevelopment project. The project must be subject to a written agreement with the agency or financial assistance must have been provided by the agency. Health & S C §33413(a). On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.402 (2) Type, Timing, and Amount of Replacement Housing

The agency must provide an equal number of replacement dwelling units to those destroyed or removed. The replacement must occur within 4 years of the destruction or removal. The units must be made available for rental or sale to persons and families of low or moderate income. The replacement units must have an equal or greater number of bedrooms as those destroyed or removed units and must be at affordable housing costs in the territorial jurisdiction of the agency. Health & S C §33413(a). On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.403 (3) Post-1989 and Post-2002 Housing Requirements

When dwelling units are destroyed or removed after September 1, 1989, 75 percent of the replacement dwelling units must replace dwelling units available at affordable housing cost in the same or lower income level of very-low-income households, lower-income households, and persons and families of low and moderate income, as the persons displaced from those destroyed or removed units. When dwelling units are destroyed or removed on or after January 1, 2002, 100 percent of the replacement dwelling units must be available at affordable housing cost to persons in the same or a lower income category (very low, low, or moderate) as the persons displaced from those destroyed or removed units. Health & S C §33413(a). On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.404 (4) Income and Affordable Housing Cost Definitions

The following are income and affordable housing cost definitions that will aid in interpretation of replacement requirements for redevelopment agencies:

- "Moderate-income households" means persons and families who are not "lower-income households" and whose gross incomes do not exceed 120 percent of the area median income adjusted for family size in accordance with adjustment factors adopted by the United States Department of Housing and Urban Development in establishing income limits for lower income families. 25 Cal Code Regs §6930; Health & S C §§33411.2(b), 50093.
- "Lower-income households" means persons and families whose gross incomes do not exceed the qualifying limits for lower income families as established and amended from time to time under Section 8 of the United States Housing Act of 1937 (42 USC §§1437-1437bbb-9). 25 Cal Code Regs §6928.
- "Very-low-income households" means persons and families whose gross incomes do not exceed the qualifying limits for very low income families established and amended from time to time under Section 8 of the United States Housing Act of 1937. The qualifying limits are set in 25 Cal Code Regs §6932. These limits are equivalent to 50 percent of the area median income, adjusted for family size by the United States Department of Housing and Urban Development. 25 Cal Code Regs §6926; Health & S C §§33411.2(d), 50105.
- "Extremely low income households" means persons and families whose incomes do not exceed the qualifying limits for extremely-low-income families as established and amended from time to time by the Secretary of Housing and Urban Development and defined in 24 CFR §5.603(b).
- For definition of "affordable housing costs," review Health & S C §§33411.2(a) and 50052.5(b) as well as 25 Cal Code Regs §6924, which state that "affordable housing costs" must vary in accordance with the income level of the household.

© The Regents of the University of California

§5.405 (5) Priority to Displaced Persons and Families of Low and Moderate Income

Whenever all or any portion of a redevelopment project is developed with low- or moderate-income housing units, the agency must require by contract or other appropriate means such housing to be made available for rent or purchase to the persons and families of low or moderate income displaced by the redevelopment project. Such persons and families must be given priority in renting or buying such housing. Health & S C §33411.3. On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.406 (6) Insufficient Suitable Housing

If insufficient suitable housing units are available in the community for low- and moderate-income persons and families to be displaced from a redevelopment project area, the legislative body must ensure that sufficient land is made available for suitable housing for rental or purchase by low- and moderate-income persons and families and the agency may, to the extent of that deficiency, direct or cause the development, rehabilitation, or construction of housing units in the community, both inside and outside of redevelopment project areas. Health & S C §33411.4. On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.407 (7) Time Limit for Making Permanent Housing Available

Permanent housing facilities must be made available within 3 years from the time occupants are displaced. Pending the development of such facilities, there must be available to such displaced occupants adequate temporary housing facilities at rents comparable to those in the community at the time of their displacement. Health & S C §33412. On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.408 b. All Plans and Amendments

A replacement housing plan must be prepared not less than 30 days before the execution of an agreement to acquire real property or of an owner participation agreement (OPA) or disposition and development agreement (DDA), if such agreement will lead to the destruction or removal of low- or moderate-income housing units. This plan must be made available to the project area committee, other public agencies and the general public for review and comment for a reasonable time before adoption of the plan. Health & S C §33413.5. At least one court has enforced this statute by granting an injunction to former tenants of low-income hotels against a redevelopment agency that failed to prepare the plan within the required time period. *Price v City of Stockton* (ED Cal 2005) 394 F Supp 2d 1256. On OPAs and DDAs, see §§5.358-5.371; on affordable housing cost definition and income definitions, see §5.404.

© The Regents of the University of California

2. New and Rehabilitated Housing

§5.409 a. Applicability

The provisions discussed in §§5.410-5.415 apply only to redevelopment projects for which a final redevelopment plan was adopted on or after January 1, 1976, and to areas that are added to a project area by amendment to a final redevelopment plan adopted on or after January 1, 1976. In addition, they apply to any redevelopment project adopted before January 1, 1976 that is amended under Health & S C §33333.10, and agencies may elect, by resolution, to make all or part of the following requirements applicable to a plan adopted before January 1, 1976. Health & S C §33413(d)(1). On affordable housing cost definition and income definitions, see §5.404.

© The Regents of the University of California

§5.410 b. Housing Developed by an Agency

At least 30 percent of all new or substantially rehabilitated dwelling units developed by an agency in a project area must be available at affordable housing cost to persons and families of low or moderate income. Not less than 50 percent of these dwelling units must be available at affordable housing cost to and occupied by very-low-income households. Health & S C §33413(b)(1). On affordable housing cost definition and income definitions, see §5.404.

© The Regents of the University of California

§5.411 c. Housing Developed by Entity or Person Other Than the Agency

At least 15 percent of all new or substantially rehabilitated dwelling units developed in the project area by public or private entities or persons other than the agency must be available at affordable housing cost to persons and families of low- or moderate-income. Not less than 40 percent of these dwelling units must be available at affordable housing cost to very-low-income households. This requirement may be satisfied by the provision of affordable units outside the redevelopment area on the basis of two affordable units outside the project area for each unit required to be affordable inside the project area. Health & S C §33413(b)(2). On affordable housing cost definition and income definitions, see §5.404.

© The Regents of the University of California

§5.412 d. Definition of "Substantial Rehabilitation"

Although the term "developed" is not defined in Health & S C §33413(b)(1)- (2), the term "substantial rehabilitation" is defined as rehabilitation, the value of which is 25 percent of the after-rehabilitation value of the dwelling unit, including land value. Health & S C §33413(b)(2)(A)(iv). But the requirements, described in §§5.410-5.411, do not apply if the rehabilitation is undertaken without agency assistance. Health & S C §33412(b)(2)(A)(iii).

PRACTICE TIP: "Developed" seems to mean something other than merely "constructed" because the terms are used in the disjunctive in the surrounding sections. Some city attorneys have suggested that "developed" is used in the land use sense to mean constructed under a discretionary approval. See Govt C §§65589.5, 65927-65928, 65931.

© The Regents of the University of California

§5.413 e. Purchase of Affordability Covenants

A redevelopment agency may meet the requirements described in §§5.410-5.411 by acquiring long-term affordability covenants on certain multi-family housing units, by purchase or other acquisition, or by regulation. Health & S C §33413(b)(2)(B). The covenants must be maintained for not less than 55 years for rental units and 45 years for owner-occupied units. Health & S C §33413(b)(2)(C). However, not more than 50 percent of the units made available to meet the requirements described in §§5.410-5.411 may be assisted through the purchase or acquisition of affordability covenants, and not less than 50 percent of the units made available through the purchase or acquisition of covenants must be available to very-low-income households. Health & S C §33413(b)(2)(C).

© The Regents of the University of California

§5.414 f. Relationship to Replacement Requirements

The new and rehabilitated housing requirements described in §§5.409-5.410 apply independently of the replacement housing requirements, described in §5.400, and in the aggregate to housing made available as described in §§5.409-5.410, respectively, and not to each individual case of rehabilitation, development, or construction of dwelling units. A redevelopment agency may aggregate all new or substantially rehabilitated dwelling units in one or more redevelopment project areas if the agency finds, based on substantial evidence in the record, after a public hearing, that this will not cause or exacerbate racial, ethnic, or economic segregation. Health & S C §33413(b)(2)(A)(v).

© The Regents of the University of California

§5.415 g. Affordable Housing Plan

An agency must adopt a plan showing how the requirements described in §§5.409-5.410 will be met every 10 years. The compliance plan must be submitted as part of an overall implementation plan required by Health & S C §33490. Health & S C §33413(b)(4). The compliance plan must be consistent with, and may be included in, the community's housing element. The plan must be reviewed and, if necessary, amended at least every 5 years in conjunction with either the housing element cycle or the plan implementation cycle. If the requirements of Health & S C §33413 are not met by the end of each 10-year period, the agency must meet these goals on an annual basis until the requirements for the 10-year period are met. If the agency has exceeded the requirements within the 10-year period, the agency may count the units that exceed the requirement in order to meet the requirements during the next 10-year period. The plan must contain the contents required by Health & S C §33490(a)(2)-(4). Health & S C §33413(b)(4).

© The Regents of the University of California

§5.416 h. Applicability to Owner-Occupied Housing

A redevelopment agency may permit a market-price sale of an affordable owner-occupied dwelling unit that was counted as an affordable dwelling unit in satisfaction of the requirements, described in §§5.410-5.411, under an adopted program that protects the agency's investment of moneys from the low- and moderate-income housing fund, including, but not limited to, an equity sharing program by which the redevelopment agency will receive some portion of the resale price in excess of the affordable housing price. In that event, the agency must use its share of the excess proceeds to assist an equal number of units at the same income level as the units sold. Health & S C §33413(c)(2). On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.417 3. Required Set-Aside of Funds for Housing

Since fiscal year 1985-1986, the provisions described in §§5.418-5.427 have applied to all redevelopment project areas and portions of project areas. Health & S C §§33334.2(a), (i), 33334.6(b). Except as otherwise permitted as described in §§5.423-5.424, not less than 20 percent of the tax increment allocated to the agency must be deposited into the low- and moderate-income housing fund and used for low- and moderate-income housing. Nevertheless, the 20-percent-or-more set-aside may be avoided if by resolution the agency makes one of the three findings described in §§5.418-5.420. Health & S C §33334.6(c). Findings described in §§5.418-5.420 must be consistent with the annual planning commission report to the city council under Govt C §65400 (status on meeting regional needs), and the housing element must support these findings. Health & S C §33334.2(a)(1)-(2).

On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

a. Findings That Avoid Set-Aside Requirement

§5.418 (1) Necessary Finding: No Need

One of the findings to avoid the set-aside of funds described in §5.417 is that of no housing need. This finding is that no need exists in the community to improve, increase, or preserve the supply of low- and moderate-income housing in a manner that would benefit the project area and this finding is consistent with the housing element of the community's general plan. Health & S C §§33334.2(a)(1)(A), 33334.6(c).

On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.419 (2) Necessary Finding: Less Than 20-Percent Need

One of the findings to avoid the set-aside of funds described in §5.417 is that there is less than a 20-percent need. The finding is that some stated percentage less than 20 percent of the tax increment that is allocated to the agency is sufficient to meet the housing needs of the community and this finding is consistent with the housing element of the community's general plan. Health & S C §§33334.6(c), 33334.2(a)(1)(B).

© The Regents of the University of California

§5.420 (3) Necessary Finding: Substantial Progress

One of the findings to avoid the set-aside of funds described in §5.417 is that of substantial progress. The finding is that the community is making a substantial effort to meet its existing and projected housing needs, including its share of the regional housing needs, for persons and families of low- and moderate-income, particularly very-low-income households, as identified in the housing element of the community's general plan. The agency must find that this effort, consisting of direct financial contributions of local funds used to increase and improve the supply of housing affordable to persons and families of low- or moderate-income and very-low-income households, is equivalent in impact to the funds otherwise required to be set aside as described in §5.417. The legislative body must consider the need that can be reasonably foreseen because of displacement of persons and families of low- or moderate-income or very-low-income households from in, or adjacent to, the project area, because of increased employment opportunities or because of any other direct or indirect result of implementation of the redevelopment plan. This finding may not be made until the community has provided or ensured the availability of replacement dwelling units and until it has complied with Health & S C §§33410-33418. This finding can only be made until June 30, 1993, unless such expiration impairs contractual obligations to bondholders or private entities, incurred before May 1, 1991. Health & S C §§33334.2(a)(1)(C), 33334.6(c).

© The Regents of the University of California

§5.421 b. After Finding: Transfer of 20-Percent Set-Aside Obligation Possible

If the agency makes any of the findings described in §§5.418-5.420, and the agency has more than one project area, it may allocate less than 20 percent to the housing set-aside in one area if the difference is allocated in another area or areas. Health & S C §§33334.3(i), 33334.6(c).

© The Regents of the University of California

§5.422 c. Written Findings Necessary

Within 10 days after making the findings described in §§5.418-5.420, the agency must send the Department of Housing and Community Development a copy of these findings, including the factual information supporting the findings. Health & S C §§33334.2(b), 33334.6(c).

© The Regents of the University of California

§5.423 d. After Finding: Exception for Existing Obligations

If the agency makes any of the above findings as described in §§5.418-5.420 (see Health & S C §33334.6(c)) and subject to the requirements described in §5.424, the agency has another option. The agency may deposit less than 20 percent of its tax increments into the low- and moderate-income housing fund if it finds the difference between the amount deposited and 20 percent of the tax increment allocated to the agency is necessary to make payments under "existing obligations" of amounts due or required to be committed, set aside, or reserved by the agency during that fiscal year and that are used by the agency for that purpose. Health & S C §33334.6(d).

On income and affordable housing cost definitions, see §5.409; on existing obligations definition, see §5.425.

© The Regents of the University of California

§5.424 e. Required Statement of Existing Obligations or Programs

Any agency that deposits less than 20 percent of tax increment into the low- and moderate-income housing fund under the allowable transfer described in §5.421 or under the existing obligation exception described in §5.423, must have adopted before September 1, 1986, by resolution, after a noticed public hearing, a statement of existing obligations, or a statement of existing programs, or both. Health & S C §33334.6(f).

On income and affordable housing cost definitions, see §5.409; on existing obligations definition, see §5.425.

© The Regents of the University of California

§5.425 f. Existing Obligations Defined

Existing obligations means the principal of and interest on loans, monies advanced to, or indebtedness (whether funded, refunded, assumed, or otherwise) incurred by the agency to finance or refinance, in whole or in part, any redevelopment project existing on, and created before January 1, 1986, and contained on the statement of existing obligations adopted as described under §5.424. Obligations incurred on or after January 1, 1986, are considered existing obligations for purposes of this section if the net proceeds are used to refinance existing obligations contained on the statement. Health & S C §33334.6(d).

© The Regents of the University of California

§5.426 g. Must Plan to Eliminate Deficit Under Existing Obligations Exception

If, under the existing obligations exception as described in §5.423, the agency deposits less than 20 percent of the tax increment allocated to the agency in the low- and moderate-income housing fund, the amount equal to the difference between 20 percent of the tax increment allocated to the agency for each affected project and the amount deposited that year constitutes a deficit of the project. The agency must adopt a plan to eliminate the deficit in subsequent years. Health & S C §33334.6(g).

On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.427 h. Amendment of Ordinance to Comply With Set-Aside Requirements

If the limitation on the number of tax increment dollars that may be allocated to the agency or the time limit on the establishing of loans, advances, and indebtedness to finance a redevelopment project, established under Health & S C §33333.4(a), conflicts with the set-aside requirements of Health & S C §33334.6 (described in §5.417), the legislative body must amend the ordinance adopted under Health & S C §33333.4(a) so as to enable the agency to eliminate the deficit and, thereby, permit compliance with the set-aside required by Health & S C §33334.6(g) (as described in §5.426) and to allow full expenditure of monies in the agency's low- and moderate-income housing fund. Health & S C §33333.4(c).

© The Regents of the University of California

4. Use of Low- and Moderate-Income Housing Fund Monies

§5.428 a. Permitted Uses

The monies set aside for affordable housing can be used in myriad ways. Health & S C §§33334.2-33334.3.

© The Regents of the University of California

§5.429 b. Planning and Administrative Expenses

The planning and general administrative costs paid with these monies are those costs incurred by the agency that are directly related to activities associated with the development, improvement, and preservation of housing and are limited to costs of salaries, wages, and related costs of the agency's staff or costs actually incurred for services provided through interagency agreements and agreements with contractors. Legal, architectural, and engineering costs are considered project costs and not administrative costs for expenditure purposes. Health & S C §33334.3(e).

© The Regents of the University of California

§5.430 c. Location Where Funds Used

These funds may be used inside or outside a project area, but in the community. However, if used outside a project area, the agency and legislative body (city council) must find that such use is of benefit to the project area. Replacement housing, under Health & S C §33413, is legislatively declared always to be of benefit. Health & S C §33334.2(g).

On replacement housing, see §§5.400-5.408.

© The Regents of the University of California

§5.431 d. Restrictions and Covenants on Use of Land

All new or substantially rehabilitated housing units developed or otherwise assisted with monies from the low- and moderate-housing fund must remain affordable to persons and families of low- and moderate-income for the longest feasible time, but at least 55 years for rental units, at least 45 years for owner-occupied units, and at least 15 years for mutual self-help housing units that are occupied by and affordable to low-income or very-low-income households. These time restrictions may be modified under certain conditions. Health & S C §33334.3(f)(1). All the above restrictions must be duly recorded covenants and restrictions running with the land. However, such restrictions may be subordinated for certain financing if specific findings are made. Health & S C §33334.14.

PRACTICE TIP: The duration-of-use restrictions seem to apply only if housing monies are used for substantial rehabilitation or new construction. There does not seem to be any statutory limit for affordability if housing set-aside monies are used, for example, for subsidies for less than substantial rehabilitation. Extensive use of this window would, however, likely result in the legislature closing it completely. Also, it is doubtful that a court would find that the intent of the legislature to create low- and moderate-income housing is being met by an agency with a program that only offers rehabilitation dollars for minor work in order to avoid the time requirements for use restrictions.

On income and affordable housing cost definitions, see §5.404.

© The Regents of the University of California

§5.432 e. Excess Surplus Requirement

On a failure of a redevelopment agency to expend or encumber any excess surplus of housing money within 1 year from the time it becomes excess surplus, the redevelopment agency must either voluntarily disburse the funds to its county housing authority or another public agency exercising housing development powers, or expend or encumber the funds within another 2 years (*i.e.,* 3 years from the date the funds became excess surplus).

NOTE: Excess surplus means any unexpended or unencumbered funds in an agency's low- and moderate-income housing fund that exceeds the greater of $1 million or the aggregate amount deposited in the fund in the previous 4 fiscal years (beginning with 1989-1990).

Failure to expend or encumber these funds within the allotted time will subject the agency to sanctions until the agency has expended or encumbered for eligible affordable housing purposes its excess surplus plus an additional amount of non-housing funds equal to 50 percent of the excess surplus. Until an agency expends or encumbers the excess surplus (plus the penalty amount), it will be prohibited from spending or encumbering any of its funds, except for enumerated purposes. Health & S C §33334.12.

PRACTICE TIP: In light of the serious consequences of failing to expend or encumber "excess surplus" housing funds within the given time period, redevelopment agencies should determine whether it is likely that any excess surplus will occur and take appropriate action to avoid the consequences. Health & S C §33334.12.

© The Regents of the University of California

I. Special Issues

1. Conflicts of Interest and Disclosure of Economic Interests

§5.433 a. Political Reform Act of 1974 (PRA) Applies

The members, officers, employees, and consultants of a redevelopment agency are governed by the Political Reform Act of 1974 (PRA) (Govt C §§81000-91014)—the same conflict of interest and disclosure laws that apply to other public entities. See §§2.119-2.217. In addition, a member of an agency who owns real property in or near an existing or proposed redevelopment project area is disqualified from participating in certain decisions. 2 Cal Code Regs §§18702.1, 18702.3, 18704.2, 18705.2. The agency must make full public disclosure about why members were actually or potentially conflicted out of participating in the decision. *Kunec v Brea Redev. Agency* (1997) 55 CA4th 511, 64 CR2d 143. Project area committee members are also governed by the PRA, under a Fair Political Practices Commission ruling. See *In re Rotman,* 10 FPPC Ops 1 (1987).

© The Regents of the University of California

§5.434 b. Prohibition Against Acquiring Land in Project Area

In addition to the obligations arising under the Political Reform Act of 1974 (PRA) (described in §5.433), agency and community officers or employees (which could include planning commissioners) are prohibited from acquiring any interest in any property in any project area, if that officer or employee must participate in the formulation of or approve the plans or policies for the redevelopment of the project area. This prohibition may not apply to certain owner participation activities, business leases, and personal residences. Health & S C §§33130, 33130.5.

© The Regents of the University of California

§5.435 c. Prohibition Against Incompatible Offices

When the council has declared itself to be the agency, a member of the agency may not be an elective officer or an employee of the city—except for council members—but may be a member, commissioner, or employee of any other agency or authority of, or created for, the city. Health & S C §33111.

© The Regents of the University of California

§5.436 2. Merger of Project Areas Possible

Mergers are a special form of project area amendment. Any agency may merge two or more project areas regardless of the contiguity of the areas. Such mergers allow the expenditure of monies received for one project area to be spent in the other merged areas. The merger is accomplished through plan amendments to the merging project areas. Certain of the low- and moderate-income housing requirements that may not apply to the separate project areas, because of when such project areas were adopted or last amended, would be applicable to the merged project areas. Notice of the proposed merger must be sent to the Department of Housing and Community Development at least 30 days before the merger. Health & S C §§33485-33489. See also Health & S C §33333.6 (time limits application to merged plans).

On housing requirements, see §§5.400-5.432; on income and affordable housing cost definitions specifically, see §5.404.

© The Regents of the University of California

§5.437 3. Transfer of Powers Possible by Court Order

A county may transfer to a city redevelopment agency jurisdiction over all or a part of a county project area when that city includes all or such part of the project area in an incorporated or annexed area. The procedure for this transfer differs depending on whether all or a part of the county project area is transferred. Health & S C §§33214-33216.

© The Regents of the University of California

J. Other References on Redevelopment

§5.438 1. Other Handbook References

For related material, see the following sections in this handbook:

- Open meeting laws (§§2.36-2.118);
- Ethical considerations and conflicts of interest (§§2.119-2.217);
- Property acquisition (§§8.1-8.79);
- Hazardous material, obligation of owners of property (§§11.237-11.255); and
- City as plaintiff, validating proceedings (§13.184-13.187).

© The Regents of the University of California

§5.439 2. Other References

- Coomes, Hawkins, Merewitz, Quinn, Ramiza, Walsh & Yang, Redevelopment in California (2009) (published by Solano Press, P.O Box 773, Point Arena, California 95468);
- Goldfarb & Lipman, Legal Aspects of California Redevelopment Practice (California Redevelopment Association, 1400 K Street, Sacramento, California 95814).

© The Regents of the University of California

VI. MUNICIPAL BANKRUPTCY

A. Statutory Authority

§5.440 1. Historical Background

Before the enactment of the Bankruptcy Act of 1934, there was no statutory authority for the filing of a bankruptcy case by a municipality. Before that time, it was believed that the constitutions of the United States and the individual states prohibited the enactment of legislation permitting municipal bankruptcies. In the case of the federal government such legislation would violate state sovereignty. *Ashton v Cameron County Water Improvement Dist.* (1936) 298 US 513, 531, 80 L Ed 1309, 56 S Ct 892. In the case of an individual state, such legislation would violate the restriction that states may not impair contractual obligations. *Hanover Nat'l Bank v Moyses* (1902) 186 US 181, 188, 46 L Ed 1113, 22 S Ct 857. Congress' first attempt at crafting a municipal bankruptcy statute in response to the Great Depression was struck down by the court. *Hanover Nat'l Bank v Moyses, supra*. Amendments to the statute made in 1937 were upheld as constitutional by the United States Supreme Court in *U.S. v Bekins* (1938) 304 US 27, 82 L Ed 1137, 58 S Ct 811. In 1942, the Supreme Court also validated the state's right to compel creditors to accept a plan adjusting municipal debts even though such adjustment might be construed by objecting creditors as an impairment of their contractual rights. *Faitoute Iron & Steel Co. v Asbury Park* (1942) 316 US 502, 86 L Ed 1629, 62 S Ct 1129.

The Bankruptcy Code is found at Title 11 of the United States Code (referred to from here on in this chapter as Title 11). It is divided into chapters. Chapter 9 is the chapter devoted to the adjustment of debts of a municipality. Chapter 7 governs liquidations for individuals and corporations. Chapter 11 provides for business restructuring. Chapter 13 is a repayment plan for individual wage earners and Chapter 12 is for family farmers. (These chapters of the Bankruptcy Code will be referred to from here on in this chapter simply by their number, e.g., Chapter 7.) The remaining chapters deal with case administration; some of the provisions in those remaining chapters apply to municipalities, although others do not.

© The Regents of the University of California

2. Eligibility for Filing

§5.441 a. Bankruptcy Code §109(c)

Bankruptcy Code §109(c) (11 USC §109(c)) contains the eligibility requirements for filing a bankruptcy case under Chapter 9. In summary these requirements are:

- The entity must be a municipality;
- State law must authorize the filing of a bankruptcy case;
- The entity must be insolvent;
- The entity desires to effect a plan to adjust its debts; and
- The entity has
- Obtained agreement to its adjustment plan from creditors;
- Negotiated in good faith negotiations with creditors without success;
- Been unable to negotiate with creditors because such negotiations are impractical; or
- A reasonable belief that a creditor may attempt to obtain a preferential transfer.

© The Regents of the University of California

§5.442 b. Definition of Municipality

A "municipality" is defined under §101(40) of the Bankruptcy Code (11 USC §101(40)) as a political subdivision or public agency or instrumentality of a state. The key issue in determining whether an entity will be classified as a municipality is whether there is direct state or municipal control over the entity. See *In re Ellicott School Bldg. Auth.* (Bankr D Colo 1992) 150 BR 261 (nonprofit corporation created to build a school and lease it to a school district held not to be a municipality); *In re Greene County Hosp.* (Bankr SD Miss 1986) 59 BR 388 (hospital under the control of the county board of supervisors qualified as a municipality).

© The Regents of the University of California

§5.443 c. State Authorization

Bankruptcy Code §903 (11 USC §903) reserves to each state the power to determine the extent to which a municipality may avail itself of the protections of the Bankruptcy Code. In California, the enabling authority for filing is contained in Govt C §§53760, 59125.

© The Regents of the University of California

§5.444 d. Municipal Insolvency Evaluation

In cases involving entities other than municipalities, insolvency is evaluated primarily on a balance sheet test measuring the value of assets against liabilities. 11 USC §101(32)(A)-(B). In municipal bankruptcy cases, the evaluation is based on an analysis of existing and projected cash flow. 11 USC §101(32)(C) (municipality is insolvent if it is generally not paying its debts as they become due or is unable to pay its debts as they become due); *In re County of Orange* (Bankr CD Cal 1995) 183 BR 594, 606. The city of Vallejo, California, filed bankruptcy in 2008 to deal with burdensome labor agreements. The bankruptcy court found, and the bankruptcy appellate panel affirmed, the city's insolvency under 11 USC §101(32)(C)(ii) when it had insufficient unrestricted funds, determined on a cash flow basis, to pay its debts due within the next year and denied the unions' motions to dismiss the petition. *International Ass'n of Firefighters, Local 1186 v City of Vallejo (In re City of Vallejo)* (BAP 9th Cir 2009) 408 BR 280. In contrast, the city of Bridgeport, Connecticut, filed bankruptcy in 1991 as part of a strategy to reject certain burdensome labor agreements. At that time, the city projected a budget deficit of $16 million. The bankruptcy court, however, dismissed the petition, finding that the city's existing cash position and forecasted revenues from pre-existing taxes failed to support the city's contention that it would be unable to pay its debts as they became due. *In re City of Bridgeport* (Bankr D Conn 1991) 132 BR 85.

© The Regents of the University of California

B. Case Administrators

1. Commencement of the Case

§5.445 a. Filing Procedures and Publication

A Chapter 9 case is commenced by the filing of a form bankruptcy petition in the United States Bankruptcy Court for the district where the county in which the municipality is located. 11 USC §§301, 901(a). A filing fee of $1000 must be paid at the time of filing. See 28 USC §1930. Along with the petition, the municipality must file a list containing the name, address, and claim of the creditors that hold the 20 largest unsecured claims. Fed R Bankr P 1007(d). A list containing the names and addresses of all the municipality's creditors also needs to be filed within the time ordered by the court. 11 USC §924; Fed R Bankr P 1007(a)(1), (e). Schedules of assets and liability, current income and expenditures, and a statement of financial affairs and other documents required in other cases are not required in a Chapter 9 case. Fed R Bankr P 1007(b)(1).

A Notice of Commencement of a Chapter 9 case must be published in a newspaper of general circulation in the district where the case is filed, and in a newspaper of general circulation among bond dealers and bondholders as the court designates, once a week for 3 successive weeks. See 11 USC §923.

© The Regents of the University of California

§5.446 b. Municipal Bankruptcy Court Jurisdiction

The bankruptcy court has jurisdiction over bankruptcy cases under 28 USC §1334(a) (the district courts have original and exclusive jurisdiction of all cases under Title 11) and 28 USC §157(a) (authorizing the district courts to refer all Title 11 cases and proceedings to the bankruptcy judges for the district). District courts have routinely adopted general orders referring bankruptcy matters to bankruptcy judges. See, *e.g.,* General Order No. 266, dated October 9, 1984 (referring all Title 11 cases and proceedings to the bankruptcy judges for the Central District of California). Non-municipal cases are randomly assigned on a rotating basis to judges sitting in the division where the case is filed. In municipal cases, however, the Chief Judge of the Court of Appeals for the Circuit designates the judge to whom a Chapter 9 case will be assigned. 11 USC §921(b).

PRACTICE TIP: Although there is a form and order for designation of a bankruptcy judge, it is generally good practice to alert the Clerk of the Court and the Chief Judge of the Court of Appeals before actually filing the case so that the designation can be handled informally and without delay.

© The Regents of the University of California

§5.447 c. Order for Relief Not Automatic

The filing of the bankruptcy petition itself is not an automatic adjudication of the eligibility of the municipality for bankruptcy relief. Under 11 USC §921(c), creditors may object or move to dismiss the petition on the grounds that the municipality is not insolvent or that the petition was not filed in good faith. If the petition is not dismissed under 11 USC §921(c), the court will order relief under Chapter 9. See 11 USC §921(d).

© The Regents of the University of California

§5.448 d. Retention of State Control Over Municipality

The filing of a Chapter 9 petition does not abrogate the power of a state to exercise control over a municipality through exercise of its political or governmental powers, including expenditure of revenues incidental to exercise of those powers. 11 USC §903. In addition, 11 USC §904 specifically prohibits the Bankruptcy Court from issuing any order that would interfere with the exercise of the municipality's governmental powers or disposition of its revenues. In the Chapter 9 filed by the County of Orange, for example, the Bankruptcy Court declined to order the county to pay counsel hired by various subcommittees representing special interest groups on the grounds that to do so would be an interference with the county's authority to control its expenditure of revenue. See *Alliance Capital Management L.P. v County of Orange (In re County of Orange)* (Bankr CD Cal 1995) 179 BR 185, 195, rev'd on other grounds (CD Cal 1995) 189 BR 499.

© The Regents of the University of California

2. Automatic Stay Applies

§5.449 a. Statutory Authority

One of the main benefits for the debtor in filing a bankruptcy case is the automatic stay provided under 11 USC §362. The stay acts as an injunction of any action against a debtor to collect pre-existing debts or to obtain property of the debtor to satisfy such debts. The provisions of 11 USC §362 apply to municipality filings under Chapter 9. In addition, 11 USC §922(a) enlarges the scope of the automatic stay in municipal cases to cover an action by a creditor against an officer or inhabitant of the municipality seeking to collect a claim against the municipality or to enforce a lien on or arising out of taxes due to the municipality. See *Mission Indep. Sch. Dist. v Texas* (5th Cir 1940) 116 F2d 175; *Touchton v City of Fort Pierce* (5th Cir 1940) 109 F2d 370.

© The Regents of the University of California

§5.450 b. Exclusion for Pledged Special Revenues

Special revenues are defined under Bankruptcy Code §902(2) (11 USC §902(2)) and include receipts from transportation or utility services, special excise taxes, incremental receipts from tax benefit districts, and project financing taxes. Bankruptcy Code §922(d) (11 USC §922(d)) provides that the automatic stay does not extend to the application of pledged special revenues to payment of indebtedness secured by those revenues. As a corollary, Bankruptcy Code §928 (11 USC §928) extends any pre-petition consensual lien against special revenues to funds received post-petition and precludes diversion of such funds for general municipal purposes. This is in contrast to the general rule under Bankruptcy Code §552(a) (11 USC §552(a)) that a pre-petition security interest does not extend to property acquired post-petition. See *Alliance Capital Management L.P. v County of Orange (In re County of Orange)* (Bankr CD Cal 1995) 179 BR 185, 194, rev'd on other grounds (CD Cal 1995) 189 BR 499.

© The Regents of the University of California

§5.451 3. Plan Confirmation

The primary purpose of the chapters in the Bankruptcy Code governing reorganization is to provide a debtor with a respite from creditor pressure in order to allow the filing and confirmation of a repayment plan. In the context of a Chapter 9 case, whether a plan gets confirmed generally hinges on the extent to which the municipality will be required to exercise its taxing authority to generate a repayment that will be fair and equitable to creditors. See, *e.g., Fano v Newport Heights Irrig. Dist.* (9th Cir 1940) 114 F2d 563.

© The Regents of the University of California

§5.452 a. Who May File a Plan

In Chapter 9, unlike in Chapter 11, only the debtor municipality has the right to propose a plan. 11 USC §941. This rule is necessary to preserve the municipality's duty to retain control over its political affairs as required by the Tenth Amendment to the United States Constitution and as codified in Bankruptcy Code §§903-904 (11 USC §§903-904). Although a creditor may not propose any reorganization plan, it may petition the court to set a deadline for the municipality to file a plan after which time the case would be dismissed if no plan had been filed.

© The Regents of the University of California

§5.453 b. Contents of Plan

Chapter 9 selectively incorporates many of the provisions contained in the Chapter 11 business reorganization section, including most of the provisions set forth in Bankruptcy Code §1123 (11 USC §1123) governing the contents of a reorganization plan. It is mandatory that the plan:

- Designate classes of creditors (11 USC §1123(a)(1));
- Specify what classes of creditors are unimpaired by the plan (11 USC §1123(a)(2));
- Specify the treatment of each class of impaired creditors (11 USC §1123(a)(3));
- Provide for uniform treatment of creditors in each class (11 USC §1123(a)(4)); and
- Set a means for implementation of the plan provisions (11 USC §1123(a)(5)).

NOTE: A claim is considered "impaired" when the legal, equitable, or contractual rights of a claimant have been altered in any fashion either through diminution or enhancement. 11 USC §1124; *L & J Anaheim Assocs. v Kawasaki Leasing Int'l, Inc. (In re L & J Anaheim Assocs.)* (9th Cir 1993) 995 F2d 940.

Bankruptcy Code §1123(b) (11 USC §1123(b)), which sets the permissive contents of a plan, is also incorporated into Chapter 9.

© The Regents of the University of California

§5.454 c. Confirmation Requirements

Bankruptcy Code §901 (11 USC §901) selectively incorporates some of the provisions of Bankruptcy Code §1129 (11 USC §1129), which govern the requirements for confirmation in the context of a business reorganization. Bankruptcy Code §943 (11 USC §943) contains additional confirmation requirements applicable only to municipalities. Among the most important plan confirmation requirements are feasibility (11 USC §943(7); *In re City of Colorado Springs Spring Creek Gen. Improvement Dist.* (Bankr D Colo 1995) 177 BR 684) and that the debtor is not prohibited by law from taking any action necessary to carry out the plan (11 USC §943(4); *Sanitary and Improvement Dist. 65 v First Nat'l Bank* (D Neb 1987) 79 BR 877, aff'd per curiam (8th Cir 1989) 873 F2d 209.

© The Regents of the University of California

C. Special Issues—Labor Contracts

§5.455 1. Background

Bankruptcy Code §365 (11 USC §365) permits debtors to reject executory contracts based on a business judgment analysis. In the seminal case of *National Labor Relations Bd. v Bildisco & Bildisco* (1984) 465 US 513, 79 L Ed 2d 482, 104 S Ct 1188, the Supreme Court held that Bankruptcy Code §365 was applicable to collective bargaining agreements and that a debtor did not have to comply with the contract terms or federal labor laws before rejecting the contract. In 1984, Bankruptcy Code §1113 (11 USC §1113) was enacted, which requires corporate debtors to enter into good faith negotiations with the union before rejection of any labor agreement.

© The Regents of the University of California

§5.456 2. Labor Contracts in Chapter 9

Significantly, 11 USC §1113 was not incorporated into Chapter 9. During the *Orange County Employees Ass'n v County of Orange (In re County of Orange)* (Bankr CD Cal 1995) 179 BR 177 bankruptcy case, the county attempted to abrogate its Memorandums of Understanding with various county employee collective bargaining units by terminating personnel based on necessity without regard to seniority. Relying on the case of *Sonoma County Org. of Pub. Employees v County of Sonoma* ("*Sonoma I*") (1979) 23 C3d 296, 152 CR 903, the Bankruptcy Court ruled in *Orange County Employees Ass'n v County of Orange, supra*, that although the requirements of 11 USC §1113 did not apply to Chapter 9, the county was required to negotiate with its employee collective bargaining units before modifying its labor agreements. The county's ability to modify the agreements was restricted to those emergency circumstances described in *Sonoma I,* that (*Sonoma I, supra*):

- A declared emergency must be based on an adequate factual foundation;
- The agency's action must be designed to protect a basic social interest and not benefit a particular individual;
- The law must be appropriate for the emergency and obligation; and
- The agency decision must be temporary, limited to the immediate exigency that caused the action.

© The Regents of the University of California

6

Municipal Services and Utilities

I. INTRODUCTION §6.1

II. WATER, SEWER, AND STORM DRAINS

A. Water Service §6.2

1. Rates and Charges

a. Setting of Water Rates §6.3

b. Basis of Water Rates: Flat or Metered Rates §6.4

2. Duties to Customers §6.5

3. Water Conservation §6.6

4. Reclaimed Water

a. Augmentation of Municipal Water Supplies §6.7

b. Regulatory Jurisdiction Over Reclaimed Water §6.8

c. Permits Required for Operation of Reclaimed Water Project §6.9

5. Water Fluoridation §6.10

B. Sewage Disposal

1. Authority to Own and Operate Sewer System §6.11

2. Sewer Treatment Plants and Pretreatment; Fees and Charges §6.12

C. Storm Drains

1. Requirements for National Pollutant Discharge Elimination System Permits §6.13

2. Types of Permits §6.14

3. Contents of Permits §6.15

4. Financing Management Programs §6.16

III. MUNICIPAL RETAIL ELECTRIC UTILITIES

A. Constitutional Authority §6.17

B. Electrical Services Industry Restructuring §6.18

1. Provision of Electrical Service Under Restructuring §6.19

2. Changes to Restructuring Program After 2000 §6.20

3. Recovery of California Department of Water Resources Costs §6.21

C. Significant Legislation Since Energy Crisis of 2000-2001 §6.22

D. Utility Industry §6.23

E. California Municipal Electric Utilities §6.24

F. Federal Energy Regulatory Commission (FERC) Jurisdiction

1. Wholesale Electric Rate Regulation

a. Interstate Transmission and Sales §6.25

b. Just and Reasonable Rates §6.26

c. Rate-Setting §6.27

2. Transmission Service

a. Transmission Rates §6.28

b. Expanded Federal Energy Regulatory Commission Authority §6.29

c. Limitations on Federal Energy Regulatory Commission Authority Over Municipal Electric Utilities §6.30

d. Open Access and the Creation of Independent System Operators and Regional Transmission Organizations §6.31

e. Federal Energy Regulatory Commission Jurisdiction Over California Independent System Operator (ISO) §6.32

3. Other Federal Energy Regulatory Commission (FERC) Regulatory Powers

a. Cogeneration and Small Power Producers §6.33

b. Natural Gas §6.34

G. California Public Utilities Commission (CPUC) Jurisdiction

1. Rates §6.35

2. Safety and Construction Standards

a. Uniform System §6.36

b. Transmission Siting §6.37

3. California Energy Commission (CEC) Jurisdiction §6.38

4. Extraterritorial Retail Service and Potential Challenges §6.39

5. Acquisition of Investor-Owned Facilities

a. Advantages of Takeovers §6.40

b. Establishing a Municipal Utility §6.41

6. Municipal Rate-Setting

a. Reasonableness Test §6.42

b. Special Tax Problems and Other Constraints on Rate-Setting §6.43

H. Electromagnetic Fields (EMF)

1. Electromagnetic Fields Exposure Issues §6.44

2. Electromagnetic Fields Litigation Limited §6.45

a. Examples of Personal Injury Litigation Related to Electromagnetic Fields §6.46

b. Defenses to Electromagnetic Fields Claims §6.47

I. References on Municipal Retail Electric Utilities §6.48

IV. FRANCHISES

A. Gas, Electric, and Water Franchises §6.49

1. Broughton Act Procedures §6.50

2. Franchise Act of 1937 Procedures §6.51

3. Provisions of Franchise Ordinances §6.52

a. Term of Franchise Usually Stated §6.53

b. Relocation Requirement Usually Stated §6.54

c. Compliance With Excavation Procedures, Indemnification, and Other Provisions Usually Stated §6.55

4. Municipal Public Lands Use Surcharge §6.56

5. Oil Pipelines and Utility Franchises for Industrial Gas or Oil (or Products of Gas and Oil) §6.57

B. Cable Television and Video Systems Franchises

1. Local Franchise Authority

a. Federal Law Limitations §6.58

b. State Law Limitations §6.59

2. State Law on Cable Television and Video System Franchises

a. Local Cable Television Franchises §6.60

(1) Potential Franchise Rights to Be Granted and Maximum Fee Possible §6.61

(2) Equal Access to Cable Services Required §6.62

(3) Multiple Franchises Possible and California Public Utilities Commission Jurisdiction §6.63

(4) Delinquency Fees Available §6.64

b. Statewide Video Franchises §6.65

(1) Effect of New Statewide Franchise on Existing Cable Franchisees §6.66

(2) Maximum Franchise Fee and Required Support for Public, Educational, and Governmental Channels §6.67

(3) Anti-Discrimination and Build-Out Requirements and Telephone Rate Limitations §6.68

3. Federal Cable Television Law §6.69

a. Definitional Scheme §6.70

b. Franchises for Cable Television §6.71

(1) Termination of Franchise §6.72

(2) Cable Operators Providing Other Telecommunications Services §6.73

(3) Telephone Companies Providing Video Programming §6.74

c. Federal Delegation of Regulation of Activities to City

(1) Rates: Use of Rights-of-Way §6.75

(2) Rates: Rate Regulation and Effective Competition §6.76

(3) Rates: Controlled by Federal Standards §6.77

(4) Rates: Revocation of Certification and Non-Certification §6.78

(5) Rates: Billing and Rate Uniformity §6.79

(6) Channel Capacity Requirements §6.80

(7) Program Restrictions Allowed §6.81

(8) Program Notice May Be Required §6.82

(9) Permitted Facility and Equipment Regulation §6.83

(10) Customer Service Regulation §6.84

(11) City Immunity From Damages; Remedies; Attorney Fees §6.85

(12) Systems Sales and Transfers §6.86

4. Constitutional Concerns §6.87

5. Other References on Cable Television and Video Systems §6.88

C. Telecommunication Franchises

1. Federal Law Applies §6.89

2. State Preemption §6.90

3. Permissible Requirements §6.91

D. Solid Waste

1. Franchising Authority

a. Police Power Authority Over Solid Waste §6.92

b. Statutory Authority Over Solid Waste §6.93

2. Solid Waste Franchises

a. Generally No Local Preemption §6.94

b. Effect on Existing Franchises §6.95

c. Discontinuation of Non-Exclusive Franchises §6.96

d. Franchise Procedures §6.97

3. Jurisdiction Over Other Governmental Agencies

a. Federal Jurisdiction Over Solid Waste §6.98

b. State Jurisdiction Over Solid Waste §6.99

4. Landfill Regulatory Authority §6.100

5. Municipal Waste Flow Control Ordinances §6.101

6. Other Handbook References on Solid Waste §6.102

E. Recycling

1. Franchising Authority Over Recyclables §6.103

2. Regulatory Authority Over Recyclables §6.104

3. Other Handbook References on Recyclables §6.105

V. MUNICIPAL SOLID WASTE AND RECYCLING

A. Facilities Authorized §6.106

B. Relationship to Water and Air Quality Issues

1. Water Quality Testing; Regional Board Regulation; Local Pretreatment Requirements §6.107

2. Air Quality §6.108

C. Recycling and Waste Diversion Requirements

1. City Solid Waste Planning

a. Source Reduction and Recycling Elements §6.109

b. Household Hazardous Waste Elements §6.110

c. Nondisposal Facility Elements §6.111

d. Relationship to County Plan; Annual Reports; Penalties §6.112

2. California Integrated Waste Management Act of 1989 Requirements

a. Impact on Source Reduction and Recycling Element §6.113

b. Diversion Requirements §6.114

c. Exemption and Time Extension for Diversion Requirements §6.115

d. Diversion Rate Calculation §6.116

e. Penalties for Noncompliance §6.117

3. Bottle Bill §6.118

4. Recyclable Design Requirements §6.119

VI. PUBLIC TRANSPORTATION §6.120

A. Duties of Public Carriers

1. Common Carrier Law §6.121

a. Protection of Passengers §6.122

b. Duty to Collect Evidence §6.123

2. Special Duties to the Disabled

a. Americans with Disabilities Act of 1990 and Federal Transit Act §6.124

b. State Accessibility Requirements §6.125

3. Miscellaneous Issues

a. Advertising on Vehicles §6.126

b. Route Scheduling §6.127

c. Certification of Bus Drivers §6.128

d. Setting of Transit Fares §6.129

e. Drug and Alcohol Testing of Transit Employees

(1) Constitutional Constraints §6.130

(2) Drug and Alcohol Testing of City Employees, Applicants, and Trainees Driving Commercial Vehicles §6.131

(3) Drug and Alcohol Testing of Pre-Employment Applicants to Accommodate Individuals With Disabilities §6.132

(4) Drug and Alcohol Testing Requires Face-to-Face Evaluation for Return to Work §6.133

(5) Drug and Alcohol Testing of Off-Duty Employees and Chain of Custody of Urine Samples §6.134

f. Specified Rate of Return May Be Required §6.135

g. Prohibition on Charter Service §6.136

h. Drug and Alcohol Testing for Taxicab Operators in the City §6.137

B. Claims and Actions Against Public Carriers §6.138

VII. AIRPORTS AND HARBORS

A. Airports

1. Basic Operation and Regulation of Airports §6.139

a. Federal Preemption Over Airports §6.140

(1) Federal Regulation of Airport Rates and Charges §6.141

(2) Prohibited Revenue Diversion §6.142

b. Permissible Areas of Local Control §6.143

2. Noise and Access Regulation

a. City as Airport Proprietor §6.144

b. Noise Restrictions May Be Limited by Commerce Clause §6.145

c. Federal Aviation Administration (FAA) Restrictions §6.146

3. Zoning and Land Use Regulations Related to Airports

a. Power to Zone Over Airports §6.147

b. Takings Issues on Flight Height Restrictions §6.148

c. Airport Land Use Commissions §6.149

d. Airport Expansions §6.150

4. Airport Rents, Fees, and Tenant Requirements; Funding Requirements §6.151

5. Heliports §6.152

6. Closing Airports §6.153

7. Free Speech Regulations in Airports §6.154

8. Security in Airports §6.155

B. Harbors §6.156

1. Department of Boating and Waterways §6.157

2. Establishment and Improvement of Harbors §6.158

3. Harbor Governance

a. Structure of Governance Over Harbors §6.159

b. Harbor Authorizing Statutes §6.160

4. Financing of Harbor Activities §6.161

5. Acquisition and Disposition of Harbor Property

a. Acquisition of Harbor Property §6.162

b. Disposition of Harbor Property: Public Trust Doctrine and Conveyance to Federal Government §6.163

c. Harbor Leasing: No Violation of Public Trust Doctrine §6.164

(1) Harbor-Related Lease Terms §6.165

(2) Exception for Leases of Wharves and Other Structures §6.166

(3) Proper Harbor-Related Lease Purposes §6.167

d. Some Harbor-Related Easements Permitted §6.168

6. Local Regulations and Obligations Over Harbors and Related Areas

a. Use and Access Restrictions Over Harbors and Related Areas

(1) Public Trust Implications and Required Access From Streets and Highways §6.169

(2) Limits of Public Access to Waterfront §6.170

(3) Proper Time-of-Day Restrictions, Speed Zones, and Special Use Areas; Emergency Rules and Regulations Permitted §6.171

(4) Marine Sanitation Issues §6.172

(5) Insurance Requirements; Floating Homes §6.173

(6) Jet Skis May Be Prohibited; Recycling Facilities Required §6.174

b. Permitted Provision of Harbor Rates, Fees, and Charges and Establishment of Harbor Lines §6.175

7. Other Laws Over Harbors and Related Areas

a. California Coastal Act §6.176

b. Oil Spill Response and Contingency Planning §6.177

c. Port and Terminal Protection and Development Corporations §6.178

d. McAteer-Petris Act §6.179

VIII. DISASTER PREPAREDNESS AND RESPONSE §6.180

A. Due Process in Disaster Situations §6.181

B. Statutory Powers in Disaster Situations

1. State Constitutional Disaster Authorizations §6.182

2. California Emergency Services Act §6.183

a. Powers and Duties Under California Emergency Services Act

(1) Declarations of Emergency §6.184

(2) State Aid May Be Provided; Local Disaster Councils §6.185

(3) Emergency Powers and Press Access in an Emergency §6.186

(4) Emergency Government After a Disaster §6.187

(5) Meeting Procedures After a Disaster §6.188

(6) Mutual Aid, Temporary Housing, and Test Exercises §6.189

(7) Extraterritorial Service After a Disaster §6.190

b. Disaster Liability Immunity §6.191

(1) Extraterritorial Immunity; Volunteers and Conscripts §6.192

(2) Inmates Endangered by Disaster §6.193

(3) Disaster Malpractice §6.194

3. Elements of a Local Emergency Plan §6.195

4. Ralph M. Brown Act Emergency Provisions §6.196

a. Emergency Notice Requirements Under Ralph M. Brown Act §6.197

b. Posting of Minutes Required §6.198

5. Other Important Laws Affecting Emergency Powers §6.199

© The Regents of the University of California

§6.1 I. INTRODUCTION

This chapter deals generally with local obligations, duties, requirements, and restrictions related to municipal services and utilities, particularly: water, sewer, and storm drains (see §§6.2-6.16); retail electric utilities, including Federal Energy Commission (FERC) jurisdiction (§§6.17-6.48); franchises over gas, electric, water, cable television, video systems, telecommunication systems, solid waste, and recycling (see §§6.49-6.105); municipal solid waste and recycling facilities and obligations and requirements related to them (see §§6.106-6.119); public transportation, including discussions about common carrier duties, Americans with Disabilities Act (ADA) (42 USC §§2101-12213), and Federal Transit Act (49 USC §§5301-5340) requirements, and laws related to drug and alcohol testing of transit employees (see §§6.120-6.138); airports and harbors (see §§6.139-6.179); and finally disaster preparedness and response, including the California Emergency Services Act (Govt C §§8550-8668) (see §§6.180-6.199).

On topics covered by this chapter, including discussions on the regulation of ports and harbors; airport noise and zoning; easements and franchises; regulation of solid waste, including the Integrated Waste Management Act of 1989 (Pub Res C §§40000-49620); drug and alcohol testing of public employees; and the duties and liabilities of common carriers, see: Advising California Employers and Employees (Cal CEB 2005); California Easements and Boundaries: Law and Litigation (Cal CEB 2008); California Government Tort Liability Practice (4th ed Cal CEB 1999); California Land Use Practice (Cal CEB 2006); and Practice Under the California Environmental Quality Act (2d ed Cal CEB 2008).

© The Regents of the University of California

II. WATER, SEWER, AND STORM DRAINS

§6.2 A. Water Service

Cities, counties, special districts, and municipally owned utilities may provide water service. State law specifically authorizes several types of local agencies to own and operate water service systems:

- Cities, see Cal Const art XI, §9; Govt C §§38730-38745;
- Counties, see Govt C §§25690-25699; and
- Special districts and municipal utilities, see Pub Util C §§10001-10002.

© The Regents of the University of California

1. Rates and Charges

§6.3 a. Setting of Water Rates

Water rates are set by the governing body of the relevant agency. Under state law, cities may fix water rates. See *Durant v City of Beverly Hills* (1940) 39 CA2d 133, 102 P2d 759. The county board of supervisors has the responsibility for establishing a county's water rates. See Govt C §25696. Cities, counties, and municipal utilities are not subject to outside review of their rates by the California Public Utilities Commission (CPUC) because municipal corporations are outside its jurisdiction. See *County of Inyo v PUC* (1980) 26 C3d 154, 161 CR 172. Special districts are also municipal corporations and are not subject to CPUC regulation. See *People ex rel Pub. Utils. Comm'n v City of Fresno* (1967) 254 CA2d 76, 62 CR 79.

© The Regents of the University of California

§6.4 b. Basis of Water Rates: Flat or Metered Rates

Water rates may be based on either a set fee by type of user (flat rate) or the quantity of water used (metered rate). Metered rates often include some fixed component. There has been an increasing trend toward the installation of meters on all customer connections, as reflected in the Water Measurement Law. See Wat C §§500-530. Urban water suppliers that receive water from the federal Central Valley Project (CVP) after 2003 are required to install meters on all service connections to residential and nonagricultural commercial buildings by January 1, 2013, and to charge customers beginning March 1, 2013, based on volume of water delivered, as measured by a meter. Wat C §526. All other urban water suppliers are required to install meters on all service connections by January 1, 2025, and to charge metered customers based on volume delivered, as measured by the meter, by January 1, 2010. Wat C §527. Any water purveyor who becomes an urban supplier after 2004 is required to install meters on all municipal and industrial service connections within 10 years of qualifying as an urban water supplier and to charge metered customers based on volume delivered, as measured by the meter, within 5 years of qualifying. Wat C §528. The legislature has declared the subject to be a matter of statewide concern and that local agency enactments are preempted by this scheme, except to the extent that local regulations impose additional or more stringent requirements. Wat C §529.

© The Regents of the University of California

§6.5 2. Duties to Customers

A city is under no duty to become a water purveyor. See *Glenbrook Dev. Co. v City of Brea* (1967) 253 CA2d 267, 61 CR 189. However, once a city chooses to act as a water purveyor, it assumes a duty to do so without discrimination to all its inhabitants who apply for water, under reasonable rules and regulations. See *Nourse v City of Los Angeles* (1914) 25 CA 384, 143 P 801. A county is also under no duty to become a water purveyor. See Govt C §25690. Water districts and other special districts created for the purpose of water provision, however, do have a duty to carry out their trust obligation to the public. See *Glenbrook Dev. Co. v City of Brea* (1967) 253 CA2d 267, 61 CR 189. A special district, like a city or county, must provide water under reasonable terms and conditions. See *Brydon v East Bay Mun. Util. Dist.* (1994) 24 CA4th 178, 29 CR2d 128.

© The Regents of the University of California

§6.6 3. Water Conservation

Water suppliers, including public entities, are authorized by statute to adopt and enforce water conservation programs. See Wat C §§375-378, 1009. The program may require installation of water-saving devices and encourage conservation through the rate structure design. See Wat C §375(b). Rate structures of this type usually charge higher marginal rates for water as usage increases. For a discussion of future water conservation opportunities, see Gleick, Waste Not, Want Not: The Potential for Urban Water Conservation in California (Pacific Institute, 2003).

A water user that does conserve water will be protected from any loss of water rights based on reduced diversions or extractions, if the user makes proper filings with the State Water Resources Control Board (SWRCB). See Wat C §§1005.1-1005.2, 1005.4, 1011-1012. A water rights holder may also transfer water rights based on conservation efforts that result in decreased consumptive use. See Wat C §§1735-1736. See also *In the Matter of Licenses 1050, Natomas Cent. Mut. Water Co.*, SWRCB Order WR 99-012 (1999), modified in part, Order WR 2000-01 (2000). A water supplier may enter into contracts with its customers to make water available for transfer through conservation. See Wat C §§1745.02, 1745.04, 1745.05(a)(1).

© The Regents of the University of California

4. Reclaimed Water

§6.7 a. Augmentation of Municipal Water Supplies

Water reclamation can be an efficient means to augment municipal water supplies. Potable water may be conserved by using reclaimed water instead of potable water for non-potable water uses. A water user may maintain its water rights despite the reduction or cessation of use due to substitution of reclaimed water, if it makes proper filings with the State Water Resources Control Board (SWRCB). See Wat C §1010. The SWRCB, through the Office of Water Recycling, also provides financial assistance for water reclamation projects, in the form of low-interest loans for project construction and grants for project planning.

© The Regents of the University of California

§6.8 b. Regulatory Jurisdiction Over Reclaimed Water

Several agencies possess regulatory jurisdiction over reclaimed water projects, including the local Regional Water Quality Control Boards (RWQCB) and Department of Health Services (DHS). The primary statutory principles for reclaimed water are found in the Water Recycling Law and Water Recycling Act of 1991. See Wat C §§13500-13556 and §§13575-13583, respectively. The provisions of Wat C §13521 require DHS to promulgate administrative regulations for the safe use of reclaimed water. See 22 Cal Code Regs §§60301-60357.

© The Regents of the University of California

§6.9 c. Permits Required for Operation of Reclaimed Water Project

A permit is required to operate a reclaimed water project. To commence the permitting process, the municipality must submit a report to the appropriate Regional Water Quality Control Boards (RWQCB). See Wat C §13522.5. The RWQCB may issue waste discharge requirements or, for projects when the municipality will distribute the reclaimed water to others for use, a master reclamation permit. See Wat C §13523.1. Among other things, a master reclamation permit must incorporate the water recycling criteria found in Title 22 of the California Code of Regulations. See 22 Cal Code Regs §§60301-60357. Additionally, the permit must require the permitee to (see Wat C §13523.1(b)(3)-(5)):

- Establish and enforce rules on the development of reclaimed water use facilities and the use of reclaimed water;
- Submit quarterly reports to the RWQCB on the reclaimed water project; and
- Undertake periodic inspections of the facilities of the reclaimed water users.

The RWQCB may also include other provisions in the master reclamation permit to protect the environment, prevent nuisance, and monitor the project and compliance. The Title 22 requirements will be prepared by the Department of Health Services and the applicable County Health Services entity.

© The Regents of the University of California

§6.10 5. Water Fluoridation

Fluoridation of the water supply can present a controversial issue for many public agencies. However, courts throughout the United States have uniformly held that fluoridation of water is a reasonable and proper exercise of the police power in the interest of public health. *Beck v City Council of Beverly Hills* (1973) 30 CA3d 112, 115, 106 CR 163; *DeAryan v Butler* (1953) 119 CA2d 674, 682, 260 P2d 98 (addition of fluoride to water supply, as directed by resolution of city council, was valid exercise of police power of city of San Diego). Despite the long-standing authority upholding fluoridation of water, opponents of fluoridation have also challenged the manner of fluoridation by alleging that the chemical chosen by the public agency to fluoridate its water supply contains contaminants that are harmful to the public. In *Coshow v City of Escondido* (2005) 132 CA4th 687, 34 CR3d 19, plaintiffs alleged that the city of Escondido's use of hydrofluorosilicic acid (HFSA) to fluoridate its water supply contained dangerous levels of lead and arsenic in violation of plaintiffs' fundamental rights under the state and federal constitutions. The court sided with the public agency on the basis that the California Safe Drinking Water Act, namely Health & S C §116410, specifically authorized fluoridation of public water supplies; the added chemicals were approved by the Department of Health Services in accordance with Health & S C §116550(a); and fluoridation was a reasonable and proper exercise of the police power. The court also held that there was no fundamental right to fluoride-free water, the use of fluoride was not mass medication because the residents were not forced to drink the water, and the rational basis test was met.

© The Regents of the University of California

B. Sewage Disposal

§6.11 1. Authority to Own and Operate Sewer System

Cities, counties, and special districts may own and operate sewer systems. When a city owns and operates such a facility, it is governed by the Porter Cologne Act (Wat C §§13000-14958) and the Clean Water Act (33 USC §§1251-1387), and it is empowered to exercise its own governmental authority to protect water quality. State law specifically authorizes several types of local agencies to own and operate sewer systems:

- Cities, see Govt C §§38900-38901;
- County sanitation districts, see Health & S C §§4700-4858;
- Sanitary districts, see Health & S C §§6400-6982;
- County water districts, see Wat C §§30000-33249;
- Sewer maintenance districts, see Health & S C §§4860-4927;
- Municipal utility districts, see Pub Util C §§11501-14403.5;
- Special districts, see Pub Util C §§13451-13691; and
- Improvement districts, see Health & S C §§4600-4650.

© The Regents of the University of California

§6.12 2. Sewer Treatment Plants and Pretreatment; Fees and Charges

Cities are expressly authorized to operate a sewer treatment plant, to require pretreatment of industrial waste, and to limit the introduction of pollutants into the system. See Govt C §§54725-54739.

State law also provides express authority to prescribe fees and charges for sewer services. See Health & S C §§5470-5474.10.

© The Regents of the University of California

C. Storm Drains

§6.13 1. Requirements for National Pollutant Discharge Elimination System Permits

Section 402(p) of the Clean Water Act requires the Environmental Protection Agency (EPA) to establish National Pollutant Discharge Elimination System (NPDES) requirements for storm water discharges. See 33 USC §1342(p). Under the Clean Water Act, the EPA has delegated its storm water permitting authority to the State of California. See 33 USC §1342(b); Wat C §13370. Cities and counties in California are thus regulated through Municipal Separate Storm Sewer System (MS4) permits issued by the State Water Resources Control Board and the regional water quality control boards. These storm water permits require dischargers to develop and implement a storm water management program with the goal of reducing the discharge of pollutants to the maximum extent practicable (MEP). See 40 CFR §122.26(d)(2)(iv). See also 33 USC §1342(p).

© The Regents of the University of California

§6.14 2. Types of Permits

The regional water quality control boards issue storm water permits for medium municipalities (serving between 100,000 and 250,000 people) and large municipalities (serving more than 250,000 people) in their jurisdictions. See 40 CFR §122.26(a)(1), (b)(4), (b)(7). The State Water Resources Control Board (SWRCB) is responsible for issuing a general storm water permit for a small Municipal Separate Storm Sewer System (MS4). See SWRCB Order No. 2003-0005-DWQ. See also 40 CFR §122.26(a)(9). Small MS4s are those municipal storm water systems operated by small municipalities and certain entities such as military bases, public campuses, state prisons, and hospital complexes. 40 CFR §122.26(b)(16)-(17). Small MS4s must file with the State Water Resources Control Board (SWRCB) a Notice of Intent (NOI) to comply with the terms of the general permit; otherwise, in appropriate circumstances, small MS4s may be regulated by an individual permit, a region-specific general permit, or by inclusion in an existing permit issued to a medium or large municipality. SWRCB Order No. 2003-0005-DWQ.

© The Regents of the University of California

§6.15 3. Contents of Permits

The regional board permits and the State Water Resources Control Board (SWRCB) general permit require permittees to develop proposed management programs specifying best management practices, control techniques, and system design and engineering methods that will be used to address certain program areas. See 40 CFR §122.26(d)(2)(iv). The program areas include construction and post-construction land use activities, public education and outreach, illicit discharge detection and elimination, and monitoring of discharges from hazardous waste facilities. 40 CFR §122.26(d)(2)(iv). The regional board permits are tailored to the particular circumstances found in the region in which they are issued, although the SWRCB general permit is of statewide applicability.

© The Regents of the University of California

§6.16 4. Financing Management Programs

Many municipalities have established or are considering the establishment of storm water management utilities and imposing service or other fees to finance the various management programs required by the Clean Water Act. Typically these fees are imposed on every developed parcel in the municipality, but are graduated according to a measurement of the impervious area on each parcel. In California, storm water utility fees may be considered property-related fees rather than user fees related to sewer and water services, and thus require voter approval under Cal Const art XIIID, §6(c). See *Howard Jarvis Taxpayers Ass'n v City of Salinas* (2002) 98 CA4th 1351, 121 CR2d 228. Thus, fees imposed on every developed parcel in the municipality and graduated according to a measurement of the impervious area on each parcel have been found to be property-related under Cal Const art XIIID. *Howard Jarvis Taxpayers Ass'n v City of Salinas* (2002) 98 CA4th 1351, 121 CR2d 228.

© The Regents of the University of California

III. MUNICIPAL RETAIL ELECTRIC UTILITIES

§6.17 A. Constitutional Authority

The California Constitution empowers municipalities to establish, purchase, and operate public works to furnish their inhabitants with electrical power. Cal Const art XI, §9(a). See also Govt C §39732; Pub Util C §10002. Twenty-six California municipalities operate electrical utilities for the benefit of retail customers, including the nation's largest municipal electric utility, the Los Angeles Department of Water and Power.

© The Regents of the University of California

§6.18 B. Electrical Services Industry Restructuring

In the late 1990s legislation was adopted that amended various sections of the civil, commercial, public utilities, and government codes, resulting in a restructuring of the electrical services industry. The legislation applied primarily to the generation component of the existing distribution, transmission, and generation of electricity. It provided the process for the transition to a competitive electricity services industry by 2002. Under this restructuring, all energy users, including local governments, are authorized to serve as aggregators for their electrical loads and to purchase electricity either from a power pool or directly from energy suppliers (known as "direct access"). Aggregators must follow established consumer protection standards. Participation in an aggregated pool is voluntary and the default provider in an aggregated pool is the existing investor-owned utility. See, *e.g.*, Pub Util C §§330-399.20. The history and legacy of deregulation and restructuring of electricity markets in the mid-1990's and the energy crisis of 2000-2001 is covered in the Ninth Circuit's opinion in *Bonneville Power Admin. v Federal Energy Regulatory Comm'n* (9th Cir 2005) 422 F3d 908, 911-914.

© The Regents of the University of California

§6.19 1. Provision of Electrical Service Under Restructuring

The legislation of the late 1990s (see §6.18) established a process by which municipal utilities that provide electricity services may participate in a restructured industry and by which governing boards of municipal utilities decide whether and under what circumstances to provide electricity service outside their boundaries. It established a process for accelerated equitable non-bypassable recovery of transition costs associated with the stranded investments of investor-owned and municipal utilities. It also established a firewall that protects residential and small business consumers from paying for statewide transition costs and the potential increase in electricity costs resulting from payment of the transition costs. In addition, it required rate reductions for residential and small commercial customers. See Pub Util C §§330-399.20, 9600-9620.

The legislation also provided for the establishment of an independent system operator (ISO) with centralized control of the transmission systems of the investor-owned utilities. The ISO is charged with providing fair and nondiscriminatory access to the transmission system it operates. See Pub Util C §§330-352.7.

© The Regents of the University of California

§6.20 2. Changes to Restructuring Program After 2000

Since late 2000, in response to unexpectedly high wholesale electricity prices and weakening utility finances, the legislature has made significant changes to the restructuring program, many of which have been or are to be implemented by the California Public Utilities Commission (CPUC). On February 1, 2001, the legislature authorized the California Department of Water Resources (CDWR) to purchase electric power on behalf of the customers of the investor-owned utilities through December 31, 2002, and suspended direct access. See Wat C §§80000-80270. On September 20, 2001, the CPUC suspended direct access, including the addition of customers to community aggregation programs after September 20, 2001. See CPUC Decision 01-09-060, as modified by CPUC Decision 01-10-036; CPUC Decision 02-03-055. With the authority of the California Department of Water Resources (CDWR) to purchase power on behalf of investor-owned utilities scheduled to expire on December 31, 2002, new legislation was enacted requiring the investor-owned utilities to file procurement plans with the CPUC detailing their activities to obtain sufficient supply to meet the needs of their customers. See Pub Util C §454.5; CPUC Docket No. R.01-10-024.

In 2002, additional legislation was adopted permitting cities and counties to purchase and sell electricity on behalf of utility customers in their jurisdictions after they have registered with the CPUC as Community Choice Aggregators (CCAs). See Pub Util C §§218.3, 331.1, 366.2, 381.1, and 394.25. The legislation allows local governments to elect "to combine the loads of its residents, businesses, and municipal facilities in a communitywide electricity buyers' program." Pub Util C §331.1(a).

PRACTICE TIP: The CPUC opened Docket No. R.03-10-003 in October 2003 to propose rules addressing the responsibilities of the electric utilities, the cost recovery mechanism and re-entry fees, notification requirements, transaction costs, and the process CCAs would use to register with the CPUC. Although CCA rules are not yet established, the CPUC proposes to adapt many of the existing procedures applicable to electric service providers and direct access customers for use by CCAs wherever possible to facilitate the start of the program and implement the statute. Although the CPUC's proceedings are not yet complete, it has issued decisions establishing rules for CCAs. See CPUC Decision 05-12-041; CPUC Decision 06-02-006; CPUC Decision 07-01-025.

© The Regents of the University of California

§6.21 3. Recovery of California Department of Water Resources Costs

The legislature has directed that the costs of the power purchased by California Department of Water Resources (CDWR) should be recovered from investor-owned utility retail customers and has stressed its intent to prevent any shifting of recoverable costs between customers. See Pub Util C §366.2(d). The California Public Utilities Commission (CPUC) issued a series of decisions relating to the recovery of the costs of power purchased by CDWR including decisions that address the recovery of such costs from electricity customers that are seeking either:

- To self-generate (see CPUC Decision 02-11-002 and CPUC Decision 03-04-030); or
- To become customers of a municipal utility (see, *e.g.*, CPUC Decision 03-07-028, CPUC Decision 03-08-076, and CPUC Decision 03-09-052).

For municipal utility customers, the CPUC held that customers who took bundled service from an investor-owned utility on or after February 1, 2001, and have since switched to service by a municipal utility must pay many of the costs of the CDWR purchases. Customers of a municipal utility that are located in the service area of an investor-owned utility may in addition be subject to payment of utility uneconomic costs. See CPUC Decision 03-07-028.

In addition, the CPUC determined that certain new municipal customers (*i.e.*, new business parks that were not in existence on February 1, 2001) located in the service area of an investor-owned utility would be required to pay many of the costs of the CDWR purchases even if they were never an investor-owned utility retail customer. In particular, new customers of a municipal utility that did not exist on February 1, 2001, may be required to make such payments. See CPUC Decision 03-07-028.

© The Regents of the University of California

§6.22 C. Significant Legislation Since Energy Crisis of 2000-2001

In the California energy crisis of 2000 and 2001, retail electricity prices in California reached all-time highs and generation capacity shortages forced temporary power outages in California. In response to the energy crisis, the legislature enacted a number of provisions to facilitate the siting of new generation and to promote and fund energy conservation, the development of clean distributed generation, and renewable resources.

The 2002 legislation established the California Renewables Portfolio Standard Program (see Pub Util C §§399-399.20), imposing a requirement on investor-owned utilities to increase their procurement of renewable resources by an additional 1 percent per year so that by the end of 2010, 20 percent of their retail sales are supplied by eligible renewable resources. See Pub Util C §§399.14-399.15. The governing boards of municipal utilities are responsible for implementing and enforcing a renewables portfolio standard and municipal utilities are required to report to their customers on an annual basis on expenditures for renewable energy development and the resource mix used to supply its customers. See Pub Util C §387. The California Public Utilities Commission (CPUC) is charged with instituting a rulemaking to determine the manner in which community aggregators and energy service providers are to participate in the Renewable Portfolio Standard Program. Pub Util C §399.12(g)(2)-(3). See CPUC Docket No. R.01-10-024; CPUC Docket No. R.04-04-026; CPUC Docket No. R.06-05-027; CPUC Docket No. R.06-02-012; CPUC Docket No. R.08-08-009. The CPUC and the California Energy Commission jointly implement the California Renewables Portfolio Standard Program. Additional information regarding the program can be found at www.cpuc.ca.gov/PUC/energy/Renewables.

Entities, including cities and counties, that serve the customers of electric utilities can also apply for demand side program funds under the following:

- The electric public goods charge (PGC), as authorized by Pub Util C §§381 and 399.
- The gas PGC, as authorized by Pub Util C §§890-900.
- Self-generation and demand-responsiveness programs developed as authorized by Pub Util C §379.5(b).

The California Global Warming Solutions Act of 2006 (Health & S C §§38500-38599) requires the California Air Resources Board (CARB) to develop regulations and market mechanisms to reduce California's greenhouse gas emissions to the 1990 level by 2020. Health & S C §§38550. The reduction measures to meet the 2020 target are to be adopted by January 1, 2011 and are to become operative January 1, 2012. Health & S C §§38562. Additional information regarding implementation of the California Global Warming Solutions Act of 2006 by CARB can be found at www.arb.ca.gov/cc/cc.htm. See also §11.235.

All electric utilities are prohibited from entering into any power generation commitments of 5 years or more, when such projects are not at least as clean as a combined-cycle gas turbine project. See Pub Util C §§8340-8341. The CPUC (for all electric utilities, including municipal electric utilities) and the California Energy Commission (CEC) (for municipal electric utilities only) are required to set specific greenhouse gas limits to implement this requirement. See Pub Util C §8341; CPUC Docket No. R.06-04-009; CEC Docket No. 06-OIR-1.

© The Regents of the University of California

§6.23 D. Utility Industry

Five distinct ownership segments exist in the United States electrical industry:

(1) Investor-owned utilities;

(2) State or municipal agencies;

(3) Cooperatively owned systems;

(4) Federal agencies; and

(5) Non-utility producers of electric power.

In addition, with the introduction of competition in various regions of the country, a series of new players have entered the electricity market, including brokers, energy service providers, and even private transmission owners. Investor-owned utilities own approximately 75 percent of generating capacity in the United States and serve about the same percentage of total retail customers. 51 Public Power 75-77 (No. 1, Jan.-Feb. 1993) (the official publication of the American Public Power Association). Investor-owned utilities also own and operate the majority of the high voltage transmission systems that supply wholesale power and/or transmit power from power generation sources to most, if not all, California municipal utilities.

© The Regents of the University of California

§6.24 E. California Municipal Electric Utilities

Some California municipal electric utilities that serve retail customers own no generating capacity and purchase the power they supply at wholesale rates via high voltage transmission lines. Other retail municipal utilities own generating facilities, individually or jointly with other utilities. All retail municipal electric utilities own, operate, and maintain distribution facilities, which consist of transformers and switching gear necessary to reduce transmission voltages to distribution voltage at which power is delivered to the customer.

© The Regents of the University of California

F. Federal Energy Regulatory Commission (FERC) Jurisdiction

1. Wholesale Electric Rate Regulation

§6.25 a. Interstate Transmission and Sales

The Federal Power Act (16 USC §§791a-828c) authorizes the Federal Energy Regulatory Commission (FERC) to regulate the rates of interstate transmission and interstate wholesale sales of electricity by investor-owned utilities. 16 USC §§824d-824e. FERC's jurisdiction under the Federal Power Act (16 USC §§791a-828c) is exclusive and preempts the California Public Utilities Commission (CPUC) from regulating interstate transmission or sales. *Mississippi Power & Light Co. v Mississippi (Ex rel Moore)* (1988) 487 US 354, 101 L Ed 2d 322, 108 S Ct 2428; *Federal Power Comm'n v Southern Cal. Edison Co.* (1964) 376 US 205, 216, 11 L Ed 2d 638, 84 S Ct 644.

© The Regents of the University of California

§6.26 b. Just and Reasonable Rates

All rates and charges made by a public utility subject to the Federal Energy Regulatory Commission's (FERC) jurisdiction must be "just and reasonable." 16 USC §824d. The terms "just and reasonable" are ordinarily interpreted as meaning cost-based; however, FERC has approved rates that are based on factors other than costs, under the label of opportunity or market based pricing.

© The Regents of the University of California

§6.27 c. Rate-Setting

All rates and charges for transmission or sales subject to the Federal Energy Regulatory Commission's (FERC) jurisdiction must be filed with FERC, which may reject an initial rate filing or a rate change filing not in accordance with FERC regulations. If, after a hearing, FERC determines a rate is unjust, unreasonable, unduly discriminatory, or preferential, FERC may set a just and reasonable rate. 16 USC §824d.

© The Regents of the University of California

2. Transmission Service

§6.28 a. Transmission Rates

Investor-owned utilities largely own and therefore dominate the California transmission services market. The denial by investor-owned utilities of transmission service or the extraction of monopoly rents from transmission-dependent municipal electric utilities is a major issue. The issue appears in various contexts, including:

- Transmission service rate negotiations;
- Federal Energy Regulatory Commission (FERC) transmission rate cases;
- Applications of investor-owned utilities for regulatory approval or mergers (see, *e.g., In re merger of San Diego Gas & Elec. Co. and Southern Cal. Edison Co.,* FERC Docket No. EC 89-5-000; CPUC Application No. 88-12-035);
- Federal antitrust litigation. *City of Vernon v Southern Cal. Edison Co.* (9th Cir 1992) 955 F2d 1361; *City of Anaheim v Southern Cal. Edison Co.* (9th Cir 1992) 955 F2d 1373.

© The Regents of the University of California

§6.29 b. Expanded Federal Energy Regulatory Commission Authority

The Energy Policy Act of 1992 gave the Federal Energy Regulatory Commission (FERC) substantially enhanced authority to make orders on transmission service. 16 USC §824j. Under this legislation, any electric utility, any federal power marketing agency, or any other person generating power for wholesale may apply to FERC for an order requiring a transmitting utility (including municipally owned electric utilities) to provide transmission services. 16 USC §824j.

In issuing such transmission service orders, FERC may set transmission service rates that reflect "an appropriate share, if any, of legitimate, verifiable economic costs, including taking into account any benefit to the transmission system of providing transmission service and the costs of any enlargement of transmission facilities." 16 USC §824k.

© The Regents of the University of California

§6.30 c. Limitations on Federal Energy Regulatory Commission Authority Over Municipal Electric Utilities

The Federal Energy Regulatory Commission (FERC) does not have refund authority over wholesale electricity sales by governmental entities and non-public utilities. See 16 USC §§824(b)(1), 824(d), 824e; *Bonneville Power Admin. v Federal Energy Regulatory Comm'n* (9th Cir 2005) 422 F3d 908.

© The Regents of the University of California

§6.31 d. Open Access and the Creation of Independent System Operators and Regional Transmission Organizations

Order 888 issued by the Federal Energy Regulatory Commission (FERC), also known as the Final Open Access Rule, directs utilities subject to its jurisdiction to file open access nondiscriminatory transmission tariffs containing minimum terms and conditions of nondiscriminatory transmission service and to take transmission service for their own new wholesale sales and purchases under those tariffs. 75 FERC 61,080 (1996). In Order 888, FERC encouraged the formation of independent system operators and provided eleven principles to guide such formation. Order 889 issued by FERC describes the requirements for utilities owning transmission capacity to provide customers with information on transmission capacity, prices, and other information that would enable them to obtain open access nondiscriminatory transmission service. 75 FERC 61,078 (1996).

Since issuing Order 888, FERC has accepted open access tariffs from a variety of public utilities and independent system operators, including the California independent system operator (ISO). In addition, FERC's objectives and requirements for the operation of wholesale electricity markets and the transmission system have evolved. For example, FERC issued Order 2000, encouraging the formation of Regional Transmission Organizations that would consolidate the operation of wholesale competitive electricity markets and the transmission system into large regional organizations. 89 FERC 61,285 (1999). FERC also issued a Notice of Proposed Rulemaking proposing a standard design for wholesale competitive electricity markets in Docket No. RM01-12-000, and an order imposing market behavior rules on competitive suppliers of electricity and creating penalties for market manipulation (see 105 FERC 61,218 (2003)). These rules apply to all entities supplying electricity under a grant of market-based rate authority from FERC.

© The Regents of the University of California

§6.32 e. Federal Energy Regulatory Commission Jurisdiction Over California Independent System Operator (ISO)

Before the creation of the California independent system operator (ISO), many municipal utilities had interconnection agreements with neighboring utilities that addressed the provision of transmission service and system operations. With the creation of the California ISO, entities seeking transmission service over the facilities of the investor-owned utilities and other entities that have joined the California ISO must obtain transmission service under the California ISO tariff. Such entities must schedule their transactions with the California ISO and pay for transmission, ancillary services, and California ISO administrative charges under the California ISO tariff.

The California ISO tariff grandfathers contracts for transmission that were in effect before the California ISO commenced operations. There are proceedings underway to substantially restructure the California ISO's operations, including its congestion pricing mechanisms and scheduling and other requirements. These proceedings may result in changes to the manner in which the California ISO honors existing contracts, and will probably create a day-ahead energy market operated by the California ISO.

Municipal utilities can join the California ISO by turning over their transmission resources (including transmission facilities or rights, or both) to operation by the California ISO. Municipal utilities that join the California ISO must become signatories to the Transmission Control Agreement between the California ISO and its members, and must obtain transmission service over their facilities in accordance with the California ISO tariff.

Municipal utilities that formally join the California ISO may recover the revenue requirement for their facilities through the California ISO tariff from users of the California ISO system. Rather than joining the California ISO, municipal utilities can purchase transmission or may participate in California ISO Ancillary Services and Real-Time Energy markets like other market participants.

In an effort to improve the attractiveness of participation in the California ISO by municipal utilities, the California ISO has created a Metered Subsystem Agreement (MSS) that is available to municipal utilities whether or not they become formal California ISO members. The MSS program affords municipal utilities that sign a Metered Subsystem Agreement a degree of flexibility to follow their own load, exemptions from certain charges, and a degree of protection from load shedding that is due to supply deficiencies caused by entities other than the municipal utility.

Whether or not they join the California ISO or become a Metered Subsystem, municipal utilities that sell into California ISO markets or make sales using the California ISO transmission system are subject to the California ISO tariff requirements and Federal Energy Regulatory Commission (FERC) orders on the California ISO for such transactions. For example, such municipal utilities have been subject to various market mitigation measures created by FERC in an attempt to address the electricity crisis, including requirements to offer unused generating capacity to the California ISO at capped prices. See, *e.g.,* 95 FERC 61,418 (2001).

In addition, municipal utilities may be required to seek interconnection to the transmission system from the California ISO for new generating units, enter into participating generator agreements with the California ISO, schedule outages of their generating facilities with the California ISO, and comply with California ISO directives during emergency conditions. Some requirements can be avoided for generating units connected in a municipal utility's distribution system if such units will not be used to serve load outside of the distribution system or to participate in California ISO markets. See, *e.g.,* 100 FERC 61,055 (2002); 101 FERC 61,277 (2002).

Municipal utilities that require distribution service from an electric utility must take such service under the FERC-approved wholesale distribution tariffs.

Additional information regarding the California ISO can be found at www.caiso.com.

© The Regents of the University of California

3. Other Federal Energy Regulatory Commission (FERC) Regulatory Powers

§6.33 a. Cogeneration and Small Power Producers

The Federal Energy Regulatory Commission (FERC) has regulatory powers in other areas that can have important economic impacts on municipal generating facilities. Municipalities are subject to FERC's rules implementing the Public Utilities Regulatory Policy Act of 1979 (PURPA), under which electric utilities must purchase power generated by cogeneration and small power producers at rates based on the fuel and capital costs the utility can avoid by virtue of obtaining power in this manner. 16 USC §§2601-2645.

© The Regents of the University of California

§6.34 b. Natural Gas

Under the Natural Gas Act, the Federal Energy Regulatory Commission (FERC) regulates interstate wholesale sales and transmission of natural gas by privately owned pipelines. Natural gas prices significantly impact municipal electric utilities with generating facilities because federal and state air quality regulations virtually mandate power plants sited in non-attainment areas to burn natural gas to produce electricity. FERC's wholesale rates directly determine the natural gas prices of the interstate pipelines from which California municipal utilities directly or indirectly import natural gas from the major production areas in Canada, Wyoming, and Texas. 15 USC §§717-717z.

© The Regents of the University of California

G. California Public Utilities Commission (CPUC) Jurisdiction

§6.35 1. Rates

The California Supreme Court has determined that there is no constitutional impediment preventing the California Public Utilities Commission (CPUC) from regulating municipal utility rates; however, the legislature has not exercised its authority under Cal Const art XII to confer such jurisdiction on the CPUC. *County of Inyo v PUC* (1980) 26 C3d 154, 161 CR 172.

© The Regents of the University of California

2. Safety and Construction Standards

§6.36 a. Uniform System

The legislature has granted the California Public Utilities Commission (CPUC) authority to develop a uniform system of safety regulation over certain facilities. Pub Util C §§701, 761-900, 8037. CPUC safety rules on maintenance of electric power lines apply to municipal utilities. *Polk v Los Angeles* (1945) 26 C2d 519, 159 P2d 931. Violation of these rules constitutes negligence per se. *Langazo v San Joaquin Light & Power Corp.* (1939) 32 CA2d 678, 90 P2d 825. In any conflict between a municipal action and lawful order of the CPUC, the latter prevails. *Harbor Carriers, Inc. v Sausalito* (1975) 46 CA3d 773, 121 CR 577.

© The Regents of the University of California

§6.37 b. Transmission Siting

Although the Federal Energy Regulatory Commission (FERC) has jurisdiction over transmission rates, states retain jurisdiction over transmission siting. Electric corporations seeking to construct transmission facilities in California must obtain a certificate of public convenience and necessity (CPCN) from the California Public Utilities Commission (CPUC). Pub Util C §1001. The CPUC has no jurisdiction to require a municipal utility to obtain a CPCN for the construction of facilities. See *Los Angeles Gas & Elec. Corp. v Department of Pub. Serv. of the City of Los Angeles* (1921) 52 CA 27, 197 P 962.

© The Regents of the University of California

§6.38 3. California Energy Commission (CEC) Jurisdiction

Any electric utility seeking to construct thermal generating plants of 50 megawatts or more must first obtain certification of the site and related facilities from the California Energy Commission (CEC). See Pub Res C §§25500-25543. An electric utility is "any person engaged in, or authorized to engage in, generating, transmitting, or distributing electric power by any facilities, including but not limited to, any such person who is subject to the regulation of the Public Utilities Commission," including a city. Pub Res C §§25108, 25116.

© The Regents of the University of California

§6.39 4. Extraterritorial Retail Service and Potential Challenges

As a general principle, a municipal electric utility may furnish service outside its boundaries, except in another city that furnishes the same service and does not consent. Cal Const art XI, §9(a); Pub Util C §10005.

Special issues arise when a municipal electric utility attempts to extend service to customers in the existing service territory of an investor-owned utility. The following are legal challenges an investor-owned utility might assert.

- **Existing franchise challenge:** The investor-owned utility will most likely be providing service in the neighboring city under an exclusive franchise issued under the Broughton Act (Pub Util C §§6001-6092) or the Franchise Act of 1937 (Pub Util C §§6201-6302). These statutes might prevent any supplier other than the franchisee from providing service in the area covered by the franchise. For a general discussion of these statutes, see §§6.49-6.57.

- **Inverse condemnation challenge:** See *Hladek v City of Merced* (1977) 69 CA3d 585, 138 CR 194 (no taking occurs when municipal dial-a-ride forces plaintiff taxi company out of business).

- **Federal antitrust challenge:** Although federal antitrust laws apply to municipalities (*City of Lafayette v Louisiana Power & Light Co.* (1978) 435 US 389, 55 L Ed 2d 364, 98 S Ct 1123), municipalities are generally immune from antitrust liability, including costs and attorney fees. 15 USC §§34-36. Municipalities remain subject to injunctive relief under the antitrust laws. *R. Ernest Cohn, D.C., D.A.B.C.O. v Bond* (4th Cir 1991) 953 F2d 154.

- **State antitrust challenge:** California's antitrust statute, Bus & P C §§16700-17365, generally referred to as the Cartwright Act, contains no express municipal antitrust immunity, but has been judicially interpreted to exclude cities. *Penn v City of San Diego* (1987) 188 CA3d 636, 233 CR 514.

- **Inter-utility contracts challenge:** A municipal electrical utility may have contracts with adjoining investor-owned utilities on service territory duties with respect to each other. These contracts may be informal letter agreements allowing the investor-owned utility to service specific fringe customers more economically served by the municipal utility's distribution system or they may be formal agreements delineating service territory boundaries. The analysis of the restrictions such contracts might impose on extraterritorial service must include the extent to which they constitute unenforceable covenants not to compete or unlawful restraints on trade or business. See Bus & P C §16600.

- **Challenge alleging tortious interference with prospective business advantage or contractual relations.** An investor-owned utility challenging the authority of a municipal utility to provide service outside its corporate limits might plead tortious interference with prospective business advantage or contractual relations. The Restatement (Second) of Torts, §766B (1979) describes intentional interference with a prospective contractual relation as follows:

One who intentionally and improperly interferes with another's prospective contractual relation … is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Although the privilege of competition may be a defense, this privilege normally must be determined by the trier of fact, not on demurrer. See *Lowell v Mother's Cake & Cookie Co.* (1978) 79 CA3d 13, 20, 144 CR 664; Restatement §768.

- **Unfair competition challenge:** The Unfair Trade Practices Act, Bus & P C §§17000-17101, makes it unlawful to sell a product below cost for the purpose of injuring competitors. Bus & P C §17043. This statute might apply to a municipal utility attempting to offer service outside the city limits.

© The Regents of the University of California

5. Acquisition of Investor-Owned Facilities

§6.40 a. Advantages of Takeovers

Municipalities are generally able to provide electrical service to their residents at significantly lower rates than those offered by investor-owned utilities. Additional advantages of establishing a municipal electric utility can include local control, tax-exempt financing, federal and state tax exemptions, absence of state and federal regulation, preferences over investor-owned utilities to inexpensive hydroelectric power from the six federal agencies that market power generated by federal hydroelectric facilities, and preference in the issuance of Federal Energy Regulatory Commission (FERC) licenses for hydroelectric projects.

© The Regents of the University of California

§6.41 b. Establishing a Municipal Utility

Establishment of a municipal electric utility will usually involve acquisition of an existing investor-owned distribution system, rather than construction of a new system. The existing utility franchise agreement may be a constraint in establishing a municipal utility. *Otter Tail Power Co. v U.S.* (1973) 410 US 366, 35 L Ed 2d 359, 93 S Ct 1022, illustrates methods one investor-owned utility used to retain its franchise and frustrate local efforts, including denial of wholesale power sales and transmission service.

In California, a municipality may petition the California Public Utilities Commission (CPUC) to acquire investor-owned utility facilities under Pub Util C §1403 or it can use the general eminent domain procedure under CCP §§1230.010-1273.050. See *City of North Sacramento v Citizens Utils. Co. of Cal.* (1963) 218 CA2d 178, 32 CR 308. If the CPUC alternative is used, the CPUC establishes the price the city must pay to acquire the system. Pub Util C §1411. If eminent domain is used, conclusive presumptions that usually apply in such a proceeding are declared by statute to be rebuttable presumptions on the property of an electric, gas, or water public utility. CCP §§1240.650, 1245.250.

© The Regents of the University of California

6. Municipal Rate-Setting

§6.42 a. Reasonableness Test

Municipal rates are judicially reviewable for a determination of reasonableness. In the absence of evidence to the contrary, municipal electric utility rates are presumed valid. *Durant v City of Beverly Hills* (1940) 39 CA2d 133, 102 P2d 759. The tests of reasonableness are whether a reasonable basis exists for charging different rates and whether the rates themselves are reasonable. See *Hansen v City of San Buenaventura* (1986) 42 C3d 1172, 1188, 233 CR 22. See also *American Microsystems, Inc. v City of Santa Clara* (1982) 137 CA3d 1037, 187 CR 550.

Proposition 218, which added Cal Const arts XIIIC and XIIID, made numerous changes to local government finance law, particularly in the areas of taxes, fees, and assessments. Proposition 218 also created certain procedural requirements for both fees and charges. See Cal Const art XIIID, §6. The initiative prohibits local agencies from using fees imposed as an incident of property ownership to fund general governmental services, including, but not limited to, fees for police, fire, ambulance, or library services, which are available to the public at large in substantially the same manner as they are to property owners.

PRACTICE TIP: The League of California Cities has published the Proposition 218 Implementation Guide (2007). Copies of the guide are available through the League's publication unit at 1400 K Street, 4th Floor, Sacramento, CA 95814; telephone (916) 658-8257; fax (916) 658-8220, or online at www.cacities.org.

On Proposition 218, see §§5.110-5.120.

© The Regents of the University of California

§6.43 b. Special Tax Problems and Other Constraints on Rate-Setting

The imposition of development fees for utility services that exceed the reasonable cost of providing the service for which the fee is charged may be successfully voided as special taxes that a municipality may impose only on approval of two-thirds vote of the qualified electorate. Cal Const art XIIIA, §4; Govt C §66013. See also *Carlsbad Mun. Water Dist. v QLC Corp.* (1992) 2 CA4th 479, 485, 3 CR2d 318.

A city's rate-setting powers may be subject to charter or municipal code restrictions or to bond covenants that require careful analysis before implementing a rate change.

© The Regents of the University of California

H. Electromagnetic Fields (EMF)

§6.44 1. Electromagnetic Fields Exposure Issues

Scientific opinion varies widely about whether exposure to electromagnetic fields (EMF) can cause cancer and other adverse health effects; nonetheless, the perception that it might be harmful has created potentially enormous economic impacts on municipal electric utilities. Several national and international panels have conducted reviews of data from multiple studies and state that there is not sufficient evidence to conclude that EMF causes cancer. The International Agency for Research on Cancer (IARC) and the California Department of Health Services (DHS) both classified EMF as a possible carcinogen. See World Health Organization Fact Sheet No. 263, *Electromagnetic fields and Public Health* (October 2001); California Department of Health Services, *An Evaluation of the Possible Risks From Electric and Magnetic Fields From Power Lines, Internal Wirings, Electrical Occupations, and Appliances* (June 2002). Many utilities are now implementing EMF mitigation measures to reduce fields from new transmission and distribution facilities to minimize siting controversies and delay. The California Public Utilities Commission (CPUC) has implemented a decision requiring electric utilities to incorporate low-cost or no-cost measures for managing EMF from power lines. CPUC Decision 93-11-013 requires that utilities spend up to 4 percent of the cost of the project on low-cost methods to reduce EMF exposure. See CPUC General Order No. 131-D.

© The Regents of the University of California

§6.45 2. Electromagnetic Fields Litigation Limited

The provisions of Pub Util C §1759 limit the ability of persons to sue for damages due to high levels of electric and magnetic fields arising from power lines of regulated utilities. *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 55 CR2d 724. The California Public Utilities Commission (CPUC) has authority to adopt policy on whether electric and magnetic fields (EMF) arising from power lines of regulated utilities are a public health risk and what action, if any, utilities should take to minimize such risk. A private action for damages against a public utility under the Public Utilities Act provision governing such actions is barred by Pub Util C §1759, a provision governing jurisdiction to review CPUC decisions. *San Diego Gas & Elec. Co. v Superior Court, supra.* The court found that to allow such a private action would have the effect of undermining the general supervisory or regulatory policy of the CPUC.

© The Regents of the University of California

§6.46 a. Examples of Personal Injury Litigation Related to Electromagnetic Fields

Electromagnetic fields (EMF) personal injury litigation in California has yet to produce a trial court judgment. Pending trial cases raise such issues such as:

- A utility's alleged failure to disclose information about EMF before selling property to a developer;
- Wrongful death from leukemia allegedly caused by EMF exposure while employed as a utility maintenance worker;
- Allegations that electric lines near school caused cancer in students; and
- Claims that electric lines near a residence caused kidney tumor.

Typical causes of action have included:

- Strict liability;
- Negligence;
- Battery;
- Diminution in property value;
- Trespass; and
- Negligent infliction of emotional distress.

© The Regents of the University of California

§6.47 b. Defenses to Electromagnetic Fields Claims

One defense to electromagnetic fields (EMF) lawsuits is predicated on the utility's duty to use reasonable care in the transmission and distribution of electricity. This duty is commensurate with the level of the danger. A utility cannot and need not take precautions against unknown risks. See *Anderson v Owens Corning* (1991) 53 C3d 987, 281 CR 528 (no duty to warn about risks associated with asbestos). California courts have thus far declined to apply strict product liability to the transmission and distribution of electricity (see *Stein v Southern Cal. Edison Co.* (1992) 7 CA4th 565, 8 CR2d 907), or strict liability based on ultra hazardous activity for such transmitting electricity (see *Pierce v PG&E* (1985) 166 CA3d 68, 85, 212 CR 283).

© The Regents of the University of California

§6.48 I. References on Municipal Retail Electric Utilities

For related material:

- Public Utilities Commission, see §§1.98-1.100;
- Fees, charges, and rates, see §§5.158-5.186;
- Hazardous waste, obligations of owners of property, see §§11.250-11.253; and
- Federal statutory provisions, antitrust, see §13.153.

© The Regents of the University of California

IV. FRANCHISES

§6.49 A. Gas, Electric, and Water Franchises

Cities allow public utilities engaged in the distribution and sale of gas, electricity, or water to lay and maintain pipes, wires, and appurtenances under, along, or across a city's streets and public places by the grant of a franchise, usually in the form of an uncodified ordinance. General law cities may grant franchises for this purpose either through a bidding process provided for in the Broughton Act (Pub Util C §§6001-6092), or without a bidding process under the Franchise Act of 1937 (Pub Util C §§6201-6302). A charter city may use either statutory scheme not in conflict with its charter. Pub Util C §§6001, 6205.

© The Regents of the University of California

§6.50 1. Broughton Act Procedures

If the city chooses to use the Broughton Act (Pub Util C §§6001-6092) procedure, then on submission of an application for a franchise, the city must publish an advertisement that bids for the described franchise, stating that the franchise will be awarded to the highest bidder, and that the successful bidder will pay the city 2 percent of the gross annual receipts arising from the use, operation, or possession of the franchise. The bid must be accompanied by a deposit of 10 percent of the bid and, if the bidder is successful, the remaining 90 percent must be deposited with the city within 24 hours of the award of the bid. A bond may also be required to be posted by the successful bidder. See generally Pub Util C §§6001-6092.

© The Regents of the University of California

§6.51 2. Franchise Act of 1937 Procedures

If a city chooses to use the Franchise Act of 1937 (Pub Util C §§6201-6302) procedure, the applicant must file an application stating that during the life of the franchise it will pay to the city 2 percent of the gross annual receipts of the applicant arising from the use, operation, or possession of the franchise, provided such amount is not less than 1 percent of the gross annual receipts of the applicant derived from the sale of the utility service in the city. The city must publish a resolution of intention to grant the franchise and then hold a public hearing before adopting the franchise ordinance. See Pub Util C §§6201-6302.

© The Regents of the University of California

§6.52 3. Provisions of Franchise Ordinances

A city is not required to have an enabling ordinance to grant a franchise, but may adopt such an ordinance to establish additional procedures and requirements not in conflict with the applicable statutory scheme. Pub Util C §§6002, 6203. However, a city may not regulate the rates or internal operations of the utility by the grant of the franchise or through an enabling ordinance because such authority is vested with the California Public Utilities Commission (CPUC). See Cal Const art XII, §8; Pub Util C §701. The provisions of a franchise ordinance, discussed in §§6.53-6.55, are usually subject to negotiation between the city and the applicant.

© The Regents of the University of California

§6.53 a. Term of Franchise Usually Stated

Cities may grant franchises for as short or long as may be negotiated. Pub Util C §6264. Many franchises are granted with an indeterminate term, some with 25-year terms, and a few with short 1-5 year terms, depending on the result of negotiations with the applicant.

© The Regents of the University of California

§6.54 b. Relocation Requirement Usually Stated

A franchise typically includes a requirement that the franchisee bear the cost of relocating or removing its facilities that will be affected by the city's public works projects on the property subject to the franchise. See Pub Util C §6297. However, if the relocation is required by a private entity or another utility constructed later in time, the franchise language will often require the other entity or utility to pay the cost of relocating the franchisee's facilities. *PG&E v Dame Constr. Co.* (1987) 191 CA3d 233, 236 CR 351; *City of Anaheim v Metropolitan Water Dist.* (1978) 82 CA3d 763, 147 CR 336. Assessment district funding does not defeat the obligation of a utility to pay the costs of relocating poles and infrastructure. *City of Livermore v PG&E* (1997) 51 CA4th 1410, 59 CR2d 852.

© The Regents of the University of California

§6.55 c. Compliance With Excavation Procedures, Indemnification, and Other Provisions Usually Stated

Franchises include express provisions requiring the franchisee to obtain an excavation or highway permit before laying or replacing pipes and wires in the public right-of-way and to file maps with the city showing the location of all such facilities in the city. See Pub Util C §§6001.5, 6002-6203, 6265. An indemnification clause is required and a bond may be required by a city. Pub Util C §§6296, 6301.

© The Regents of the University of California

§6.56 4. Municipal Public Lands Use Surcharge

A city may place a land use surcharge on natural gas and electricity utilities, similar to a franchise fee on private gas and electric utilities using public rights-of-way, to replace franchise fees otherwise lost in deregulation of the gas industry. See Pub Util C §§6350-6354.1.

© The Regents of the University of California

§6.57 5. Oil Pipelines and Utility Franchises for Industrial Gas or Oil (or Products of Gas and Oil)

Both charter and general law cities may grant oil pipeline franchises under the Franchise Act of 1937. Pub Util C §§6201-6302. Charter cities may also grant oil pipeline franchises under the Broughton Act. Pub Util C §§6001.5, 6205.1. See the procedures and issues discussed in §§6.50-6.51.

A franchise granted for a pipeline that has been determined by the California Public Utilities Commission (CPUC) to be a public utility and that would carry industrial gas or oil or products may only be charged an annual fee based on the internal diameter of the pipeline in amounts set by Pub Util C §6231.5.

Cities may charge a nonpublic utility oil pipeline annual fees based on (see Pub Util C §6231.5(e)-(f)):

- A negotiated percentage of gross annual receipts arising from the use, operation, or possession of the franchise;
- An agreed-on internal diameter pipeline rate schedule; or
- Any other amount on which the parties agree.

© The Regents of the University of California

B. Cable Television and Video Systems Franchises

1. Local Franchise Authority

§6.58 a. Federal Law Limitations

Federal law governs interstate cable communication systems and thus governs cable television systems, because they are considered as being engaged in interstate communications regardless of the size of the system. *U.S. v Southwestern Cable Co.* (1968) 392 US 157, 20 L Ed 2d 1001, 88 S Ct 1994. Federal law, however, permits cities to franchise such systems if otherwise consistent with state and local law. 47 USC §541. Furthermore, federal law does not prevent a state from exercising jurisdiction on cable services consistent with federal law. 47 USC §556(b). Because the federal law establishes different rules depending on the nature of the video service provider (*e.g.*, open video system operator or cable operator), the extent of a city's authority to regulate or franchise particular system providers will vary, even though the providers may appear on the surface to be performing the same activities. The Cable Communications Policy Act of 1984 (Cable Act) (47 USC §§521-573) does not preclude local regulation of non-cable video programming. See *Pacific Bell Tel. Co. v City of Walnut Creek* (ND Cal 2006) 428 F Supp 2d 1037, 1045. Finally, because cable television communication is protected speech under the First Amendment of the United States Constitution, governmental regulation at any level may need to meet the standards discussed in §§8.118-8.153.

© The Regents of the University of California

§6.59 b. State Law Limitations

The enactment of California's Digital Infrastructure and Video Competition Act of 2006 (Pub Util C §§5800-5970), discussed in §§6.65-6.68, has substantially limited the authority with which cities may regulate video service providers. The law defines video service to include video programming services, cable services, and open video system services. Pub Util C §5830(s). The law identifies the California Public Utilities Commission (CPUC) as the sole franchising authority to issue state franchises to video service providers. Pub Util C §5840(a). The law also preempts most local regulation of video service providers that have received a state franchise to provide such services. See §6.65.

PRACTICE TIP: A video service provider that seeks to provide video services in California must obtain a state franchise from the CPUC. Although video service providers may continue to provide video services under a franchise received from a city before January 1, 2008, as of that date, cities are not authorized to issue new franchises or renew existing franchises for video services. See Pub Util C §5840(c). See also CPUC Decision 07-03-014.

© The Regents of the University of California

2. State Law on Cable Television and Video System Franchises

§6.60 a. Local Cable Television Franchises

Except as exempted by federal law, no person may construct a cable television system without a franchise or license from the jurisdiction in which it operates or a statewide video service franchise from the California Public Utilities Commission (CPUC). Govt C §53066(e); Pub Util C §5840; *FCC v Beach Communications* (1993) 508 US 307, 124 L Ed 2d 211, 113 S Ct 2096 (federal exemption of satellite master antenna television operators for buildings in common ownership only upheld). California state law now requires that a cable provider obtain a state franchise in lieu of a new local franchise or renewal of an existing local franchise. See discussion in §§6.65-6.68. Cable providers may continue to provide services under a franchise issued by a city until expiration or termination of the local franchise. See Pub Util C §5840(o). See also §6.66.

© The Regents of the University of California

§6.61 (1) Potential Franchise Rights to Be Granted and Maximum Fee Possible

The franchise or license may authorize the grantee to place wires, conduits, and appurtenances along or across public streets, highways, alleys, public properties, or public easements of the granting agency. Govt C §53066(d). But see §§6.69-6.86.

State law caps the franchise fee at 5 percent of gross receipts from operations in the city and governs advance franchise fee payments. Govt C §§53066(c), 53066.01. Federal law caps franchise fees at 5 percent of the cable operator's gross revenues derived from the cable system to provide cable services, and permits franchise fees to be prepaid or deferred as long as they do not exceed the cap that may be paid in a 1-year period. 47 USC §542(b). To be constitutional, the franchise fee may not exceed that charged to other users of public right-of-way. *Century Fed., Inc. v City of Palo Alto* (ND Cal 1988) 710 F Supp 1559; *Group W Cable, Inc. v City of Santa Cruz* (ND Cal 1988) 679 F Supp 977 (fee no greater than 5 percent valid if content neutral and nondiscriminatory). For the purpose of calculating franchise fees, "gross receipts" include the amounts listed as "franchise fees" on subscriber bills. *City of Dallas v FCC* (5th Cir 1997) 118 F3d 393.

© The Regents of the University of California

§6.62 (2) Equal Access to Cable Services Required

Cable services must not be denied to any group of potential residential cable subscribers because of the income of the residents in the area. Govt C §53066.2. If the franchisee denies equal access to service, the city may consider the franchise to have been abandoned and may take appropriate action, including revocation of the franchise agreement (after notice and opportunity for hearing have been given to the franchisee). Govt C §53066.2(c).

© The Regents of the University of California

§6.63 (3) Multiple Franchises Possible and California Public Utilities Commission Jurisdiction

Although federal law prohibits exclusive franchises (47 USC §541(a)), state law permits the operation of multiple cable service providers under local franchises. Govt C §53066.3. All cable operators must serve the same geographic area and satisfy the same public, educational, and governmental access requirements. Govt C §53066.3(d). See also §§6.69-6.86.

The CPUC has authority to regulate certain aspects of cable television equipment. 47 USC §556(a); Pub Util C §768.5.

© The Regents of the University of California

§6.64 (4) Delinquency Fees Available

State law allows delinquency fees imposed by a cable operator on a consumer for making a late payment. Cities are preempted from regulating delinquency fees that fall within this statute. Govt C §53088.7. See *Manibog v MediaOne of Los Angeles, Inc.* (2000) 81 CA4th 1366, 98 CR2d 297 (discussing the definition of "delinquency fee").

© The Regents of the University of California

§6.65 b. Statewide Video Franchises

The Digital Infrastructure and Video Competition Act of 2006 (Pub Util C §§5800-5970) provides a streamlined process for granting statewide franchises to video service providers. It allows telephone companies to compete with cable television providers in providing video service. See CPUC Docket No. 06-10-005. The California Public Utilities Commission (CPUC) is the sole authority for granting new 10-year video franchises. Pub Util C §§5840(a), 5850.

A video franchisee can unilaterally terminate their video franchise at any time by providing 90 days' notice to (Pub Util C §5840(j)):

- Customers;
- Local entities; and
- The CPUC.

Before offering video service in a city, a video franchisee must provide each city with at least 10 but no more than 60 days' notice that it will provide video service in that city's jurisdiction. Pub Util C §5840(n).

© The Regents of the University of California

§6.66 (1) Effect of New Statewide Franchise on Existing Cable Franchisees

Existing cable franchisees may opt out of their local franchise on the occurrence of any of the three following events (Pub Util C §5840(o)):

- The expiration of the cable franchise agreement;
- A mutually agreed-on date set between the city and the franchisee; or
- When notification is received by a city from a state video franchise holder that it intends to provide service in the city (see §6.65).

Cities will generally receive the benefit of public, education, and government (PEG) and institutional networks required by cable franchises existing on December 31, 2006, until the latest of the following three dates (Pub Util C §5870(k)):

- The expiration of the cable franchise;
- The termination date of the cable franchise, assuming the cable franchisee had not opted out of its local cable franchise to seek a statewide video franchise; or
- January 1, 2009.

© The Regents of the University of California

§6.67 (2) Maximum Franchise Fee and Required Support for Public, Educational, and Governmental Channels

Unless there is no local franchisee and the city opts to require a lesser amount, a video franchisee must pay 5 percent of gross revenues to the city, or the percentage paid by local cable franchisees, whichever is less. Pub Util C §5840(q)(1).

Video franchisees must provide a number of public, educational, and government (PEG) channels equal to the greatest number of PEG channels that provide at least 8 hours of programming per day by an incumbent cable franchisee as of January 1, 2007. Pub Util C §5870(a). Cities may also, by ordinance, impose an additional fee up to a maximum of 3 percent for support of PEG channel facilities. Pub Util C §5870(n). However, unless a city was imposing a fee for support of PEG channel facilities of more than 1 percent as of December 31, 2006, no more than a 1-percent fee may be imposed.

© The Regents of the University of California

§6.68 (3) Anti-Discrimination and Build-Out Requirements and Telephone Rate Limitations

Video franchisees may not discriminate or deny access to potential residential subscribers based on their income. In addition, the Digital Infrastructure and Video Competition Act of 2006 (Pub Util C §§5800-5970) places additional build-out requirements on video franchisees that are telephone corporations serving more than 1 million customers. Cities may bring discrimination and build-out complaints to the California Public Utilities Commission (CPUC), or the CPUC may open an investigation on its own motion. Pub Util C §5890.

Video franchisees that also provide stand-alone local telephone services are prohibited from increasing their telephone rates to finance the costs of their video service network deployment. Pub Util C §5940.

© The Regents of the University of California

§6.69 3. Federal Cable Television Law

Interstate communications through the physical medium of cable on wire are regulated by the Cable Communications Policy Act of 1984 (Cable Act) (47 USC §§521-573), as amended by the Cable Television Consumer Protection and Competition Act of 1992 (CTCPCA) and by the Telecommunications Act of 1996. The Cable Act mandates the Federal Communications Commission (referred to throughout this chapter as FCC) to develop guidelines for its implementation. These are generally located in 47 CFR part 76. These statutes and guidelines regulate the relationships between the various parties concerned with the provision of cable television services, including equipment manufacturers, program providers, cable television system owners and operators, and franchising authorities, such as cities.

PRACTICE TIP: If the city owns or operates a cable communications system, additional rules and regulations not discussed here will apply.

© The Regents of the University of California

§6.70 a. Definitional Scheme

The Cable Communications Policy Act of 1984 (Cable Act) (47 USC §§521-573), as amended by the Cable Television Consumer Protection and Competition Act of 1992 (CTCPCA) and by the Telecommunications Act of 1996 (see 47 USC §§521-573), contains a series of definitions that are carefully considered by the courts and the FCC in determining which regulations apply to which types of services. 47 USC §522. For example, the facilities of common carriers, such as telephone companies, are by definition not cable systems, except to the extent that they are used to transmit video programming (*i.e.*, programming provided by, or generally considered comparable to programming provided by, a television broadcast station) directly to subscribers. Therefore, common carriers are exempt from the local franchise requirements applicable to cable television systems unless they provide such video programming.

© The Regents of the University of California

§6.71 b. Franchises for Cable Television

Federal law permits cities to franchise cable television systems if otherwise consistent with state and local law. 47 USC §541. Franchises may not be exclusive. 47 USC §541(a). See also §§6.63, 6.87.

© The Regents of the University of California

§6.72 (1) Termination of Franchise

A franchising authority may revoke a cable operator's franchise for cause. 47 USC §546(i). Such termination may lead to a transfer of ownership of the system at "an equitable price." 47 USC §547(b). If a franchise renewal is denied and the franchising authority acquires the cable system, such acquisition must be at "fair market value." 47 USC §547(a). In either case, if the franchise existed before October 30, 1984, acquisition may occur as determined by the franchise agreement.

© The Regents of the University of California

§6.73 (2) Cable Operators Providing Other Telecommunications Services

A city may not limit the cable operator's ability to provide telecommunications services and may not require the operator to obtain a franchise before providing such other telecommunications services. 47 USC §541(b). Moreover, state law prohibits cities from requiring an operator to obtain a franchise as a condition of providing telecommunications service. Pub Util C §7901; *Qwest Communications v City of Berkeley* (ND Cal 2001) 146 F Supp 2d 1081. In any event, a city may require a cable operator to pay a nondiscriminatory fee for use of public property in providing such other telecommunications services. 47 USC §253(c).

Many cable operators offer Internet access over their cable systems. The FCC ruled in 2002 that the provision of Internet access by cable companies (also called cable modem service) is an "interstate information service" that does not include a separate "telecommunications service" subject to mandatory common carrier regulation under Title II of the Communications Act of 1934 (47 USC §§201-231). See Declaratory Ruling and Notice of Proposed Rule Making, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCCR 4798, 4802 (2002). See also *National Cable & Telecommunications Ass'n v Brand X Internet Servs.* (2005) 545 US 967, 162 L Ed 2d 820, 125 S Ct 2688. However, cable modem service is subject to FCC regulation under its ancillary jurisdiction through Title I of the Cable Act to regulate interstate and foreign communications. See 47 USC §§151-161; *National Cable*, 545 U.S. at 976. The Cable Act is the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (CTCPCA) and by the Telecommunications Act of 1996. See 47 USC §§521-573. Although no rulemaking has been adopted in several open proceedings that may affect regulations over broadband access, it appears that any regulation by local government must not interfere with competition among cable modem service providers. FCC CC Docket Nos. 95-20, 98-10, 01-337, 02-33; FCC GN Docket No. 00-185; FCC CS Docket No. 02-52.

© The Regents of the University of California

§6.74 (3) Telephone Companies Providing Video Programming

A telephone company that provides video programming is required to obtain a state franchise from the California Public Utilities Commission (CPUC), if not already providing video programming under a local franchise, unless the video programming is provided (47 USC §571):

- Using radio communication;
- On a common carrier basis; or
- By means of an open video system.

An open video system is essentially a system over which the telephone company controls the video programming on no more than one-third of the activated channel capacity of the system. 47 USC §573; 47 CFR §§76.1500-76.1514. A city may impose a fee on an open video system provider that does not exceed the rate at which franchise fees are imposed on the local cable operator. 47 USC §573(c)(2)(B). A city may also impose public, educational, and governmental access requirements on an open video system provider. 47 CFR §76.1505. Under the Cable Communications Policy Act of 1984 (Cable Act) (47 USC §§521-573), as amended by the Cable Television Consumer Protection and Competition Act of 1992 (CTCPCA) and by the Telecommunications Act of 1996, telephone companies and any other entity authorized by FCC rules may provide video service through an open video system. FCC regulations permit essentially anyone to become an open video system provider, except incumbent cable operators that do not face effective competition in their service areas. 47 CFR §76.1501.

© The Regents of the University of California

c. Federal Delegation of Regulation of Activities to City

§6.75 (1) Rates: Use of Rights-of-Way

Any franchise issued under the Cable Communications Policy Act of 1984 (Cable Act) (47 USC §§521-573), as amended by the Cable Television Consumer Protection and Competition Act of 1992 (CTCPCA) and by the Telecommunications Act of 1996, is construed to authorize the construction of a cable system over public rights-of-way and through easements in the area to be served by the cable system and which have been dedicated for compatible uses. In using such easements the cable operator must ensure that (47 USC §541(a)):

- The safety, functioning, and appearance of the property and the convenience and safety of other persons will not be adversely affected by the installation or construction of facilities necessary for a cable system;
- The costs of the installation, construction, operation, or removal of such facilities will be borne by the cable operator or subscriber, or a combination of both; and
- The owner of the property will be justly compensated by the cable operator for any damages caused by such activities by the cable operator.

© The Regents of the University of California

§6.76 (2) Rates: Rate Regulation and Effective Competition

A franchising authority may regulate the rates for the provision of communication services over a cable system to cable subscribers only to the extent permitted by 47 USC §543. Rate regulation is not permitted if the cable system is subject to "effective competition," as defined by the Cable Communications Policy Act of 1984 (Cable Act) (47 USC §§521-573) (*i.e.,* the cable system serves fewer than 30 percent of the households in the franchise area or two unaffiliated video providers offer comparable programming to at least 50 percent of households in the franchise area; see 47 USC §543(*l*)).

If a cable system is not subject to effective competition, the franchising authority may exercise regulatory jurisdiction over basic cable service rates by filing with the FCC a written certification to the effect that (47 USC §543(a)(3)):

- It will adopt and administer rate regulations consistent with the FCC's regulations;
- It has legal authority to adopt, and personnel to administer, such regulations; and
- Applicable procedural laws and regulations provide a reasonable opportunity for consideration of the views of interested persons.

The certification is effective 30 days after it is filed unless the FCC, after notice and an opportunity to comment, determines that the criteria are not met. 47 USC §543(a). The FCC's regulations with which the city's regulations must be consistent are found in 47 CFR §§76.901-76.990.

© The Regents of the University of California

§6.77 (3) Rates: Controlled by Federal Standards

The city's authority is limited to ensuring that the rate for basic cable service complies with federal standards. 47 USC §543(a). The basic tier consists generally of local commercial broadcasters, and public, educational, and governmental access stations. 47 USC §543(b). The FCC regulated rates for other tiers of cable service until March 31, 1999, when FCC authority over those rates ended. 47 USC §543(c)(4). Federal law directly controls other aspects that arise from the tier concept of cable service (*e.g.*, cable operator cannot require subscriber to purchase any tier of service other than the basic tier as a condition of receiving any premium or pay-per-view channel). 47 USC §543(b)(8). Basic cable service means any tier that includes the retransmission of local television broadcast signals. 47 USC §522(3).

© The Regents of the University of California

§6.78 (4) Rates: Revocation of Certification and Non-Certification

The FCC is empowered to revoke a franchising authority's rate regulation jurisdiction if it finds, on the filing of a petition by an affected party (which includes the cable operator), that the franchising authority has acted or is acting inconsistently with federal requirements (after the expiration of a reasonable cure period). 47 USC §543(a)(5).

A failure or refusal of the FCC to certify a franchising authority's rate regulation certification results in the basic service tier being regulated at the FCC level until such certification is granted. The FCC must act on a recertification request within 90 days after submission. 47 USC §543(a)(6).

© The Regents of the University of California

§6.79 (5) Rates: Billing and Rate Uniformity

The cable operator may identify as a line item on bills to subscribers the amount of the franchise fee and other taxes or assessments and the amount of the bill assessed to satisfy franchise agreement obligations to support public, educational, or governmental channels. *47* USC §542(c). Cable operators must have a uniform cable service rate structure throughout the cable system's geographic area. *47* USC §543(d). It is not clear, however, whether the definition of "geographic area" (which physically may cross city boundaries) necessarily coincides with the franchise area (which by definition lies in one political entity).

© The Regents of the University of California

§6.80 (6) Channel Capacity Requirements

A franchising authority may require that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, provided that if it does so, it must prescribe rules and regulations that permit the cable operator to use such channel capacity if it is not otherwise being used. 47 USC §§531, 544(b). A franchising authority may not establish requirements for video programming or other information services. 47 USC §544(b).

© The Regents of the University of California

§6.81 (7) Program Restrictions Allowed

Cable television service that in the judgment of the franchising authority or the cable operator is obscene or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent, or is otherwise unprotected by the Constitution of the United States may be prohibited. 47 USC §§532(h), 544(d). If the franchising authority holds any ownership interest in the cable system (other than programming on any channel designated for educational or governmental use), however, it may not exercise any editorial control regarding the content of the cable service on that system unless such control is exercised through an entity separate from the franchising authority. 47 USC §533(e).

© The Regents of the University of California

§6.82 (8) Program Notice May Be Required

A franchising authority may require a cable operator to (47 USC §544(h)):

- Provide 30 days' advance written notice of any change in channel assignments or in the video programming service over any channel; and
- Inform subscribers, via written notice, that comments on programming and channel position changes are being recorded by a designated office of the franchising authority.

© The Regents of the University of California

§6.83 (9) Permitted Facility and Equipment Regulation

The FCC has established minimum technical standards. 47 CFR §76.605. A franchising authority may enforce the FCC technical standards, but cannot impose different technical standards. FCC Report and Order, *In the matter of Implementation of Cable Act Reform Provisions of the Telecom Act of 1996,* 14 FCCR 5296 (1999). Presumably, a franchising authority could negotiate with the cable operator for different requirements. A franchising authority may establish requirements for other facilities and equipment. 47 USC §544(b). However, it cannot restrict a cable system's use of any type of subscriber equipment or any transmission technology. 47 USC §544(e). The scope and possible conflict between these two provisions is unclear.

© The Regents of the University of California

§6.84 (10) Customer Service Regulation

A franchising authority may establish and enforce customer service requirements of the cable operator as well as construction schedules and other construction-related requirements of the cable operator, even if they exceed the federal customer service standards. 47 USC §552. The federal standards govern (47 CFR §76.309):

- Cable system office hours and telephone availability;
- Installation, outages, and service calls; and
- Communications between the cable operator and the subscriber, including standards governing bills and refunds.

However, customer service standards and requirements established by cities are preempted for holders of a state franchise for video services issued by the California Public Utilities Commission (CPUC), and cities can enforce only specific limited customer service standards. See Pub Util C §5900.

© The Regents of the University of California

§6.85 (11) City Immunity From Damages; Remedies; Attorney Fees

For all actions pending on or initiated after October 5, 1992, cities have complete statutory immunity from damages for acts relating to the regulation of cable television. 47 USC §555a; *Jones Intercable of San Diego, Inc. v City of Chula Vista* (9th Cir 1996) 80 F3d 320. Remedies for violations are limited to injunctive relief and declaratory relief.

An exception to the damage immunity appears to be for claims involving discrimination on the basis of race, color, sex, age, religion, national origin, or handicap.

It is unclear whether the damages immunity would prevent a cable operator from recovering attorney fees under an action for injunctive or declaratory relief.

© The Regents of the University of California

§6.86 (12) Systems Sales and Transfers

If the franchise requires franchising authority approval of the sale, transfer, or change of control of the franchisee, the franchising authority has 120 days to act on any request for approval of such sale or transfer that contains or is accompanied by such information as required by the Federal Communications Commission's (FCC) regulations and by the franchising authority. The 120-day period does not begin to run until the franchising authority has received all required information. If the franchising authority fails to render a final decision within 120 days, absent a mutually agreed extension, such request must be considered granted. 47 USC §537.

Franchise agreements typically prohibit the franchising authority from unreasonably denying a requested sale, transfer, or change of control. Because the franchising authority's decision is legislative and, therefore, discretionary, the decision "should be upheld as long as there is substantial evidence for any one sufficient reason" for the decision. *Charter Communications, Inc. v County of Santa Cruz* (9th Cir 2002) 304 F3d 927, cert denied (2004) 540 US 1140. If the local franchising authority could be considered to have reasonably denied the request, a court should defer to that decision. *Charter Communications, Inc. v County of Santa Cruz, supra.*

© The Regents of the University of California

§6.87 4. Constitutional Concerns

The First Amendment to the United States Constitution is frequently used in challenges to governmental regulation of cable television at all levels. See, *e.g.*, *Turner Broadcasting System, Inc. v FCC* (1994) 512 US 622, 129 L Ed 2d 497, 114 S Ct 2445 (challenging requirement for cable system to carry certain signals); *City of Los Angeles v Preferred Communications, Inc.* (1986) 476 US 488, 90 L Ed 2d 480, 106 S Ct 2034 (challenging exclusive franchise); *GTE Cal., Inc. v FCC* (9th Cir 1994) 39 F3d 940 (challenging statute prohibiting telephone companies from providing video programming on their own systems); *Century Fed., Inc. v City of Palo Alto* (ND Cal 1987) 710 F Supp 1552 (challenging the requirement for access channels).

© The Regents of the University of California

§6.88 5. Other References on Cable Television and Video Systems

- Local Officials' Guide to the 1992 Cable Act (National League of Cities, telephone (202) 626-3000);
- All About Cable (Law Journal Seminars Press, 1982) (Law Journal Seminars Press, 111 8th Avenue, New York, NY 10011);
- FCC Media Bureau, telephone (202) 418-7200;
- FCC website: www.fcc.gov; and
- Valle-Riestra, Telecommunications, the Governmental Role in Managing the Connected Community (Solano Press Books, 2002).

© The Regents of the University of California

C. Telecommunication Franchises

§6.89 1. Federal Law Applies

Federal law preempts local regulation of telecommunications services within the public rights-of-way: "No State or local statute or regulation … may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." 47 USC §253(a). The FCC has outlined some of the types of local regulations it believes are within local authority to regulate use of the public right-of-way. FCC Memorandum Opinion and Order, *In the Matter of TCI Cablevision of Oakland County, Inc.* (1997) 12 FCCR 21396, 103. Furthermore, the Ninth Circuit has held that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Sprint Telephony PCS, L.P. v County of San Diego* (9th Cir 2008) 543 F3d 571, 578, cert denied (2009) ___ US ___, 174 L Ed 2d 576, 129 S Ct 2860 (quoting *Level 3 Communications, L.L.C. v City of St. Louis* (8th Cir 2007) 477 F3d 528, 532).

© The Regents of the University of California

§6.90 2. State Preemption

Notwithstanding language to the contrary in the Broughton Act (Pub Util C §§6001-6092), telephone companies may construct and maintain telephone lines in public streets and highways without a franchise granted by a city. See Pub Util C §7901; *Pacific Tel. & Telegraph Co. v City & County of San Francisco* (1959) 51 C2d 766, 336 P2d 514. The definition of "telephone line" in Pub Util C §7901 includes wireless facilities. *GTE Mobilnet of Cal. Ltd. Partnership v City & County of San Francisco* (ND Cal 2006) 440 F Supp 2d 1097, 1103. The provision of non-telephone services over a company's telephone lines does not deprive a telephone company of the protection afforded by Pub Util C §7901. *Williams Communications, LLC v City of Riverside* (2003) 114 CA4th 642, 8 CR3d 96. The state has determined that the right to construct and maintain telephone lines is a matter of statewide concern and both general law and charter cities are preempted from requiring telephone companies to obtain a franchise or pay a franchise fee for operation in their borders. This right is limited however, to lands held for public road, highway, or waterway purposes; it does not authorize use of other publicly owned property. 28 Ops Cal Atty Gen 215 (1956).

© The Regents of the University of California

§6.91 3. Permissible Requirements

Cities have the authority to regulate telephone lines within public streets and highways based on aesthetic concerns. Cal Pub Util C §7901.1; *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir 2009) 583 F3d 716, 723. Consistent with Pub Util C §7901, cities have the right to exercise reasonable control over the time, place, and manner in which roads may be used to protect the function and safety of the road. Pub Util C §§2902, 5885(a), 7901.1 (making §7901.1 applicable to video franchisees); Cal Const art XI, §9(b). Telephone companies can be required to obtain an excavation or highway permit before laying telephone lines in the public-right-of-way. See Pub Util C §2902; *Pacific Tel. & Telegraph Co. v City & County of San Francisco* (1959) 51 C2d 766, 336 P2d 514. Consideration needs to be given to compliance with the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) as well. Permit fees imposed on telephone companies may not exceed the reasonable cost of providing the service and must not be levied for general revenue purposes. Govt C §50030. Also, telephone companies can be required to relocate their facilities and bear those expenses when necessary to make way for a governmental use of a street. *Pacific Tel. & Telegraph Co. v Redevelopment Agency of City of Redlands* (1977) 75 CA3d 957, 142 CR 584.

The California Public Utilities Commission (CPUC) will rule on applications from telephone companies that challenge the terms and conditions cities impose on access to the public right-of-way, but acknowledges that it lacks jurisdiction to order a city to grant access. CPUC Decision 98-10-058, *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service,* p 28 (Oct. 22, 1998); CPUC General Order 159A.

For telephone company provision of video programming, see §§6.65-6.68.

© The Regents of the University of California

D. Solid Waste

1. Franchising Authority

§6.92 a. Police Power Authority Over Solid Waste

A city has the right under its police power to handle solid waste collection itself or to contract for its collection by one or more private parties. See *Matula v Superior Court* (1956) 146 CA2d 93, 99, 303 P2d 871 (cities under their police power could choose to regulate activities of private garbage and rubbish collectors rather than engage in such activities themselves or grant exclusive contracts to do so); *Davis v City of Santa Ana* (1952) 108 CA2d 669, 676, 239 P2d 656 (collection and disposal of garbage by city constitutes valid exercise of police power; city may elect to collect garbage itself or may grant exclusive collection privileges to one or more persons); *Glass v Fresno* (1936) 17 CA2d 555, 558, 62 P2d 765. The franchise may be exclusive or non-exclusive. *Gardner v Michigan* (1905) 199 US 325, 50 L Ed 212, 26 S Ct 106 (exclusive contract); *California Reduction Co. v Sanitary Reduction Works* (1905) 199 US 306, 50 L Ed 204, 26 S Ct 100 (exclusive disposal arrangements); *Ponti v Burastero* (1952) 112 CA2d 846, 853, 247 P2d 597 (exclusive contract for removal of garbage constitutes proper exercise of police power); *In re Zhizhuzza* (1905) 147 C 328, 81 P 955 (upholding authority to enter into an exclusive franchise in face of would-be collector's challenge).

© The Regents of the University of California

§6.93 b. Statutory Authority Over Solid Waste

The California Integrated Waste Management Act of 1989 (Pub Res C §§40000-49620) gives cities broad authority over solid waste matters, including (Pub Res C §40059):

- Aspects of solid waste handling that are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services; and
- Whether the services are to be provided by means of nonexclusive franchise, contract, license, permit, or otherwise; whether with or without competitive bidding; or if in the opinion of its governing body, the public health, safety, and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding.

However, the term "solid waste" under the Act has been construed to exclude non-discarded recyclable material. See §§6.103-6.105.

© The Regents of the University of California

2. Solid Waste Franchises

§6.94 a. Generally No Local Preemption

The California Integrated Waste Management Act of 1989 (Pub Res C §§40000-49620) does not preempt local governmental agency determination of most aspects of garbage collection. Pub Res C §49300. Local governmental agency determinations continue to govern not only the means of collection but also the amount of fees and charges for the service. Pub Res C §40059(a)(1). Except for obligations created before 1998, a local agency is preempted from imposing indemnity obligations on a solid waste enterprise for penalties arising from the failure to meet the Act's diversion requirements (see §§6.109-6.119) in a manner that is not proportionate to its degree of fault for the penalty being imposed. Pub Res C §40059.1. Although cities may grant exclusive franchises for refuse collection, state agencies are immune from such regulation. *Laidlaw Waste Sys., Inc. v Bay Cities Servs., Inc.* (1996) 43 CA4th 630, 50 CR2d 824.

© The Regents of the University of California

§6.95 b. Effect on Existing Franchises

The California Integrated Waste Management Act of 1989 (Pub Res C §§40000-49620) also does not abrogate existing franchises or existing franchises that are extended (Pub Res C §40059(b)), or preempt local determination of whether garbage collection is to be provided by exclusive or nonexclusive franchises or by competitive bidding or not. Pub Res C §40059(a)(2). But see *Waste Mgmt. of the Desert, Inc. v Palm Springs Recycling Ctr., Inc.* (1994) 7 C4th 478, 28 CR2d 461 (holding that California Integrated Waste Management Act of 1989 does not authorize the granting of an exclusive franchise for collection of recyclable materials that the owner wishes to sell or donate). Cities may contract for the collection or disposal, or both, of garbage or other refuse matter under terms and conditions prescribed by each city's own ordinance or resolution. Pub Res C §49300.

© The Regents of the University of California

§6.96 c. Discontinuation of Non-Exclusive Franchises

If a city intends to enter into an exclusive franchise for the handling of solid waste but has historically allowed nonexclusive solid waste handling franchises or contracts, the city must provide mailed notice 5 years in advance to the company or companies currently providing the nonexclusive service, stating that the city intends to grant an exclusive franchise after the 5-year notice period has elapsed. Pub Res C §§49520-49521; *City of Alhambra v P.J.B. Disposal Co.* (1998) 61 CA4th 136, 71 CR2d 364. Cities may by ordinance, however, restrict such companies from soliciting new customers during the 5-year notice period. *Valley Vista Servs., Inc. v City of Monterey Park* (2004) 118 CA4th 881, 13 CR3d 433.

PRACTICE TIP: Although case law has not addressed whether the requirements of Proposition 218 (Cal Const art XIIID) apply to solid waste franchise fees, franchise agreements typically include provisions clarifying that franchise fees are imposed on haulers' gross receipts as consideration for franchise rights granted to them and not on property owners as a component of their trash bill. Common solid waste franchise agreement provisions include:

- Requiring haulers to collect customer payments instead of collecting them on property tax bills;
- Only setting maximum rates and allowing haulers to set actual rates for service;
- Eliminating annual discretionary rate increases and, instead, automatically adjusting maximum rates based on annual consumer price index (CPI) or producer price index (PPI) changes;
- Prohibiting the imposition of charges on vacant properties; and
- Allowing self-hauling (under highly regulated conditions).

For more information, see the League of California Cities, Proposition 218 Implementation Guide (2007). See also §§5.110-5.120.

© The Regents of the University of California

§6.97 d. Franchise Procedures

The procedures a city uses to negotiate with a private party to collect and dispose of garbage, waste, refuse, rubbish, offal, trimmings, or other refuse matter are left within the discretion of each city and may be prescribed by resolution or ordinance. Pub Res C §49300. See also Pub Res C §§49520-49523 (relating to continuation of services); Pub Res C §40059 (local government's authority over solid waste matters). In response to *City of Alhambra v P.J.B. Disposal Co.* (1998) 61 CA4th 136, 71 CR2d 364, an urgency measure was enacted to amend Pub Res C §§49520-49521 and to add Pub Res C §§49501.3, 49501.5, and 49524. Under these statutes, cities proposing exclusive franchises or contracts for solid waste services must mail a 5-year cancellation notice to all non-exclusive waste handlers who have operated lawfully in the jurisdiction with a city business or solid waste license, franchise, permit, or contract for more than 3 years prior. Those holding exclusive franchises or contracts may continue to provide services for the term of the unexpired contract or 5 years, whichever is less. Pub Res C §49520. Finally, it is illegal for waste handling companies to voluntarily waive their right to use the 5-year window. Pub Res C §49524.

© The Regents of the University of California

3. Jurisdiction Over Other Governmental Agencies

§6.98 a. Federal Jurisdiction Over Solid Waste

Federal government facilities must use a city's franchisee for solid waste services. See *Parola v Weinberger* (9th Cir 1988) 848 F2d 956 (Resource Conservation and Recovery Act (RCRA) (42 USC §§6901-6992k), as amended, requires federal facilities to comply with local exclusive waste collection and disposal franchise). See also *Solano Garbage Co. v Cheney* (ED Cal 1991) 779 F Supp 477 (Travis Air Force Base must use city's solid waste franchisee for waste collection services.) However, should the federal government improperly put a waste contract out for bid, a city's exclusive franchisee must participate in the bidding process and will have standing in federal court only by invoking the citizen suit provision of RCRA, not that of the Administrative Procedure Act (5 USC §§701-706). See *Brem-Air Disposal v Cohen* (9th Cir 1998) 156 F3d 1002.

© The Regents of the University of California

§6.99 b. State Jurisdiction Over Solid Waste

In contrast, cities and local government agencies may not compel state agencies to use the city's or local agency's franchisee. See *City of Santa Ana v Board of Educ.* (1967) 255 CA2d 178, 62 CR 863 (city did not have authority to force local school district to use city's waste collection services); *Laidlaw Waste Sys., Inc. v Bay Cities Servs., Inc.* (1996) 43 CA4th 630, 50 CR2d 824 (state agencies such as school districts are not bound by city's exclusive franchisee); *Del Norte Disposal Inc. v Department of Corrections* (1994) 26 CA4th 1009, 31 CR2d 746 (local agency may not compel state agency to use local agency's exclusive franchisee).

© The Regents of the University of California

§6.100 4. Landfill Regulatory Authority

Under the California Integrated Waste Management Act of 1989 (Pub Res C §§40000-49620), a city may choose to pursue either an administrative or judicial remedy to enforce its own land use restrictions contained in a solid waste landfill conditional use permit. See *San Elijo Ranch v County of San Diego* (1998) 65 CA4th 608, 76 CR2d 601.

The Resource Conservation and Recovery Act of 1976 (RCRA), as amended (42 USC §§6901-6992k), does not authorize citizen suits in federal court to enforce state landfill regulations that are more stringent than federal standards. See *Ashoff v City of Ukiah* (9th Cir 1997) 130 F3d 409.

The siting, design, and construction of municipal solid waste landfills on wetlands sites are regulated by the Environmental Protection Agency (EPA) or states with EPA-approved programs, such as California, not by the United States Army Corps of Engineers. See *Resource Invs. Inc. v United States Army Corps of Eng'rs* (9th Cir 1998) 151 F3d 1162.

PRACTICE TIP: When structuring municipal solid waste license, permit, or franchising systems, carefully consider the implications of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (42 USC §§9601-9675) and the possibility of including a clause in the franchise agreement indemnifying the city against CERCLA liability. Cities have been sued as arrangers under CERCLA when solid waste collected in city limits has been disposed of in landfills that are causing environmental problems. See *B.F. Goodrich Co. v Murtha* (2d Cir 1992) 958 F2d 1192; *Transportation Leasing Co. v State* (CD Cal 1993) 861 F Supp 931. On CERCLA, see §§11.237, 11.239, 11.250.

© The Regents of the University of California

§6.101 5. Municipal Waste Flow Control Ordinances

Municipal ordinances that require waste handlers to deliver solid waste to a particular private facility violate the United States Constitution's Commerce Clause. See *C & A Carbone, Inc. v Town of Clarkstown* (1994) 511 US 383, 128 L Ed 2d 399, 114 S Ct 1677. However, flow control ordinances that require solid waste to be delivered to a particular public facility do not discriminate against interstate commerce for purposes of the Commerce Clause. See *United Haulers Ass'n, Inc. v Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007) 550 US 330, 167 L Ed 2d 655, 127 S Ct 1786. Additionally, some courts have recognized distinctions between waste destined for in-state as opposed to out-of-state disposal. See *IESI AR Corp. v Northwest Arkansas Reg'l Solid Waste Mgmt. Dist.* (8th Cir 2006) 433 F3d 600; *Ben Oehrleins & Sons & Daughter, Inc. v Hennepin County* (8th Cir 1997) 115 F3d 1372, cert denied (1997) 522 US 1036. However, contract provisions between municipalities and other parties that require waste handlers to deliver waste to a particular facility may be valid. See *SSC Corp. v Town of Smithtown* (2d Cir 1995) 66 F3d 502, cert denied (1996) 516 US 1112, reh'g denied, 517 US 1150. This is true if the contract has been competitively procured. See *Harvey & Harvey, Inc. v County of Chester* (3d Cir 1995) 68 F3d 788. Solid waste fees collected from generators or users, rather than through tipping fees payable at solid waste management facilities (a form of economic rather than regulatory or contractual flow control), also may be valid. See *U.S.A. Recycling, Inc. v Town of Babylon* (2d Cir 1995) 66 F3d 1272, cert denied (1996) 517 US 1135.

In contrast, a municipal ordinance that creates an exclusive waste franchise is valid and is not an impermissible flow control ordinance. In *Waste Mgmt. of Alameda County, Inc. v Biagini Waste Reduction Sys., Inc.* (1998) 63 CA4th 1488, 74 CR2d 676, the court found an exclusive waste franchise ordinance valid, particularly when it regulates solid waste processed entirely in a city, does not prevent waste disposal at a facility of the resident's choice, and does not force waste handlers to purchase waste processing services from the local exclusive franchisee.

© The Regents of the University of California

§6.102 6. Other Handbook References on Solid Waste

For related material regarding regional planning issues and waste management, see §§10.261-10.274.

© The Regents of the University of California

E. Recycling

§6.103 1. Franchising Authority Over Recyclables

The California Integrated Waste Management Act of 1989 (Pub Res C §§40000-49620) authorizes cities to grant exclusive franchises for solid waste handling services. See Pub Res C §40059(a)(2). However, an owner of undiscarded recyclables is not required to transfer them to a holder of an exclusive franchise. See *Waste Mgmt. of the Desert, Inc. v Palm Springs Recycling Ctr., Inc.* (1994) 7 C4th 478, 28 CR2d 461. Recyclable materials have economic value and do not constitute waste under the Act until discarded by the owner. Recyclable materials are not discarded if the owner chooses to sell the materials for compensation, or donate them without payment to the donee. If, however, the owner of recyclable material discards them, they then become waste. Once the recyclables become discarded waste (and assuming the franchise agreement so provides), an exclusive franchisee then has the right to collect the materials and sell or otherwise dispose of them. See also *City of San Marcos v Coast Waste Mgmt., Inc.* (1996) 47 CA4th 320, 54 CR2d 588 (if an owner of recyclables pays a collector to remove them, the materials are actually solid waste; but when an owner sells materials to a collector they are recyclables).

© The Regents of the University of California

§6.104 2. Regulatory Authority Over Recyclables

The California Integrated Waste Management Act of 1989 finds a crisis in dwindling landfill space and requires local governments to embark on an extensive planning process designed to achieve dramatic reductions in the amounts of solid waste sent to local landfills. See Pub Res C §§40002 (declaring the local mandates to be essential part of state strategy), 40900-41851 (local planning requirements), 41780 (diversion requirements of 25 percent by 1995 and 50 percent by 2000). Failure to achieve these percentage reductions may subject a local agency to stiff monetary penalties of $10,000 per day. See Pub Res C §41850. Cities and counties can form regional agencies to collectively meet diversion mandates. Pub Res C §40970. Cities (not regional agencies) are also allowed to request time extensions in meeting the 50-percent requirement alternative diversion requirement. Pub Res C §§41785, 41820.

© The Regents of the University of California

§6.105 3. Other Handbook References on Recyclables

For related material, see the following sections in this handbook:

- Recycling and waste diversion requirements, see §§6.109-6.119;
- Regional planning issues, waste management, see §§10.261-10.274; and
- Hazardous waste, see §11.237-11.255.

© The Regents of the University of California

V. MUNICIPAL SOLID WASTE AND RECYCLING

§6.106 A. Facilities Authorized

Cities are authorized by several statutes to purchase, construct, and maintain solid waste disposal facilities. See Govt C §6547 (joint power authorities for construction of solid waste disposal, treatment, and conversion facilities funded by revenue bonds); Govt C §§54300-54700 (Revenue Bond Law of 1941) (construction of solid waste collection, treatment, and disposal facilities); Govt C §§91500-91574 (California Industrial Development Financing Act) (establishment of industrial development authorities to issue revenue bonds to construct certain limited types of solid waste and energy conversion facilities). See also Pub Util C §§11501-14403.5 (Municipal Utility District Act) (two or more cities may establish municipal utility districts to acquire, construct, and operate solid waste resource recovery enterprises).

© The Regents of the University of California

B. Relationship to Water and Air Quality Issues

§6.107 1. Water Quality Testing; Regional Board Regulation; Local Pretreatment Requirements

Each solid waste disposal site operator must regularly prepare and submit solid waste water quality assessment tests to the regional water quality control board. Wat C §§13260-13274. The regional water quality control board also can regulate the disposal of pollutants and solid waste into navigable waters of the United States as required by the federal Water Pollution Prevention and Control Act (33 USC §§1251-1387). 40 CFR §§403.1-403.20; Wat C §§13370-13389.

A city is authorized to require local industry to pretreat its waste if the city determines it necessary to meet state or federal environmental laws or to protect its treatment plant. Govt C §54739.

© The Regents of the University of California

§6.108 2. Air Quality

Regional air quality districts are authorized to require each disposal site in their jurisdiction to prepare solid waste air quality assessment test reports. Health & S C §41805.5.

© The Regents of the University of California

C. Recycling and Waste Diversion Requirements

1. City Solid Waste Planning

§6.109 a. Source Reduction and Recycling Elements

Each city must adopt a Source Reduction and Recycling Element (SRRE) for purposes of achieving a reduction in the amount of solid wastes generated in the city and disposed of in landfills. Pub Res C §§41000-41260. The SRRE must have the following components (Pub Res C §41003):

- Waste characterization;
- Source reduction;
- Recycling;
- Composting;
- Solid waste facility capacity;
- Education and public information;
- Funding; and
- Special waste.

A principal aspect of the SRRE is compliance with statutory goals for reduction in the volume of solid waste generated in the city. At least once every 5 years, each city is required to review and correct any deficiencies in its SRRE to comply with the source reduction and recycling requirements of Pub Res C §41822. All revisions to the SRRE, however, are subject to the approval of the California Department of Resources Recycling and Recovery (CDRRR). Pub Res C §§40110, 41822. A city's SRRE is not subject to county approval. Pub Res C §41760.

PRACTICE TIP: Before January 1, 2010, the duties and responsibilities of the CDRRR were held by the California Integrated Waste Management Board. Pub Res C §40400.

© The Regents of the University of California

§6.110 b. Household Hazardous Waste Elements

Each city must adopt a Household Hazardous Waste Element (HHWE) for the safe collection, recycling, and disposal of household hazardous wastes, which should be separated from the solid waste stream. Pub Res C §41500. A city's HHWE is not subject to county approval. Pub Res C §41760.

© The Regents of the University of California

§6.111 c. Nondisposal Facility Elements

Each city must adopt a Nondisposal Facility Element (NDFE) that may be appended to the city's Source Reduction and Recycling Element (SRRE) and that must indicate the city's use of current and potential nondisposal facilities. Pub Res C §§40151, 41730, 44001. The NDFE must describe new solid waste facilities and the expansion of existing solid waste facilities necessary to meet the city's source reduction and recycling obligations. Pub Res C §41732.

NOTE: A nondisposal facility is any solid waste facility for which a permit must be obtained except a disposal facility (*e.g.*, a landfill) or a transformation facility (*e.g.*, a waste-to-energy plant). Pub Res C §40151.

The NDFE is not subject to county approval. Pub Res C §§41730, 41760, 41800; 14 Cal Code Regs §§18760-18775.4, 18769.

© The Regents of the University of California

§6.112 d. Relationship to County Plan; Annual Reports; Penalties

A city must submit its Source Reduction and Recycling Element (SRRE), Household Hazardous Waste Element (HHWE), and Nondisposal Facility Element (NDFE) to the county. 14 Cal Code Regs §18767. These become part of the county's integrated waste management plan, which takes effect on approval by the California Department of Resources Recycling and Recovery (CDRRR) under Pub Res C §§40110, 41800. See Pub Res C §§41730, 41750, 41800. See also §§6.109-6.111, 6.113-6.117.

Each city, county, and regional agency must submit an annual report to the CDRRR that describes the progress achieved in implementing the SRRE, HHWE, and NDFE. Pub Res C §41821; 14 Cal Code Regs §§18794.4-18794.6. After notice and hearing, the CDRRR is authorized to impose civil penalties of up to $10,000 per day on any city or county, or on any city or county as a member of a regional agency, that fails to timely implement an element of SRRE, HHWE, or NDFE. Pub Res C §§41813, 41850.

© The Regents of the University of California

2. California Integrated Waste Management Act of 1989 Requirements

§6.113 a. Impact on Source Reduction and Recycling Element

A principal purpose of a city's Source Reduction and Recycling Element (SRRE) is compliance with statutory goals for reduction of the volume of solid waste generated in the city. See Pub Res C §§41002, 41780. See §6.109.

© The Regents of the University of California

§6.114 b. Diversion Requirements

Each city must reduce or divert the following amounts of solid waste through its implementation of source reduction, recycling, and composting programs and activities (Pub Res C §§41780, 41780.2, 41781):

- Twenty-five percent reduction or diversion of the rate of waste generated on January 1, 1990, by January 1, 1995; and
- Fifty-percent reduction or diversion of the rate of waste generated on January 1, 1990, by and after January 1, 2000.

The California Department of Resources Recycling and Recovery (CDRRR) must determine each city's compliance with the diversion requirements for the years beginning with January 1, 2007, by comparing each city's change in its per capita disposal rate in subsequent years with the equivalent per capita disposal rate that would have been necessary for the city to meet the diversion requirements on January 1, 2007. Pub Res C §§40110, 41780.05, 41825. Per capita disposal or per capita disposal rate may be calculated according to population of the city, industry employment, or other method as determined by the CDRRR under Pub Res C §41780.05.

© The Regents of the University of California

§6.115 c. Exemption and Time Extension for Diversion Requirements

The California Department of Resources Recycling and Recovery (CDRRR) may reduce diversion requirements for a regional agency if all member jurisdictions are rural cities, rural counties, or cities located in a rural area and rural county if certain conditions are met (*e.g.*, small quantity of waste generation). Pub Res C §§40110, 40973(c), 41782.

The CDRRR may grant a time extension for compliance with diversion requirements under certain specified conditions (*e.g.*, cities incorporated under specific conditions, a city demonstrates that it is achieving the maximum feasible amount of source reduction, recycling, and composting). Pub Res C §41820.5(a).

© The Regents of the University of California

§6.116 d. Diversion Rate Calculation

Before use of the per capita disposal rate measurement system described in §6.114, the diversion rate was calculated from the base rate for solid waste disposal, calculated under Pub Res C §41781. With the use of the per capita disposal rate measurement system beginning in 2007, the base rate calculation is no longer used. See www.calrecycle.ca.gov/lgcentral/DivMeasure/How2MSys.htm.

© The Regents of the University of California

§6.117 e. Penalties for Noncompliance

If a city fails to timely submit an adequate Source Reduction and Recycling Element (SRRE) or Household Hazardous Waste Element (HHWE), the California Department of Resources Recycling and Recovery (CDRRR) may impose an administrative penalty of up to $10,000 per day to gain compliance. Pub Res C §§40110, 41813. Before issuing any penalty, the CDRRR must consider various factors, including a city's good faith efforts to comply and the degree of compliance. Pub Res C §41850. The CDRRR also may issue compliance orders with a schedule for achieving compliance. Pub Res C §41825.

© The Regents of the University of California

§6.118 3. Bottle Bill

The California Beverage Container Recycling and Litter Reduction Act (Pub Res C §§14500-14599) is a comprehensive program to generate large scale redemption and recycling of beverage containers. The Act does not preempt local zoning regulation of the siting of multi-material recycling centers, reverse vending machines, or mobile recycling units, as those terms are defined in the Act, but does contain language urging cities to act favorably on the siting of such recycling centers. Pub Res C §14501(e).

PRACTICE TIP: City-operated curbside collection programs and drop-off recycling facilities may collect redemption values for beverage containers and may be eligible for other related payments from the California Department of Conservation Division of Recycling. Pub Res C §14549.6.

© The Regents of the University of California

§6.119 4. Recyclable Design Requirements

State law requires local agencies to adopt ordinances on adequate areas for collecting and loading recyclable materials for private and public development projects. See Pub Res C §§42900-42911 (California Solid Waste Reuse and Recycling Access Act of 1991). Cities were required to adopt this ordinance by September 1, 1994; if they did not, the state's model ordinance on this issue took effect in the city. Pub Res C §42911. The California Department of Resources Recycling and Recovery (CDRRR) has also developed a model construction and demolition (C&D) diversion ordinance, which is intended to assist jurisdictions with diverting their C&D waste material and does not automatically take effect in a city that has not adopted its own. Pub Res C §42912.Copies of the state's model ordinance are available from the California Department of Resources Recycling and Recovery, 801 K Street, Sacramento, CA 95814, (916) 322-4027, or online at www.calrecycle.ca.gov/LGCentral/Library/CandDModel/About.htm.

© The Regents of the University of California

§6.120 VI. PUBLIC TRANSPORTATION

The authority of California cities to provide public transportation derives from Cal Const art XI, §9. That section allows each municipal corporation to furnish certain utility services, including transportation, inside as well as outside its boundaries, except in another municipal corporation that furnishes the same service and does not consent. Increasingly, regional transportation agencies coordinate and control many aspects of public transportation. This control is frequently exercised by imposing conditions on cities in order to receive grants to provide public transportation services.

For related material on public transportation, see the following sections:

- Fees, charges, and rates, see §§5.158-5.186; and
- Air quality, see §§11.184-11.236.

© The Regents of the University of California

A. Duties of Public Carriers

§6.121 1. Common Carrier Law

Anyone who offers to the public to carry persons, property, or messages is a common carrier. CC §2168. This definition covers all forms of public transportation, including rail, bus, boat, and plane; it also includes passenger elevators and escalators.

Paid carriers owe their passengers an especially high duty of care. Rather than mere reasonable care, such carriers must use the utmost care and diligence for their passengers' safe carriage. They must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill. CC §2100. This duty extends to all passengers, including those in the process of boarding and alighting from vehicles. See 6 Witkin, Summary of California Law, *Torts* §927 (10th ed 2005).

© The Regents of the University of California

§6.122 a. Protection of Passengers

The common carrier has a duty to take all reasonable steps to protect its passengers from harm. This includes the situation in which two passengers are fighting and a third is injured. See *Lopez v Southern Cal. Rapid Transit Dist.* (1985) 40 C3d 780, 791, 221 CR 840 (common carrier is responsible when it has or should have knowledge from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability to prevent the injury).

© The Regents of the University of California

§6.123 b. Duty to Collect Evidence

A common carrier has no statutory duty to collect evidence following an accident between its vehicle and another. However, at least one appellate court decision has held the public entity liable for failing to preserve information about the other vehicle and its driver in a lawsuit by an injured passenger. See *De Vera v Long Beach Pub. Transp. Co.* (1986) 180 CA3d 782, 795, 225 CR 789. As a practical matter, it is advisable to preserve evidence and witnesses from the accident scene; see Practice Tip in §6.138.

© The Regents of the University of California

2. Special Duties to the Disabled

§6.124 a. Americans with Disabilities Act of 1990 and Federal Transit Act

Under Title II of the Americans with Disabilities Act of 1990 (42 USC §§12101-12213), public entities may not discriminate against or deny access or services to any qualified individual with a disability when providing services, including public transportation. 42 USC §§12131-12165. Title II of the ADA establishes detailed requirements for accessibility and usability of public transportation vehicles, trains, or commuter rail cars and for transportation facilities or stations. 42 USC §§12131-12165. See also 28 CFR §§35.101-35.190.

Under the Federal Transit Act (formally Urban Mass Transportation Act of 1964), federal funding may be obtained for the planning and design of mass transportation facilities to meet the special needs of the elderly or disabled. 49 USC §5310.

© The Regents of the University of California

§6.125 b. State Accessibility Requirements

Both general law and charter cities are prohibited from purchasing rapid transit equipment that is not accessible to individuals with disabilities. Govt C §4500(a). If state law prescribes higher accessibility standards than federal law, state legislation has expressly provided that state law requirements must be followed. Govt C §4500(b). For a discussion of special fares for the disabled, see §6.129.

PRACTICE TIP: Although a public transit operator may be complying with the requirements of the Americans with Disabilities Act, operators should be aware that state accessibility requirements under Govt C §4500 may dictate more stringent standards.

© The Regents of the University of California

3. Miscellaneous Issues

§6.126 a. Advertising on Vehicles

Purely commercial speech is not protected under the First Amendment and thus may be regulated. Nevertheless, policies regulating access to advertising space must not be arbitrary, capricious, or invidious. *Lehman v City of Shaker Heights* (1974) 418 US 298, 303, 41 L Ed 2d 770, 94 S Ct 2714. Although political speech is protected under the First Amendment, *Lehman* held that a city transit system's policy against accepting any political or public issue advertising was constitutionally permissible. In *Children of the Rosary v City of Phoenix* (9th Cir 1998) 154 F3d 972, cert denied (1999) 526 US 1131, the court held that advertising panels on public buses were a nonpublic forum and a city's requirement that advertisements convey a commercial message was a reasonable regulation of speech.

© The Regents of the University of California

§6.127 b. Route Scheduling

There is no authority holding public entities liable when a particular route is canceled without notice or is ahead of or behind schedule.

PRACTICE TIP: It is a good practice, however, to indicate on each printed schedule that the schedule is subject to change without notice.

© The Regents of the University of California

§6.128 c. Certification of Bus Drivers

Public bus drivers must have a certificate from the Department of Motor Vehicles. Veh C §12804.6. For activities involving school buses or school pupil activity buses, a more specialized certification is required. See Veh C §12517.

© The Regents of the University of California

§6.129 d. Setting of Transit Fares

Local public transportation fares generally are set by ordinance. There is no state or federal law requiring particular rates. However, federal law does require large urban transit systems receiving federal assistance to offer half-price fares for senior citizens and persons with disabilities during non-peak hours. 49 USC §5307(d)(1)(D). There is no comparable requirement for children's discounts, though they are common. Special rates may be set for the disabled, blind, or hearing-impaired. Pub Util C §§525, 529. State law specifies the types of identification that operators must accept as proof of senior citizen, handicapped, disabled, or disabled veteran status for purposes of determining passengers' eligibility for reduced fares. Pub Util C §99155.

© The Regents of the University of California

e. Drug and Alcohol Testing of Transit Employees

§6.130 (1) Constitutional Constraints

All common forms of drug and alcohol testing (breathalyzer, urinalysis, blood, and saliva) are considered searches under the Fourth Amendment. Thus, any employee substance-testing program must be reasonable. This means, among other things, only employees in safety-sensitive positions (such as drivers or mechanics) may be tested and only in relation to performance of safety-related duties. A number of decisions set the framework in this area. See *National Treasury Employees Union v Von Raab* (1989) 489 US 656, 103 L Ed 2d 685, 109 S Ct 1384 (upholding urinalysis of customs employees up for promotion to drug-sensitive positions); *Skinner v Railway Labor Executives' Ass'n* (1989) 489 US 602, 103 L Ed 2d 639, 109 S Ct 1402 (upholding post-accident blood-testing and reasonable-cause breath-testing of certain rail employees); *Lanier v City of Woodburn* (9th Cir 2008) 518 F3d 1147 (city's policy of requiring all candidates chosen for employment to pass a pre-employment drug and alcohol test was unconstitutional as applied to applicant for position of page at city's library, but would be constitutional if public agency could demonstrate "special need" to screen a prospective applicant for drugs and alcohol). See also *Loder v City of Glendale* (1997) 14 C4th 846, 59 CR2d 696, cert denied (1997) 522 US 807 (public employers may constitutionally require drug testing for job applicants—regardless of position sought—but not for promotions).

For related material on drug testing, see §§4.93-4.121.

© The Regents of the University of California

§6.131 (2) Drug and Alcohol Testing of City Employees, Applicants, and Trainees Driving Commercial Vehicles

Cities are required to establish a mandatory drug and alcohol testing program for city employees, applicants, and trainees with commercial driver's licenses who operate certain commercial vehicles (depending on size and use). See Department of Transportation (DOT) and Federal Highways Administration (FHWA) regulations at 49 CFR pts 382, 391-392, 395 and 49 CFR pt 40. California also mandates drug and alcohol testing requirements for drivers operating certain types of commercial vehicles described in Veh C §34500. See Veh C §§34520-34520.5 (mirroring the requirements of 49 CFR pt 40). Each individual's record of testing and results is confidential (49 CFR pts 40, 382) and must not be released without express written authorization of the individual tested except as permitted by 49 CFR §382.405.

PRACTICE TIP 1: Enforcement of DOT drug testing regulations does not appear to conflict with *Loder v City of Glendale* (1997) 14 C4th 846, 59 CR2d 696, cert denied (1997) 522 US 807. Following federal precedent, the *Loder* court abandoned the compelling state interest test for determining Fourth Amendment or state constitutional privacy violations and substituted a balancing test. The DOT has already determined that the positions to which its regulations apply are safety sensitive. Cities should use reasonable testing procedures, accompanied by careful implementation of DOT's education, information, and remedial components.

PRACTICE TIP 2: In *United Pub. Employees Local 790 v City & County of San Francisco* (1997) 53 CA4th 1021, 62 CR2d 440, the court ruled that federal authority indicates that the possibility that the employee might be called on to perform a safety-sensitive function is enough to satisfy the regulatory definition of safety-sensitive position and thus subject the employee to random testing.

PRACTICE TIP 3: Review the impact of *Lanier v City of Woodburn* (9th Cir 2008) 518 F3d 1147 on the line of decisions culminating in *Loder v City of Glendale* (1997) 14 C4th 846, 59 CR2d 696, cert denied (1997) 522 US 807, as discussed at §§4.19, 4.93-4.94, 4.100.

© The Regents of the University of California

§6.132 (3) Drug and Alcohol Testing of Pre-Employment Applicants to Accommodate Individuals With Disabilities

The Department of Transportation (DOT) has attempted to provide reasonable accommodation of individuals with certain permanent or long-term medical conditions in situations when an individual is unable to provide the necessary amount of urine for pre-employment drug testing. 49 CFR §40.195. This change in the rules applies only to pre-employment drug testing.

© The Regents of the University of California

§6.133 (4) Drug and Alcohol Testing Requires Face-to-Face Evaluation for Return to Work

Federal law requires a face-to-face meeting with the substance abuse professional evaluating an employee for returning to duty after testing positive for drugs or alcohol, and requires at least six tests in the first 12 months following the covered employee's return to duty. See 49 CFR §40.301; 49 CFR pt 40.

© The Regents of the University of California

§6.134 (5) Drug and Alcohol Testing of Off-Duty Employees and Chain of Custody of Urine Samples

In *Edgerton v State Personnel Bd.* (2000) 83 CA4th 1350, 100 CR2d 491, the court granted a permanent injunction prohibiting a state employer from conducting off-duty drug testing of its employees as an unjustified intrusion of personal privacy in violation of the state constitution. The court also found that the violation of federal regulations related to the chain of custody in the storage and handling of the employee's urine samples meant the state could not sustain its burden of proving the tests were positive.

© The Regents of the University of California

§6.135 f. Specified Rate of Return May Be Required

Public operators may be required to maintain a specified rate of return for their services. Pub Util C §§99260-99273. Certain types of rural route and new services may be exempt from the requirements. Further, expenditures made to comply with the Americans with Disabilities Act may be excluded from this calculation. Pub Util C §99268.17.

© The Regents of the University of California

§6.136 g. Prohibition on Charter Service

A transportation entity receiving Federal Transit Act funds is generally prohibited from providing a charter service. A charter service is a transportation service provided under a single contract to a defined group of users along a user-controlled route. 49 CFR §§604-604.4.

© The Regents of the University of California

§6.137 h. Drug and Alcohol Testing for Taxicab Operators in the City

The provisions of Govt C §53075.5 require drug and alcohol testing for taxicab drivers operating in a city, including charter cities. It requires cities to establish a policy that makes mandatory drug and alcohol testing an absolute condition for issuance or renewal of a taxicab driver permit by a city. The drug and alcohol testing and procedures must be in compliance with 49 CFR pt 40. It is the city's responsibility to ensure that each company or independent taxi driver is in compliance with standards and procedures for drug and alcohol testing consistent with federal regulations. The provisions of Veh C §34520 require drug or alcohol testing consortiums to mail a copy of all positive drug and alcohol test results to the Department of Motor Vehicles within 3 days of testing. It is a misdemeanor to willfully violate this requirement under the Vehicle Code.

© The Regents of the University of California

§6.138 B. Claims and Actions Against Public Carriers

Providers of public transportation are most commonly sued as a result of accidents involving public vehicles. All such lawsuits must be preceded by a proper, timely claim under the California Government Claims Act (Govt C §§810-998.3). For information on the Government Claims Act, see §§13.28-13.85.

PRACTICE TIP: It is advisable to institute a policy under which operators of mass transit vehicles collect witness cards from all passengers and bystanders following accidents. The information then can be used to aid investigation and refresh witnesses if there is litigation, and may be protected from pretrial discovery. See *Greyhound Corp. v Superior Court* (1961) 56 C2d 355, 15 CR 90 (although not considered attorney work product, witness statements are protected to the extent that the opposing party must show good cause to compel production).

© The Regents of the University of California

VII. AIRPORTS AND HARBORS

A. Airports

§6.139 1. Basic Operation and Regulation of Airports

The operation of a public airport requires compliance with federal, state, and local regulations. A city's ability to regulate local airport operations is significantly limited by federal law. However, a city as an airport proprietor has somewhat more control over airport operations. 49 USC §§40101-46507; Pub Util C §§21601-21690.29; Govt C §§50470-50478.

For related material on airport regulation, see the following sections:

- Fees, charges, and rates, see §§5.158-5.186;
- Freedom of speech, see §§9.118-9.153;
- Regional planning issues, airport planning, see §§10.254-10.260; and
- Hazardous materials, obligations of owners of property, see §§11.250-11.253.

© The Regents of the University of California

§6.140 a. Federal Preemption Over Airports

Federal preemption precludes state or municipal action that attempts to regulate the use of navigable airspace, aircraft traffic, or flight safety. See, *e.g.*, *San Diego Unified Port Dist. v Superior Court* (1977) 67 CA3d 361, 376, 136 CR 557; *U.S. v City of New Haven* (2d Cir 1974) 496 F2d 452, 454. Federal preemption also extends to on-ground activities and preempts portions of the state airport regulatory system. *Federal Express Corp. v California Pub. Utils. Comm'n* (9th Cir 1991) 936 F2d 1075 (preemption areas include rates, discounts and promotional pricing, claims, overcharges, bills of lading and freight bills, and the imposition of fees). However, there is case authority for the proposition that there is no federal preemption of local zoning regulations that restrict the size, scope, and manner of operations at a private, non-public-use airport, for example by limitations on the number of based aircraft, restrictions on aircraft types, and prohibitions on flight training and instruction. See *Faux-Burhans v County Comm'rs of Frederick County* (D Md 1987) 674 F Supp 1172, aff'd (4th Cir 1988) 859 F2d 149, cert denied (1989) 488 US 1042.

© The Regents of the University of California

§6.141 (1) Federal Regulation of Airport Rates and Charges

Airport rates and charges by airport sponsors are regulated and governed by federal laws, regulations, and policies. 49 USC §40116 (Anti-Head Tax Act); 49 USC §47129 (Federal Aviation Administration Authorization Act of 1994); 49 USC §47107(a) (federal grant assurances require nondiscriminatory and reasonable charges); 61 Fed Reg 31994-32023 (1996) ("Policy Regarding Airport Rates and Charges," portions vacated in *Air Transport Ass'n of Am. v United States Dept. of Transp.* (DC Cir 1997) 119 F3d 38, amended (DC Cir 1997) 129 F3d 625). See *Northwest Airlines v County of Kent* (1994) 510 US 355, 127 L Ed 2d 183, 114 S Ct 855; *City of Los Angeles v United States Dep't of Transp.* (DC Cir 1999) 165 F3d 972; *Air Canada v United States Dep't of Transp.* (DC Cir 1998) 148 F3d 1142.

© The Regents of the University of California

§6.142 (2) Prohibited Revenue Diversion

Airports that have received federal grants are prohibited from diverting airport revenues to their parent airport-sponsoring governments by making payments or transfers for which no equivalent value in return is received. Termed revenue diversion or the revenue use requirement, airports are required (49 USC §§47107, 47133; 64 Fed Reg 7696 (1999); FAA Order 5100.38A):

- When leasing property, to charge at least fair market value; and
- When expending airport revenue, to ensure that it directly benefits the airport.

© The Regents of the University of California

§6.143 b. Permissible Areas of Local Control

Although federal preemption broadly restricts local control of air operations and many ground operations, it does not prohibit all common law remedies for airport noise and pollution. *Bieneman v City of Chicago* (7th Cir 1988) 864 F2d 463, 470.

In addition, state tort law remedies and inverse condemnation may be sought against an airport sponsor as long as the action does not frustrate the purposes of the Federal Aviation Act of 1958 (49 USC §§40101-46507) and no immunity is provided by statute. *Greater Westchester Homeowners Ass'n v City of Los Angeles* (1979) 26 C3d 86, 160 CR 733; *Bethman v City of Ukiah* (1989) 216 CA3d 1395, 265 CR 539. Such claims can be barred by the statute of limitations or a prescriptive navigation easement. *Institoris v City of Los Angeles* (1989) 210 CA3d 10, 258 CR 418.

Furthermore, a city in its role as airport proprietor may impose some regulations, *e.g.*, about noise and flight operations, when it cannot so regulate under its police power. See *National Aviation v City of Hayward* (ND Cal 1976) 418 F Supp 417.

© The Regents of the University of California

2. Noise and Access Regulation

§6.144 a. City as Airport Proprietor

Although the federal statutory scheme preempts regulation of aircraft noise by state or local governments, municipalities acting in their capacity as airport proprietors may impose noise control regulations as long as the regulations are reasonable and not unjustly discriminatory. 49 USC §41713; *City of Burbank v Lockheed Air Terminal, Inc.* (1973) 411 US 624, 635, 36 L Ed 2d 547, 93 S Ct 1854; *City & County of San Francisco v Federal Aviation Admin.* (9th Cir 1991) 942 F2d 1391. Airport noise restrictions will not be upheld if they are discriminatory or if they have the effect of excluding an entire class of aircraft, such as jets. *Santa Monica Airport Ass'n v City of Santa Monica* (CD Cal 1979) 481 F Supp 927.

© The Regents of the University of California

§6.145 b. Noise Restrictions May Be Limited by Commerce Clause

Noise restrictions must be carefully tailored to avoid creating an impermissible burden on interstate commerce. A permissible noise restriction is one that is not illusory and does not favor in-state industry over out-of-state industry. *Alaska Airlines, Inc. v City of Long Beach* (9th Cir 1992) 951 F2d 977, 984. *Alaska Airlines* held that an ordinance imposing noise limits on individual aircraft did not violate the United States Constitution Commerce Clause because "[t]he goal of reducing airport noise to control liability and improve the aesthetics of the environment is a legitimate and permissible one." 951 F2d at 984.

© The Regents of the University of California

§6.146 c. Federal Aviation Administration (FAA) Restrictions

Any noise restriction must comply with Notice and Approval of Airport Noise and Access Restrictions (14 CFR pt 161), which were promulgated by the Federal Aviation Administration (FAA) to implement the National Aviation Noise Policy (49 USC §§47521-47533). These rules provide that noise or access restrictions on stage 2 aircraft may not be adopted unless the airport operator conducts an in-depth analysis of the costs and benefits of the restriction and considers alternatives to the proposed restriction. 14 CFR §§161.201-161.213. Proposed noise or access restrictions on stage 3 aircraft must be submitted to the FAA for review and approval. 14 CFR §§161.301-161.325. See 14 CFR §§161.7, 161.101-161.505 (for exceptions). See also Airport Noise and Capacity Act of 1990 (49 USC §§47521-47533), and implementing regulations in 14 CFR §161.

© The Regents of the University of California

3. Zoning and Land Use Regulations Related to Airports

§6.147 a. Power to Zone Over Airports

The power to zone for airports is within the general power to zone. Cal Const art XI, §7. City zoning actions, however, may be preempted by federal law if they are inconsistent with federal regulations on air transportation. *U.S. v City of Berkeley* (ED Mo 1990) 735 F Supp 937. Specifically, a local government may not exercise its zoning control over portions of an airport directly involved in flight operations. *Burbank-Glendale-Pasadena Airport Auth. v City of Los Angeles* (9th Cir 1992) 979 F2d 1338.

© The Regents of the University of California

§6.148 b. Takings Issues on Flight Height Restrictions

Zoning that restricts development in flight approaches may constitute an unconstitutional taking of property. *Peacock v County of Sacramento* (1969) 271 CA2d 845, 77 CR 391. Height restrictions in the vicinity of an airport are particularly problematic. Unlike commonly accepted zoning height restrictions, height restrictions designed to protect airport flight approaches contemplate the use of the airspace and are in effect a taking of property for the purpose of creating an easement in the airspace. *Sneed v County of Riverside* (1963) 218 CA2d 205, 32 CR 318.

© The Regents of the University of California

§6.149 c. Airport Land Use Commissions

California has established airport land use commissions (ALUCs) in each county to regulate land use around airports. Pub Util C §§21670-21679.5. The role of an ALUC is to formulate a comprehensive airport land use plan (ALUP) that will provide for the orderly growth of and around each public airport. Pub Util C §21675. The ALUC approves ALUPs and reviews local governments' implementing land use decisions for conformity.

The type of local decisions in an area covered by a land use plan and reviewable by the ALUC are broader than simple zoning. Their authority includes review of "actions, regulations or permits." Pub Util C §21675.2.

Although the local government can override the ALUC's decision, an override requires a two-thirds vote of the local legislative body and the adoption of specific findings. Pub Util C §21676. See also 75 Ops Cal Atty Gen 47 (1992) (two-thirds of a quorum of the legislative body is sufficient). The finding overriding the ALUC must be supported by substantial evidence and must comply with the standards found in *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 113 CR 836 and *California Aviation Council v City of Ceres* (1992) 9 CA4th 1384, 12 CR2d 163.

© The Regents of the University of California

§6.150 d. Airport Expansions

State law mandates that before acquiring land for a new airport or to expand or enlarge an existing airport, approval must be obtained from the state and from the local government in which the land is located. Pub Util C §§21661.5-21666. See *City of Burbank v Burbank-Glendale-Pasadena Airport Auth.* (1999) 72 CA4th 366, 85 CR2d 28.

© The Regents of the University of California

§6.151 4. Airport Rents, Fees, and Tenant Requirements; Funding Requirements

Ground leases to fixed-base operators (FBO) and other flight-related operators must be awarded on a nondiscriminatory basis. In addition, an airport proprietor may not grant an exclusive right to operate to any individual providing aeronautical services. FAA Advisory Circular 150/5190-5. A city may, however, allow only one FBO to provide services at an airport when to allow more would be unreasonably costly, burdensome, or impractical and would require a reduction in leased area under agreements with existing FBO. 49 USC §47107(a)(4); 49 USC §40103(e). The goal of the Federal Aviation Administration (FAA) is to ensure maximum competition in the provision of services to the flying public. FAA Order 5190.6A.

Any municipal airport proprietor receiving federal funds must make all airport facilities and services available on fair and reasonable terms without unjust discrimination. 49 USC §47107(a). The Airport Compliance Requirements identified as FAA Order 5190.6A should be consulted in attempting to comply with this requirement.

© The Regents of the University of California

§6.152 5. Heliports

Heliports are state-regulated. The standards for permitting heliports vary with frequency of use. Heliport regulations are by their nature more flexible, but there are some statutory restrictions for any permanent heliport. Pub Util C §21662.5. Cities may adopt ordinances and regulations for the siting of heliports that are more restrictive than provided for by statute. Pub Util C §21662.5. In this area, the federal role is primarily advisory.

© The Regents of the University of California

§6.153 6. Closing Airports

A city can close its airport and go out of the airport business. *Seltenreich v Town of Fairbanks* (9th Cir 1954) 211 F2d 83. However, closure may breach conditions of federal grant funds or grant deed provisions and may cause federal reversionary interests to cloud the city's title.

© The Regents of the University of California

§6.154 7. Free Speech Regulations in Airports

The United States Supreme Court has held that airports are non-public forums under the First Amendment to the United States Constitution and, therefore, any restriction on speech protected under the First Amendment must only satisfy a requirement of reasonableness. See *International Soc'y for Krishna Consciousness, Inc. v Lee* (1992) 505 US 672, 120 L Ed 2d 541, 112 S Ct 2711 (upholding New York's ban on repetitive solicitation of money on airport property because airport terminal was considered non-public forum and ban was reasonable given nature of solicitation and interest that travelers are not subject to undue interference).

The California Supreme Court, however, has not determined whether airports are public forums under the California Constitution. In 2008, the Ninth Circuit requested that the California Supreme Court decide this question in *International Soc'y for Krishna Consciousness v City of Los Angeles* (9th Cir 2008) 530 F3d 768. In its 2010 decision, the California Supreme Court did not determine whether an airport is a public forum because the resolution of that question could not determine the outcome of the case. *International Soc'y for Krishna Consciousness v City of Los Angeles* (2010) 48 C4th 446, ___ CR3d ___. The court determined, however, that regardless of whether an airport is a public forum, the ban on the solicitation of the immediate receipt of funds was a content-neutral time, place, and manner regulation and, consistent with *Los Angeles Alliance for Survival v City of Los Angeles* (2000) 22 C4th 352, 93 CR2d 1, was valid under the California Constitution because it survived intermediate scrutiny.

© The Regents of the University of California

§6.155 8. Security in Airports

Following the terrorist attacks of September 11, 2001, Congress enacted new legislation establishing the Transportation Security Administration (TSA) to oversee all aspects of civil aviation security. 49 USC §§44901-44945. The TSA is under the control of the Under Secretary of Transportation for Security. 49 USC §114. New federal regulations cover airport and air carrier security programs and procedures, passenger and baggage screening, explosive detection systems, federal air marshals, airport contingency plans, and standards for law enforcement and screening personnel. 49 CFR pt 1500. TSA has broad inspection powers. 49 CFR §1550.3.

PRACTICE TIP 1: Always check the terms of any grants that the city may have received from the FAA or the state for airport improvements. Grants often require the airport operator to continue certain airport operations long after the work is done. Each grant condition may vary. See Airport Compliance Requirements (FAA Order 5190.6A).

PRACTICE TIP 2: Many municipal airports are converted military airfields. Most of the title documents contain reversionary clauses that cause title to return to the federal government if the property is not used for airport purposes.

PRACTICE TIP 3: Regulatory actions involving airports may be discretionary projects requiring California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) review. If the action includes federal funding, National Environmental Policy Act (NEPA) (42 USC §§4321-4370f) review may also be required.

PRACTICE TIP 4: Even if the city knows that its small municipal airport cannot support two fixed base operators (FBOs), the city's regulations must allow access to the competing FBO.

© The Regents of the University of California

§6.156 B. Harbors

A harbor is generically defined as "a portion of the ocean or inland waters within the jurisdiction of this state either naturally or artificially protected so as to be a place of safety for vessels, including the artificially protective works, the public lands ashore and the structures and facilities provided within the enclosed body of water and shore for the mooring and servicing of vessels and the servicing of their crews and passengers." Harb & N C §34. Various acts that deal with specific kinds of harbors contain other definitions of the term harbor. See §§6.160 below for listing of authorizing statutes.

For related material on harbors, see the following sections:

- California Coastal Commission, see §1.101;
- Fees, charges, and rates, see §§5.158-5.186;
- California Coastal Act (Pub Res C §§30000-30900), see §§10.277-10.333;
- Tidelands, beaches, and streams, see §§10.334-10.361;
- Water quality, see §§11.111-11.183; and
- Hazardous materials, obligations of owners of property, see §§11.237-11.240.

© The Regents of the University of California

§6.157 1. Department of Boating and Waterways

Harbors and waterways are extensively regulated by state law through the California Harbors and Navigation Code. The California Harbors and Navigation Code establishes a Department of Boating and Waterways, a Boating and Waterways Commission, and the position of Director of Boating and Waterways. Harb & N C §§30-40.

© The Regents of the University of California

§6.158 2. Establishment and Improvement of Harbors

A city whose limits include or bound on a harbor, bay, estuary, or other navigable body of water, subject to certain limitations, may (Govt C §39901):

- Establish, acquire, construct, improve, and maintain piers, docks, wharves, and other necessary works;
- Construct, improve, dredge, deepen, or straighten channels, basins, canals, slips, and other waterways; and
- Do anything necessary or convenient to the establishment, improvement, conduct, and maintenance of a harbor, and in furtherance of commerce and navigation.

Major commercial port areas also derive their legislative authority to regulate their harbors from legislative grants of tidelands and from their respective city charters.

© The Regents of the University of California

3. Harbor Governance

§6.159 a. Structure of Governance Over Harbors

Harbors may be governed as a city department. See Govt C §§39900-39965. Alternatively, harbors maybe governed through one of many special harbor districts authorized by the Harbors and Navigation Code. The various special harbor districts authorized by the California Harbors and Navigation Code have different structures, powers, and territorial limits. Some districts are created by special legislation. See §6.160 for a discussion of various authorizing statutes.

© The Regents of the University of California

§6.160 b. Harbor Authorizing Statutes

The following is a listing of the various types of special harbor districts authorized by the California Harbors and Navigation Code with a citation to the principal act for the district and the applicable California Public Contract Code provisions.

- County Harbor Commissions. See Harb & N C §§4000-4017. See also Pub Cont C §§20690-20696.
- Harbor Improvement Districts. See Harb & N C §§5800-5956. See also Pub Cont C §20710.
- Harbor Districts. See Harb & N C §§6000-6110. See also Pub Cont C §§20720-20724.
- Port Districts. See Harb & N C §§6200-6372. See also Pub Cont C §§20750-20753.
- River Port Districts. See Harb & N C §§6800-6963. See also Pub Cont C §§20760-20764.
- Small Craft Harbor Districts. See Harb & N C §7000-7340. See also Pub Cont C §§20730-20737.
- San Diego Unified Port District Act. See Harb & N C App I, §§1-88 (Stats 1962, 1st Ex Sess, ch 67 (amended Stats 1996, chaps 399, 480)).
- Humboldt Bay Harbor, Recreation, and Conservation District Act. See Harb & N C App II, §§1-84 (Stats 1970, ch 1283).

PRACTICE TIP: The California Public Contract Code provisions on the various types of harbor districts may provide powers beyond those usually considered to be contractual in nature. To determine if a particular district has authority on a matter, review both the principal act or statutes and the Public Contract Code provisions.

© The Regents of the University of California

§6.161 4. Financing of Harbor Activities

In addition to expenditures from general revenues, cities may finance harbor activities from:

- An indebtedness funded by a harbor improvement fund (see Govt C §§43450-43455);
- Revenue bond financing for acquisition, construction, maintenance, operation, improvement, and development of marinas and small craft harbors (see Govt C §§50701-50798.4);

NOTE: Govt C §50701 appears to limit the use of revenue bonds for condemnation and Govt C §50798.4 appears to require an election authorizing revenue bond financing.

- Assessments, reassessments, special taxes, and bonds for certain purposes (see Harb & N C §§5904 (harbor improvement districts), 6094 (harbor districts), 6365 (port districts), 6944 (river port districts), and 7266 (small craft harbor districts)). See also Harb & N C §§6092.5, 6364 (giving harbor districts and port districts authority to levy special taxes in accordance with Govt C §§50075-5077.5).

© The Regents of the University of California

5. Acquisition and Disposition of Harbor Property

§6.162 a. Acquisition of Harbor Property

Most public harbors have been developed as a result of grants in trust of tidelands and submerged lands from the State of California. See *City of Berkeley v Superior Court* (1980) 26 C3d 515, 162 CR 327, cert denied sub nom by *Santa Fe Land Improvement Co. v City of Berkeley* (1980) 449 US 840; *City of Long Beach v Vickers* (1961) 55 C2d 153, 10 CR 359; *County of Orange v Heim* (1973) 30 CA3d 694, 106 CR 825; *City of Coronado v San Diego Unified Port Dist.* (1964) 227 CA2d 455, 38 CR 834. A small craft harbor is within the scope of a state tidelands grant for the creation of a harbor. *City of Redondo Beach v Taxpayers, Property Owners, Citizens & Electors* (1960) 54 C2d 126, 138, 5 CR 10.

PRACTICE TIP: Keep a file of the authorizing legislation, grant deeds, and other documents conveying tidelands and submerged lands to the city. The city's ability to use and transfer interests in the tidelands and submerged lands is often limited by the terms of these documents.

A city may acquire private property by condemnation for the improvement of waterfronts and the acquisition or maintenance of public harbors. Govt C §40404. Property located at former military installations can be assigned at no cost for development or operation of a port facility. 40 USC §554.

© The Regents of the University of California

§6.163 b. Disposition of Harbor Property: Public Trust Doctrine and Conveyance to Federal Government

The California Constitution and common law public trust doctrine impose certain restrictions on the conveyance and use of tide and submerged lands. See Cal Const art X, §§3-4 (formerly Cal Const art XV, §§2-3); *City of Long Beach v Mansell* (1970) 3 C3d 462, 478, 91 CR 23. The constitution prohibits the sale to private persons of tidelands within two miles of an incorporated city and says no individual may obstruct the free navigation of tidelands on navigable waters or the right-of-way to such waters, when required for a public purpose. *City of Berkeley v Superior Court* (1980) 26 C3d 515, 523, 162 CR 327, cert denied sub nom by *Santa Fe Land Improvement Co. v City of Berkeley* (1980) 449 US 840. Generally, a city may not alienate tidelands granted to it by the state without special authority to do so. *City of Oakland v Oakland Water-Front Co.* (1897) 118 C 160, 50 P 277. The grant is also subject to revocation and alteration by the state. See *City of Coronado v San Diego Unified Port Dist.* (1964) 227 CA2d 455, 38 CR 834.

A city may convey tide or submerged lands to the United States for public or governmental use, if the lands were granted to them by the state, and on approval by a majority of the electors. Govt C §37358.

© The Regents of the University of California

§6.164 c. Harbor Leasing: No Violation of Public Trust Doctrine

Leases are not conveyances for the purpose of the constitutional restriction on alienation of trust lands. *City of Long Beach v Vickers* (1961) 55 C2d 153, 161, 10 CR 359.

© The Regents of the University of California

§6.165 (1) Harbor-Related Lease Terms

"Any tidelands or submerged lands, granted to any city by the State of California, may be leased for a period not to exceed 66 years unless the grant from the state of the use thereof provides specifically the term for which said lands may be leased." CC §718. See also Govt C §37385. The provisions of Govt C §37384 limit the terms of leases of city-owned tide or submerged land to 50 years, except when the state grant specifically provides otherwise. The provisions of CC §718 also limit the purposes for which such lands may be leased, which limits are reflected in Govt C §§37385-37387. See §§6.166-6.167.

© The Regents of the University of California

§6.166 (2) Exception for Leases of Wharves and Other Structures

A city may lease, for up to 66 years, tide and submerged lands, the wharves, docks, piers, and other structures or improvements on these lands, and abutting uplands, as considered necessary by the legislative body for the proper development and use of its waterfront and harbor facilities. Govt C §37385.

© The Regents of the University of California

§6.167 (3) Proper Harbor-Related Lease Purposes

A city may lease such tide and submerged lands and uplands for industrial uses, improvement, and development of city harbors, construction of wharves, and similar waterfront structures, and other public uses consistent with the requirement of commerce or navigation. Govt C §37386. If industrial use of tidelands or uplands is inimical to the best interest of the city, it may lease them for park, recreational, residential. or educational purposes under conditions not inconsistent with the public trust. Govt C §37387.

© The Regents of the University of California

§6.168 d. Some Harbor-Related Easements Permitted

A grant of an easement is not covered by the constitutional restriction on alienation. 30 Ops Cal Atty Gen 212, 221 (1957). However, vacation of streets, in furtherance of a redevelopment plan, in a manner that would deny access to the ocean is invalid because it violates the constitutional right of the public to access to navigable waters. *Lane v City of Redondo Beach* (1975) 49 CA3d 251, 122 CR 189.

© The Regents of the University of California

§6.178 c. Port and Terminal Protection and Development Corporations

Public agencies may associate with other public agencies, private corporations, or individuals in the formation of a nonprofit mutual benefit corporation for a variety of nonregulatory activities, including lobbying, marketing, and other activities in the common interests of its members. Corp C §§10700-10703.

© The Regents of the University of California

§6.180 VIII. DISASTER PREPAREDNESS AND RESPONSE

When a disaster occurs, many of the normal rules of governmental powers are temporarily laid aside and getting the job done assumes paramount importance. From hazardous chemical spills to floods and earthquakes, city government is normally the first level of government to respond and the first to be affected by the changes in the normal rules and procedures of government.

NOTE: The city attorney plays a role in preparation for such emergency situations, in advising on emergency powers and procedures during disaster response, and in properly documenting governmental actions after the emergency is over. The city attorney must understand not only the constitutional limits of emergency powers, but also the federal and

documenting governmental actions after the emergency is over. The city attorney must understand not only the constitutional limits of emergency powers, but also the federal and state legislative enactments governing such powers.

PRACTICE TIP: When an emergency occurs, the city attorney should make certain the city manager or city council (at an emergency meeting under Govt C §54956.5) promptly declares an emergency. Many of the powers and immunities that apply in an emergency are dependent on such a declaration.

For additional information on disaster preparedness and response, see the following:

- Lowell, *Emergency Preparedness*, League of California Cities (City Attorneys Continuing Education Seminar, September 2004);
- Williams, *The Oakland Firestorm: A Personal and Professional Perspective,* 16 Pub LJ (No 2, 1992);
- *Federal Emergency Management Agency, Comprehensive Preparedness Guide 101: A Guide for All-Hazard Emergency Operations Planning*, (March 2009). This downloadable document provides general guidelines on developing Emergency Operations Plans. See the Federal Emergency Management Agency website at www.fema.gov.

© The Regents of the University of California

§6.181 A. Due Process in Disaster Situations

Earthquakes and other disasters can leave private property damaged and dangerous. City officials must make difficult decisions quickly, such as when buildings must be razed immediately to protect public health and safety. In the past, cities could rely on the rule that government may damage private property without compensating the owner as long as the damage is inflicted to prevent impending danger to public health or safety. See, *e.g., Holtz v Superior Court* (1970) 3 C3d 296, 305, 90 CR 345. However, the scope of this protection for city police power has been brought into question by case law arising out of earthquake damage. See *Rose v City of Coalinga* (1987) 190 CA3d 1627, 236 CR 124 (when there is triable issue of fact as to whether emergency existed, whether demolition was essential to safeguard public, and whether due process was provided, owners may state claim for inverse condemnation against city when city demolished building).

condemnation against city when city demolished building).

PRACTICE TIP: Provision for such emergency hearings should be written into the local emergency plan and local ordinances. Use of the immediate vacation order available under the Uniform Code for the Abatement of Dangerous Buildings may be considered as an alternative to immediate demolition when appropriate. Hearing procedures are provided in the Uniform Code for the Abatement of Dangerous Buildings.

© The Regents of the University of California

B. Statutory Powers in Disaster Situations

§6.182 1. State Constitutional Disaster Authorizations

Cities are authorized to provide aid or assistance to private parties for clearing debris, wreckage, or natural materials on private property as a result of a disaster or emergency if (Cal Const art XVI, §6):

- The city council finds it to be in the public interest;
- A major disaster or emergency has been declared by the president of the United States;
- The city is indemnified by the recipient of the aid for any claims arising out of rendering the aid; and
- The cost of the aid or assistance is eligible for federal reimbursement.

© The Regents of the University of California

Govt C §8568. It contains specific provisions dealing with oil spills, highway toxic disasters, floods (including dam breaks), and nuclear power plant emergencies.

© The Regents of the University of California

Only the local agency's governing body or an official designated by ordinance of the governing body whose actions must be ratified within 7 days may declare local emergencies. Govt C §8630. The governing body must review the need for continuing the emergency declaration at its regularly scheduled meetings until the local emergency is terminated. In no event may a review take place more than 21 days after the previous review, or if the body meets weekly, it must review the need for continuing the local emergency at least every 14 days until the emergency is terminated. The governing body must terminate the emergency at the earliest possible day that the conditions warrant. Govt C §8630. For additional information, see California Emergency Management Agency (Cal EMA), *Local Government Guide for Emergency Proclamations*, available at www.oes.ca.gov.

© The Regents of the University of California

§6.185 (2) State Aid May Be Provided; Local Disaster Councils

The costs of extraordinary services to carry out mutual aid agreements constitute a charge against the state, when approved by the governor. Govt C §8633. Local agencies may request the assistance of the Highway Patrol and other state law enforcement agencies to deal with local emergencies. Govt C §8598.

Cities may establish local disaster councils by ordinance. Govt C §8610.

© The Regents of the University of California

§6.186 (3) Emergency Powers and Press Access in an Emergency

The governing body (or any official designated by the governing body) has authority to issue and enforce orders and regulations necessary for the protection of life and property during the local emergency, including curfew zones to preserve public order and safety. Govt C §8634; *In re Juan C.* (1994) 28 CA4th 1093, 33 CR2d 919. Such orders and regulations must be in writing and must be given widespread publicity and notice. Govt C §8634.

The police may close areas to the public whenever a menace to the public health or safety is created by a calamity or disaster. The emergency command post may also be closed to public access. Pen C §409.5. However, these closure provisions do not apply to duly authorized representatives of any news service, newspaper, radio, or television station or network.

Pen C §409.5(d). Press representatives must be given unrestricted access to disaster sites unless police personnel at the scene reasonably determine that unrestricted access will interfere with emergency operations. The restrictions on media access may be imposed only for so long, and only to such extent, as is necessary to prevent actual interference. *Leiserson v City of San Diego* (1986) 184 CA3d 41, 51, 229 CR 22. Nothing in Pen C §409.5 gives reporters permission to trespass onto private property, and law enforcement officials have no authority to grant such permission. See *Hanlon v Berger* (1999) 526 US 808, 143 L Ed 2d 978, 119 S Ct 1706 (Fourth Amendment violated when officers permit media to accompany them during execution of search warrant).

© The Regents of the University of California

§6.188 (5) Meeting Procedures After a Disaster

Special rules govern the duties and procedures of the governing body in holding meetings during the emergency. See Govt C §§8642-8643. The governing body must meet as soon as possible after the declaration of emergency. Subpoena powers are granted to compel the attendance of witnesses for damage assessment purposes.

© The Regents of the University of California

disaster response. Govt C §§8615-8619.

Local agencies have authority to purchase, lease, or otherwise procure both sites and materials for temporary housing. Govt C §8654. The governor may assist local agencies in this procurement.

Cities may conduct test exercises and joint test exercises, but without extraordinary powers over local citizens. Govt C §8611.

© The Regents of the University of California

§6.191 b. Disaster Liability Immunity

State and local agencies have immunity against claims for the performance or failure to perform any discretionary function or duty by any agency, officer, or employee in carrying out duties under the California Emergency Services Act. Govt C §8655. See also *Adkins v State* (1996) 50 CA4th 1802, 1816, 59 CR2d 59, overruled on other grounds by *City of Moorpark v Superior Court* (1998) 18 C4th 1143, 1148, 77 CR2d 445 (*Adkins* holding that immunity for discretionary acts does not apply to intentional misrepresentations).

© The Regents of the University of California

§6.192 (1) Extraterritorial Immunity; Volunteers and Conscripts

The same privileges and immunities apply when a local agency performs emergency functions outside its territorial limits as would apply if the functions were performed inside its territorial limits. Govt C §8656. See §6.191.

Volunteers and conscripted emergency workers have the same legal immunities as officers and employees of the local agency. Govt C §8657. The agency with immunity also is immune for injuries to such emergency workers.

© The Regents of the University of California

© The Regents of the University of California

© The Regents of the University of California

§6.196 4. Ralph M. Brown Act Emergency Provisions

The Ralph M. Brown Act (Brown Act) (Govt C §§54950-54963) contains special provisions for city councils to meet to deal with "emergency situations involving matters on which prompt action is necessary due to the disruption or threatened disruption of public facilities." See Govt C §54956.5. A legislative body may meet in closed session in an emergency session if agreed to by a two-thirds vote of the members of the legislative body present, or if less than two-thirds of the members are present, by a unanimous vote of the members present. Govt C §54956.5. A document that assesses an agency's vulnerability to terrorist attack, prepared for consideration or distribution in closed session, is exempt from disclosure under the California Public Records Act. Govt C §6254(aa).

NOTE: An "emergency situation" means a work stoppage, crippling disaster, or other activity that severely impairs public health or safety. Govt C §54956.5.

© The Regents of the University of California

if the telephone system is not functional, the pre-meeting notice requirement is waived and notice of the meeting, its purpose, and any action taken is to be given to the media as soon as possible after the meeting. Govt C §54956.5(b)(2). In the case of a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a 1-hour notice before the emergency meeting may endanger public health, safety, or both, a majority of the legislative body may declare a dire emergency and meet immediately. Govt C §54956.5.

© The Regents of the University of California

public place as soon after the meeting as possible. Govt C §54956.5.

© The Regents of the University of California

- **Disaster service workers:** In an emergency, all public employees are disaster service workers "subject to such disaster service activities as may be assigned to them by their superiors or by law." See Govt C §§3100-3109.
- **Workers' compensation:** Special rules on workers' compensation apply to disaster service workers. See Lab C §§3211.92-3219, 3352.94, 4351-4355.
- **Chief executive powers:** A city may provide by ordinance for a chief executive to exercise "complete authority" and "all police power vested in the city by the Constitution and general laws" during periods of "great public calamity, such as extraordinary fire, flood, storm, epidemic, earthquake, sabotage or enemy attack." Govt C §38791.
- **Police chief powers:** A police chief has all powers and protections of sheriffs for suppression of riots, public tumult, disturbance of the peace, or resistance against the laws or public authorities, and for the execution of the local health officer's orders related to the prevention of contagious, infectious, or communicable diseases. Govt C §41601.
- **Sheriff powers:** The sheriff has special powers in his or her capacity as "ex officio director of emergency services" in an emergency. See Govt C §§26620-26624.
- **Expenditure of funds:** Special rules apply for the expenditure of funds and the provision of extraterritorial services in the event of emergency. See Govt C §§53019-53023.

- **Contracting authority:** In case of emergency, the city council may adopt a resolution by a four-fifths vote authorizing the immediate expenditure of public money "to safeguard life, health or property." Pub Cont C §20168. Competitive bidding and other requirements of the Local Agency Public Construction Act (Pub Cont C §§20100-20929) are suspended. However, a city must comply with the specific emergency contracting procedures. See Pub Cont C §§22050.
- **Municipal utilities:** Municipal utility districts may adopt a resolution to suspend notice and bid requirements for emergency work. Pub Util C §12753.
- **California Disaster Assistance Act:** The California Disaster Assistance Act (see Govt C §§8680-8692) provides for state assistance in repair, restoration, or replacement of public works of local agencies in an amount up to 75 percent of the costs not covered by federal assistance. "Terrorism" and "epidemic" are included in the definition of "disaster."
- **Shelter:** A city council may declare a shelter crisis on a finding that a significant number of persons are without the ability to obtain shelter, resulting in a threat to the health and safety of those persons, and may then use public parks, buildings, and other facilities for emergency shelter purposes. Govt C §§8698-8698.2. City liability for conditions, acts, or omissions directly related to the provision of emergency housing is limited to "grossly negligent, reckless, or intentional conduct" for any injuries. Most housing, safety, and health standards for the use of the facilities are suspended during the emergency. Govt C §8698.1.
- **Hazardous substance spills:** Special rules apply to declarations of local emergencies by the local health officer due to release or spill of hazardous substances. Health & S C

§§101075-101095.

- **Hazardous material transportation and handling:** The hazardous materials law authorizes counties certified by the Secretary for Environmental Protection as a Certified Unified Program Agency (CUPA) to regulate the handling, transportation, storage, or other activities related to hazardous materials and substances. See Health & S C §§25404-25404.9. Cities may apply for CUPA certification. The hazardous materials law requires business plans for emergency response to spills and releases, reporting requirements for incidents, and powers of inspection.
- **Small craft vessels and harbors:** Cities, port authorities, and similar agencies may adopt emergency rules and regulations to govern small craft vessels and harbors in emergency situations for a period of up to 60 days, unless authorized for extension by the state Department of Harbors. Harb & N C §660.
- **Joint powers agreements:** Joint powers agreements may be used to establish disaster preparation and response agencies with adjoining agencies. See Govt C §§6500-6536.

© The Regents of the University of California

7

Public Contracting

I. PUBLIC WORKS CONTRACTS §7.1
A. Legal Authority §7.2
B. Bidding §7.3
1. Public Project §7.4
2. Exceptions to Competitive Bidding §7.5
a. Emergency §7.6
b. Professional Services §7.7
c. Special Services §7.8
d. Design-Build §7.9
3. Notice Inviting Bids
a. Contents of the Notice §7.10
b. Bid Addenda §7.11
c. Mandatory Pre-Bid Conference or Job Walk §7.12
4. Presentation of Bid and Security §7.13
5. Internet Submissions §7.14
6. Award
a. Lowest Responsible Bidder §7.15
(1) Lowest Monetary Bidder §7.16
(2) Additive and Deductive Bids §7.17
(3) Responsive Bid §7.18
(4) Responsible Bidder §7.19
b. Bid Protests §7.20
7. Bid Rejection §7.21
8. Mistakes
a. Changing the Bid §7.22
b. Consent to Withdrawal §7.23
c. Legal Action for Relief §7.24
d. Prohibition from Further Bidding §7.25
9. Other Reference §7.26
C. Prequalification of Contractors §7.27
D. Affirmative Action
1. Locally and State-Funded Programs §7.28
a. *Hi-Voltage Wire Works, Inc. v City of San Jose* §7.29
b. Data Collection §7.30
c. Permissible Preferences §7.31
2. Equal Protection Considerations and Federally Funded Programs
a. Limitation on Proposition 209 Prohibitions §7.32
b. Supreme Court Review of Affirmative Action Programs §7.33
c. Federal Challenges to State and Local Affirmative Action Programs §7.34
E. Specific Bidding and Contract Provisions §7.35
1. Contractor's License Issues
a. Invitation to Bid §7.36
b. Effect of Failure to Have Proper License §7.37
c. Verification §7.38
2. Major Subcontractors
a. General Requirements §7.39
b. Requests for Additional Information §7.40
c. Contractors and Subcontractors Debarred by the State §7.41
3. Unfair Business Practice Claims §7.42
4. Trenching Requirements §7.43
5. Non-Collusion Affidavit §7.44
6. Retention §7.45
7. Securities in Lieu of Retention §7.46
8. Resolution of Claims §7.47
9. Government Code Claims §7.48
10. Bidder's Security §7.49
11. Prevailing Wage Law §7.50

a. Notices Concerning Rates §7.51
b. Labor Compliance Programs §7.52
c. Penalties §7.53
d. Payroll Records §7.54
e. Apprentices §7.55
f. Day's Work §7.56
g. Workers' Compensation §7.57
12. Labor Code §2810 Liability §7.58
13. Labor and Materials Bond §7.59
14. Utilities Relocation §7.60
15. Engineering Specifications and Costs §7.61
16. Termination, Amendment, or Modification §7.62
17. Brand or Trade Names §7.63
18. Release of Claims §7.64
19. Notice of Third Party Claims §7.65
20. Liquidated Damages §7.66
21. Limit on Force Majeure Damages §7.67
22. Resolution of Contract Disputes §7.68
23. Limits on Indemnification §7.69
24. Specific Bonding and Insurance Companies §7.70
25. Assumption of Responsibility for Plans and Specifications §7.71
26. Interest on Progress Payment Requests §7.72
27. Cost Records §7.73
28. Venue §7.74

F. Subletting and Subcontracting Fair Practices Act
1. Definition §7.75
2. Public Policy §7.76
3. Criteria for Substitution §7.77
4. Procedure §7.78
5. Mistakes—Clerical Errors §7.79
6. Emergency/Necessity Exception §7.80
7. Penalties §7.81

G. Prevailing Wages
1. Statutory Authority §7.82
a. Applicability to General Law Cities, Redevelopment Agencies, Other Public Agencies, and Some Partly or Wholly Private Projects §7.83
b. Applicability to Charter Cities §7.84
2. Scope of "Public Works"
a. "Public Works" §7.85
b. "Paid for in Whole or in Part Out of Public Funds" §7.86
c. Exemptions §7.87
d. Leased Facilities §7.88
3. Requirement to Pay Prevailing Wages §7.89
4. Penalties
a. Failure to Pay Prevailing Wages §7.90
b. Failure to Require Payment of Prevailing Wages §7.91
5. Payroll Records
a. Duty to Maintain §7.92
b. Accuracy and Inspection §7.93
6. Volunteer Work Exemption §7.94

H. Bonds and Insurance
1. Surety Bonds Distinguished From Insurance §7.95
2. Key Features of Surety Bonds
a. When Liability Arises §7.96
b. Scope of Liability §7.97
c. Changes to Scope of Work §7.98
d. Surety Qualifications §7.99
(1) Admitted Surety §7.100
(2) City Liability §7.101
e. Sufficiency of Sureties §7.102
f. Bid Bonds Versus Payment Bonds §7.103
g. Insurance Distinguished From Indemnification §7.104
h. Other Handbook References §7.105

I. Interpreting the Contract and Resolving Disputes
1. Implied Warranty of Correctness §7.106

2. Effect of Disclaimers §7.107
3. Differing Site Conditions §7.108
4. Finality of the Engineer's Decision
a. Historical Rule §7.109
b. Statutory Rule §7.110
5. Mediation and Arbitration of Construction Claims
a. Arbitration Required by Statute §7.111
b. Contract Provisions §7.112
c. Other Alternative Dispute Resolution Methods §7.113
6. Limitations on Contractor Claims
a. False Claims §7.114
b. Total Cost Claims §7.115
c. Abandonment §7.116
J. Stop-Notices
1. Purpose of Stop-Notice §7.117
2. Preliminary 20-Day Notice §7.118
3. Timing §7.119
4. Payment Disputes §7.120
5. Resolution
a. Duty to Withhold §7.121
b. Funds Subject to Withholding §7.122
c. Notice to Claimant §7.123
d. Contractor Bond §7.124
e. Prompt Payment §7.125
f. Suit by Contractor §7.126
g. Suit by Stop-Notice Claimant §7.127
6. Other Reference Materials §7.128
K. Federally Funded Projects
1. Authority to Comply With Federal Requirements §7.129
2. Use of Federal Grant Funds to Purchase Supplies and Services
a. Uniform Administrative Regulations §7.130
b. Grantee/Grantor Responsibility §7.131
c. Grantor Review of Proposed Contracts §7.132
d. Code of Conduct §7.133
e. Contracting With Small and Minority Firms, Women's Business Enterprise (WBE), and Labor Surplus Area Firms §7.134
f. Selection Procedures §7.135
g. Method of Procurement §7.136
(1) Small Purchase Procedures §7.137
(2) Competitive Sealed Bids (Formal Advertising) §7.138
(a) Solicitation of Responses §7.139
(b) Information Provided §7.140
(c) Bid Opening §7.141
(d) Award §7.142
(e) Bid Rejection §7.143
h. Competitive Negotiation §7.144
(1) Solicitation of Responses §7.145
(2) Contents §7.146
(3) Evaluation §7.147
(4) Award §7.148
i. Noncompetitive Negotiation §7.149
j. Contract Pricing §7.150
k. Contract Provisions §7.151
(1) Remedies §7.152
(2) Termination §7.153
(3) Building Requirements §7.154
(4) Executive Order Compliance §7.155
(5) "Anti-Kickback" Act §7.156
(6) Davis-Bacon Act §7.157
(7) Hours and Safety Standards §7.158
(8) New Inventions and Materials §7.159
(9) Access to Records §7.160
(10) Environmental Law Compliance §7.161
(11) Energy Efficiency §7.162
(12) Contract Administration §7.163

3. Prevailing Wages §7.164
4. Definitions §7.165
5. Contract Documents
a. Specifications §7.166
b. Contracts §7.167
6. Payroll Records §7.168
7. Penalties §7.169
L. Charter Cities
1. Charter Cities and the Public Contract Code §7.170
2. Bidding §7.171
3. Charter Provisions §7.172
4. Prevailing Wages §7.173

II. CONTRACTING FOR SERVICES AND GOODS
A. Authority to Contract
1. In General §7.174
2. Specifically §7.175
3. Delegation of Authority
a. Unlawful Delegations of Government Functions §7.176
b. Caveat Emptor §7.177
4. Express Grant of Authority to Enter Into Contracts §7.178
5. Authority for Intergovernmental Agreements
a. Source of Authority §7.179
b. County Performance of General City Functions §7.180
c. Charter City Contracting Authority §7.181
d. Assessment and Equalization Functions—Alternative Procedures for Charter Cities §7.182
e. Contracts for Municipal Services §7.183
f. Fire Protection Services From Counties §7.184
g. Water Mains and Sewers §7.185
h. Construction and Maintenance of Sewers and Electrical Poles §7.186
i. Cement Facilities §7.187
j. Emergency Assistance §7.188
k. County Charges §7.189
6. Federally Funded Projects §7.190
7. Prohibited Contracts
a. Police Officers as Security Guards §7.191
b. Job Order Contracts §7.192
B. Competitive Bidding Requirements
1. General Rule §7.193
2. Rule for Certain Kinds of Professional Services §7.194
3. Contracting for Supplies and Equipment §7.195
4. "Piggyback" Purchasing §7.196
C. Purchase Ordinance and Regulation §7.197
D. Local Preferences
1. Validity §7.198
2. "Buy America Act" §7.199

III. GENERAL CONTRACT PROVISIONS AND ISSUES
A. General Rule of Interpretation §7.200
B. Contract Provisions and Issues
1. Parties §7.201
2. Duration §7.202
3. Duties §7.203
4. Time §7.204
5. Responsible Contract Administrators §7.205
6. Dispute Clause §7.206
7. Compensation §7.207
8. Reimbursement of Expenses §7.208
9. Public Entity Liability and Insurance §7.209
a. Right to Require Insurance §7.210
b. Common Types of Insurance §7.211
(1) Commercial General Liability §7.212
(2) Automobile Liability §7.213
(3) Professional Liability §7.214
(4) Workers' Compensation and Employer Liability §7.215

c. Common Contractual Provisions §7.216
10. Indemnification
a. Establishment of Indemnification §7.217
b. City Liability for Contractor Acts §7.218
(1) Non-Delegable Duty §7.219
(2) Peculiar Risk Doctrine §7.220
c. Type and Scope of Indemnification §7.221
(1) Indemnity as a Condition for Rendering Essential Public Service §7.222
(2) Construction Contracts §7.223
(3) Trucking Contracts §7.224
d. Further Reference §7.225
11. Limitation of Liability Clauses §7.226
12. Notices §7.227
13. Status of Contractor §7.228
14. License Requirement §7.229
15. Assignment §7.230
16. Arbitration §7.231
17. Conflict of Interest §7.232
18. Ownership of Materials and Documents §7.233
19. Termination §7.234
20. Discrimination §7.235
21. Ownership Interest §7.236
22. Records §7.237
23. Audit §7.238
24. Choice of Law §7.239
25. Entire Agreement §7.240
26. Waiver §7.241
27. Attorney Fees Provision §7.242
C. Execution of Contracts
1. Effect on Enforceability §7.243
2. Signature and Other Requirements §7.244
3. Consequence of Defective Bidding Process §7.245
D. Payment Procedures
1. General Law Cities §7.246
2. Charter Cities §7.247
3. Audits
a. Local Audit Requirements §7.248
b. State Audit Requirements §7.249
4. Extra Compensation for Services Already Rendered §7.250
E. Other Handbook References §7.251

IV. INSURANCE §7.252
A. Coverage and Exclusions
1. Mandatory Versus Optional Coverage §7.253
2. Interpretation of Insurance Policies §7.254
3. Exclusions §7.255
4. Duty to Defend §7.256
5. Duty to Indemnify §7.257
B. Self-Insurance and Insurance Pools §7.258
1. Self-Insured Retentions/Reserves §7.259
2. Self-Insurance Pools
a. Purpose and Scope §7.260
b. Services Provided §7.261
c. Legal Underpinning for Pools §7.262
d. Pools Are Not "Other Insurance" §7.263
e. Examples of Pool Types §7.264
f. Professional Organizations §7.265
C. Other Insurance Issues
1. Practice Resources §7.266
2. "Occurrence" Versus "Claims Made" Policies §7.267
a. "Occurrence" Policies §7.268
b. "Claims Made" Policies §7.269
3. "Comprehensive" Coverage
a. In General §7.270
b. Exclusions §7.271

c. Owner-Controlled Insurance Programs §7.272
4. Aggregate Limits §7.273
5. "Broad Form" Coverage §7.274
6. "Commercial General Liability" Coverage
a. Scope of Coverage §7.275
b. Amounts §7.276
7. Rating Insurance Carriers
a. Best's Rating §7.277
b. Insurance Company Licensing §7.278
8. Additional Insured Endorsements
a. Insurance Policy as Contract §7.279
b. Reasons for Additional Insured Status §7.280
c. Endorsement Language §7.281
d. Form Endorsements §7.282
e. Further Reference §7.283
9. Certificates of Insurance §7.284
D. Specific Insurance Types
1. Automobiles §7.285
2. Workers' Compensation §7.286
3. Bodily Injury §7.287
4. Personal Injury §7.288
5. Products and Completed Operations §7.289
6. Property §7.290
7. Umbrella or Excess Policies §7.291
8. Professional Liability Insurance §7.292
9. Public Officials Errors and Omissions Coverage §7.293
E. Submitting and Enforcing Insurance Claims §7.294
F. Additional Handbook References §7.295

V. INDEMNITY AGREEMENTS AND BONDS
A. Introduction to Indemnification
1. Nature of Indemnity §7.296
2. Right to Seek Indemnification §7.297
B. Express Indemnity Agreements
1. Contract Principles Apply §7.298
2. Negligence
a. General Principles §7.299
b. Statutory Limitations §7.300
c. Passive Negligence §7.301
d. Active Negligence §7.302
(1) General Versus Specific Indemnification Clauses §7.303
(2) General Indemnification Clauses and Active Negligence §7.304
e. Accrual of Right to Indemnification §7.305
f. Right to Defense Costs §7.306
g. Statute of Limitations for Enforcing Indemnity Agreement §7.307
3. Intentional Acts
a. Availability of Indemnification §7.308
b. Future Versus Past Acts §7.309
C. Implied Indemnity
1. When Applicable §7.310
2. Source of Obligation §7.311
D. Equitable Indemnity §7.312
E. Toxic and Hazardous Wastes
1. Statutory Authority §7.313
2. Questions to Consider §7.314
a. Covered Parties §7.315
b. Identity of Beneficiary §7.316
c. Specific Acts Covered §7.317
d. Types of Acts Covered §7.318
e. Impact of Insurance §7.319
f. Control of Defense and Settlement §7.320
F. Further Reference §7.321

© The Regents of the University of California

§7.7 b. Professional Services

Contracts for professional services such as private architectural, landscape architectural, engineering, environmental, land surveying, or construction management firms need not be competitively bid, but contracts must be awarded on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required at a fair and reasonable price to the public agency. Govt C §4526. Price can be considered and fee information solicited, but may not be the sole determining factor. Gov't C §4526. However, if the professional services are too closely akin to the work typically performed by public works construction contractors (for example, some services performed by construction managers), then competitive bidding may be required. *Inglewood-Los Angeles County Civic Ctr. Auth. v Superior Court* (1972) 7 C3d 861, 103 CR 689.

© The Regents of the University of California

§7.8 c. Special Services

The legislative body of any public or municipal corporation may contract with and employ any persons for the furnishing to the corporation special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required. Govt C §53060. The test as to whether services are special services depends on the nature of the services, the necessary qualifications required of a person furnishing the services, and the availability of the service from public sources. *California Sch. Employees Ass'n v Sunnyvale Elementary Sch. Dist.* (1973) 36 CA3d 46, 60, 111 CR 433.

© The Regents of the University of California

§7.9 d. Design-Build

Design-build is a method of project delivery in which the design and construction functions are contracted from a single entity, called the "design-build entity." See Pub Cont C §20175.2. The design-build method stands in contrast to the traditional design-bid-build method, whereby design, procurement, and construction of the project proceed sequentially, with award of the construction contract delivered to the lowest responsible bidder based on completed plans and specifications, and the designer being retained by use of a separate contract. On responsible bidders, see §7.19. The awarding of a design-build contract may be made in accordance with the statutory procedure which results in the issuance of a design-build request for proposal. See Pub Cont C §20175.2(d). The design-build contract may be awarded to the lowest responsible bidder, or the city may award the contract based on a "best value" determination described in the code. Pub Cont C §20175.2(a)(2). The "best value" competition provides an alternative to competitive bidding and award to the lowest bidder. See Pub Cont C §20175.2(c)(1).

Charter cities may use design-build if there is a specific city charter provision or ordinance that authorizes the design-build project delivery method. Pub Cont C §1100.7. Cities may enter into design-build contracts for a qualifying building construction project in excess of $1 million with approval of the city council. Eligible construction projects include the construction of a building and related improvements, but not streets, highways, public rail transit, or water resource facilities and infrastructure. Pub Cont C §20175.2(c). In addition, cities, counties, and special districts may utilize design-build contracts for certain water or water treatment facilities. Pub Cont C §§20193-20195.

PRACTICE TIP: Construction project management services under Govt C §4526 are not subject to the design-build project requirements under Pub Cont C §20175.2. Construction project management services are solicited under Govt C §4526 and therefore are not generally subject to competitive bidding and other public works contracting requirements. See §7.7.

© The Regents of the University of California

3. Notice Inviting Bids

§7.10 a. Contents of the Notice

The notice inviting bids must set a date for opening of bids. The timing, content, and method of publishing the notice are described in Pub Cont C §§4104.5 and 20164 and Govt C §53068. Additional information that must be included in the notice inviting bids is described in §§7.11-7.12.

© The Regents of the University of California

§7.11 b. Bid Addenda

If the city issues a bid addendum that results in a material change to the invitation, the date and time for submitting bids must be extended by no less than 72 hours. Pub Cont C §4104.5.

PRACTICE TIP: Many cities set forth specific requirements for submission of requests for additional information in the bid documents, including that such requests be in writing, and received with enough time for the city to properly issue an addendum if necessary.

© The Regents of the University of California

§7.12 c. Mandatory Pre-Bid Conference or Job Walk

If required, a mandatory pre-bid site visit, conference, meeting, or job walk must not occur within a minimum of 5 days from the initial publication of the notice calling for bids. The notice calling for bids must clearly indicate the time, date, and location of the mandatory conference or job walk. Pub Cont C §6610.

© The Regents of the University of California

§7.13 4. Presentation of Bid and Security

All bids must be sealed and accompanied by security of at least 10 percent of the bid amount to guarantee the bid. The city cannot consider a bid from a bidder who fails to provide the required security. Pub Cont C §§20170-20171. Rules governing forfeiture of bid security are contained in Pub Cont C §§20172-20174 and limit the amount of forfeiture to the difference between the low bid and the second low bid.

© The Regents of the University of California

§7.14 5. Internet Submissions

Public entities may adopt methods and procedures to receive bids and/or supporting materials online. Public entities are required to provide contractors an electronic receipt showing the date and time the submission was received. Pub Cont C §1601.

© The Regents of the University of California

6. Award

§7.15 a. Lowest Responsible Bidder

The contracts for competitively bid public projects must be awarded to the lowest responsible bidder. Pub Cont C §20162. The process for selecting the lowest responsible bidder includes a determination of: (1) which bidder is the lowest monetary bidder; (2) whether or not the lowest monetary bidder submitted a responsive bid; and (3) whether or not the lowest monetary bidder is responsible. *Inglewood-Los Angeles County Civic Ctr. Auth. v Superior Court* (1972) 7 C3d 861, 103 CR 689; *Taylor Bus Serv., Inc. v San Diego Bd. of Educ.* (1987) 195 CA3d 1331, 241 CR 379. If the lowest monetary bidder is responsible and submits a responsive bid, the contract must be awarded to the lowest monetary bidder even if another bidder is more responsible. *Inglewood-Los Angeles County Civic Ctr. Auth. v Superior Court, supra*. A city that improperly awards a bid to any bidder other than the lowest responsible bidder may be liable for reimbursing the low bidder's actual cost in submitting the bid, but will not be liable for the low bidder's lost profits. *Kajima/Ray Wilson v Los Angeles County Metro. Transp. Auth.* (2000) 23 C4th 305, 315, 96 CR2d 747.

© The Regents of the University of California

§7.16 (1) Lowest Monetary Bidder

The invitation for bids must be written so that there is a clear method to compare bids and determine which bid is the lowest monetary bid. *Konica Business Machs. U.S.A., Inc. v Regents of Univ. of Cal.* (1988) 206 CA3d 449, 253 CR 591. When bidders are required to include calculations on the bid form, a clause in the invitation for bids will be enforced if it clearly indicates that the unit price amounts will take precedence over the calculated line item amounts. *Pozar v Department of Transp.* (1983) 145 CA3d 269, 193 CR 202. If two or more bids are the same and the lowest, the city may accept the one it chooses as the lowest monetary bidder. Pub Cont C §20166.

© The Regents of the University of California

§7.17 (2) Additive and Deductive Bids

A local agency may include items of work in the bidding documents to be bid in the alternative, as additions to or deductions from its base bid price. Pub Cont C §20103.8. However, the procedure for selection of alternates must be such as will not create an opportunity for favoritism. The method used to select the accepted alternates must be from among those methods described in the statute and must be declared in advance in the bid solicitation. If the public agency does not specify a method, the lowest bid will be the lowest bid prices on the base contract without consideration of prices on the additive or deductive items. Pub Cont C §20103.8(a).

© The Regents of the University of California

§7.18 (3) Responsive Bid

A bid must conform to the material terms of the bid package. *Menefee v County of Fresno* (1985) 163 CA3d 1175, 210 CR 99. A bid is responsive if it promises to do what the bidding instructions demand. *Valley Crest Landscape Inc. v City Council* (1996) 41 CA4th 1432, 1438, 49 CR2d 184. Responsiveness should be determined from the face of the bid. *Taylor Bus Serv., Inc. v San Diego Bd. of Educ.* (1987) 195 CA3d 1331, 241 CR 379. A bid may be responsive even if there is a discrepancy in the bid, as long as the discrepancy is inconsequential, that is, the discrepancy must not: (1) affect the amount of the bid; (2) give a bidder an advantage over others (*e.g.,* give a bidder an opportunity to avoid its obligation to perform by withdrawing its bid); (3) be a potential vehicle for favoritism; (4) influence potential bidders to refrain from bidding; or (5) affect the ability to make bid comparisons. *Ghilotti Constr. Co. v City of Richmond* (1996) 45 CA4th 897, 53 CR2d 389.

© The Regents of the University of California

§7.19 (4) Responsible Bidder

A responsible bidder is one who is able to perform the contract if awarded. To be considered responsible, the bidder must demonstrate the attributes of trustworthiness, quality, fitness, capacity, and experience to satisfactorily perform the public works contract. Pub Cont C §1103. A range of factors may be used to determine bidder responsibility, including performance history, reliable financial information, bonding and insurance capacity, public works experience, personnel, litigation history, and others.

© The Regents of the University of California

§7.20 b. Bid Protests

Bid protests generally arise out of and relate to the responsiveness or responsibility determination. See §7.19. If a city intends to reject a bid based on non-responsibility, before the award of the contract, the city must give notice to the bidder of any evidence reflecting on bidder's responsibility, afford bidder an opportunity to rebut such adverse evidence, and permit bidder to present evidence that he or she is qualified to perform the contract. However, due process does not compel a quasi-judicial proceeding before rejection of the bid. *Inglewood-Los Angeles County Civic Ctr. Auth. v Superior Court* (1972) 7 C3d 861, 871, 103 CR 689. A finding of non-responsibility must be supported by substantial evidence. *Boydston v Napa Sanitation Dist.* (1990) 222 CA3d 1362, 1369, 272 CR 458.

PRACTICE TIP: Generally, a finding of non-responsibility is considered at a public hearing, and a record is created to provide the substantial evidence necessary to support the final decision.

A bidder determined to be nonresponsive is entitled to notice of that fact and is entitled to submit materials, in a manner defined by the city, concerning the issue of responsiveness. The city is not required to conduct a hearing, however, and need not produce findings. A city generally has the discretion to determine responsiveness and may demand strict compliance with the bid specifications. *Taylor Bus Serv., Inc. v San Diego Bd. of Educ.* (1987) 195 CA3d 1331, 1343, 241 CR 379. Although a hearing is not required, it is advisable. The basis for the finding of non-responsiveness should be memorialized as part of the award of contract and in a written notice to the bidder. See *D.H. Williams Constr., Inc. v Clovis Unified Sch. Dist.* (2007) 146 CA4th 757, 53 CR3d 345.

PRACTICE TIP: Many public entities include specific administrative procedures for handling bid protests in the bid documents. Such procedures typically establish a date by which protests must be received, require a detailed explanation of the grounds for the protest, and allow other bidders the opportunity to respond to the protest.

© The Regents of the University of California

§7.21 7. Bid Rejection

The legislative body may, in its discretion, reject all bids without having to give a reason. Pub Cont C §20166. If no bids are received, the legislative body may then dispense with competitive bidding. Pub Cont C §20166. If all bids are rejected and the legislative body resolves by a four-fifths vote that the project can be performed more economically by day labor or through open market purchases of materials and supplies, it may dispense with further public bidding. Pub Cont C §20167. See also Pub Cont C §20102 (if the public agency determines to proceed by day labor, the work will be performed in accordance with the same plans and specifications).

© The Regents of the University of California

8. Mistakes

§7.22 a. Changing the Bid

Once a bid is opened, the bidder may not thereafter change the bid. Pub Cont C §5101. Clerical errors in listing subcontractors may be corrected if the proper procedure is followed. Pub Cont C §4107.5.

© The Regents of the University of California

§7.23 b. Consent to Withdrawal

In the case of bid mistakes, the awarding authority may consent to a withdrawal of the bid if the bidder establishes that the requirements of Pub Cont C §5103 have been satisfied, and the public entity documents the facts in support of relief. Pub Cont C §5101(a).

© The Regents of the University of California

§7.24 c. Legal Action for Relief

When the public entity refuses to relieve the bidder of its bid, the contractor may, within 90 days, file an action to seek relief. Pub Cont C §§5101(a), 5102.

© The Regents of the University of California

§7.25 d. Prohibition from Further Bidding

A bidder who claims mistake or forfeits its bid security cannot participate in further bidding on the same project. Pub Cont C §5105.

© The Regents of the University of California

§7.26 9. Other Reference

On bid errors and irregularities, see Brown, California Public Works Projects: Managing Contracts and Resolving Disputes (1999).

© The Regents of the University of California

§7.27 C. Prequalification of Contractors

State agencies are authorized to prequalify bidders for construction projects. Pub Cont C §10163. Cities may also prequalify prospective bidders. Pub Cont C §20101. It appears from the language of the statute and the content of the model guidelines developed by the California Department of Industrial Relations (DIR) that the standards for prequalification are not necessarily the same as the legal standard for "non-responsibility" that applies to lowest responsible bidder selection without prequalification. Thus, it is possible that the kind of "relative superiority" evaluation and selection that is prohibited by case law in lowest responsible bidder procurement conducted without prequalification (*City of Inglewood-Los Angeles County Civic Ctr. v Superior Court* (1972) 7 C3d 861, 103 CR 689) may be permissible to a limited extent in the context of local agencies using statutory prequalification.

PRACTICE TIP: Under Pub Cont C §20101(a), the Department of Industrial Relations (DIR) has developed guidelines, including Model Forms, which may be used in the prequalification process. This information is published on the DIR website at www.dir.ca.gov/prequal.htm.

© The Regents of the University of California

D. Affirmative Action

§7.28 1. Locally and State-Funded Programs

Proposition 209, adopted by initiative on November 6, 1996, amended the California Constitution by adding Cal Const art I, §31(a): "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

© The Regents of the University of California

§7.29 a. *Hi-Voltage Wire Works, Inc. v City of San Jose*

In *Hi-Voltage Wire Works, Inc. v City of San Jose* (2000) 24 C4th 537, 101 CR2d 653, the California Supreme Court held that Proposition 209 (Cal Const art I, §31) prohibits any kind of preferential treatment based on race, sex, or other prohibited characteristics by the state and its political subdivisions. Thus, the court held that a program that required contractors bidding on city projects either to utilize a specified percentage of minority and female subcontractors or to document efforts to include minority and female subcontractors in their bids violated Proposition 209.

It is clear from the *Hi-Voltage* decision that the court has broadly interpreted Proposition 209 to prohibit any form of race or sex-based preferences imposed by public agencies on contractors or subcontractors, including some forms of outreach requirements. Thus, the continued viability of local MBE (minority-owned business enterprises) and WBE (women-owned business enterprises) requirements under Pub Cont C §2000 is substantially in doubt. The broad reach of the decision is indicated by the court's holding that the outreach portion of the San Jose plan also violated Proposition 209. Outreach programs cannot be exclusively applied to or conditioned on race, sex, or some other prohibited characteristic. For example, if there were meetings to encourage bids, such meetings could not be held exclusively with MBE and WBE organizations. The court acknowledged, however, that not all forms of outreach programs would be considered unlawful. At the very minimum, the *Hi-Voltage* decision must be carefully examined by counsel with respect to any existing or contemplated state or local affirmative action plan.

PRACTICE TIP: The United States Court of Appeals for the Ninth Circuit has held that the state ethnic and gender set-aside statutes (Pub Cont C §§10115-10115.15) violate the Equal Protection Clause (US Const amend XIV, §1). See *Monterey Mechanical v Wilson* (9th Cir 1997) 125 F3d 702. Similar arguments may be applied to local MBE (minority-owned business enterprises) and WBE (women-owned business enterprises) requirements under Pub Cont C §2000. See *Domar Elec., Inc. v City of Los Angeles* (1995) 41 CA4th 810, 48 CR2d 822.

© The Regents of the University of California

§7.30 b. Data Collection

In *Connerly v State Personnel Bd.* (2001) 92 CA4th 16, 112 CR2d 5, the court upheld the data collection and reporting requirements in laws as long as the statutory provisions that require data to be collected and reported are not intended as some sort of supervisorial device necessarily intertwined with a "discriminatory program." Data collection can serve a legitimate interest; in this case, as the basis for future legislative consideration with respect to the need for future legislative action. Although *Connerly* involves only the California State Legislature's use of data collection for legislative purposes, it appears as though data collection and reporting requirements by other public entities for purposes other than affirmative action would be acceptable.

© The Regents of the University of California

§7.31 c. Permissible Preferences

Proposition 209 does not address preferences unrelated to race or sex, such as disability or veteran status. Targeted outreach based on such criteria may still be permissible. Some outreach programs that may not be foreclosed by Proposition 209 and *Hi-Voltage Wire Works, Inc. v City of San Jose* (2000) 24 C4th 537, 101 CR2d 653, include requiring contractors to (*Hi-Voltage Wire Works, Inc. v City of San Jose, supra; Domar Elec., Inc. v City of Los Angeles* (1994) 9 C4th 161, 36 CR2d 521):

- warrant in writing that they have not discriminated against or given preference to any subcontractor based on race, gender, color, ethnicity, national origin, sexual orientation, disability, age, veteran status, or religion;
- advertise subcontract bid solicitations, including beyond traditional trade journals;
- follow up on subcontract bid solicitations directly with subcontractors expressing interest;
- negotiate in good faith with, and not unjustifiably reject, subcontractors identified through the outreach effort that express interest; and
- provide written documentation of their outreach efforts, including information why each subcontract bid was accepted or rejected.

© The Regents of the University of California

2. Equal Protection Considerations and Federally Funded Programs

§7.32 a. Limitation on Proposition 209 Prohibitions

An important but very narrow limitation to the broad prohibitions Proposition 209 added to the California Constitution in Cal Const art I, §31(a) can be found in Cal Const art I, §31(e): "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." The state is defined in Cal Const art I, §31(f) to include the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state. Courts have interpreted this subsection very narrowly, focusing on the word, "must." The fact that race-based measures may be permitted under the federal funding scheme is not enough. *C & C Constr., Inc. v Sacramento Mun. Util. Dist.* (2004) 122 CA4th 284, 18 CR3d 715.

© The Regents of the University of California

§7.33 b. Supreme Court Review of Affirmative Action Programs

The leading United States Supreme Court cases as to the United States Constitutional viability of affirmative action programs are *Adarand Constructors, Inc. v Pena* (1995) 515 US 200, 132 L Ed 2d 158, 115 S Ct 2097, and *City of Richmond v J.A. Croson Co.* (1989) 488 US 469, 102 L Ed 2d 854, 109 S Ct 706. In *Croson,* the court held that state and local affirmative action programs that utilized racial classifications were subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment to the United States Constitution. In *Adarand,* a subcontractor not awarded a portion of a federal highway contract challenged financial incentives the federal government provided to contractors to hire minority subcontractors, arguing that the practice violated the equal protection guarantee of the Fifth Amendment to the United States Constitution. In overruling *Metro Broadcasting, Inc. v FCC* (1990) 497 US 547, 111 L Ed 2d 445, 110 S Ct 2997, the *Adarand* court held that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

© The Regents of the University of California

§7.34 c. Federal Challenges to State and Local Affirmative Action Programs

Even in the absence of Proposition 209 and the California Supreme Court's decision in *Hi-Voltage Wire Works, Inc. v City of San Jose* (2000) 24 C4th 537, 101 CR2d 653, state and local affirmative action programs have been successfully attacked under the United States Constitution. See, *e.g.*, *Dallas Fire Fighters Ass'n v City of Dallas* (5th Cir 1998) 150 F3d 438 (rank promotions based on affirmative action plan violated equal protection clause); *Engineering Contractors Ass'n v Metro Dade County* (11th Cir 1997) 122 F3d 895 (affirmative action programs that required racial and sexual preferences in construction contract awards and state contractor personnel employment violated equal protection clause); *Alexander v Estepp* (4th Cir 1996) 95 F3d 312 (affirmative action goals that were met by racial preferences violated equal protection clause). But see *Hayden v County of Nassau* (2d Cir 1999) 180 F3d 42 (no violations of equal protection clause to design test to diminish adverse effects on minority applicants when test administered and scored in an identical manner for all applicants).

© The Regents of the University of California

§7.35 E. Specific Bidding and Contract Provisions

Generally, each contract for a public project or public work must contain certain statutorily prescribed provisions unless the particular statute does not apply to the specific type of project or work being undertaken. The required contract provisions are summarized together in §§7.36-7.74 for ease of reference. Certain of these provisions are discussed at greater length later in the chapter. See, *e.g.,* §§7.95-7.105 (bonds and insurance), 7.109-7.113 (resolving disputes).

© The Regents of the University of California

1. Contractor's License Issues

§7.36 a. Invitation to Bid

The public entity must specify the classification of contractor's license required in both the plans and the invitation for bids. Pub Cont C §3300. The contractor must include its license number in the construction contract, subcontracts, calls for bids to subcontracting, and bid advertisements. Bus & P C §7030.5. For contracts involving federal funds, the contractor's licensing requirements must be included in the standard form of prequalification questionnaire and financial statement. Pub Cont C §20103.5. The public entity may exercise its judgment or discretion in determining which license class is permitted for a particular project. *M&B Constr. v Yuba County Water Agency* (1999) 68 CA4th 1353, 1359, 81 CR2d 231. The Contractors State License Board (CSLB), however, retains jurisdiction regarding the validity of the license.

The CSLB will issue a determination on what license category is required for a particular project; however, the CSLB determination cannot prevail if erroneous or unauthorized by the applicable laws. *Ron Yates Constr. Co. v Superior Court* (1986) 186 CA3d 337, 344, 230 CR 629. The CSLB website is www.cslb.ca.gov. Moreover, when a specialty contractor is authorized to bid a project, all work to be performed outside the bidder's license classification (other than incidental or supplemental work) must be performed by licensed subcontractors. Bus & P C §7059(b).

© The Regents of the University of California

§7.37 b. Effect of Failure to Have Proper License

A bid by a contractor who is not properly licensed must be considered nonresponsive and be rejected by the public entity. The unlicensed contractor is also subject to discipline by the state. Bus & P C §7028.15(a). For contracts involving federal funds, however, a failure to be licensed at the time of bid does not invalidate the bid, but the contractor must be properly licensed at the time the contract is awarded. Pub Cont C §20103.5. Moreover, before obtaining a joint venture license, licensed contractors may jointly bid a public works project; however, to be awarded the contract, the joint venture must hold the license. Bus & P C §§7028.15(c), 7029.1. No payment for work or material may be made until the Registrar of Contractors verifies the contractor was properly licensed at the time the bid was awarded. Pub Cont C §20103.5; *Construction Fin. v Perlite Plastering Co.* (1997) 53 CA4th 170, 61 CR2d 574.

© The Regents of the University of California

§7.38 c. Verification

Except for federally funded contracts under Pub Cont C §20103.5, the public entity must verify that the contractor was properly licensed at the time it submitted its bid, before awarding a contract or before issuing a purchase order; failure to do so subjects the public entity's officers and employees to citation and civil penalties. Bus & P C §7028.15(e). The verification may be made by telephone from the Contractors State License Board (CSLB). Bus & P C §7028.15(g).

© The Regents of the University of California

2. Major Subcontractors

§7.39 a. General Requirements

The bid specifications or general conditions must require the bidder to list in its bid all its subcontractors who will perform work in excess of ½ percent of the total bid or, in the case of streets or highways, ½ percent or $10,000, whichever is greater. Pub Cont C §4104.

© The Regents of the University of California

§7.40 b. Requests for Additional Information

In addition to the name and business location of each subcontractor, a city may request additional information to be submitted by the prime contractor up to 24 hours after the bid deadline. Pub Cont C §4104.

© The Regents of the University of California

§7.41 c. Contractors and Subcontractors Debarred by the State

The contract documents must contain a provision prohibiting work by contractors or subcontractors who are ineligible under Lab C §§1777.1 and 1777.7. Pub Cont C §6109. The California Department of Industrial Relations publishes a list of debarred contractors online at www.dir.ca.gov/dlse/debar.html.

© The Regents of the University of California

§7.42 3. Unfair Business Practice Claims

The contract specifications or general conditions must provide for the assignment of unfair business practices claims (Clayton Act (15 USC §§12-27) and Cartwright Act (Bus & P C §§16720-16770)) from the contractor to the public entity. Pub Cont C §7103.5.

© The Regents of the University of California

§7.43 4. Trenching Requirements

Jobs involving trenching more than four feet deep must contain a contract provision that (Pub Cont C §7104):

- requires the contractor to notify the public entity of hazardous materials, subsurface or latent physical site conditions different from those indicated in information about the site made available to bidders before the bid deadline, and unusual site conditions;
- describes the duties of the public entity as to investigation thereof; and
- specifies how disputes must be addressed.

Contract disclaimers that attempt to relieve the pubic entity from responsibility for subsurface conditions that differ from those indicated by information about the site made available to bidders before the bid deadlines are generally unenforceable. *Condon-Johnson & Assoc., Inc. v Sacramento Mun. Util. Dist.* (2007) 149 CA4th 1384, 57 CR3d 849.

In contracts exceeding $25,000, detailed plans are also required for trenches or excavations of five feet or more in depth. Lab C §6705.

© The Regents of the University of California

§7.44 5. Non-Collusion Affidavit

A public works contract must contain a non-collusion affidavit signed by the bidder in the statutory form. Pub Cont C §7106.

© The Regents of the University of California

§7.45 6. Retention

The public entity must retain at least 5 percent of the contract price on any public works contract exceeding $5000. Pub Cont C §9203. After one-half of the work is completed and the public entity determines that satisfactory progress is being made to complete the job, the public entity may make the remaining payments in full. Pub Cont C §9203. The retention must be released (with the exception of 150 percent of any disputed amount) within 60 days after the date of completion of the work; noncompliance may subject the public entity to payment of interest at the rate of 2 percent per month. Pub Cont C §7107.

PRACTICE TIP: The most common practice is to require a 10-percent retention through the completion of the contract.

© The Regents of the University of California

§7.46 7. Securities in Lieu of Retention

The invitation for bids and the contract documents must contain a statement that the contractor may substitute securities in place of retained funds withheld by the city. Pub Cont C §22300. Alternatively, an escrow agreement, in the form prescribed by the Code, may be used by the contractor. Pub Cont C §22300.

© The Regents of the University of California

§7.47 8. Resolution of Claims

The plans or specifications must contain certain mediation and arbitration provisions. Pub Cont C §§20104, 20104.2, 20104.4. These provisions apply to claims of $375,000 or less. Pub Cont C §20104(a)(1).

© The Regents of the University of California

§7.48 9. Government Code Claims

When a local entity provides for a claims procedure in a contract, that procedure governs exclusively, unless the agreement expressly requires presentation of a statutory Government Code claim as well. *Arntz Builders v City of Berkeley* (2008) 166 CA4th 276, 82 CR3d 605; Govt C §§905, 910, 930-935.8.

PRACTICE TIP: A public entity must expressly state in the agreement that a contractor must follow contractual claims procedures and Government Code claims presentation requirements if the public entity does not want the procedures provided in the contract to be the sole method of dispute resolution. Many public works contracts have specific notice and claim procedures governing disputes that arise during the course of the project and require that a Government Code claim be presented on completion of the project for any dispute that remains unresolved.

© The Regents of the University of California

§7.49 10. Bidder's Security

All bids must include bidder's security in an amount of at least 10 percent of the amount bid, and in a form specified by the Code. Pub Cont C §§20170- 20171. Equivalent provisions are applicable to redevelopment agencies. Pub Cont C §20685.5.

© The Regents of the University of California

§7.50 11. Prevailing Wage Law

The provisions of the prevailing wage law discussed in §§7.51-7.57 are discussed in greater detail in §§7.82-7.94

© The Regents of the University of California

§7.51 a. Notices Concerning Rates

The invitation for bids, bid specifications, and contract documents must specify the general rate of per diem wages (prevailing wage) for each craft, classification, or type of worker needed to execute the contract or contain a statement that copies of the prevailing rate of per diem wages are on file at the public entity's principal office. Lab C §1773.2. The public entity must also cause a copy of the wage rates to be posted at each job site. Lab C §1773.2. Prevailing wages must be paid on all contracted public works projects over $1000 within the meaning of Lab C §§1720-1743. Lab C §1771.

© The Regents of the University of California

§7.52 b. Labor Compliance Programs

For cities with a Labor Compliance Program on all of their public works projects, construction projects of $25,000 or less and maintenance projects of $15,000 or less are exempt from prevailing wage requirements. Lab C §1771.5.

NOTE: In 2009, additional contract language requirements were added to 8 Cal Code Regs §§16421-16439. The Department of Industrial Relations is in the process of amending these regulations further. These regulations provide guidance regarding the obligations and responsibilities of public entities with respect to prevailing wage law.

© The Regents of the University of California

§7.53 c. Penalties

The contract must state that the statutory provisions for penalties for failure to pay prevailing wages will be enforced (Lab C §1775) and that the statutory provisions for penalties for failure to comply with state's wage and hour laws will be enforced (Lab C §1813). The awarding body may be liable for increased costs when the project or a portion thereof was not identified as a public work, but was subsequently so classified by the body itself, the Department of Industrial Relations, or the court. Lab C §1781.

© The Regents of the University of California

§7.54 d. Payroll Records

The contract must require compliance with the statutory requirements relating to certified copies of payroll records, including the maintenance of the records, their certification, and their availability for inspection. Lab C §1776.

© The Regents of the University of California

§7.55 e. Apprentices

The contract must require compliance with the statutory requirements relating to the employment of apprentices. Lab C §1777.5.

© The Regents of the University of California

§7.56 f. Day's Work

The contract must have a provision stating that 8 hours' labor constitutes a legal day's work. Lab C §1810.

© The Regents of the University of California

§7.57 g. Workers' Compensation

The contract must state the contractor must secure the payment of workers' compensation to its employees as provided in Lab C §§1860 and 3700. A second low bidder has a right of action for damages against a low bidder who violates the workers' compensation laws or the Unemployment Insurance Code and thereby damages the second low bidder. Lab C §1750. The contractor must sign and file a statutorily prescribed statement acknowledging its obligation to secure the payment of workers' compensation to its employees before beginning work. Lab C §1861.

© The Regents of the University of California

§7.58 12. Labor Code §2810 Liability

Labor Code §2810 prohibits a person or an entity from entering into a contract for construction, farm labor, garment, security guard, or janitorial services when the person knows, or should know, that the contract does not have sufficient funds to allow the contractor to comply with applicable laws and regulations. There is a rebuttable presumption affecting the burden of proof that there has been no violation when the contract meets all of the requirements in Lab C §2810(b).

© The Regents of the University of California

§7.59 13. Labor and Materials Bond

The invitation for bids must require the submission of a labor and materials bond (payment bond) on projects in excess of $25,000. CC §3247. The minimum amount and conditions of the bond are specified by state law. CC §3248.

© The Regents of the University of California

§7.60 14. Utilities Relocation

Contracts must compensate a contractor for utilities relocation work not shown on the public entity's plans and waive liquidated damages for delay caused by the public entity's or a public utility's failure to provide for removal or relocation of utility facilities. Govt C §4215. However, the public entity may seek appropriate remedies against the utility for delays that are the responsibility of the utility. The public entity must assume the responsibility for the timely removal, relocation, or protection of utility facilities not shown on the plans and specifications that are part of the invitation for bids. Govt C §4215. See also Govt C §§4216-4216.9 (establishing regional notification system to protect public utilities from damage during excavation and requiring contractors to notify utilities and obtain an identification number before excavation or be subject to liability for damages to subsurface installations).

© The Regents of the University of California

§7.61 15. Engineering Specifications and Costs

The public entity's engineer must prepare and file either complete and accurate plans and specifications or a work authorization describing the work to be performed, together with an estimate of the cost thereof, before beginning work. Govt C §4004. Failure to do so is a misdemeanor. Govt C §4007. See §7.73 (relating to cost records) for additional requirements subject to this penalty.

© The Regents of the University of California

§7.62 16. Termination, Amendment, or Modification

A local agency may terminate, amend, or modify the contract only if the ability to do so is provided for in the contract. Pub Cont C §7105(d)(2).

© The Regents of the University of California

§7.63 17. Brand or Trade Names

Specifications by brand or trade name are prohibited except (Pub Cont C §3400):

- when followed by the words "or equal"; or
- when the public agency or its designee makes a finding that is described in the invitation for bids that the specific brand is:
- designated for a field test or experiment on a particular item;
- in order to match other products in use;
- in order to obtain a necessary item that is only available from one source;
- in order to respond to an emergency declared by a local agency, but only if the declaration is approved by a four-fifths vote of the governing board of the local agency issuing the invitation for bids or request for proposals; or
- in order to respond to an emergency declared by the state, a state agency, or a political subdivision of the state, but only if the facts setting forth the reasons for the finding of the emergency are contained in the public records of the authority issuing the invitation for bids or request for proposals.

The specifications must provide a period of time before or after, or before and after the award of the contract for submission of data substantiating a contractor's request for substitution of an equal item. Pub Cont C §3400. If no time period is specified, contractors have 35 days after award to submit the data. The intent of §3400 is to "encourage contractors and manufacturers to develop and implement new and ingenious materials, products, and services, as specified, at a lower cost to taxpayers." Pub Cont C §3400(a).

© The Regents of the University of California

§7.64 18. Release of Claims

Contract provisions that provide that acceptance of a payment is a waiver of all claims, or that require submission of a release of all claims as a precondition to payment, are not permitted. Pub Cont C §7100. However, a public entity may require a release of claims for undisputed payments. CC §3262.

© The Regents of the University of California

§7.65 19. Notice of Third Party Claims

Public entities are required to include provisions in public works contracts for timely notification to the contractor of the receipt of any third party claim related to the contract. Pub Cont C §9201(b).

© The Regents of the University of California

§7.66 20. Liquidated Damages

Contracts may not limit a contractor's damages for delays caused by the agency to a time extension only. Pub Cont C §7102. In public project contracts, liquidated damages that are not manifestly unreasonable under the circumstances existing at the time the contract was made are permitted, but the specifications must clearly describe the liquidated damages provisions. Govt C §53069.85. This section also permits contract provisions granting a bonus to the contractor for early completion of the project.

© The Regents of the University of California

§7.67 21. Limit on Force Majeure Damages

Contracts may not require a contractor to assume responsibility for repairing or restoring damages caused by an act of God in excess of 5 percent of the contract amount. Pub Cont C §7105. Acts of God are defined as earthquakes in excess of magnitude 3.5 on the Richter Scale and tidal waves. This section is not mandatory as to construction contracts financed by revenue bonds. The public entity may require the contractor to purchase insurance to cover such losses if the insurance premium is a separate bid item and the requirement is set forth in the invitation for bids. Pub Cont C §7105. The contract may contain a provision for termination in the event of such damages. Pub Cont C §7105.

© The Regents of the University of California

§7.68 22. Resolution of Contract Disputes

A public entity cannot require construction contract disputes to be decided by its agent or employee; if the contract contains such a provision, the dispute must be resolved instead by arbitration or litigation. CC §1670.

© The Regents of the University of California

§7.69 23. Limits on Indemnification

Indemnification agreements in construction contracts that indemnify the promisee against the promisee's sole negligence or willful misconduct are generally void. CC §2782(a). Agreements that purport to impose on the contractor or relieve the public agency from liability for the active negligence of the public agency are also void. CC §2782(b).

© The Regents of the University of California

§7.70 24. Specific Bonding and Insurance Companies

Generally, a bidder may not be required to apply to, furnish information to, or obtain a bond or insurance policy from a specific company, agent, or broker. Govt C §4420.

© The Regents of the University of California

§7.71 25. Assumption of Responsibility for Plans and Specifications

A public entity cannot require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except on clearly designated design-build projects. However, the public entity can require a bidder to review the plans and specifications and report any errors or omissions. Pub Cont C §1104.

© The Regents of the University of California

§7.72 26. Interest on Progress Payment Requests

A public entity must pay interest at the legal rate on any contractor's progress payment request not paid within 30 days of its submission when the validity of the request is not disputed and the request has been properly submitted. Pub Cont C §20104.50. Local agency contracts must include the text or a summary of §20104.50. Pub Cont C §20104.50(f).

© The Regents of the University of California

§7.73 27. Cost Records

A public entity's engineer must keep an accurate account of the cost of each public work. Govt C §4004. Detailed information concerning the project, including the total cost of the work broken into its component parts, must be filed within 60 days of the completion of the project. Govt C §4005. Failure to do so is a misdemeanor. Govt C §4007. See §7.61 (relating to engineering specifications and costs) for additional requirements subject to this penalty.

PRACTICE TIP: Although there are few statutes expressly governing contract administration, cost containment and a successful project rely heavily on continuous project oversight by the public entity. When possible, a single employee should be given day-to-day oversight responsibility for the project. Problems and potential claims should be recognized and resolved at the earliest possible opportunity. Good project records, including photographs or videotapes made during construction, are key to resisting major claims presented at the conclusion of the project. When a project site has an unusual configuration or when adjacent properties may be adversely affected by vibration, photographs or videotapes showing conditions before construction may be valuable in resisting a contractor's changed conditions claim or third party property damage claims. Minutes of all meetings held between the public entity's staff and contractor's personnel are also useful in avoiding or limiting claims for extra work, delay, or inefficiency.

© The Regents of the University of California

§7.74 28. Venue

A contractor or other defendant sued by a local government agency in the county where that agency is located may transfer the matter to another county. CCP §394(a). Contract provisions that require contractors to waive this transfer right are invalid. *Arntz Builders v Superior Court* (2004) 122 CA4th 1195, 19 CR3d 346.

© The Regents of the University of California

F. Subletting and Subcontracting Fair Practices Act

§7.75 1. Definition

The Subletting and Subcontracting Fair Practices Act (Pub Cont C §§4100-4114) generally requires a bidder to list in its bid all subcontractors performing work in excess of one-half of 1 percent of the prime contractor's total bid price or, in the case of streets and highway work, the greater of one-half of 1 percent of the prime contractor's total bid price, or $10,000. Pub Cont C §§4104(a). A bidder may only list one subcontractor for each portion of work defined in the prime contractor's bid. Pub Cont C §4104(b). Following the bid closing date, the bidder may substitute a subcontractor for a listed subcontractor only in those instances authorized by law and approved by the public entity. Pub Cont C §4107(a). A subcontractor does not have a right to protection under the Act unless the subcontractor is listed. *E.F. Brady Co. v M.H. Golden Co.* (1997) 58 CA4th 182, 67 CR2d 886.

© The Regents of the University of California

§7.76 2. Public Policy

The public policy behind the Subletting and Subcontracting Fair Practices Act is to prevent bid shopping and bid peddling, and to give the public entity the opportunity to investigate and approve proposed replacement subcontractors. Pub Cont C §4101; *E.F. Brady Co. v M.H. Golden Co.* (1997) 58 CA4th 182, 189, 67 CR2d 886. "Bid shopping is the use of the low bid already received by the general contractor to pressure other subcontractors into submitting even lower bids. Bid peddling … is an attempt by a subcontractor to undercut known bids already submitted to the general contractor in order to procure the job." *Southern Cal. Acoustics Co. v C. V. Holder, Inc.* (1969) 71 C2d 719, 726, n7, 79 CR 319, 456.

© The Regents of the University of California

§7.77 3. Criteria for Substitution

After the bid closing date, the prime contractor must first request and obtain the consent of the public entity before substituting a subcontractor for a listed subcontractor. Pub Cont C §4107(a). A public entity may approve the prime contractor's request to substitute a listed subcontractor only if the prime contractor demonstrates that one of the following nine criteria is met (Pub Cont C §4107):

(1) the subcontractor fails or refuses to execute a contract for the scope of work and price specified in the subcontractor's bid;

(2) the subcontractor becomes insolvent;

(3) the subcontractor fails or refuses to perform its subcontract;

(4) the subcontractor fails to meet bonding requirements;

(5) the subcontractor was listed through inadvertent clerical error;

(6) the subcontractor is not properly licensed;

(7) the subcontractor performs unsatisfactorily or is substantially delaying or disrupting progress of the work;

(8) the subcontractor is ineligible to work on a public works project under Lab C §1777.1 or §1777.7; or

(9) the subcontractor is not a responsible contractor.

© The Regents of the University of California

§7.78 4. Procedure

Following the receipt of a prime contractor's request to substitute a listed subcontractor, a public entity must notify the listed subcontractor of the prime contractor's substitution request and the basis for the request. Pub Cont C §4107(a). Such notice from the public entity to the listed subcontractor must be in writing and must be served by certified or registered mail to the last known address of the listed subcontractor. If the listed subcontractor does not object to the proposed substitution within 5 working days of its receipt of the substitution notice from the public entity, the listed subcontractor is presumed to consent to the substitution and the public entity may authorize the substitution. Pub Cont C §4107(a).

If the listed subcontractor objects within 5 working days of receiving notice of the proposed substitution, the public entity must hold a substitution hearing to consider the prime contractor's substitution request. The public entity must notify the listed subcontractor of the substitution hearing at least 5 working days before the substitution hearing. Pub Cont C §4107(a).

Although the Act sets forth processes for a proposed substitution, failure to strictly comply with the procedure for replacing a subcontractor on a public contract does not invalidate the substitution as long as a public entity complies in substance with the objectives of the Act. *Titan Elec. Corp. v Los Angeles Unified Sch. Dist.* (2008) 160 CA4th 188, 205, 72 CR3d 570 (substantial compliance with Act's objectives found when public entity consented to substitution of listed subcontractor after work had been performed).

PRACTICE TIP: Establish a hearing process, including a hearing panel, in which a subcontractor may protest substitution.

© The Regents of the University of California

§7.79 5. Mistakes—Clerical Errors

Bidders may substitute a listed subcontractor if there was an inadvertent clerical error in the bid. Pub Cont C §4107.5. To substitute a listed subcontractor due to inadvertent clerical error, the bidder must give notice of the error to the public entity and the listed subcontractor within 2 working days after the bid opening date. The listed subcontractor then has 6 working days from the bid opening date to submit written objections to the public entity and to the bidder. If the listed subcontractor does not object within 6 working days, it is presumed that an inadvertent clerical error was made. If the listed subcontractor files a timely objection, the agency shall investigate the claims before proceeding with a public hearing. Pub Cont C §4107.5.

© The Regents of the University of California

§7.80 6. Emergency/Necessity Exception

A public entity may also authorize a prime contractor to subcontract work in excess of one-half of 1 percent of the original total bid price in the event of an emergency or out of public necessity on the making of written findings delineating the facts constituting the emergency or necessity. Pub Cont C §4109.

© The Regents of the University of California

§7.81 7. Penalties

Failure to comply with the Subletting and Subcontracting Fair Practices Act (Pub Cont C §§4100-4114) could subject the prime contractor to cancellation of the contract by the public entity, monetary sanctions, and penalties, as well as disciplinary action by the Contractors State License Board. Pub Cont C §§4110, 4111.

© The Regents of the University of California

G. Prevailing Wages

§7.82 1. Statutory Authority

State labor law requires payment of prevailing wages on "public works" projects over $1000. Lab C §1771. Higher thresholds may apply ($15,000 or $25,000) if the public entity has adopted a special labor compliance program. Lab C §1771.5. Additionally, the Labor Code defines public works differently than the Public Contract Code, and there may be instances in which public bidding is not required but payment of prevailing wages is required. Compare Lab C §§1720-1720.3 with Pub Cont C §§1101, 20161. The obligation of a contractor to pay prevailing wages and to maintain certified payroll records evidencing such payment of prevailing wages must be set forth in a public entity's contract documents, regardless of whether such contract is bid. Lab C §§1773.2, 1776.

© The Regents of the University of California

§7.83 a. Applicability to General Law Cities, Redevelopment Agencies, Other Public Agencies, and Some Partly or Wholly Private Projects

Public and private projects that are paid for in whole or in part out of public funds are subject to prevailing wage laws. Lab C §§1720(b), 1771. Prevailing wage laws do not apply to work performed by a public entity with its own forces. Lab C §1771.

© The Regents of the University of California

§7.84 b. Applicability to Charter Cities

The law with respect to the applicability of prevailing wage laws to charter cities is in a state of flux at this time. The provisions of the prevailing wage law, Lab C §§1770-1781, may be inapplicable to the public works projects of a charter city as long as the projects in question are within the realm of municipal affairs and not projects of state concern or funded by state or federal grants. *Vial v City of San Diego* (1981) 122 CA3d 346, 348, 175 CR 647. But see *Division of Labor Standards Enforcement v Erisson Info. Sys.* (1990) 221 CA3d 114, 123, 270 CR 75. In *City of Long Beach v Department of Indus. Relations* (2004) 34 C4th 942, 947, 22 CR3d 518, the California Supreme Court declined the opportunity to resolve whether prevailing wage laws are a matter of statewide concern and thus applicable to charter cities. However, in 2009 the California Supreme Court granted review of a case in which the court of appeal held that a charter city was not required to comply with the prevailing wage laws with respect to public works contracts that were financed solely from city revenues. See *State Bldg. & Constr. Trades Council of Cal., AFL-CIO v City of Vista* (review granted Aug. 19, 2009, S173586; superseded opinion at 173 CA4th 567, 93 CR3d 95) (concluding that charter cities could determine whether their charter city contracts were subject to prevailing wages because city contracts are municipal affairs over which city has paramount power under Cal Const art XI, §5).

© The Regents of the University of California

2. Scope of "Public Works"

§7.85 a. "Public Works"

Public works generally include (Lab C §§1720, 1720.3):

- construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds (construction includes work performed during the design and preconstruction phases of construction, including but not limited to inspection and land surveyors' work);
- work done for certain special districts;
- street, sewer, or other improvement work done under the direction and supervision or by the authority of any charter or general law city;
- the laying of carpet paid for out of public funds; and
- hauling refuse from a public works site to an outside disposal location.

For cases holding that the prevailing wage statute is inapplicable to charter city projects, see §7.84.

The definition of public works under Lab C §1720 is broader than the definitions that affect public bidding. See Pub Cont C §§1101, 20161. Prevailing wages may apply to projects done under contract, even otherwise private projects, when a public agency pays money or its equivalent, performs construction work, transfers assets for less than their market price, pays project costs (such as bond costs), makes credits, reduces or waives fees, or permits repayment on a contingent basis. Lab C §1720(b).

Because the definition of a "public works" project subject to the prevailing wage law is broad, transactions commonly used by redevelopment agencies and certain partly or wholly private projects may be subject to the payment of prevailing wages. See §5.363. For instance, a fire station and a library constructed by a private developer at its sole expense and then transferred to the county as part of an agreement, with the county to obtain necessary general plan amendment and subdivision map approvals, are public works under Lab C §1720, even though no public funds were to be expended in their construction. 69 Ops Cal Atty Gen 300 (1986). On the other hand, a contract between two private parties for construction of a residential care facility on land leased from a public agency was not a contract for public work, even though the public agency deferred all rent for 20 years, waived inspection fees, loaned the developer money to purchase payment and performance bonds, and agreed to place disturbed and abused minors in the facility. *McIntosh v Aubry* (1993) 14 CA4th 1576, 18 CR2d 680. Because of the fact-specific analysis necessary to determine whether prevailing wages apply to a public or private project, the California Department of Industrial Relations (DIR) will issue, on request, a legal opinion determining the applicability of prevailing wages from the Division of Labor Standards Enforcement of the DIR. 8 Cal Code Regs §16001(a). Opinions are maintained by the DIR at www.dir.ca.gov/dlse/DLSE_OpinionLetters.htm.

PRACTICE TIP: In 2007, the DIR decided that it will no longer designate its public works coverage determination letters as "precedential." Additionally, *State Bldg. & Constr. Trades Council of Cal. v Duncan* (2008) 162 CA4th 289, 304, 76 CR3d 507, suggests that courts do not give deference to DIR coverage determinations. The DIR's determinations may be viewed as advisory only and will not be deemed to bind the DIR in its future decisions. Governmental agencies and contractors should consider the DIR's determinations as advice letters directed to specific individuals or entities about whether a specific project or type of work is a public work and subject to prevailing wage requirements. See *Corrales v Bradstreet* (2007) 153 CA4th 33, 62 CR3d 440 (DIR could not prove that it had formally adopted Administrative Procedure Act (Govt C §§11340-11359) and therefore DIR's "precedential decisions" issued under Govt C §11425.60 cannot be relied on as binding on agency in future adjudications). See also Notice To Awarding Bodies And Interested Parties Regarding The Department's Decision To Discontinue The Use Of Precedent Determinations, available online at www.dir.ca.gov/dlsr/2007-2/Notices/09-06-2007(pwcd).pdf.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/7 Public Contracting/§7.86 b. 'Paid for in Whole or in Part Out of Public Funds'

§7.86 b. "Paid for in Whole or in Part Out of Public Funds"

"Paid for in whole or in part out of public funds" includes (Lab C §1720(b)):

- when a public agency pays money or the equivalent to or on behalf of the public works contractor, subcontractor, or developer;
- performs construction work in execution of the project;
- transfers an asset of value for less than the fair market price;
- pays, reduces, or charges at less than fair market value;
- waives or forgives fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations normally required in the execution of the contract;
- makes available money to be repaid on a contingent basis; or
- grants credits applied against repayment obligations.

However, the definition of paid for in whole or in part out of public funds excludes certain construction or rehabilitation of affordable housing units for low- or moderate-income persons and certain tax credits. Lab C §1720(c)(4)-(5).

© The Regents of the University of California

§7.87 c. Exemptions

An exemption from prevailing wage requirements applies to private residential projects on private property that are not built according to an agreement with a state agency, redevelopment agency, or local public housing authority. Lab C §1720(c)(1). When a public agency requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private project, and the public agency contributes no more money or its equivalent than required to perform the public improvement work, and the public agency maintains no proprietary interest in the overall project, prevailing wage requirements apply only to the public improvement work. Lab C §1720(c)(2). Public agency reimbursements to a private developer for costs normally borne by the public, or direct or indirect public subsidies to a private development project that are de minimis in the context of the project, do not in themselves make an otherwise private development project subject to prevailing wage requirements. Lab C §1720(c)(3).

Construction or rehabilitation of privately owned residential projects that meet certain specified conditions also are exempt from prevailing wage requirements. Lab C §1720(c)(6). See also §§5.363.

© The Regents of the University of California

§7.88 d. Leased Facilities

Certain work performed under private contract qualifies as public works when more than 50 percent of the assignable square feet of the work is leased to a public entity for its use and the lease was executed before construction or the public entity furnished the plans, specifications, or criteria for the work. Lab C §1720.2.

© The Regents of the University of California

§7.89 3. Requirement to Pay Prevailing Wages

All workers on public works projects over $1000 must receive not less than the general prevailing rate of per diem wages (commonly referred to as prevailing wages) for work of a similar character in the locality in which the public work is performed. Lab C §1771. Higher thresholds apply ($15,000 or $25,000) if the public entity has adopted a special labor compliance program. See Lab C §1771.5(b).

PRACTICE TIP: If the city is contributing a portion of the construction cost, prevailing wages are generally required under the expanded definition of public works contained in Lab C §1720. However, see *State Bldg. & Constr. Trades Council of Cal. v Duncan* (2008) 162 CA4th 289, 76 CR3d 507, when a rehabilitation project funded in part by state low income housing tax credits (LIHTC) was not required to comply with the prevailing wage law.

© The Regents of the University of California

4. Penalties

§7.90 a. Failure to Pay Prevailing Wages

Contractors and subcontractors are subject to a penalty of not more than $50 per day for each worker paid less than the prevailing wage rate. The amount of the penalty is determined by the State Labor Commissioner. Lab C §1775.

© The Regents of the University of California

§7.91 b. Failure to Require Payment of Prevailing Wages

An awarding body is not liable to the State Labor Commissioner for damages or penalties for its failure to discharge its duties in connection with the prevailing wage laws. *Aubry v Tri-City Hosp. Dist.* (1992) 2 C4th 962, 9 CR2d 92. A contractor who has been misled by representations of an awarding body to the effect that the contract in question is not subject to the prevailing wage laws may, however, have an action against the awarding body for indemnification and any consequential damages it incurs as a result of its good faith reliance on such representations. *Lusardi Constr. Co. v Aubry* (1992) 1 C4th 976, 4 CR2d 837.

An awarding body or body otherwise undertaking a project classified as a "public work" may be subject to an action for recovery of "increased costs," including increased labor costs, penalties, attorney fees, and costs. Lab C §§1726, 1781. This liability may extend to a contractor with which it did not contract. Lab C §1781.

© The Regents of the University of California

5. Payroll Records

§7.92 a. Duty to Maintain

The contractor must maintain certified payroll records that show the name, address, Social Security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each worker. Lab C §1776(a).

© The Regents of the University of California

§7.93 b. Accuracy and Inspection

The contractor must certify the accuracy of the records and they must be available for inspection at all reasonable hours. The records may be inspected by the employee, the state, and the public entity. Lab C §1776(b). The public may inspect the records only after the worker's name, address, and Social Security number are removed. Lab C §1776(e).

PRACTICE TIP: The public agency may consider including in private contracts (*e.g.,* disposition and development agreements) defense and indemnity clauses that require the developer or other contracting entity to defend and indemnify the public agency for any penalty or damages resulting from a later determination that the project is classified as a public work (subject to prevailing wages), absent a prior Department of Industrial Relations determination that the project is not a public work.

© The Regents of the University of California

§7.94 6. Volunteer Work Exemption

Qualifying volunteer work is not subject to prevailing wage requirements. Lab C §1720.4. This prevailing wage exemption for volunteers and Conservation Corps members extends until January 1, 2012.

© The Regents of the University of California

H. Bonds and Insurance

§7.95 1. Surety Bonds Distinguished From Insurance

In the context of public contracts, surety bonds serve the purpose of guaranteeing the contractor's performance of public works contracts. They typically take the form of bid bonds, which guarantee that the contractor bidding on the job will enter into the contract at the price quoted; performance bonds, which protect the agency from financial loss if the contractor fails to construct the project in compliance with the contract terms; and payment bonds, which guarantee that the contractor will pay for all materials and labor and complete the project free of liens. See generally CC §§3247-3252.

It is very important to understand the distinction between surety bonds and insurance. A surety contract creates a tripartite relationship between the principal (contractor) whose performance is guaranteed by the bond; the obligee (city), the party that receives the guarantee of someone else's performance; and the surety, the corporation or person who has pledged assets to guarantee the obligation of another. See *Cates Constr., Inc. v Talbot Partners* (1999) 21 C4th 28, 86 CR2d 855; *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464, 54 CR2d 888. In *Cates Constr., Inc.*, the California Supreme Court held that the obligee may not maintain a bad faith action against a surety because a surety bond is not insurance. *Cates Constr., Inc.*, 21 C4th at 58. Thus, when dealing with a seemingly recalcitrant surety, threats of "bad faith" will have little impact.

PRACTICE TIP: There are several reasons why a surety may not respond promptly to a city claim. In disputed cases when the contractor contends that the construction problems or delays are not its fault, the surety will not automatically step in because it is entitled to assert as defenses to a bond all defenses available to the principal contractor. *Cates Constr., Inc.,* 21 C4th at 48. The surety also must be careful that it is not found to have "volunteered" payments that it may not be able to ultimately recover from the contractor under their indemnification agreement. See *Arntz Contracting Co.,* 47 CA4th at 483. The fastest way to get the surety on board is to quickly prepare and present a strong case in favor of the city and convince the surety that its failure to take over the job will only make things worse. It is also very important to understand that a claim against a contractor's bond can have serious repercussions. Bonding capacity is the "life blood" of a public works contractor. Without bonds, a public contractor cannot bid. Thus, an ill-advised call on a contractor's surety bond that impairs its bonding capacity and can result in a claim against the city. *Lewis Jorge Constr. Mgmt., Inc. v Pomona Unified Sch. Dist.* (2004) 34 C4th 960, 22 CR3d 340.

© The Regents of the University of California

2. Key Features of Surety Bonds

§7.96 a. When Liability Arises

In suretyship, the risk of loss remains with the principal contractor, while the surety merely lends its credit so as to guarantee payment or performance in the event that the principal defaults. Thus, the liability of the surety does not arise until the principal defaults. CC §2807; *Cates Constr., Inc. v Talbot Partners* (1999) 21 C4th 28, 38, 86 CR2d 855.

© The Regents of the University of California

§7.97 b. Scope of Liability

When one assumes liability as a surety on a conditional obligation, the surety's liability is commensurate with that of the principal. CC §2808. The purpose of the bond is to provide security for the covenants of the underlying contract. *National Tech. Sys. v Superior Court* (2002) 97 CA4th 415, 424, 118 CR2d 465. However, total recovery generally remains limited to the penal amount of the bond. When, as in most surety bonds, the bond incorporates the public works contract by an express reference, the bond and contract should be read together and construed fairly and reasonably as a whole according to the intentions of the parties. *Cates Constr., Inc. v Talbot Partners* (1999) 21 C4th 28, 39, 86 CR2d 855. Based on the language of the particular bond and public works contract, the scope of a surety's obligation has been held to include:

- "delay damages" under a performance bond (*Cates Constr., Inc.,* 21 C4th at 39);
- requiring a surety on a public works payment bond to pay an interest penalty based on the contractor's conduct (*Washington Int'l Ins. Co. v Superior Court* (1998) 62 CA4th 981, 988, 73 CR2d 282);
- attorney fees under an attorney fees clause in the underlying contract (*T & R Painting Constr., Inc. v St. Paul Fire & Marine Ins. Co.* (1994) 23 CA4th 738, 29 CR2d 199); and
- collecting unpaid prevailing wages (*Department of Indus. Relations v Fidelity Roof Co.* (1997) 60 CA4th 411, 70 CR2d 465).

PRACTICE TIP: When litigating a case involving a surety, it is important to name the surety as a defendant in the lawsuit. Due to the distinctions between surety bonds and insurance, a surety is generally not bound to a judgment or default against the principal in an action in which it did not have the opportunity to participate. *National Tech. Sys. v Superior Court* (2002) 97 CA4th 415, 421, 118 CR2d 465. Suit against the surety must be commenced before the expiration of the 6-month period in which stop notices may be filed. CC §3249.

© The Regents of the University of California

§7.98 c. Changes to Scope of Work

A surety is exonerated if the obligee, without the consent of the surety, makes a material alteration to the contract (CC §2819), except as otherwise provided in CC §3225. The surety may consent in advance to changes in the nature and scope of work if the bond so provides. *City of Sacramento v Trans Pac. Indus. Acc., Inc.* (1979) 98 CA3d 389, 159 CR 514; *Simpson v Bergmann* (1932) 125 CA 1, 13 P2d 531.

© The Regents of the University of California

§7.99 d. Surety Qualifications

Although personal sureties are allowed in other contexts, any bond required on a public works contract, as defined in Pub Cont C §1101, must be executed by an admitted surety insurer. CCP §995.311.

© The Regents of the University of California

§7.100 (1) Admitted Surety

An admitted surety insurer is a corporate insurer or a reciprocal or inter-insurance exchange to which the Insurance Commissioner has issued a certificate of authority to transact surety insurance in this state. CCP §995.120(a). Admitted surety insurer, bonding company, and corporate surety are construed to mean admitted surety insurer. CCP §995.120(b). A public agency approving the bond on a public works contract has a duty to verify that the bond is being executed by an admitted surety insurer. CCP §995.311. The city can fulfill this obligation by printing out verification from the website of the California Department of Insurance confirming that the surety is an admitted surety insurer and attaching it to the bond or obtaining a certificate from the county clerk that confirms that the surety is an admitted insurer and attaching it to the bond. The California Department of Insurance website address is www.insurance.ca.gov/. The Department's website address to obtain a company profile is http://interactive.web.insurance.ca.gov/webuser/idb_co_list$.startup.

© The Regents of the University of California

§7.101 (2) City Liability

Public agencies have a mandatory duty to ensure that payment bond sureties are sufficient, admitted surety insurers. *Walt Rankin & Assocs., Inc. v City of Murrieta* (2000) 84 CA4th 605, 101 CR2d 48 (because city failed to comply with its mandatory duty, city compelled to pay subcontractors and material suppliers directly, because nonadmitted surety was unable to meet obligation). The holding in *Rankin* was codified and expanded. CCP §995.311; *N. V. Heathorn v County of San Mateo* (2005) 126 CA4th 1526, 25 CR3d 400. See also Govt C §815.6.

© The Regents of the University of California

§7.102 e. Sufficiency of Sureties

State law establishes the procedures for determining the sufficiency of a bond issued by personal sureties (see CCP §§995.510-995.520), as well as the sufficiency of a bond issued by an admitted surety insurer (CCP §§995.610-995.670). It appears that a city may not require a duly admitted surety insurer to meet additional minimum underwriting standards for surety bonds if it otherwise complies with state law requirements. See CCP §§995.660, 995.670. See also 74 Ops Cal Atty Gen 89, 96 (1991). Deposits in lieu of bonds are also permitted under CCP §995.710 except when the statute providing for the bond precludes such deposits.

© The Regents of the University of California

§7.103 f. Bid Bonds Versus Payment Bonds

Bids may be secured by deposits in lieu of a bond. Pub Cont C §20170. If a bidder chooses to supply a bid bond instead of one of the other types of permitted bid security, an admitted surety insurer must execute the bond. Pub Cont C §20170; CCP §995.120. By contrast, a public works payment bond must be in the form of a bond and not a deposit (cash) in lieu of a bond. CC §3248(d).

PRACTICE TIP: Performance bonds are not required by state statute, but are required by virtually all public agencies. When a city requires a performance bond by ordinance or resolution, it may wish to require that such bond be issued by an admitted surety insurer and in the form of a bond, not a deposit in lieu of a bond. Because performance and payment bonds are customarily issued by the same company for a single premium, such a local requirement might avoid the presentation of unwanted personal surety bonds or deposits in lieu of a bond.

© The Regents of the University of California

§7.104 g. Insurance Distinguished From Indemnification

It is important to distinguish insurance requirements from the separate contractual obligation of the contractor to defend and indemnify the city from claims. In the event of a claim, both obligations should be pursued.

© The Regents of the University of California

§7.105 h. Other Handbook References

For related material regarding insurance, see §§7.252-7.295. For further discussion of indemnity agreements and bonds, see §§7.296-7.321.

© The Regents of the University of California

I. Interpreting the Contract and Resolving Disputes

§7.106 1. Implied Warranty of Correctness

Public works contracts include an implied warranty of correctness. *Howard Contracting, Inc. v G.A. MacDonald Constr. Co.* (1998) 71 CA4th 38, 83 CR2d 590. If a contract includes a material misrepresentation (or a public entity withholds relevant information) of a condition known to the public entity, and the contractor reasonably relies on the misrepresentation, the public entity may be liable for any damages the contractor sustains arising from the misrepresentation. *Wunderlich v State Dep't of Pub. Works* (1967) 65 C2d 777, 56 CR 473; *Salinas v Souza & McCue Constr. Co.* (1967) 66 C2d 217, 57 CR 337, overruled in part on other grounds in *Helfend v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 1, 84 CR 173.

© The Regents of the University of California

§7.107 2. Effect of Disclaimers

General disclaimer clauses that attempt to shift all liability to the contractor have been routinely disregarded. See *Gogo v Los Angeles County Flood Control Dist.* (1941) 45 CA2d 334, 114 P2d 65; *Foster Constr. C.A. & Williams Bros.Co. v U.S.* (Ct Cl 1970) 435 F2d 873. However, very specific disclaimer provisions that fairly warn of a particular risk have been held enforceable. *Umpqua River & Nav. Co. v Crescent City Harbor Dist.* (9th Cir 1980) 618 F2d 588; *Wunderlich v State Dep't of Pub. Works* (1967) 65 C2d 777, 56 CR 473.

© The Regents of the University of California

§7.108 3. Differing Site Conditions

Construction problems arising from differing site conditions are commonly faced by the public entity. The specificity of contract provisions as to those site conditions, coupled with the specificity of the contract disclaimer language, is crucial in determining allocation of fault between the parties. Any public contract with excavations deeper than four feet must contain a clause allowing the filing of a change order (and hence compensation) for subsurface or latent physical conditions differing from those indicated in the specifications. Pub Cont C §7104. See *Condon-Johnson & Assocs., Inc. v Sacramento Mun. Util. Dist.* (2007) 149 CA4th 1384, 57 CR3d 849.

PRACTICE TIP: In order to be valid, an exculpatory clause must clearly disclaim any representation made in the contract. *Wunderlich v State Dep't of Pub. Works* (1967) 65 C2d 777, 56 CR 473.

© The Regents of the University of California

4. Finality of the Engineer's Decision

§7.109 a. Historical Rule

Contracts frequently provide that the city's architect or engineer will resolve disputes between the city and the contractor, especially disputes involving the intent of the drawings and specifications. For the better part of a century, the decision of the engineer or architect was given great deference in the courts. The engineer's decision would not be rejected if supported by substantial evidence. *Clack v State* (1969) 275 CA2d 743, 80 CR 274. However, grossly erroneous or bad faith decisions were subject to challenge based on the imputed requirement of implied fair dealing. *Department of Pub. Works v MacNamara Corp.* (1972) 28 CA3d 641, 104 CR 822. The court's limited role in reviewing the engineer's or architect's decision was reaffirmed in *Zurn Eng'rs v State* (1977) 69 CA3d 798, 138 CR 478.

© The Regents of the University of California

§7.110 b. Statutory Rule

The provisions of CC §1670 were enacted in reaction to the decision in *Zurn Eng'rs v State* (1977) 69 CA3d 798, 138 CR 478. Disputes must be resolved by submitting the dispute to independent arbitration (if mutually agreeable) or by litigation, even if the contract authorizes the engineer or architect to make the final decision. CC §1670.

© The Regents of the University of California

5. Mediation and Arbitration of Construction Claims

§7.111 a. Arbitration Required by Statute

Claims of $375,000 or less must be arbitrated, provided the contract was entered into on or after January 1, 1991, and the public agency has not elected to resolve disputes under Pub Cont C §§10240-10240.13. See Pub Cont C §§20104-20104.6.

© The Regents of the University of California

§7.112 b. Contract Provisions

Provisions for mediation or arbitration may be included by the drafters in any public works contract. The provisions of Pub Cont C §22201 authorize any public works contract to include a provision requiring claims to be resolved by arbitration under Pub Cont C §§10240-10240.13. Alternatively, the parties to a dispute may agree to alternative dispute resolution after the dispute arises.

© The Regents of the University of California

§7.113 c. Other Alternative Dispute Resolution Methods

Parties to a dispute may stipulate to have the dispute, or specific issues, tried by a temporary judge, or a referee. Cal Const art VI, §21; CCP §§638-645.2.

PRACTICE TIP: The benefits of alternative dispute resolution are:

- Assuming the opposing party is cooperative, the parties can fashion their own rules (*e.g.,* briefing, scope of discovery, depositions) for resolution;
- The process may be quicker;
- Fewer attorney fees may be spent on the discovery process; and
- The parties may obtain a seasoned judge in the field of construction disputes.

However, when deciding whether or not to stipulate to alternative dispute resolution, consider:

- It may be more difficult to compel discovery from uncooperative parties;
- The rules of evidence may be less formal during hearings; and
- An adverse ruling may not be appealable.

Corporations and large entities are now more frequently including mandatory arbitration provisions for all disputes in their contracts.

© The Regents of the University of California

6. Limitations on Contractor Claims

§7.114 a. False Claims

A contractor who knowingly presents a false claim to a public entity is subject to civil penalties. In addition, the public entity may recover three times the amount of damages sustained because of the false claim. Govt C §§12651-12656. A city can, by ordinance, bar a contractor from bidding on its public works projects for a set period for knowingly filing a false claim. *Stacey & Witbeck, Inc. v City & County of San Francisco* (1995) 36 CA4th 1074, 44 CR2d 472.

© The Regents of the University of California

§7.115 b. Total Cost Claims

Total cost claims by contractors against a public entity are generally disfavored and available only on showing: the impracticality of proving actual losses directly; that the contractor's bid was reasonable; that its actual costs were reasonable; and that it was not responsible for the added costs. *Amelco Elec. v City of Thousand Oaks* (2002) 27 C4th 228, 115 CR2d 900.

© The Regents of the University of California

§7.116 c. Abandonment

As a matter of law and public policy, the abandonment theory of liability does not apply against a public entity. *Amelco Elec. v City of Thousand Oaks* (2002) 27 C4th 228, 115 CR2d 900. Therefore, contractors are precluded from asserting claims that a public entity abandoned a project. However, public entities may still employ abandonment against a contractor if the facts so warrant.

© The Regents of the University of California

J. Stop-Notices

§7.117 1. Purpose of Stop-Notice

Material suppliers, subcontractors, and others furnishing provisions, services, or supplies may serve a stop-notice on the city for nonpayment of their services and materials. See *Contractors Labor Pool, Inc. v Westway Contractors, Inc.* (1997) 53 CA4th 152, 61 CR2d 715. The procedure for serving and enforcing stop-notices is described in CC §§3179-3214.

© The Regents of the University of California

§7.118 2. Preliminary 20-Day Notice

To file a stop-notice, a claimant who does not have a direct contractual relationship with the prime contractor must provide the city with a notice within 20 days of first furnishing labor, service, equipment, or materials to the jobsite. CC §§3098, 3183. A claimant who fails to file the preliminary 20-day notice within the first 20 days may file a late preliminary 20-day notice; however, the claimant waives the right to file a stop-notice for payment of any labor, service, equipment, or material furnished more than 20 days before filing the late preliminary 20-day notice. CC §3098.

© The Regents of the University of California

§7.119 3. Timing

Stop-notices must be filed with the city within 30 days after the city records a timely notice of completion (sometimes called notice of acceptance) or notice of cessation. CC §3184(a). If no such notices are recorded by the public entity, the stop-notice must be filed within 90 days after completion or cessation of the project. CC §3184(b). Cessation is deemed to exist on public projects when all work has stopped for a continuous period of at least 30 days. CC §3086. See *W.F. Hayward v Transamerica Ins. Co.* (1993) 16 CA4th 1101, 20 CR2d 468. The notice of cessation will be effective only if there has been a continuous cessation of labor for at least 30 days before recording of notice in the county recorder's office. CC §3092. To be valid, the notice of completion must be recorded by the city within 10 days after acceptance of the project. CC §3093. See *Department of Indus. Relations v Fidelity Roof Co.* (1997) 60 CA4th 411, 70 CR2d 465. If the work is subject to acceptance by the city, the work will be considered completed on the date of acceptance. CC §3086.

PRACTICE TIP: A city is not required to file a notice of completion when work is completed. However, filing a notice of completion protects a city by shortening the time period in which stop-notices may be filed.

© The Regents of the University of California

§7.120 4. Payment Disputes

Payment disputes and stop-notices involving subcontractors and materials suppliers may be reduced, or released in their entirety. Although a claimant may use the forms included in CC §3263, there is no requirement that those forms be used. The release or reduction must, however, be in writing. Releasing a stop-notice claim will not preclude a claimant from filing a subsequent timely stop-notice. CC §3263(b). Pay-if-paid clauses in subcontracts are not a valid waiver of the subcontractor's stop-notice rights. See *William R. Clarke Corp. v Safeco Ins. Co.* (1997) 15 C4th 882, 64 CR2d 578; *Capitol Steel Fabricators v Mega Constr. Co.* (1997) 58 CA4th 1049, 68 CR2d 672.

© The Regents of the University of California

5. Resolution

§7.121 a. Duty to Withhold

Following receipt of a valid stop-notice, the city has a duty to withhold an amount equal to the stop-notice, plus an amount to cover reasonable costs of litigation. CC §3186. The generally accepted practice is to withhold a total of 125 percent of the face amount of the stop-notice. See CC §3196. The city should keep interest earned on funds withheld under a stop-notice because the city is obligated to pay interest to the contractor if the contractor establishes entitlement to the withheld funds. *Breda Costruzioni Ferroviarie v Los Angeles Metro. Transp. Auth.* (1997) 56 CA4th 1433, 66 CR2d 416. If, after properly withholding all sums available for withholding, the city has insufficient funds to pay all stop-notices received, the city is not liable to the subcontractors for any amounts in excess of the funds being withheld. In such an event, each subcontractor with valid stop-notices pending will be entitled only to a prorated share of the withheld funds, without regard to the order in which the stop-notices were served. CC §§3187, 3190.

© The Regents of the University of California

§7.122 b. Funds Subject to Withholding

The only funds subject to a stop-notice lien are those due or to become due to the contractor. CC §§3186-3187. Funds withheld under a valid liquidated damage clause are not considered to be due or become due to the contractor, and thus are not subject to stop-notice liens. *Westinghouse Elec. Corp. v County of Los Angeles* (1982) 129 CA3d 771, 181 CR 332. The duty to withhold is not affected by an assignment or garnishment, even if the assignment or garnishment takes place before service of the stop-notice. CC §3193.

PRACTICE TIP 1: The stop-notice amount must be withheld from the next progress payment. Some cities apply the stop-notice amount to the accumulated retention, only withholding from a progress payment if the total stop-notices exceed the accumulated retention. This is not acceptable. Although contract terms may vary, typically the retention is designed, in part, to cover liquidated damages and other claims the city may have against the contractor, as well as to provide a fund for stop-notices received after completion or cessation. If the city fails to withhold funds under a stop-notice from the next progress payment, the retention may not be adequate to cover the city's claims and later-filed stop-notices. If this happens, the city may have waived its rights against the bonding company for the funds it did not withhold from progress payments and may be forced to use its own funds to pay such stop-notices to the extent that they represent valid claims against the prime contractor.

PRACTICE TIP 2: Cities must pay the contractor any contract amounts due in excess of the total of all stop-notices, plus reasonable amounts withheld under CC §3186, as the contract amounts become due under the contract and prompt payment statutes. Withholding too much money is a common mistake and subjects the city to liability for interest and penalties under Pub Cont C §7107. Before withholding funds due to a stop-notice, the city should provide written notification to the contractor. Although the contractor generally receives a copy of the stop-notice from the subcontractor, there should be clear communication from the city of the amounts to be withheld.

© The Regents of the University of California

§7.123 c. Notice to Claimant

If the claimant pays the city $2.00 with its stop-notice, the city is required to notify the claimant when the notice of completion is recorded or a cessation of labor on the project has occurred. CC §3185. Failure to provide the notice will constitute a waiver of the applicable statute of limitations, if the claimant proves the elements of estoppel. *J.H. Thompson Corp. v DC Contractors* (1992) 4 CA4th 1355, 7 CR2d 604.

© The Regents of the University of California

§7.124 d. Contractor Bond

In the case of a disputed stop-notice, the contractor may file a stop-notice release bond with the public entity in an amount equal to 125 percent of the claim stated to provide protection to the stop-notice claimant. On the filing of the bond, the public entity may, in its discretion, then release the withheld amount to the contractor. CC §3196. The surety for any stop notice release bond is jointly and severally liable to the stop notice claimant with the surety on the payment bond. CC §3196.

PRACTICE TIP: It is imperative that the city insist on a different surety for the stop-notice release bond than the surety who issued the payment bond. See *Azusa Western, Inc. v City of West Covina* (1975) 45 CA3d 259, 119 CR 434. But see *Cal-Pacific Materials Co. v Redondo Beach City Sch. Dist.* (1979) 94 CA3d 652, 156 CR 590. When there are multiple stop-notices on a project, a bond to release one may still not allow the contractor to receive any of the "released" funds. No funds will flow to the contractor until all the valid stop-notices have been fully covered.

© The Regents of the University of California

§7.125 e. Prompt Payment

A city must release undisputed retained funds within 60 days following the completion of work. Pub Cont C §7107. "Completion" for purposes of prompt payment requirements is defined in Pub Cont C §7107(c).

If a dispute exists between a city and the contractor, the city may withhold 150 percent of the disputed amount. Cities that fail to comply with Pub Cont C §7107 are subject to penalties of 2 percent per month as well as attorney fees and costs. If stop-notices remain at the end of the 60-day window, the city must continue to hold sufficient funds.

PRACTICE TIP: If a notice of completion is properly filed within 10 days of the completion of the project, the stop-notice period of 30 days will have expired and the city should be aware of all valid claims at the time it releases retained funds. However, if a city fails to file a notice of completion, the valid stop-notice period of 90 days could continue after the 60 days the city has to properly release all contract funds. In this case, the city would be protected from subcontractor's claims by the stop-notice statutes that limit claims against the city to the amount withheld at the time the stop-notice was filed. Cities can avoid this by filing a notice of completion within 10 days of completion.

© The Regents of the University of California

§7.126 f. Suit by Contractor

As an alternative to posting a release bond, the contractor may file an action to contest the validity of the stop-notice under summary proceedings as identified in CC §§3198-3205. See CC §3197.

© The Regents of the University of California

§7.127 g. Suit by Stop-Notice Claimant

A stop-notice claimant may file an action against the original contractor and the city to enforce payment of a claim. CC §3210. In such situations, the city takes on the role of a stakeholder in the litigation, unless the city is claiming entitlement to liquidated damages. The issue of entitlement to liquidated damages can then be litigated in the stop-notice action. If the city has accepted a stop-notice release bond and released all funds held under the stop-notice at issue, the city is no longer a proper party to the suit. The city must be dismissed and the stop-notice release bond surety company will be brought into the suit.

© The Regents of the University of California

§7.128 6. Other Reference Materials

For a guide to stop-notice procedures, see California Mechanics' Liens and Related Construction Remedies, chaps 4, 9 (3d ed Cal CEB 1998).

© The Regents of the University of California

K. Federally Funded Projects

§7.129 1. Authority to Comply With Federal Requirements

Cities are authorized to accept federal grants for public works and to comply with all requirements of such grants. Govt C §§53701-53702. In most cases, the federal or state agency administering the federal funds will provide the local public entity with complete information concerning federal labor law requirements applicable to a particular funded project. Accordingly, the discussion in §§7.130-7.169 is only an abbreviated outline of current federal requirements.

© The Regents of the University of California

2. Use of Federal Grant Funds to Purchase Supplies and Services

§7.130 a. Uniform Administrative Regulations

The Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments establish the standards and guidelines to be used in procuring supplies, equipment, construction, and services with federal grant funds. See 49 CFR Part 18 (superseding standards set out in Attachment 0 of OMB (Office of Management and Budget) Circular No. A-102). The rules for each federal agency's grant programs are contained in the Code of Federal Regulations. The citation to each agency's rules can be found at 53 Fed Reg 8034. The Department of Transportation has adopted other procurement regulations. See editorial note to 49 CFR §18.36.

© The Regents of the University of California

§7.131 b. Grantee/Grantor Responsibility

The standards established by the uniform administrative regulations do not relieve the recipient of the grant ("grantee") of any contractual obligations under its contracts. Grantees must use their own procurement procedures under applicable state and local laws and regulations provided that procurements conform to the federal standards.

© The Regents of the University of California

§7.132 c. Grantor Review of Proposed Contracts

Pre-award review and approval of grantee's proposed contracts and procurement documents, such as requests for proposals and invitations for bids, is only permitted if (See, *e.g.*, 49 CFR §18.36(g)):

- the procurement is expected to exceed $100,000 and is to be awarded without competition or only one bid or offer is received in response to solicitation; or
- the procurement expected to exceed $100,000 specifies a brand name product; or
- the grantee's procurement procedures or operations fails to comply with federal procurement standards; or
- the proposed award over $100,000 is to be awarded to other than the apparent low bidder; or
- a proposed contract modification changes the scope, or increases the price, of the contract by more than $100,000.

© The Regents of the University of California

§7.133 d. Code of Conduct

Grantees must maintain a written code or standards of conduct, including provisions for penalties or sanctions that must govern the performance of their officers, employees, or agents engaged in the award and administration of contracts supported by federal funds. 49 CFR §18.36(b)(3). No employee, officer, or agent of the grantee may participate in the award or administration of a contract supported by federal funds if a conflict of interest, real or apparent, is involved. The circular defines what constitutes a conflict of interest.

© The Regents of the University of California

§7.134 e. Contracting With Small and Minority Firms, Women's Business Enterprise (WBE), and Labor Surplus Area Firms

Affirmative steps must be taken to ensure that small and minority businesses are used when possible as sources of supplies, equipment, construction, and services. 49 CFR §18.36(e). But see §7.29 regarding preferences.

© The Regents of the University of California

§7.135 f. Selection Procedures

All procurement transactions, regardless of whether by sealed bids or by negotiation and without regard to dollar value, must be conducted in a manner that provides maximum open and free competition consistent with the applicable federal procurement rules. 49 CFR §18.36(c). The grantee must have written selection procedures that provide for certain procedural requirements outlined in the procurement rules. 49 CFR §18.36(c)(3).

© The Regents of the University of California

§7.136 g. Method of Procurement

Procurement under federal grants must be made by one of the methods described in §§7.137-7.143.

© The Regents of the University of California

§7.137 (1) Small Purchase Procedures

Simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies, or other property, costing in the aggregate not more than $100,000. Grantees must comply with state or local small purchase dollar limits under $100,000. If this procedure is used, price or rate quotations must be obtained from an adequate number of qualified sources. See, *e.g.,* 49 CFR §18.36(d)(l).

© The Regents of the University of California

§7.138 (2) Competitive Sealed Bids (Formal Advertising)

Sealed bids are publicly solicited and a firm fixed-price contract (lump sum or contract price) is awarded to the responsible bidder whose bid, conforming with all material terms and conditions of the invitation for bids, is lowest in price. 49 CFR §18.36(d)(2). The minimum conditions for formal advertising are provided for in the procurement rules.

If formal advertising is used for a procurement, the requirements outlined in §§7.139-7.143 apply.

© The Regents of the University of California

§7.139 (a) Solicitation of Responses

A sufficient time before the date set for opening of bids, bids must be solicited from an adequate number of known suppliers. In addition, the invitation must be publicly advertised.

© The Regents of the University of California

§7.140 (b) Information Provided

The invitation for bids, including specifications and pertinent attachments, must clearly define the items or services needed in order for the bidders to properly respond to the invitation.

© The Regents of the University of California

§7.141 (c) Bid Opening

All bids must be opened publicly at the time and place stated in the invitation for bids.

© The Regents of the University of California

§7.142 (d) Award

A firm fixed-price contract award must be made by written notice to that responsible bidder whose bid, conforming to the invitation, is lowest.

© The Regents of the University of California

§7.143 (e) Bid Rejection

Any or all bids may be rejected when there are sound documented business reasons in the best interest of the program.

© The Regents of the University of California

§7.144 h. Competitive Negotiation

Proposals are requested from a number of sources and the request for proposal is publicized. 49 CFR §18.36(d)(3). Negotiations are normally conducted with more than one of the sources submitting offers and a fixed price or cost reimbursement contract is awarded, as appropriate. The requirements discussed in §§7.145-7.148 apply.

© The Regents of the University of California

§7.145 (1) Solicitation of Responses

Proposals are solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The request for proposals must be publicized and reasonable requests by other sources to compete must be honored to the maximum extent practicable.

© The Regents of the University of California

§7.146 (2) Contents

The request for proposal must identify all significant evaluation factors, including price or cost when required and their relative importance.

© The Regents of the University of California

§7.147 (3) Evaluation

The grantee must provide mechanisms for technical evaluation of the proposals received, determinations of responsible offerors for the purpose of written or oral discussions, and selection for contract award.

© The Regents of the University of California

§7.148 (4) Award

Award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, considering price and other factors. Unsuccessful offerors should be notified promptly.

© The Regents of the University of California

§7.149 i. Noncompetitive Negotiation

This approach involves procurement through solicitation of a proposal from only one source or from a number of sources. 49 CFR §18.36(d)(4). Such negotiation may be used when the award of a contract is infeasible under the other methods. Circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

- The item is available only from a single source;
- Public exigency or emergency will not permit a delay incident to competitive solicitation;
- The federal grantor authorized noncompetitive negotiation; or
- After solicitation of a number of sources, competition is determined inadequate.

© The Regents of the University of California

§7.150 j. Contract Pricing

The cost plus a percentage of cost and percentage of construction cost method of contracting must not be used. 49 CFR §18.36(f)(4). Grantees must perform some form of cost or price analysis in connection with every procurement action including contract modifications. 49 CFR §18.36(f)(1). Costs or prices based on estimated costs are allowed only to the extent costs incurred or cost estimates included in negotiated prices are consistent with federal cost principles. 49 CFR §18.36(f)(3).

© The Regents of the University of California

§7.151 k. Contract Provisions

Any recipient of federal grant funds must include in all procurement contracts and subcontracts the contract provisions or conditions discussed in §§7.152-7.163.

© The Regents of the University of California

§7.152 (1) Remedies

Contracts in excess of $25,000 must contain provisions or conditions that will allow for administrative, contractual, or legal remedies in instances in which contractors violate or breach contract terms and provide for such sanctions and penalties as may be appropriate.

© The Regents of the University of California

§7.153 (2) Termination

All contracts in excess of $10,000 must contain suitable provisions for termination by the grantee, including the manner by which it will be effected and the basis for settlement. It must also describe conditions under which the contract may be terminated for default as well as conditions when the contract may be terminated because of circumstances beyond the control of the contractor.

© The Regents of the University of California

§7.154 (3) Building Requirements

In all contracts for construction or facility improvements awarded for more than $100,000, recipients must observe the building requirements contained in Attachment B of OMB (Office of Management and Budget) Circular A-110 (see 2 CFR pt 215).

© The Regents of the University of California

§7.155 (4) Executive Order Compliance

All contracts awarded in excess of $10,000 by grantees and their contractors or sub-grantees must contain a provision requiring compliance with Executive Order No. 11246 (Sept. 24, 1965) (1965 WL 7913) as amended by Executive Order No. 11375 (Oct. 13, 1967) (1967 WL 7772) and as supplemented in Department of Labor regulations. See 41 CFR chap 60.

© The Regents of the University of California

§7.156 (5) "Anti-Kickback" Act

All contracts and sub-grants in excess of $2000 for construction or repair awarded by recipients and sub-recipients must include a provision for compliance with the Copeland Anti-Kickback Act (18 USC §874), as supplemented in Department of Labor regulations. See 29 CFR pt 3.

© The Regents of the University of California

§7.157 (6) Davis-Bacon Act

When required by the federal program legislation, all construction contracts awarded by the recipients and sub-recipients of more than $2000 must include a provision for compliance with the Davis-Bacon Act (40 USC §§3141-3148), and as supplemented by Department of Labor regulations. See 29 CFR part 5.

PRACTICE TIP: There is no authority excusing a city from complying with existing state public works requirements when expending federal funds. Therefore, unless a federal requirement conflicts with a state requirement, the city will be required to comply with both requirements. For example, sometimes both the Davis-Bacon Act and the state prevailing wage statutes apply to a particular contract. In such cases, the contractor will likely be required to pay the higher of the two wages. See 8 Cal Code Regs §16001(b). On the other hand, the Davis-Bacon Act might not apply to a particular federally funded contract, but the city might still be required to adhere to the state prevailing wage statutes.

© The Regents of the University of California

§7.158 (7) Hours and Safety Standards

When applicable, all contracts awarded by recipients in excess of $2000 for construction contracts and in excess of $2500 for other contracts that involve the employment of mechanics or laborers, must include a provision for compliance with §§103 and 107 of the Contract Work Hours and Safety Standards Act (40 USC §§3700-3708), as supplemented by Department of Labor regulations. See 29 CFR pt 5.

© The Regents of the University of California

§7.159 (8) New Inventions and Materials

Contracts or agreements must contain a notice that matters regarding rights to inventions and materials generated under the contract or agreement are subject to the regulations issued by the federal sponsoring agency and the recipient. The contractor must be advised as to the source of additional information regarding these matters. See, *e.g.,* 49 CFR §18.36(i)(8)

© The Regents of the University of California

§7.160 (9) Access to Records

All contracts awarded by grantees must include a provision that the grantee, the federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives, must have access to any books, documents, papers, and records of the contractor that are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions. Grantees must require contractors to maintain all required records for 3 years after grantees make final payments and all other pending matters are closed.

© The Regents of the University of California

§7.161 (10) Environmental Law Compliance

Contracts, subcontracts, and sub-grants of amounts in excess of $100,000 must contain a provision that requires compliance with all applicable standards, orders, or requirements issued under §306 of the Clean Air Act (42 USC §§7606), §508 of the Clean Water Act (33 USC §1368), Executive Order No. 11738 (Sept. 10, 1973), and Environmental Protection Agency (EPA) regulations (40 CFR pt 35, subpt E, Appendix C-2), which prohibit the use under non-exempt federal contracts, grants, or loans of facilities included on the EPA List of Violating Facilities. See, *e.g.,* 49 CFR §18.36(i)(12).

© The Regents of the University of California

§7.162 (11) Energy Efficiency

Contracts must recognize mandatory standards and policies relating to energy efficiency that are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub L 94-163, 89 Stat 965).

© The Regents of the University of California

§7.163 (12) Contract Administration

Grantees must maintain a contract administration system ensuring that the contractor perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

© The Regents of the University of California

§7.164 3. Prevailing Wages

The Davis-Bacon Act requires the payment of prevailing wages on federally funded projects exceeding $2000 for the construction, alteration, or repair, including painting and decorating, of public buildings or public works. 40 USC §§3141-3148. In addition, there are also federal laws that mandate payment of prevailing wages in supply contracts exceeding $10,000 (41 USC §§35-45) (Walsh-Healy Act), and in services contracts exceeding $2500 (41 USC §§351-358) (Services Contract Act). These latter two acts have no counterparts in California law.

© The Regents of the University of California

§7.165 4. Definitions

The terms used in the Davis-Bacon Act are defined in 29 CFR §5.2. Projects that constitute public works for the purposes of the Davis-Bacon Act are defined in detail in 29 CFR §5.2. These definitions are not necessarily congruent with the various California definitions of public works and public projects.

© The Regents of the University of California

5. Contract Documents

§7.166 a. Specifications

The Davis-Bacon Act requires that the advertised specifications for the public works contract and the contract itself provide for the payment of prevailing wages. 40 USC §3142.

© The Regents of the University of California

§7.167 b. Contracts

The public entity must include ten specified prevailing wage contract clauses in its contract. 29 CFR §5.5(a). These clauses deal with minimum wages, withholding, payrolls and basic records, apprentices and trainees, compliance with the Copeland Act (40 USC §3145), by incorporating the provisions of 29 CFR §§3.1-3.11 into the contract, subcontracts, contract termination, compliance with the Davis-Bacon Act, disputes, and certification of eligibility.

Four additional clauses required by the Contract Work Hours and Safety Standards Act (40 USC §§3701-3708) must also be included in the contract. 29 CFR §5.5(b). These clauses deal with overtime requirements, violations and liquidated damages, withholding, and subcontracts. 40 USC §3702. Failure to include these clauses bars the federal agency from making any payments of federal funds on the contract. 29 CFR §5.6(a)(1).

© The Regents of the University of California

§7.168 6. Payroll Records

The contractor must maintain certified payroll records in the form and manner prescribed in 29 CFR §5.5(a)(3) and the public entity must include the text of those regulations in its contract. 29 CFR §5.5(a).

© The Regents of the University of California

§7.169 7. Penalties

Failure to comply with the prevailing wage statutes may result in penalties ranging from criminal prosecution (29 CFR §5.5(a)(3)(ii)(D)) to liquidated damages (29 CFR §5.8) to debarment. 29 CFR §5.12. The sections of the Code of Federal Regulations that the public entity must reference in its contract include references to these various penalties. The amounts of the various penalties are determined by the Secretary of Labor as described in the sections cited.

PRACTICE TIP: Always obtain the current federal forms from the appropriate overseeing agency before preparing the city's bid package. A written ruling may be obtained from the Administrator, Wage and Hour Division, Employment Standards Administration, United States Department of Labor as to the prevailing wages issues in a given federally funded contract. See 29 CFR §5.13.

© The Regents of the University of California

L. Charter Cities

§7.170 1. Charter Cities and the Public Contract Code

Charter cities derive their authority directly from Cal Const art XI; this grants charter cities supreme authority in the area of municipal affairs. *Bishop v City of San Jose* (1969) 1 C3d 56, 61, 81 CR 465. The administration of public works and procurement are municipal affairs. This includes the mode for municipal contracting (see *Loop Lumber Co. v Van Loben Sels* (1916) 173 C 228, 159 P 600), the improvement of municipal streets (see *City of San Jose v Lynch* (1935) 4 C2d 760, 52 P2d 919), and the establishment and maintenance of sewers and drains (see *Cramer v San Diego* (1958) 164 CA2d 168, 330 P2d 235). However, Pub Cont C §1100.7 provides that the Public Contract Code applies to charter cities in the absence of an express exemption or conflicting charter provision or ordinance. Stats 2001, ch 832, §1 (SB 974). The legislature's declared intent is that Pub Cont C §1100.7 as adopted is declaratory of existing law as described in *Howard Contracting, Inc. v G.A. MacDonald Constr. Co.* (1998) 71 CA4th 38, 83 CR2d 590. *Howard Contracting* held that although charter cities enjoy the exclusive power to legislate municipal matters under Cal Const art XI, §5, the home rule doctrine applies only when a subject matter conflict exists between a charter or other municipal enactment and a state statute. *Howard Contracting, Inc.,* 71 CA4th at 51. Accordingly, the court ruled that a no damage for delay clause in a city contract failed to establish the required conflict between a charter or other municipal enactment and state law, and that the Public Contract Code prohibition against such provisions applied. *Howard Contracting, Inc.,* 71 CA4th at 51.

© The Regents of the University of California

§7.171 2. Bidding

General law provisions requiring cities to solicit public, competitive bids for public projects do not apply to charter cities. See *R & A Vending Servs., Inc. v City of Los Angeles* (1985) 172 CA3d 1188, 218 CR 667 (disappointed bidder for Griffith Park concession); *Piledrivers' Local Union v City of Santa Monica* (1984) 151 CA3d 509, 198 CR 731 (rebuilding of Santa Monica Pier); *Smith v City of Riverside* (1973) 34 CA3d 529, 110 CR 67 (alleged violation of Govt C §§37901-37935, now Pub Cont C §§20161-20175.2).

© The Regents of the University of California

§7.172 3. Charter Provisions

The charter city is, of course, bound by the limitations of its own charter and it is bound by state laws in matters of statewide concern. Thus, a city must follow a charter provision requiring that bids be awarded to the lowest responsible bidder. *Los Angeles Dredging Co. v City of Long Beach* (1930) 210 C 348, 291 P 839.

© The Regents of the University of California

§7.173 4. Prevailing Wages

Historically, it has been the general view that charter cities are not bound by state law prevailing wages requirements. See Lab C §1771 when exclusively municipal projects are undertaken and state and federal funds are not involved. *Vial v City of San Diego* (1981) 122 CA3d 346, 175 CR 647. However, the applicability of prevailing wage requirements to charter cities, under an analysis that argues that payment of prevailing wages is a matter of statewide concern, may soon be decided. The California Supreme Court granted review of a split appellate decision holding that a charter city was not required to comply with the prevailing wage requirements. See *State Bldg. & Constr. Trades Council of Cal., AFL-CIO v City of Vista* (review granted Aug. 19, 2009, S173586; superseded opinion at 173 CA4th 567, 93 CR3d 95). On applicability of prevailing wage requirement, see §§7.83-7.84.

© The Regents of the University of California

II. CONTRACTING FOR SERVICES AND GOODS

A. Authority to Contract

§7.174 1. In General

General law cities have authority to enter into contracts to carry out necessary functions, including those expressly granted and those implied by necessity. *Carruth v City of Madera* (1965) 233 CA2d 688, 43 CR 855. Charter cities may exercise authority conferred on them by general law, provided that it is not inconsistent with the charter. *Hubbard v City of San Diego* (1976) 55 CA3d 380, 127 CR 587.

© The Regents of the University of California

§7.175 2. Specifically

Cities have specific statutory authority to contract for special services for financial, economic, accounting, engineering, legal, or administrative matters. Govt C §§37103, 53060. Special services are those that are unusual and unavailable within the agency. *Hubbard v City of San Diego* (1976) 55 CA3d 380, 127 CR 587 (city council could contract ad hoc for services for legislative analysts, but ordinance establishing permanent position was void because of conflict with city manager's duties specified in charter); *Jaynes v Stockton* (1961) 193 CA2d 47, 14 CR 49; *Rafael v Boyle* (1916) 31 CA 623, 161 P 126 (charter precluded city council from employing an attorney to perform special services at city's expense, when city attorney is ready and willing to do so).

PRACTICE TIP: Personal service contracts should include a finding that the city does not have the personnel able to perform the contracted services.

© The Regents of the University of California

3. Delegation of Authority

§7.176 a. Unlawful Delegations of Government Functions

In contracting for services, a city may not contract away its legislative and governmental functions. *McNeil v City of South Pasadena* (1913) 166 C 153, 135 P 32. The effect of this rule is to void any contract that amounts to a surrender or abnegation of its control of its proper municipal functions. *Morrison Homes Corp. v City of Pleasanton* (1976) 58 CA3d 724, 130 CR 196 (citing *McNeil* & *Wills v City of Los Angeles* (1930) 209 C 448, 287 P 962). But see *Department of Transp. v Chavez* (1992) 7 CA4th 407, 9 CR2d 176 (state functions may be contracted to private sector if there is legislative authorization and work involves new state function).

© The Regents of the University of California

§7.177 b. Caveat Emptor

Persons dealing with a municipal corporation are charged with knowledge of the limitation of authority of its officers and agents; contracts made without authority are invalid and cannot be the subject of ratification or estoppel. *City of Pasadena v Estrin* (1931) 212 C 231, 298 P 14; *Foxen v City of Santa Barbara* (1913) 166 C 77, 134 P 1142 ("all persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or of its officer to make the contract").

© The Regents of the University of California

§7.178 4. Express Grant of Authority to Enter Into Contracts

The following list illustrates instances in which cities have been given specific grants of authority to enter into contracts. The list is not exhaustive.

- Energy service contracts. See Govt C §§4217.12, 4217.15.
- Ambulance services. See Govt C §38794; Health & S C §1797.201; *County of San Bernardino v City of San Bernardino* (1997) 15 C4th 909, 64 CR2d 814 (Health & S C §1797.201 allows cities that provided pre-hospital emergency services within jurisdictions on June 1, 1980, option to continue to provide such services, but not to expand such services, or to contract with county to provide all or a portion of such services). See also §§9.22-9.25.
- Ferry system. See Govt C §39731.1.
- Conduct competitive examinations for civil service. See Govt C §45008.
- Employ aircraft pilot. See Govt C §50474.
- Contract with operator to provide public transportation. See Pub Util C §99288.
- Collection and/or disposal of solid waste. See Pub Res C §49300.
- Contracts for financial services with respect to the financial affairs of the city. See Govt C §53997.

© The Regents of the University of California

5. Authority for Intergovernmental Agreements

§7.179 a. Source of Authority

In order for a city to lawfully contract with a county for the performance of its functions, either the legislature must have made statutory provision or the county charter must provide that the county may assume and discharge municipal functions of the municipality if requested. Cal Const art XI, §8. Examples of specific legislative authority to contract with counties implementing Cal Const art XI, §8 (including other municipalities) are described in Govt C §§51300-51308 and are listed in §7.180.

© The Regents of the University of California

§7.180 b. County Performance of General City Functions

A county may contract with a general law or charter city to have county employees perform city functions. See Govt C §51301. This authority does not extend to cities over 1.9 million according to the 1950 census or cities that are both cities and counties. Govt C §51300. The original term of the contract may not exceed 5 years. The term renews for 5-year periods unless either legislative body gives a 1-year notice to terminate. Govt C §51302. See also Govt C §§51305-51308 (personnel reduction caused by department unification). The county employees have the same power and duties as city employees named in the contract. Govt C §51303.

© The Regents of the University of California

§7.181 c. Charter City Contracting Authority

A charter city may, if authorized in its charter, transfer any of its functions to the county. Govt C §51330. The transfer must be approved by the county by resolution containing certain recitals. Govt C §§51330-51331. The functions that may be transferred include tax collection, assessment collection, and sale of property for non-payment of taxes and assessments. See Govt C §51334. If authorized by charter, other functions may be transferred as well. See Govt C §51335.

© The Regents of the University of California

§7.182 d. Assessment and Equalization Functions—Alternative Procedures for Charter Cities

The Government Code also provides an alternative method for charter cities to contract with the county for tax assessment and equalization functions. Govt C §§51540, 51562.

© The Regents of the University of California

§7.183 e. Contracts for Municipal Services

Cities may contract with counties, districts, or other cities for municipal services. See Govt C §§54980-54983. Municipal services includes fire, police, ambulance, and utilities, as well as street repair and operation. Govt C §54980(c). See also Govt C §§55631-55634 (city authority to contract for police and fire protection).

© The Regents of the University of California

§7.184 f. Fire Protection Services From Counties

In counties in which a fire warden has been appointed, cities may contract with the county fire warden for fire protection services. Govt C §55603. Such contracts must be a minimum of 1 year and can only be rescinded by the voters of either the county or the city. Govt C §55603.5.

© The Regents of the University of California

§7.185 g. Water Mains and Sewers

Cities may enter into agreements with other municipalities or sanitary districts for the construction and maintenance of conduits, sewers, and water mains. Govt C §55002.

© The Regents of the University of California

§7.186 h. Construction and Maintenance of Sewers and Electrical Poles

Cities may enter into contracts with other cities, counties, or sanitary districts for the construction and maintenance of sewers and electrical poles. Govt C §§55300-55310. This authority is an alternative and not a repeal of the authority to enter into contracts for water mains and sewers elsewhere in the Government Code. Govt C §55304.

© The Regents of the University of California

§7.187 i. Cement Facilities

Cities may jointly lease, purchase, and operate rock quarries, cement plants, and similar facilities with other cities, counties, and irrigation districts. Govt C §55500.

© The Regents of the University of California

§7.188 j. Emergency Assistance

Cities may enter into mutual aid agreements to render aid in emergencies. See Govt C §8631. This section is applicable to charter cities so long as the charter contains no specific prohibition. See 32 Ops Cal Atty Gen 223 (1958).

© The Regents of the University of California

§7.189 k. County Charges

In providing contract services, the county may only charge to the city additional fees for providing the service, but is expressly prohibited from charging direct or indirect overhead costs of services made available elsewhere in the county or for general county overhead. Govt C §51350.

© The Regents of the University of California

§7.190 6. Federally Funded Projects

Title VII of the Civil Rights Act of 1964 prohibits discrimination under any program or activity receiving federal financial assistance. 42 USC §2000d. See generally 64 Am Jur 2d §91 (discussion of conditions applicable to federal grants); Libonati & Sands, Local Government Law §7.14 (enforcement of conditions for federal grants) and §7.15 (rights of local governments under federal grant programs).

For additional related material in this handbook, see §§4.139-4.268 (discrimination laws); §§7.32-7.34 and §§7.129-7.169 (federally funded programs); and §§13.114-13.152 (municipal liability, federal statutory provisions).

© The Regents of the University of California

7. Prohibited Contracts

§7.191 a. Police Officers as Security Guards

A city may not contract with a private party to provide on- or off-duty police officers for regular private security services for agreed compensation, nor may the chief of police informally act as an arranger of such services. 68 Ops Cal Atty Gen 175 (1985). But see Pen C §70(d) (authorizing police officers, under certain conditions, to serve as private security guards).

© The Regents of the University of California

§7.192 b. Job Order Contracts

A general law city may not enter a job order contract exceeding $50,000. A job order contract is a competitively bid agreement for minor construction, repair, and remodeling of city buildings for a base year and multiple option years. Such contracts are prohibited because the subject matter is essentially unspecified by the time of bidding. 76 Ops Cal Atty Gen 126 (1993).

© The Regents of the University of California

B. Competitive Bidding Requirements

§7.193 1. General Rule

In the absence of a requirement by ordinance, statute, or constitution, a public entity is not bound to engage in competitive bidding. *San Diego Serv. Auth. for Freeway Emergencies v Superior Court* (1988) 198 CA3d 1466, 244 CR 440; *Davis v City of Santa Ana* (1952) 108 CA2d 669, 239 P2d 656. Under Pub Cont C §20162, when the expenditures required for a public project exceed $5000, the project must be contracted for and let to the lowest responsive bidder after notice. However, competitive bidding under the Public Contract Code is not required for personal service contracts that depend on the skill or ability of the entity performing the services. *City & County of San Francisco v Boyd* (1941) 17 C2d 606, 620, 110 P2d 1036; *Adams v Ziegler* (1937) 22 CA2d 135, 138, 70 P2d 537. Because the mode and method of contracting for services or public works is a municipal affair, a charter city may designate the mode and method in its charter or by an ordinance. *Smith v City of Riverside* (1973) 34 CA3d 529, 110 CR 67.

© The Regents of the University of California

§7.194 2. Rule for Certain Kinds of Professional Services

The selection of architectural, landscape architectural, engineering, environmental, land surveying, or construction project management contractors must be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required. Govt C §4526. Historically, this requirement has not applied to cities. See 62 Ops Cal Atty Gen 332 (1979). However, the statute has been amended to include local agencies, including charter and general law cities. See Govt C §§4525(c) (defining local agency head), 4526 (imposing requirement on local agency heads). Although this section would seem to prohibit selection of such contractors based on price alone, it does not specifically preclude a city from considering price once the city has satisfied itself that the would-be contractors have demonstrated the competence and professional qualifications necessary for the satisfactory performance of the services required. See also Bus & P C §5616 (prescribing minimum requirements of contracts with certified landscape architects).

© The Regents of the University of California

§7.195 3. Contracting for Supplies and Equipment

The provisions of Govt C §§54201-54205 require cities to adopt procedures for acquisition of supplies and equipment. Most of these purchasing ordinances require competitive bids for contracts in excess of designated dollar amounts.

© The Regents of the University of California

§7.196 4. "Piggyback" Purchasing

State and local agencies may, without prior competitive bidding, contract with suppliers who have been awarded contracts by the state for the purchase of goods, information technology, and services under the competitive processes in Pub Cont C §§12100-12113. Such state contracts typically take the form of master agreements, price schedules, or multiple award schedules that allow the state to take advantage of leveraged pricing that can be obtained through the state's buying power. The local agency may make these purchases directly from the vendors or the state may provide assistance to local agencies in making these acquisitions. See Pub Cont C §10299.

© The Regents of the University of California

§7.197 C. Purchase Ordinance and Regulation

Cities must, by ordinance, adopt policies and procedures, including bidding regulations, governing purchases of supplies and equipment by the city. Govt C §§54202-54203. Such purchases must be in accordance with such adopted policies and in accordance with all relevant provisions of law. Govt C §54202. No policy, procedure, or regulation may be adopted that is inconsistent or in conflict with statute. Govt C §54202. Cities have considerable freedom to tailor purchasing ordinances or regulations to meet local needs. See *Davis v City of Santa Ana* (1952) 108 CA2d 669, 239 P2d 656.

© The Regents of the University of California

D. Local Preferences

§7.198 1. Validity

Preferences for firms based in the city are only permitted if the city council can legitimately find that local firms are disadvantaged because doing business within the city limits is more expensive than doing business outside the city. *Associated Gen. Contractors of Cal., Inc. v City & County of San Francisco* (9th Cir 1987) 813 F2d 922. But see *United Bldg. & Constr. Trades Council of Camden County & Vicinity v City of Camden* (1984) 465 US 208, 79 L Ed 2d 249, 104 S Ct 1020, in which an ordinance requiring preference for hiring local residents on public works contracts was held to violate the privileges and immunities clause of the United States Constitution. The Attorney General has opined that local preference ordinances do not conflict with state public bidding statutes. 72 Ops Cal Atty Gen 86 (1989). The opinion does not discuss *Associated Gen. Contractors of Cal., Inc. v City & County of San Francisco, supra*, and its validity is open to question.

© The Regents of the University of California

§7.199 2. "Buy America Act"

The "California Buy America Act" (Govt C §§4300-4305) and the "California Preference Law" (Govt C §§4330-4334) have been declared invalid as an interference with the federal government's power over foreign affairs. *Bethlehem Steel Corp. v Board of Comm'rs of the Dep't of Water & Power of the City of Los Angeles* (1969) 276 CA2d 221, 80 CR 800; 53 Ops Cal Atty Gen 72 (1970).

© The Regents of the University of California

III. GENERAL CONTRACT PROVISIONS AND ISSUES

§7.200 A. General Rule of Interpretation

Except as otherwise specified in the Civil Code, all contracts, whether public or private, are interpreted by the same rules. CC §1635 (same rule for public and private contracts). See also CC §§1636-1663 (general rules of contract interpretation). A public agency construction contract generally is separated into General Provisions and Special Provisions. The General Provisions contain the legal contract provisions. See §§7.35-7.74. The Special Provisions contain the more technical construction provisions, usually drafted by the design engineers and architects. However, it is important for legal counsel to review all revisions for consistency as it is not unusual for drafters of the Specific Provisions to insert legal provisions or other language inconsistent with the General Provisions, leading to contract ambiguity.

© The Regents of the University of California

B. Contract Provisions and Issues

§7.201 1. Parties

A clear statement should be made of party identification, by name and legal status, *i.e.,* an individual operating under a fictitious name; a partnership; a joint venture; or a corporation or some other business entity.

© The Regents of the University of California

§7.202 2. Duration

The term or life of the agreement should be set. This includes, if necessary, dates for required performance in phases, with drop-dead dates for each phase, as well as for overall project completion. This can be done on an attachment to the contract entitled schedule of performance, which is sometimes combined with a scope of services attachment.

© The Regents of the University of California

§7.203 3. Duties

A precise description of the duties is especially important because this description will define and limit the obligation of the contractor. The preferred practice is to define the duties in the agreement based on the request for proposals sent out by the city and the proposal submitted by the successful responder. The description may be included within the body of the contract or by attaching a scope of services to the contract and incorporating the attachment by reference. If the city merely attaches a copy of the proposal submitted by the contractor as the scope of services, the agency should carefully review that proposal to ensure that it clearly defines, in terms appropriate to contractual obligations, the nature of the duties to be performed.

© The Regents of the University of California

§7.204 4. Time

If time is of the essence to the performance of the contractor's duties, that fact should be clearly stated in the agreement. Further, if time is truly an important factor, consider the inclusion of a liquidated damages clause in the agreement. A liquidated damages clause makes the parties to the contract agree to the amount of damages in the event one party breaches the contract. When a contract includes a liquidated damages provision, the liquidated damages provision is the measure of damages for the damages that are covered by the liquided damages clause; the city is not entitled to actual damages no matter what their nature. The preferred practice is that when such a liquidated damages clause is included in any kind of an agreement, the agreement should also contain a recital of all of the supporting facts demonstrating the need for the liquidated damages provision. Govt C §53069.85.

© The Regents of the University of California

§7.205 5. Responsible Contract Administrators

Each agreement should identify the individuals, by office or title, who represent each party to the agreement and are responsible for the administration of the agreement. Usually the contractor will have a principal who is designated as the managing employee or partner in charge. Usually the city will use either the city manager or the city manager's designee as the contract administrator.

© The Regents of the University of California

§7.206 6. Dispute Clause

A desirable clause in an agreement is a dispute provision. This provision says that a delegated person is empowered to issue orders and instructions to the contractor to effectuate the performance of the contractor's work and to ensure that the work complies with the agreement. The provision should include a statement that if the contractor receives a written direction or order from the delegated person that the contractor believes is inappropriate or not within the scope of the work under the agreement, the contractor has the right to appeal to the city council or other designated forum. A performance after dispute clause requiring the contractor to continue performing the agreement pending resolution of the dispute should also be included.

© The Regents of the University of California

§7.207 7. Compensation

A compensation provision that states the basis for the contractor's compensation is essential. Compensation may be calculated on an hourly basis, a fixed, not to exceed fee, some combination of those two, or some other clearly stated basis (for example, percentage or per parcel). Some contracts, usually in areas such as design engineering, provide for additional compensation by way of an incentive or bonus amount, conditioned on the contractor performing earlier than required under the agreement.

© The Regents of the University of California

§7.208 8. Reimbursement of Expenses

The agreement should clearly specify whether there is any right to reimbursement for expenses and, if so, the nature and extent of that reimbursement. Potential kinds of reimbursable expenses include local telephone calls, long distance telephone calls, fax service, photocopying, word processing costs, and travel allowances. Whether a contractor is given the right to obtain reimbursement is a policy decision. The point is the contract should not be silent on this issue. The contract should either say there is no right to expense reimbursement, or, if reimbursement is allowed, what kinds of expenses are reimbursable. To control costs, the expense reimbursement provisions can include standards and maximum amounts. The contract should also specify who in the city has the right to review such requests and determine whether the reimbursement requested is consistent with the agreement.

© The Regents of the University of California

§7.209 9. Public Entity Liability and Insurance

A public entity is liable for injury proximately caused by the tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Govt C §815.4. *McCarty v Department of Transp.* (2008) 164 CA4th 955, 79 CR3d 777. However, the public entity is not liable for acts or omissions of an independent contractor for which, if committed by the public entity's employee, the public entity would not be liable. Govt C §815.4.

PRACTICE TIP: The public entity should require the independent contractor to obtain insurance providing for defense and indemnity of the public entity protecting against such liability.

© The Regents of the University of California

§7.210 a. Right to Require Insurance

Cities may require those with whom they contract to obtain insurance naming the city as an additional insured. See *No Oil, Inc. v City of Los Angeles* (1987) 196 CA3d 223, 242 CR 37. See also Govt C §§989-991.2 (authority of cities to insure). Public entities may contract for insurance that calls for payment of punitive damages, and may contract for the defense of the claim. Govt C §990(c).

© The Regents of the University of California

§7.211 b. Common Types of Insurance

Cities customarily require contractors to supply various types of insurance. The nature and amount are usually determined in collaboration with each city's risk manager and are dependent on an assessment of the risks involved in performing the contract. Some of the types of insurance generally required are discussed in §§7.212-7.215.

© The Regents of the University of California

§7.212 (1) Commercial General Liability

This typically covers bodily injury and property damage arising from the insured's premises and operations. The policy usually includes contractual liability. Comprehensive general liability is an older form of coverage, usually with slightly narrower protections.

© The Regents of the University of California

§7.213 (2) Automobile Liability

This covers injury to persons or property arising out of ownership, maintenance, or use of an automobile.

© The Regents of the University of California

§7.214 (3) Professional Liability

This covers injury to persons or property resulting from negligent delivery of professional services.

© The Regents of the University of California

§7.215 (4) Workers' Compensation and Employer Liability

Workers' compensation insurance covers injuries to the insured's employees injured while acting in the scope of employment. Employer's liability insurance covers common law claims by the employee against the employer. Under-reporting of payroll to avoid paying workers' compensation insurance premiums automatically results in the suspension of a contractor's license and prevents the contractor from suing for money owed the contractor on work that required a contractor's license. *Wright v Issak* (2007) 149 CA4th 1116, 58 CR3d 1.

© The Regents of the University of California

§7.216 c. Common Contractual Provisions

A contract should provide, whenever possible

- that the contractor's insurance is primary to that of any insurance carried by the city;
- that the city and its officers, employees, and volunteers are named as additional insureds in the contractor's insurance policies;
- that the city will receive at least 30 days advance notice of any cancellation, material reduction, or termination of insurance;
- a waiver of subrogation;
- the right to disclosure and approval of deductibles and to verification of coverage; and
- that the city's failure to comply with reporting requirements should not affect coverage.

The contract may establish the size of the insurer by the use of an insurance rating service, such as Bests or some other known insurance evaluating company. With respect to performance bonds, they must comply with the requirements of CCP §995.660, including that they be from a California admitted surety. CCP §995.670.

PRACTICE TIP 1: Liability limits and allowable contractor deductibles and exclusions on contracts should be reviewed with the risk manager. The city should determine early on whether the contractor's policy is a claims made policy or an occurrence policy. If the policy is a claims made policy, the city should negotiate and draft appropriate provisions to protect the city for the period between the termination of the contract and the statutes of limitations.

PRACTICE TIP 2: It is occasionally difficult or very expensive for some professionals to obtain professional liability or errors and omissions insurance. One alternative is to include a peer review process in the contract, in which the consultant's work is reviewed by a second, equally well qualified professional. This approach offers some assurance of quality control and could be less costly than insurance.

PRACTICE TIP 3: If the contractor's policy has a substantial deductible or self-insured retention, the city would be required to pay it if the contractor is financially unable to pay, or if the indemnity clause should be set aside by a court. As protection, the city should require the contractor to reduce or eliminate the deductible as to the city or obtain a surety bond guaranteeing its payment plus any related losses, claims, and investigation and defense costs.

© The Regents of the University of California

10. Indemnification

§7.217 a. Establishment of Indemnification

The right to indemnification is established by contract. The extent of the duty to indemnify is determined from the terms of the contract and not from the independent doctrine of equitable indemnity. *City of Los Angeles v Japan Air Lines Co.* (1974) 41 CA3d 416, 116 CR 69. But see *E.L. White, Inc. v City of Huntington Beach* (1978) 21 C3d 497, 146 CR 614 (contractual indemnity agreement failed to protect city against claim of implied indemnity when city was actively negligent and agreement did not address this issue). Cities may require those with whom they contract to indemnify the city. See *No Oil, Inc. v City of Los Angeles* (1987) 196 CA3d 223, 242 CR 37.

PRACTICE TIP: The right to obtain a contractual defense from the contractor is an obligation separate from the duty to indemnify. The contractual obligation to defend must be included in the contract language along with the duty to indemnify. How that language is crafted can have a significant impact on when the defense obligation triggers. See *Crawford v Weather Shield Mfg., Inc.* (2008) 44 C4th 541, 79 CR3d 721.

© The Regents of the University of California

§7.218 b. City Liability for Contractor Acts

A public entity is liable for injury proximately caused by the tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Govt C §815.4; *McCarty v Department of Transp.* (2008) 164 CA4th 955, 79 CR3d 777. However, the public entity is not liable for acts or omissions of an independent contractor for which, if committed by the public entity's employee, the public entity would not be liable. Govt C §815.4.

© The Regents of the University of California

§7.219 (1) Non-Delegable Duty

When there is a duty to do certain work carefully, or to maintain property in a safe condition, this duty cannot be avoided by delegating the work to an independent contractor. *Delgado v W.C. Garcia & Assocs.* (1963) 212 CA2d 5, 27 CR 613 (city compliance with state safety requirement cannot be delegated); California Government Tort Liability Practice §9.22 (4th ed Cal CEB 1999).

© The Regents of the University of California

§7.220 (2) Peculiar Risk Doctrine

Under the peculiar risk doctrine, a city is liable for injuries resulting from the negligent performance of a contract involving special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is done, against which a reasonable person would recognize the necessity of taking special precautions. It is sufficient that it is a risk that the employer should recognize as likely to arise in the course of the ordinary and usual method of doing the work, or the particular method of doing the work, or the particular method that the employer knows that the contractor will adopt. *Caudel v East Bay Mun. Util. Dist.* (1985) 165 CA3d 1, 211 CR 222. But see *Johnson v Tosco Corp.* (1991) 1 CA4th 123, 1 CR2d 747 (independent contractors' use of defective equipment, which employer had no part in selecting, does not bring conduct within peculiar risk doctrine). See also California Government Tort Liability Practice §9.23 (4th ed Cal CEB 1999).

© The Regents of the University of California

§7.221 c. Type and Scope of Indemnification

The provisions of CC §2778 establish the rules for interpreting indemnity agreements. Indemnity provisions must be carefully drafted. Indemnification agreements may apply not only to the acts of the indemnitor, but also to those of his or her agents. CC §2775; *Crawford v Weather Shield Mfg., Inc.* (2008) 44 C4th 541, 79 CR3d 721.

PRACTICE TIP 1: Indemnity agreements should be carefully crafted to include:

- the entities and persons who will be the indemnifying parties and the indemnified parties;
- the nature of those activities to which the indemnification will apply, *i.e.* active or passive negligence or willful misconduct;
- whether the indemnified party will be indemnified against its negligence; and
- the defense obligation and when it will trigger.

PRACTICE TIP 2: Each contract should be evaluated to determine whether or not there is a peculiar risk or non-delegable duty. If these exist, the contract should have provisions specifically designed to accommodate these issues. (The agency may find it more cost-effective to separately contract for the remediation of known or reasonably foreseeable risks, and exclude those risks from the scope of the indemnification.)

© The Regents of the University of California

§7.222 (1) Indemnity as a Condition for Rendering Essential Public Service

Generally, a city may not obtain indemnification against its own negligence if it impairs a public interest. *Tunkl v Regents of Univ. of Cal.* (1963) 60 C2d 92, 32 CR 33. When no essential public interest is involved, or there is no statutory prohibition, the city may require such indemnification against ordinary negligence. *City of Santa Barbara v Superior Court (Janeway)* (2007) 41 C4th 747, 62 CR3d 527. A public entity may not require indemnification for its own gross negligence. 41 C4th at 776.

© The Regents of the University of California

§7.223 (2) Construction Contracts

Construction contracts, as defined in CC §2783, that indemnify the promisee for damages arising from the sole negligence or willful misconduct of the promisee, its employees, subcontractors, or independent contractors directly responsible to the promisee are void and unenforceable. CC §2782(a). A public agency may not obtain indemnification for its own active negligence. CC §2782(b). Certain exceptions apply. See CC §§2782(a)-(b), 2782.1 (permitting the city to be indemnified by a contractor under a construction contract (which includes design under §2783) when the contractor enters into an agreement with the city to enter onto city or adjacent property to perform a contract for others), §2782.2 (permitting, under certain circumstances, agreements to indemnify engineers providing inspection services), §2782.5 (permitting agreements to allocate, release, liquidate, exclude, or limit liability for design defects or other matters), §2782.6 (permitting indemnity agreements with engineers or geologists providing hazardous materials identification, evaluation, preliminary assessment, and design and remediation services, if certain requirements are met, but specifically excluding contracts with public entities (CC §2782.6(f)).

© The Regents of the University of California

§7.224 (3) Trucking Contracts

State law prohibits indemnity agreements in any hauling or trucking contracts relieving the trucker or hauler, or any person directly responsible to the trucker or hauler, of the trucker's or hauler's sole negligence or willful misconduct resulting in bodily injury, death, property damage, or expenses arising therefrom, except when under the control of the indemnitee. CC §2784.5.

© The Regents of the University of California

§7.225 d. Further Reference

On indemnity agreements and bonds, see §§7.296-7.309; on toxic and hazardous wastes, see §§7.313-7.320.

© The Regents of the University of California

§7.226 11. Limitation of Liability Clauses

State law permits parties to negotiate and expressly agree with respect to the allocation, release, exclusion, or limitation of liability for design defects or of the promisee to the promisor arising from the construction contract. CC §2782.5. See *Markborough Cal., Inc. v Superior Court (J. Harlan Glenn & Assocs.)* (1991) 227 CA3d 705, 277 CR 919 (limiting damages for contractor's negligence permitted when there was opportunity to negotiate and expressly agree). If, at the time of entering into the obligation, there is a limitation on the extent to which a municipality may enter into such obligation, or on the extent of taxation for the payment of its liability, or on the mode in which such payment is to be made, there is no violation of any provisions of the constitution, or of any obligation of the municipality, in insisting that the person dealing with it be bound by the terms of the law as they existed when he or she entered into his or her dealings with the municipality. *Bilardi Constr., Inc. v Spencer* (1970) 6 CA3d 771, 86 CR 406. See also 1 Witkin, Summary of California Law, *Contracts* §999 (10th ed 2005).

PRACTICE TIP: It is common to find limitation of liability provisions in the standard language of design professional (engineer, architect) agreements. For risk management purposes, it is important to remove those provisions from the contract or modify them to provide an acceptable risk limitation. It is best for a public agency to develop its own professional services agreement and insist that contractors use that agreement.

© The Regents of the University of California

§7.227 12. Notices

City contracts should include a clearly written notice clause. All notices should be required to be in writing and given either by personal service or delivery by the United States Postal Service, postage prepaid to specifically named persons or the holders of designated positions. There should be a provision indicating when those notices become effective insofar as service is concerned, for example, on the date of personal service, 5 days following deposit in a United States mailbox, or date of postmark. Email should not be used due to issues concerning confirmation of receipt.

© The Regents of the University of California

§7.228 13. Status of Contractor

The contract should specify whether the contractor is an employee or an independent contractor. In most cases, the contract will indicate that the contractor is, in fact, an independent contractor and not an employee or agent of the city. In the latter case, the city has no direct obligation to any of the officers, agents, employees, or subcontractors of the contractor; such individuals will not be entitled to claim direct payment of salaries and will not be able to seek any city employment benefits.

© The Regents of the University of California

§7.229 14. License Requirement

The contract should include a provision warranting that the contractor and all subcontractors are properly licensed. See *D.H. Williams Constr., Inc. v Clovis Unified Sch. Dist.* (2007) 146 CA4th 757, 53 CR3d 345. This warranty should include possessing a local business license, and requiring all subcontractors and suppliers to be similarly licensed. A contractor with a suspended contractor's license cannot sue for money owed the contractor on work that required a contractor's license. *Wright v Issak* (2007) 149 CA4th 1116, 58 CR3d 1. An unlicensed corporate contractor may not enforce the contract on the basis that one of the contractor's employees is a licensed contractor, even if the employee is the president of the corporate contractor. *Opp v St. Paul Fire & Marine Ins. Co.* (2007) 154 CA4th 71, 64 CR3d 260.

© The Regents of the University of California

§7.230 15. Assignment

The contract should prohibit the use of subcontractors or any other type of assignment without the prior consent of the city. Such a provision usually prohibits the unreasonable withholding of such consent.

© The Regents of the University of California

§7.231 16. Arbitration

It may be worthwhile to consider the inclusion of a provision providing for binding arbitration to enforce provisions of the contract. See *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 10 CR2d 183 (scope of arbitration is determined by contract). However, there are risks, including loss of the right of appeal in most cases. In recent years, the costs of arbitration have increased as has the time for resolution in an arbitration setting.

© The Regents of the University of California

§7.232 17. Conflict of Interest

The contract should include a provision requiring the contractor to avoid conflicts of interest. The contractor also should be specifically required to comply with any applicable local conflict of interest code. Alternatively, the contract should recite that the contractor does not fall within the local code or the Political Reform Act and explain why conflict of interest constraints do not apply to the contractor. The provision may also address the furnishing of products or services in which the contractor has a separately defined financial interest. However, persons not contracting with a city cannot be held liable for conspiracy to violate Govt C §1090. *Klistoff v Superior Court* (2007) 157 CA4th 469, 68 CR3d 704. A city's official, who has no personal financial interest in the contact at issue, cannot violate Govt C §1090 for performing legislative acts that aid in another public official's alleged violation of Govt C §1090. *D'Amato v Superior Court* (2008) 167 CA4th 861, 84 CR3d 497. The provisions of Govt C §1090 are discussed in greater detail in §§2.162-2.173.

© The Regents of the University of California

§7.233 18. Ownership of Materials and Documents

A provision sometimes is necessary authorizing the city to use media prepared by the contractor, *e.g.,* documents, CAD files, reports, electronic data, maps, and photographs. This authorization should apply whether or not the contractor's portion of the project proceeds to completion. The contract should provide that all such material is the property of the city once delivered to the city or at such time as the agreement is terminated. The agreement should specify that the work under the contract is considered work made for hire. See *Community for Creative Non-Violence v Reid* (1989) 490 US 730, 104 L Ed 2d 811, 109 S Ct 2166. If the work is public art or artistic in nature, the agency should consider obtaining a waiver of the artist's rights under CC §987 regarding removal or modification of the work.

© The Regents of the University of California

§7.234 19. Termination

There should be a provision permitting termination, without cause, on the giving of a brief period of notice, *e.g.,* 48 hours or 5 days, with provision for equitable adjustment for services performed or materials furnished. For-cause termination clauses are, generally, simply an invitation to litigate.

© The Regents of the University of California

§7.235 20. Discrimination

There should be a provision included that prohibits any type of discrimination by the contractor in the conduct of the work.

© The Regents of the University of California

§7.236 21. Ownership Interest

A provision prohibiting the holding of any interest in the contract by any elected official, officer, or employee of the city is appropriate. See Govt C §1090.

© The Regents of the University of California

§7.237 22. Records

The contractor should be required to maintain records relating to its performance of the contract and to make those records available for audit and/or inspection for 4 years after the contractor completes performance of the contract or the contract is otherwise terminated.

© The Regents of the University of California

§7.238 23. Audit

If compensation is based on a method of payment other than a flat fee, the contract should contain a clause permitting the city to examine books and records, and perform an audit to determine the appropriate amount of compensation to be paid. In addition, this right of audit should be phrased so that if there is a substantial billing deviation adverse to the city (for example, an overcharge of 5 percent or more), then the cost of the audit is borne by the contractor. Otherwise, the cost of the audit is borne by the city.

© The Regents of the University of California

§7.239 24. Choice of Law

A provision that California law governs the interpretation and enforcement of the contract should be included.

© The Regents of the University of California

§7.240 25. Entire Agreement

A catchall provision should be included, reciting that:

- the agreement embodies the entire agreement of the parties;
- there are no oral agreements;
- no amendment will be valid unless in writing, executed by both parties; and
- the language of the agreement governs as against any conflicting language or terms contained in any attachment, exhibit, or scope of work.

© The Regents of the University of California

§7.241 26. Waiver

The contract should include a provision reciting that neither acceptance of work nor payment for that work constitutes a waiver of any provisions of the agreement. The contract should also say that waiver of any breach does not constitute waiver of any other provision or subsequent breach.

© The Regents of the University of California

§7.242 27. Attorney Fees Provision

As a general rule, except as provided by statute, attorney fees are not recoverable in a contract action absent the inclusion of an express provision. CCP §1021.

PRACTICE TIP: The inclusion of a fees provision should be carefully considered. Many public agencies purposely exclude attorney fees provision in a public works contract because, especially in a dispute with a contractor involving multiple claims, there is a risk that if the contractor prevails on even a small portion of the claim, substantial fees could be awarded. There is also the risk that the contractor's effort to win attorney fees can at times drive the litigation more than the claim itself.

© The Regents of the University of California

C. Execution of Contracts

§7.243 1. Effect on Enforceability

A contract executed in a manner not authorized by statute or charter is not enforceable against the city. *Reams v Cooley* (1915) 171 C 150, 152 P 293. Statutes or charters authorize a city to contract; they therefore provide the measure of that power. *Dynamic Indus. Co. v City of Long Beach* (1958) 159 CA2d 294, 323 P2d 768. When the charter's provisions for contracting have not been complied with, the city cannot be held liable in quasi-contract and the city will not be estopped from denying the validity of the contract. *Lemoge Elec. Co. v San Mateo County* (1956) 46 C2d 659, 257 P2d 638; *City of Oakland v Burns* (1956) 46 C2d 401, 296 P2d 333; *San Francisco Int'l Yachting Group v City & County of San Francisco* (1992) 9 CA4th 672, 12 CR2d 25.

© The Regents of the University of California

§7.244 2. Signature and Other Requirements

In general law cities, the mayor must sign all contracts and conveyances, unless another officer is authorized to do so by ordinance. Govt C §40602. Cities may prescribe the method for entering into contracts by ordinance.

© The Regents of the University of California

§7.245 3. Consequence of Defective Bidding Process

A city may be required to pay reasonable costs, excluding profit, for labor, equipment, materials, and services furnished by a contractor when a contract is declared invalid due to a defect or defects in the competitive bidding process caused solely by the city. Pub Cont C §5110. To be entitled to such a payment, the contractor must meet specific criteria in the statute.

© The Regents of the University of California

D. Payment Procedures

§7.246 1. General Law Cities

A general law city may pay for contract services after such demands are audited in the manner prescribed by ordinance or resolution. Govt C §37202. Such payments must be approved by the city council (see Govt C §37202), and warrants or checks drawn in payment of demands must be certified or approved by the city clerk (or director of finance if the city has one) (see Govt C §37209) because warrants or checks conforming to a budget approved by ordinance or resolution of the legislative body need not be audited by the legislative body before payment. Govt C §37208(b). After allowing a demand or approving a register of audited demands, the mayor draws a warrant in compliance with either the Government Code or an alternate method of drawing warrants and checks prescribed by ordinance or resolution. See Govt C §37203. The city treasurer is authorized to pay out money only on warrants signed by the legally designated person. Govt C §41003.

© The Regents of the University of California

§7.247 2. Charter Cities

Payment of money for services rendered has historically been a municipal affair and charter cities may adopt their own payment procedures. See *City of Pasadena v Charleville* (1932) 215 C 384, 385, 10 P2d 745, overruled on other grounds in *Purdy & Fitzpatrick v State* (1969) 71 C2d 566, 585, 79 CR 77.

© The Regents of the University of California

3. Audits

§7.248 a. Local Audit Requirements

A city's legislative body is authorized to pay demands for money that have been audited in the manner prescribed by ordinance or resolution. See Govt C §37202. A city's charter or ordinances may provide for receipt of goods or services before payment of demands.

© The Regents of the University of California

§7.249 b. State Audit Requirements

State law also permits the establishment of auditing procedures in connection with direct service contracts with nonprofit corporations. Govt C §53078. See also Health & S C §§38040-38041. Federal block grant expenditures are subject to audit. See Govt C §§53130-53138.

© The Regents of the University of California

§7.250 4. Extra Compensation for Services Already Rendered

A city may not pay a contractor extra compensation after services are rendered or the contract performed. Cal Const art XI, §10(a) ("local government body may not grant extra compensation or extra allowance … after service has been rendered or a contract has been entered into and performed in whole or in part"). A contractor is not entitled to payment for extra work outside of the scope of the contract with the city, even though the work was authorized by a city employee and an agent of the city. The contractor must comply with contractual change order provisions. *Katsura v City of Buenaventura* (2007) 155 CA4th 104, 65 CR3d 762. However, in some circumstances, a contract may adopt prior acts or fix a retroactive date of execution. See *Baker v City of Palo Alto* (1961) 190 CA2d 744, 12 CR 425.

PRACTICE TIP: If a city's charter or ordinance requires delivery of goods or services before payment, the city's contracts should avoid provisions for either down payments or payments in advance of delivery.

© The Regents of the University of California

§7.251 E. Other Handbook References

For related material regarding specific contract provisions, see §7.35.

© The Regents of the University of California

§7.252 IV. INSURANCE

Part IV of this chapter (§§7.252-7.295) addresses insurance coverage and exclusions, self-insurance pools and types of insurance and certificates.

© The Regents of the University of California

A. Coverage and Exclusions

§7.253 1. Mandatory Versus Optional Coverage

Insurers are often required by state law or regulation to provide certain insurance coverage when issuing policies. For example, automobile liability insurers are required to provide uninsured motorist coverage. Ins C §11580.2. However, absent such regulation, an insurer is at liberty to select the character of the risk it will assume. *Fullerton v Houston Fire & Cas. Ins. Co.* (1965) 234 CA2d 743, 750, 44 CR 711.

© The Regents of the University of California

§7.254 2. Interpretation of Insurance Policies

Courts have developed rules as to how insurance contracts are to be interpreted. See *Bank of the West v Superior Court* (1992) 2 C4th 1254, 1264, 10 CR2d 538 (summarizing these rules) and *AIU Ins. Co. v Superior Court* (1990) 51 C3d 807, 821, 274 CR 820. For a comprehensive discussion of insurance contracts, coverage, and exclusions, see *Shell Oil Co. v Winterthur Swiss Ins. Co.* (1993) 12 CA4th 715, 737, 15 CR2d 815.

© The Regents of the University of California

§7.255 3. Exclusions

Because insurance policy language is usually drafted by insurers, with no meaningful opportunity for insureds to bargain for modifications, courts generally interpret the policy's coverage clauses broadly, and interpret the policy's exclusions narrowly to protect the insured's objectively reasonable expectations. *Shell Oil Co. v Winterthur Swiss Ins. Co.* (1993) 12 CA4th 715, 15 CR2d 815. The burden of proof that coverage paragraphs apply is on the insured, while the burden of proof that exclusions apply is on the insurer. *Aydin Corp. v First State Ins. Co.* (1998) 18 C4th 1183, 77 CR2d 537.

© The Regents of the University of California

§7.256 4. Duty to Defend

A liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity. Once a duty of defense is triggered, the insurer must defend the entire action, subject to a right of reimbursement of defense costs the insurer can show are allocable only to claims that are not even potentially covered. *Buss v Superior Court* (1997) 16 C4th 35, 65 CR2d 366. Site investigation costs can qualify as defense costs that the insurer must incur in fulfilling its duty to defend. *Aerojet-General Corp. v Transport Indem. Co.* (1997) 17 C4th 38, 70 CR2d 118. The duty to defend arises once a tender has been made and suit has been filed. *Foster-Gardner, Inc. v National Union Fire Ins. Co.* (1998) 18 C4th 857, 77 CR2d 107; *Buss v Superior Court* (1997) 16 C4th 35, 65 CR2d 366. The duty to defend exists during the entire action even when only one of several causes of action is potentially covered. A public entity has no duty to share defense costs on a "continuous loss" claim with an insurer simply because it was self-insured during some of the loss period. *State v Pacific Indem. Co.* (1998) 63 CA4th 1535, 75 CR2d 69; *County of San Bernardino v Pacific Indem. Co.* (1997) 56 CA4th 666, 65 CR2d 657. The duty to investigate the insurability of an insured is a non-delegable duty. *Fireman's Fund Ins. Co. v Escobedo* (1978) 80 CA3d 610, 145 CR 785. See also DiMugno & Glad, California Insurance Law Handbook p 516 (West Group, 2009).

PRACTICE TIP: A certificate of insurance form is not sufficient evidence of insurance. Such certificates on their face may not indicate exclusions. They also contain a standard disclaimer that the policy, not the certificate, controls coverage. Unless otherwise stated on the certificate, it is intended merely to constitute notice to a third party of the types and amounts of coverages held by the named insured. For example, a certificate of insurance for aquatic diving may not indicate that trampoline activities are excluded by the policy, even though trampolines are commonly used for aquatics diving practice. Therefore, evidence of insurance should be established by receipt of the insurance declarations page or the policy itself, including additional insured endorsements.

© The Regents of the University of California

§7.257 5. Duty to Indemnify

The insurer's duty to defend and duty to indemnify differ in their substance: whereas the duty to defend entails the rendering of a service, *i.e.,* the mounting and funding of a defense, the duty to indemnify entails the payment of money. In general, the duty to indemnify is not broad enough to extend beyond "damages," *i.e.,* money ordered by a court. *Certain Underwriters at Lloyd's of London v Superior Court* (2001) 24 C4th 945, 103 CR2d 672. For example, expenses incurred by an agency requiring it to remediate environmental contamination may not be "damages" and thus not covered by the policy. See *County of San Diego v Ace Prop. & Cas. Ins. Co.* (2005) 37 C4th 406, 33 CR 3d 583.

© The Regents of the University of California

§7.258 B. Self-Insurance and Insurance Pools

With the high cost and general unavailability of liability insurance, many cities are self-insuring some, if not all, of their risk. Self-insurance pools are also becoming more popular as an alternative to commercial insurance or total self-insurance.

© The Regents of the University of California

§7.259 1. Self-Insured Retentions/Reserves

Cities have often accepted a minimum level of liability self-insurance through deductible amounts (Self-Insured Retention (SIR)) in the policies issued by private company insurers. However, as liability exposure risks have increased and insurance premiums have skyrocketed, most cities have been forced to accept higher levels of self-insurance. Some cities have found it more practical to self- insure their entire liability exposure. With self-insurance, sufficient reserves must be set aside to pay liability claims, settlements, or judgments. Note that new accounting rules effective for accounting years beginning in 1995 require reserves to be actually funded. See Government Accounting Standards Board, *Governmental Accounting Standards Bulletin No. 10* (P.O. Box 30784, Hartford, CT 06150, telephone (203) 847-0700).

PRACTICE TIP: Although the Vehicle Code exempts public agencies from proving financial responsibility for publicly owned vehicles (see Veh C §§16051-16056), self-insured cities should prepare certificates of self-insurance to carry in city-owned vehicles in order to comply with the proof of insurance requirements. Such a document provides information to the employee, citizen, and police officer when an accident occurs. An accident procedures packet should also be placed in each agency vehicle to guide employees in the case of an accident.

© The Regents of the University of California

2. Self-Insurance Pools

§7.260 a. Purpose and Scope

Self-insurance pools have evolved in California over the last two decades to provide a variety of services. The early pools were created when private liability insurance was generally obtainable. Their purpose was to combine the purchasing power of several cities or agencies to reduce the overall cost of acquiring private liability insurance. In the mid-1980s, when private insurance became virtually unobtainable, pools began to offer full self-insurance to their members. Recently, as the insurance market has become softer, some pools are again acquiring excess layers of private insurance coverage for their members, in combination with pooled layers.

© The Regents of the University of California

§7.261 b. Services Provided

Pools often exist for the single purpose of providing liability coverage. Alternatively, they may provide a full range of services for their members, including: investigation and adjusting of claims; providing health and workers' compensation coverage; long-term disability insurance; dental insurance; property fire and risk insurance; risk management and safety services; and even employee "wellness" programs.

© The Regents of the University of California

§7.262 c. Legal Underpinning for Pools

The provisions of Govt C §§990-990.8 authorize a local public entity to procure insurance or to self-insure and to pool self-insurance with other local public entities through the Joint Exercise of Powers Act. See Govt C §§6500-6536. The Act essentially permits cities to enter into a joint powers agreement to establish a separate governmental entity for a specific purpose. There is also permissive authority, see Govt C §§6599.01-6599.10, establishing the framework for a statewide pool. Under Govt C §990.8(c), local public entity self-insurance pools are exempt from regulation under the California Insurance Code. Proposals to regulate pools, however, surface from time to time in the state legislature or through the office of the Insurance Commissioner. Because the members of a joint powers authority draft coverage agreements, courts will not rely on insurance case law, but will instead look for the intent of the parties in resolving coverage disputes. Questions of coverage are governed by rules of contract law that emphasize the intent of the parties. *City of South El Monte v Southern Cal. Joint Powers Ins. Auth.* (1995) 38 CA4th 1629, 45 CR2d 729 (discussing history and application of Govt C §990.8).

© The Regents of the University of California

§7.263 d. Pools Are Not "Other Insurance"

Because pool members share self-insured risks, pools are not considered "other insurance" required to share defense or indemnity obligations with insurers. An insurer may not require a city first to exhaust all coverage from any Joint Powers Authority as a condition for the insurer to assume any defense or indemnity obligations of its own. *Orange County Water Dist. v Association of Cal. Water Auth.* (1997) 54 CA4th 772, 63 CR2d 182.

PRACTICE TIP: Some additional insured endorsements make themselves secondary or "excess" to any other primary insurance held by the holder of the additional insured certificate. Because pooled coverage is not insurance, the carrier should be obligated to immediately pick up the tender because no primary "insurance" exists.

© The Regents of the University of California

§7.264 e. Examples of Pool Types

Some pools limit their membership to a defined geographic area or commonality of interest. Typical of this type of pool is the Redwood Empire Municipal Insurance Fund (REMIF) and the Municipal Pooling Authority (MPA) of Northern California (formerly, Contra Costa County Municipal Risk Management Insurance Authority). Other pools have a regional bent but may also solicit membership statewide, such as Association of Bay Area Governments, Public Entity Risk Management Authority, and Independent Cities Risk Management Authority. At least one major statewide pool exists, the California Joint Powers Risk Management Authority (CJPRMA), with over 75 members.

© The Regents of the University of California

§7.265 f. Professional Organizations

At least two major professional organizations exist for public sector risk managers and others involved in public liability insurance issues. The Public Risk and Insurance Management Association (PRIMA) is a national organization headquartered in Washington, D.C. It also has a California-affiliated organization. A statewide organization is the Public Agency Risk Managers Association (PARMA) (see www.parma.com).

© The Regents of the University of California

C. Other Insurance Issues

§7.266 1. Practice Resources

Other issues relating to insurance, including the classification of coverage types, how insurance companies are rated for acceptability, and the meaning of insurance "certificates" and "endorsements," are discussed in §§7.266-7.284. Two excellent practice resources that discuss all these issues in more detail are the Procedure Manual for Insurance Requirements in Contracts, published by the Public Risk and Insurance Management Association (available from PRIMA at 1120 "G" Street NW, Suite 400, Washington D.C. 20005), and Insurance and Risk Management for State and Local Governments, by Thomas W. Rynard, published by Matthew Bender. Matthew Bender has also published a more detailed treatment of individual issues called California Insurance Law and Practice.

© The Regents of the University of California

§7.267 2. "Occurrence" Versus "Claims Made" Policies

Third party liability policies are written on an "occurrence" basis or on a "claims made" basis. These two types of policies have subtle but important differences. Policies written to cover professionals, such as architects and engineers, are generally made on a claims made basis. Conversely, most commercial general liability policies are written on an occurrence basis. When the insurance market becomes tight, more policies tend to be written on a claims made basis. At this time, occurrence coverage for professionals is not readily available on the market or its cost may be so high as to be practically unavailable.

© The Regents of the University of California

§7.268 a. "Occurrence" Policies

A policy written on an "occurrence" basis insures incidents that occur during the policy's term, even if the claim is not made until after the policy period. An occurrence policy is generally better for a city, because its window of coverage is longer; the insured is afforded protection against third party claims for a longer period of time, and with fewer limitations on the "trigger of coverage" than would be permitted under a "claims made" policy. An occurrence can take place during multiple policy periods, for example, when slowly progressing property damage is caused by soil subsidence, dry rot, or leaching pollutants over a period of time. *Montrose Chemical Corp. v Admiral Ins. Co.* (1995) 10 C4th 645, 42 CR2d 324. When this occurs, each insurer on the risk during any of the loss is separately obligated to defend and indemnify. *Aerojet-General Corp. v Transport Indem. Co.* (1997) 17 C4th 38, 70 CR2d 118. An insurer cannot avoid its defense and indemnity obligations to its insured based on the fact that a third party claimant did not own the insured property at the time of the event. Coverage under an occurrence based policy includes property damage that occurred during the policy period; coverage is not dependent on whether a third party claimant owned the damaged property during the policy period. To require the injury to have happened to the third party claimant during the policy period would unduly transfer the occurrence based commercial general liability policy to a "claims made" policy. *Century Indemnity Co. v Hearrean* (2002) 98 CA4th 734, 120 CR2d 66. On "claims made" policies, see §§7.267, 7.269.

PRACTICE TIP: Especially in environmental claims against a city involving long-term pollution discharges, it is important not to ignore very old city first party policies going back as far back as the 1950s and 1960s. Under the *Montrose* decision, the carrier may have an obligation to defend and indemnify on a policy many years old. Old insurance policies should never be destroyed; even just having evidence of the old insurance policy may trigger coverage. *Dart Indus., Inc. v Commercial Union Ins. Co.* (2002) 28 C4th 1059, 124 CR2d 142. The other value of old policies is that they do not contain the restrictive pollution exclusions found in modern policies. See, *e.g.*, *State of Cal. v Allstate Ins. Co.* (2009) 45 C4th 1008, 90 CR3d 1. If a claim involves pollution discharge, have the risk manager conduct an extensive search for all insurance policies.

© The Regents of the University of California

§7.269 b. "Claims Made" Policies

A "claims made" policy responds only to third party claims against the insured and reported to the insurer during the policy term, irrespective of when the triggering accident happens. Thus, if the claim is not made during the policy term, that policy will not be available to respond to it. *Abifadel v Cigna Ins. Co.* (1992) 8 CA4th 145, 9 CR2d 910. Obviously, "claims made" coverage should be accepted only when "occurrence" coverage is not available. On "occurrence" policies, see §§7.267-7.268.

© The Regents of the University of California

3. "Comprehensive" Coverage

§7.270 a. In General

In 1973, the Insurance Services Office (ISO) issued a standard form "comprehensive general liability" policy that, with minor variations, most commercial insurance carriers still use. Under the 1973 form, coverage is provided for bodily injury and property damage claims. This form was expanded in 1986 with the issuance of a standard "commercial general liability" policy in two alternative forms: an "occurrence" policy and a "claims made" policy.

© The Regents of the University of California

§7.271 b. Exclusions

Typically excluded is liability arising from the operation of automobiles, aircraft, and watercraft, which are covered separately. See generally 3 California Insurance Law and Practice, chap 49 (2007) (detailed description of policy language and exclusion).

© The Regents of the University of California

§7.272 c. Owner-Controlled Insurance Programs

Local agencies may use owner-controlled or "wrap-up" insurance on construction or renovation programs that exceed $50 million, subject to certain enumerated conditions. Govt C §4420. If a wrap-up insurance policy is used on a public work that is put out to bid after January 1, 2009, certain requirements apply. See CC §2782.96.

© The Regents of the University of California

§7.273 4. Aggregate Limits

Many liability insurance policies impose aggregate limits. An aggregate limit is the total of all claims on all losses paid by the policy for that particular policy year. There are usually three types of aggregate limits: (1) a products and completed operations aggregate; (2) a personal injury and advertising aggregate; and (3) a general aggregate for all other types of losses. Any losses claimed during a policy year will reduce the aggregate limit, thus reducing the coverage available for losses incurred by the city. To protect an entity against this happening, a higher aggregate limit may be required or the policy may be written with a per-location or a per-project aggregate limit. See ISO forms CG 25 04 11 85 (per location) and CG 25 03 11 85 (per project).

© The Regents of the University of California

§7.274 5. "Broad Form" Coverage

The "broad form comprehensive general liability" endorsement includes 12 add-ons that expand the coverage of the "comprehensive general liability" coverage discussed in §§7.270-7.272. The more important of these include personal injury indemnity liability (*e.g.,* slander or wrongful eviction) incurred in the ordinary course of business; advertising injury; contractual liability (incidental promises to indemnify another party); and broad form property damage coverage, which extends coverage for property damage caused by subcontractors of the insured.

© The Regents of the University of California

6. "Commercial General Liability" Coverage

§7.275 a. Scope of Coverage

The "comprehensive" and "broad form" commercial coverages have been superseded by a new form in use since 1986 called the "commercial general liability" policy form. This form incorporates most of the broad form endorsements into the body of the policy and brings the policy up to date in light of intervening case law. However, some insurers still use the older forms discussed above. The commercial general liability form limits all loss payments to two aggregate limits, one for products and completed operations and one for all other loss. This form can be written on a "claims made" or "occurrence" basis.

© The Regents of the University of California

§7.276 b. Amounts

The amount of insurance to require should be based on the loss potential or risks involved in a contract, not the value of the contract. One million dollars of commercial general liability insurance is generally a minimum practical limit to require. Higher limits should be required for any hazardous activity or if an activity has a significant loss potential. The present standard form for commercial general liability coverage is CG 00 01 11 88.

© The Regents of the University of California

7. Rating Insurance Carriers

§7.277 a. Best's Rating

Typically, a contract will require insurance coverage from a carrier "acceptable to the city attorney." How is the practitioner to judge insurance companies? A.M. Best & Company is widely used as a standard for measurement of insurer acceptability. The firm uses a two-part ranking, which is separated by a colon. The first portion is Best's assessment of the quality of the overall management, while the second is expressed as a Roman numeral up to XV, which indicates size by policyholder's surplus. The largest, XV, indicates a surplus of at least $200 million. A common measure of acceptability is a Best's rating of at least A:VII. Copies of the A.M. Best & Company report can often be found in the reference sections of public libraries.

© The Regents of the University of California

§7.278 b. Insurance Company Licensing

The State of California "admits" and "licenses" insurance companies. This issue is particularly important with admitted sureties under public contracts. See CCP §995.311. This process provides a measure of comfort because pooled state funds are available to back losses for admitted insurers that go bankrupt. See Ins C §§1063-1063.17. If an insurance company proposed for providing coverage is unfamiliar, it is prudent to call the State Department of Insurance to check on the status of the company in California. Its consumer hotline number is (800) 927-4357.

© The Regents of the University of California

8. Additional Insured Endorsements

§7.279 a. Insurance Policy as Contract

An insurance policy is the financial guarantee of a risk transfer and financially supports the hold harmless and indemnification clauses of a contract. In order to establish a contractual relationship between the city and the insurance company, the insurance policy must be endorsed to add the city as an "additional insured" party. Standard contract language should require that the city be added to the insurance policy by an endorsement naming the city as an "additional insured" to all liability policies except workers' compensation and professional liability policies.

© The Regents of the University of California

§7.280 b. Reasons for Additional Insured Status

The primary reasons for requiring additional insured status on a liability policy are:

- It reinforces risk transfers otherwise accomplished through hold harmless agreements that could be invalidated by the courts or statute;
- It gives indemnitees (cities) direct rights under the other party's insurance, particularly with respect to defense coverage;
- It may prohibit the indemnitor's insurer from subrogating against the indemnitee when a loss is caused by the indemnitee's acts or omissions; and
- It may provide the indemnitee with personal injury coverage.

PRACTICE TIP: Contracts requiring insurance should state that the city should either be "described as an additional insured" or be placed in the policy proffered as an "additional named insured." Various opinions are voiced when discussing whether to require an agency to be an "additional insured" or "additional named insured" on policies provided by third parties to protect the city. The better practice appears to be to have the city as an additional named insured on the policy, in order to afford the city all of the benefits to which the party with whom it contracts, *i.e.,* the named insured, is entitled under the named insured's coverage. Otherwise, the city's coverage rights may be restricted. Further, the contract and policy should provide notice to the city in the case of default in payment of insurance premiums by the party contracting with the city. Finally, insurers offer different types of additional insured endorsements and typically will try to provide the weakest available to the city. The City Attorney should work with the risk manager in determining which additional insured form to require.

© The Regents of the University of California

§7.281 c. Endorsement Language

The endorsements should include the requirement the other party's insurance is to be primary insurance, *i.e.,* underlying the city's own coverage, which then becomes excess to the coverage of the party with whom the city contracts, provide a 30-day written notice of cancellation, and include a severability of interest clause. An authorized representative of the insurance company must sign these endorsements.

PRACTICE TIP: The provisions of Ins C §11580.04, enacted in 1996, prohibit public agencies from requiring additional insured endorsements in connection with construction contracts that indemnify for active negligence of the agency.

© The Regents of the University of California

§7.282 d. Form Endorsements

The city may develop its own standard endorsement form ensuring that the above requirements are met, or it may accept the Insurance Services Office (ISO)'s endorsement forms. The two most commonly used ISO endorsement forms are the Owners, Lessees or Contractors Form A (CG 20 09) and Form B (CG 20 10). Form B is the endorsement that is intended for use with the 1986 and 1988 commercial general liability policies that include contractual liability insurance. When Form B is used, the coverage provided will more closely correspond to the liabilities transferred in the intermediate and broad form hold harmless clauses.

© The Regents of the University of California

§7.283 e. Further Reference

The Additional Insured Book (International Risk Management Institute, Inc., 5th ed 2004) provides a handy reference for endorsements.

© The Regents of the University of California

§7.284 9. Certificates of Insurance

Most insurance carriers use the Acord form certificate of insurance to standardize the summary of the underlying policy. However, be aware that if the certificate does not accurately reflect the policy, the insurer is not required to conform the policy to the certificate. Ins C §384. Also note the caution expressed in §7.255 (relating to exclusions), pointing out that the certificate is not required to list policy exclusions. The certificate itself does not alter or amend the insurance policy; it is merely a summary of coverage provided and the limits that apply. Because the certificate does not alter, change, or modify the insurance policy, the certificate itself does not add an entity as an additional insured or as an additional named insured.

PRACTICE TIP: Some insurers permit their insureds to add parties with whom they contract as additional insureds merely by the issuance of a certificate. Typically, the right of a named insured to include parties with whom it contracts as additional insureds solely by issuance of a certificate is found in an "Additional Insured" endorsement on the policy itself. However, to ensure the city is covered as an additional insured or additional named insured under the policy, a separate, express "Additional Insured" endorsement on the policy should be obtained.

© The Regents of the University of California

D. Specific Insurance Types

§7.285 1. Automobiles

"Business automobile liability insurance" covers claims arising out of the insured's use of vehicles. The scope of coverage is indicated by a symbol used in the policy. Generally, Code 1 should be required because it covers any automobile, the broadest coverage. Other codes relate to other vehicles that are owned by the insured, specifically described vehicles, hired autos, or non-owned autos. The most common automobile policy form is designated Auto-CA0001 (12 90).

PRACTICE TIP: Automobile coverage should be waived only if the insured's work clearly does not involve the use of automobiles. The auto policy should include contractual liability coverage, which mirrors commercial general liability coverage, but addresses contractual risk transfers arising from auto accidents.

© The Regents of the University of California

§7.286 2. Workers' Compensation

This coverage pertains to injuries or illness sustained by the insured's employees in the course and scope of employment. It also insures against common law claims of injured employees that are made in lieu of or in addition to workers' compensation claims. See discussion in §§4.350-4.399 (relating to workers' compensation).

© The Regents of the University of California

§7.287 3. Bodily Injury

Bodily injury coverage insures against liability for injuries of a physical nature; it includes physical injury, sickness, or disease, including death resulting therefrom. It may also include "emotional distress," provided that the "emotional distress" is manifested as a physical injury.

© The Regents of the University of California

§7.288 4. Personal Injury

Personal injury coverage (which is incorporated into the standard 1986 form) insures against liability for injuries of a non-physical nature, such as false arrest, malicious prosecution, invasion of privacy, defamation, or wrongful eviction.

© The Regents of the University of California

§7.289 5. Products and Completed Operations

Products and completed operations coverage insures against loss resulting from a product that is sold, handled, or distributed by a supplier, or faulty work completed by a contractor. Typically, this coverage is included in comprehensive and commercial general policies.

© The Regents of the University of California

§7.290 6. Property

Property insurance pertains to loss from insured risks (such as fire) and should be required when the city has a financial interest in property leased to others.

© The Regents of the University of California

§7.291 7. Umbrella or Excess Policies

Umbrella or excess liability policies may raise the limits of all primary or underlying insurance policies and provide a way for a contractor to provide sufficient limits to meet the city's requirements. Additional insured endorsements are not typically used because most umbrella policy forms include provisions which automatically include the additional insured on the underlying insurance policy. However, an excess insurer is not obligated to provide a defense when the insured fails to exhaust the self-insured retention on all primary liability policies, even one for a successive coverage year. *Padilla Constr. Co. v Transp. Ins. Co.* (2007) 150 CA4th 984, 58 CR3d 807. In addition, an excess liability insurer is not obligated to indemnify its insured for a settlement amount negotiated within the context of a lawsuit, because the settlement amount, which was not entered as part of a stipulated judgment, was not "damage" triggering coverage under the policy. *Aerojet-General Corp. v Commercial Union Ins. Co.* (2007) 155 CA4th 132, 65 CR3d 803.

PRACTICE TIP: When settling a lawsuit under *Aerojet-General,* consider entering into a stipulated judgment to protect claims against insurers for defense and indemnification obligations.

© The Regents of the University of California

§7.292 8. Professional Liability Insurance

Professional liability insurance protects against losses occurring when a professional fails to practice to the standards customary to that profession. This coverage is often excluded in a general liability policy. Professional liability policies are usually written on a "claims made" basis.

© The Regents of the University of California

§7.293 9. Public Officials Errors and Omissions Coverage

Public officials errors and omissions coverage is a type of liability insurance intended to protect public officials, *e.g.,* city council members, city officers, or city employees, from claims of third parties for ordinary acts of negligence committed by them in the performance of their duties, such as malfeasance, misfeasance, and nonfeasance.

PRACTICE TIP: With leases, the city may want to consider obtaining its own property insurance, rather than relying on a lessee to do so. This has the advantage of ensuring that adequate coverage is obtained and premiums are paid. When the lessee provides coverage, either in the place of or in addition to the agency's insurance, the agency should be named as a loss payee. Generally, insuring the building to at least 90 percent of its replacement cost is good practice.

© The Regents of the University of California

§7.294 E. Submitting and Enforcing Insurance Claims

On the receipt of a third party claim against the city that may arise from work performed by others under a contract, the city should immediately tender the claim to both the contractor and its insurer, demanding a defense and indemnification both as an additional insured and under the indemnification provision of the contract. The public entity must include provisions in its public works contract for timely notification of the contractor of the receipt of any third party claim relating to the contract. Pub Cont C §9201.

It is helpful to recognize that unlike a surety, the insurer under an additional insured endorsement owes a duty of good faith and fair dealing to its additionally insured city and failure to agree to defend and indemnify can subject the carrier to bad faith liability. *Hartford Cas. Ins. Co. v Travelers Indem. Co.* (2003) 110 CA4th 710, 2 CR3d 18; *Acceptance Ins. Co. v Syufy Enters.* (1999) 69 CA4th 321, 81 CR2d 557.

If a carrier continues to refuse to defend, the city's options include filing an action for declaratory relief and bad faith against the insurer. If the contractor also fails to accept the contractual defense and indemnity obligation, declaratory relief is also available.

PRACTICE TIP: Insurance carriers are traditionally reluctant to accept additional insured tenders unless the circumstances are absolutely clear. It often takes time, prodding, and sometimes threats of bad faith for them to finally recognize their obligations. Be persistent. It can save the city a lot of money in defense costs.

© The Regents of the University of California

§7.295 F. Additional Handbook References

For additional material related to insurance in this handbook, see the following:

- California workers' compensation law (see §§4.350-4.399);
- bonds and insurance (see §§7.95-7.105);
- general contract provisions and issues, insurance (see §§7.209-7.216); and
- hazardous material (liability under the Resource Conservation and Recovery Act (RCRA) (42 USC §§6901-6992k) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund") (42 USC §§9601-9675)) (see §§11.237-11.255).

© The Regents of the University of California

V. INDEMNITY AGREEMENTS AND BONDS

A. Introduction to Indemnification

§7.296 1. Nature of Indemnity

In a hold harmless or indemnity agreement, one party (the indemnitor) assumes the other party's (the indemnitee's) legal liability. This agreement operates independently from the indemnitor's insurance. A public entity enters into a contract with hold harmless or indemnity provisions when the public entity intends to indemnify a party to the contract or the public entity intends to be indemnified. Because most city attorneys find themselves dealing more with the latter, the discussion in §§7.296-7.320 will focus in this area.

© The Regents of the University of California

§7.297 2. Right to Seek Indemnification

As to the right to seek indemnification, the general law indicates that public entities not only possess powers expressly granted but also possess implied powers as are necessary or reasonably appropriate to the accomplishment of their express powers. The demand by the public entity for an indemnity agreement to hold the entity harmless has been held to be within the scope of the public entity's implied power and is not a contract of adhesion. *County of San Joaquin v Stockton Swim Club* (1974) 42 CA3d 968, 117 CR 300. See also 60 Ops Cal Atty Gen 59 (1977). Indemnity can arise either by an express indemnity agreement, by an implied contractual indemnity, or through the doctrine of equitable indemnity. Typically, the public entity will demand an express indemnity agreement as part of a contract.

© The Regents of the University of California

B. Express Indemnity Agreements

§7.298 1. Contract Principles Apply

Because an express indemnity agreement is considered a contractual agreement, contract law prevails in the interpretation of the indemnity agreement. See CC §2778; *Crawford v Weather Shield Mfg., Inc.* (2008) 44 C4th 541, 79 CR3d 721; see also *Hernandez v Badger Constr. Equipment Co.* (1994) 28 CA4th 1791, 1818, 34 CR2d 732. If an injury to the indemnitor's employee is involved, the indemnity agreement must be fully executed before the injury in order to trigger coverage. *Nielsen Constr. Co. v International Iron Products* (1993) 18 CA4th 863, 22 CR2d 497. The question whether an indemnity agreement covers a given case is based on the language and contents of the contract. *Crawford v Weather Shield Mfg., Inc., supra*. As with all contracts, ambiguities are construed against the drafter and, unless appropriate language is used, courts will interpret the language to provide general rather than strict indemnity coverage.

PRACTICE TIP: In thinking through the elements to consider in drafting an indemnity agreement, the city attorney may be assisted by the questions posed in §§7.313-7.320 relative to toxic and hazardous waste indemnity agreements.

© The Regents of the University of California

2. Negligence

§7.299 a. General Principles

The courts have generally allowed the indemnitee to indemnify itself from acts of negligence with several important exceptions. Under a general indemnity provision only passive negligence, not active negligence, will be covered.

© The Regents of the University of California

§7.300 b. Statutory Limitations

Construction contracts with provisions seeking to indemnify for sole negligence, willful misconduct, or the public entity's own active negligence are deemed void. CC §2782(a)-(b). See also Ins C §11580.04 (prohibiting agency from requiring insurance endorsement indemnifying for agency's active negligence relating to construction contract). The provisions of CC §2784.5 also prohibit indemnity for the willful misconduct or sole negligence of another in trucking or cartage contracts, except when the promisor directly supervises or controls the party at fault. For all design professional services contracts and amendments entered into on or after January 1, 2007, a public entity's right to express indemnification by the design professional will be strictly limited to claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. CC §2782.8. "Public agency" is defined in the statute to specifically exclude the State of California. CC §2782.8. "Design professional" is defined to include licensed architects, landscape architects, professional land surveyors, and registered professional engineers. CC §2782.8.

PRACTICE TIP 1: The exact scope and effect of CC §2782.8 has yet to be tested in court. Areas of concern include whether a finding of negligence, recklessness, or willful misconduct must be made before the duty to indemnify will arise; whether the duty to indemnify includes the duty to defend; and whether the exclusion of the State of California can be seen as an acknowledgement that the statute addresses only local concerns and not matters of statewide concern, thus exempting charter cities from compliance if the statute conflicts with a city charter or municipal enactment.

PRACTICE TIP 2: When drafting design contracts, the city attorney may want to consider including a clause making obligations such as the duty to prepare design documents free from defects a contract requirement. This may help to bridge the gap between the designer's limited obligation to indemnify and claims brought against the owner for breach of contract or breach of the warranty of the correctness of the plans and specifications, when these claims may not rise to the level of professional negligence against the designer.

© The Regents of the University of California

§7.301 c. Passive Negligence

In instances when either a construction contract or a general indemnity clause in a non-construction contract exists, a public entity will only be indemnified for its passive negligence. A determination of the negligence as being active or passive revolves primarily around the facts and circumstances of the particular case. *Rossmoor Sanitation, Inc. v Pylon, Inc.* (1975) 13 C3d 622, 119 CR 449.

The distinction between whether negligence is active or passive is sometimes fine. In one instance, an indemnitee's negligence in its failure to discover the dangerous condition of its premises was determined to be merely nonfeasance of a legal duty and, as such, passive negligence. *Markley v Beagle* (1967) 66 C2d 951, 59 CR 809. However, in somewhat similar circumstances, the fact that an indemnitee had actual knowledge of the dangerous condition was determinative in classifying the indemnitee's negligence as active, thereby creating no right to indemnification under the general indemnity agreement. *Jiminez v Pacific Western Constr. Co.* (1986) 185 CA3d 102, 229 CR 575 (general contractor held to be actively negligent when its workers knew of dangerous condition of trench before the collapse of trench wall injuring and killing workers).

© The Regents of the University of California

§7.302 d. Active Negligence

Although special statutes apply to construction contracts and design professional service contracts, it is still necessary to understand the difference between active and passive negligence. In the non-construction context, the language of a general indemnification agreement excludes indemnification for the public entity's active negligence. Although the character of an indemnitee's negligence is ordinarily a question of fact for the jury, when its conduct has negligently created a condition that proximately causes injury, the question of active versus passive negligence can be decided as a matter of law. *Morgan v Stubblefield* (1972) 6 C3d 606, 100 CR 1. But see *Morton Thiokol, Inc. v Metal Bldg. Alteration Co.* (1987) 193 CA3d 1025, 238 CR 722 (noting that the intent of the parties should control).

PRACTICE TIP: City attorneys may wish to forego completely using a general indemnity provision in favor of a much more explicit clause providing indemnification for all types of negligence and/or strict liability. Case law appears to support the notion of even broader indemnification language to address mixed claims, when both the public entity and the indemnitor are negligent. In other words, it may be possible for the public entity to obtain indemnity for all claims save those arising from the sole negligence of the public entity. See *John E. Branagh & Sons v Witcosky* (1966) 242 CA2d 835, 51 CR 844; *C.I. Eng'rs & Constructors, Inc. v Johnson & Turner Painting Co.* (1983) 140 CA3d 1011, 189 CR 824 (indemnification provided to contractor when claims arising from negligence of both the subcontractor's employee and the contractor).

© The Regents of the University of California

§7.303 (1) General Versus Specific Indemnification Clauses

In non-construction or design services contracts, there are essentially two alternatives: either (1) rely on a general indemnity clause in the contract, or (2) draft an all-inclusive indemnification provision that specifically and unequivocally provides for indemnification for all acts caused by active negligence, passive negligence, and/or acts for which the public entity would be held strictly liable. If a party seeks to be indemnified for its own active negligence, or regardless of the indemnitor's fault, the contractual language must be particularly clear and explicit, and will be construed strictly against the indemnitee. *Prince v Pacific Gas & Elec. Co.* (2009) 45 C4th 1151, 1158, 90 CR3d 732.

© The Regents of the University of California

§7.304 (2) General Indemnification Clauses and Active Negligence

If a general indemnification provision is used, there will be many circumstances under which active negligence may be alleged, resulting in a lack of a duty of indemnification to the indemnitee. Active negligence includes when the indemnitee participates in some manner of conduct or omission that caused the injury, beyond the mere failure to perform a duty imposed by law. See *Morgan v Stubblefield* (1972) 6 C3d 606, 100 CR 1. Active negligence also includes instances when the indemnitee knew or acquiesced in the negligent conduct (see *King v Timber Structures, Inc.* (1966) 240 CA2d 178, 49 CR 414) or failed to perform some duty assumed by contract (see *MacDonald & Kruse, Inc. v San Jose Steel Co.* (1972) 29 C3d 413, 105 CR 725). See generally California Forms of Pleading and Practice, *Indemnity* §300.02[5] (Matthew Bender).

© The Regents of the University of California

§7.305 e. Accrual of Right to Indemnification

The right to indemnity under an express contract that agrees to hold the indemnitee harmless from a liability accrues when the indemnitee incurs such a liability. CC §2778(1). In contract, an agreement to hold the indemnitee harmless from a loss accrues only once the indemnitee pays on that loss. CC §2778(2).

PRACTICE TIP: From a practical standpoint, any indemnification disputes relating to express indemnity provisions should be addressed immediately after they arise in order to avoid a determination the indemnitor was in some way prejudiced by the lack of notice of the claim and/or not given an opportunity to defend the action. See *Eva v Andersen* (1913) 166 C 420, 137 P 16. Failure to give the indemnitor notice of a lawsuit brought against the indemnitee does not go to the indemnitee's right of action against the indemnitor, but it does change the burden of proof and imposes on the indemnitee the necessity of again litigating and establishing all actionable facts. See CC §2778(6). When drafting indemnification provisions, the right to indemnity should be stated so as to be triggered by either the occurrence of the liability, which usually occurs before the actual loss, or the loss.

© The Regents of the University of California

§7.306 f. Right to Defense Costs

Absent explicit language to the contrary, an express indemnification clause implies the right to a defense of the indemnitee, at the cost of the indemnitor. CC §2778(4). Whether the indemnitor is obligated to reimburse the indemnitee for its defense costs depends on the language of the express indemnification clause, supplemented by CC §2778(4), not on principles of insurance law that require the tendering of the indemnitee's defense. Nothing in CC §2778 requires the indemnitee to tender the defense. *City of Watsonville v Corrigan* (2007) 149 CA4th 1542, 58 CR3d 458. The duty to defend arises when there is a potential for indemnity and may exist even when coverage is in doubt and ultimately does not develop, whereas the duty to indemnify arises when an insured's liability is established. *Armstrong World Indus., Inc. v Aetna Cas. & Surety Co.* (1996) 45 CA4th 1, 52 CR2d 690.

Even if there is a dispute as to whether the indemnitee's negligence caused the loss, the actual determination of the defense duty does not wait until the end of the lawsuit because the duty to defend arises immediately when the lawsuit is brought against the indemnitee. *Crawford v Weather Shield Mfg., Inc.* (2008) 44 C4th 541, 79 CR3d 721. *Crawford* emphasizes the need for the defense language to clearly state the indemnitee's desire for an immediate defense although liability is not yet determined. 44 C4th at 557. The public entity may save having to expend funds to pay attorneys fees and costs on the indemnified matter by tendering the defense and indemnification of the claim to the indemnitor as soon as possible. Moreover, fees incurred in pursuing the indemnity claim will not be recoverable unless the contract so provides. *Otis Elevator Co. v Toda Constr. of Cal.* (1994) 27 CA4th 559, 32 CR2d 404. The filing of an original complaint, or a cross complaint in an existing action, against the indemnitor for a declaration of rights and duties, is acceptable. See *Roylance v Doelger* (1962) 57 C2d 255, 19 CR 7.

If the indemnitor refuses to defend and indemnify, the indemnitee may later sue for recovery of defense costs and sums paid in settlement; depending on the language of the agreement, the indemnitee need not prove that the indemnitor's acts were negligent or the predominate predominant cause of the loss. *Continental Heller Corp. v Amtech Mechanical Servs., Inc.* (1997) 53 CA4th 500, 61 CR2d 668.

© The Regents of the University of California

§7.307 g. Statute of Limitations for Enforcing Indemnity Agreement

The statute of limitations for filing an action arising out of a written indemnity agreement is 4 years. CCP §337(1). Also relevant whenever an action relating to a written indemnity agreement arises are the claim presentation requirements discussed in §§13.42-13.85. The claim presentation requirements can significantly affect when action must be taken.

© The Regents of the University of California

3. Intentional Acts

§7.308 a. Availability of Indemnification

The provisions of CC §1668 provide that all contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for his or her own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law. The provisions of CC §1668 are not applicable to indemnity agreements. There is a public policy in favor of providing additional assurance through an indemnification agreement that the loss to the victim will be compensated. *State Farm Fire & Cas. Co. v Eddy* (1990) 218 CA3d 958, 267 CR 379 (insurance contract providing indemnity for injury resulting from transmission of venereal disease was enforceable under CC §1668).

© The Regents of the University of California

§7.309 b. Future Versus Past Acts

Indemnity agreements are subject to CC §§2773 and 2774. Those sections make a distinction between unlawful acts already committed and unlawful acts in the future. See *State Farm Fire & Cas. Co. v Eddy* (1990) 218 CA3d 958, 267 CR 379 (concerning the requirement of actual knowledge for CC §2773 to void indemnification for future acts). Indemnity for an act that is not a felony and has already been done is valid, even though the act was known to be wrongful at the time the indemnification provision was entered into. See CC §2774. See also *Lemat Corp. v American Basketball Ass'n* (1975) 51 C3d 267, 124 CR 388 (upholding an agreement by the American Basketball Association to indemnify member team for any liability arising out of team's efforts to sign basketball star Rick Barry from the National Basketball Association).

PRACTICE TIP: From a practical standpoint, it is unlikely that a public entity would be willing to indemnify another or be indemnified for an intentional act already committed. In most situations, an indemnification provision relating to intentional acts would only be useful to the public entity if it afforded broad coverage for the public entity for such acts in the future. Such a provision, however, is void under CC §2773; courts say such indemnification encourages illegal acts. See *Lemat Corp. v American Basketball Ass'n* (1975) 51 C3d 267, 124 CR 388.

© The Regents of the University of California

C. Implied Indemnity

§7.310 1. When Applicable

An implied right of indemnity may arise in a contract situation when it is determined that an express contractual indemnity is by its terms inapplicable to the factual circumstances but other contractual language brings indemnity into play. See *Bay Dev. Ltd. v Superior Court* (1990) 50 C3d 1012, 269 CR 720; *E.L. White, Inc. v City of Huntington Beach* (1978) 21 C3d 497, 146 CR 614.

© The Regents of the University of California

§7.311 2. Source of Obligation

In essence, implied contractual indemnity is a form of equitable indemnity. It rests on the principle that when one party agrees to do work for another, it is implied in the contract between the parties that the performing party has an obligation to do the work properly. See California Forms of Pleading and Practice, *Indemnity* §300.61[5] (Matthew Bender). As such, a good faith settlement by the indemnitor with the plaintiff will defeat the implied contractual indemnity claim just as it would any other equitable indemnity agreement. See *Bay Dev. Ltd. v Superior Court* (1990) 50 C3d 1012, 269 CR 720; see also CCP §877.6 (determination of good faith settlement with one or more joint tortfeasors or co-obligators).

PRACTICE TIP: The holding in *Bay Dev. Ltd. v Superior Court* (1990) 50 C3d 1012, 269 CR 720, suggests that a good faith settlement may also defeat any other claim that seeks the same relief as an implied indemnity claim. It is possible, therefore, that the only claim by a non-settling co-defendant that may survive a good faith settlement is the express indemnity provision. That being the case, any limitations on the types of losses that may be recoverable under a right of express indemnity need to be carefully considered, as those limitations may ultimately prevent recovery by the public agency in the event that it is the sole defendant remaining after a good faith settlement and dismissal by the other co-defendants.

PRACTICE TIP 2: The city attorney should not rely on a determination of implied contractual indemnity if he or she is able to place within the contract express indemnification provisions in favor of the public entity. If, however, such an express recitation of the right to indemnification is not in the contract, the city attorney should tender the defense and indemnification of the claim to the wrongdoer on the basis of implied contractual indemnity, particularly if the claim arises out of the failure of the wrongdoer to perform contracted-for services. The city attorney may want to match the city's documents and facts to the questions posed in the toxics context in §§7.315-7.320.

PRACTICE TIP 3: The city attorney should take care in drafting contracts, particularly those in which the public entity agrees to take responsibility for the maintenance of a certain location or perform a particular service. Parties to the contract may use that same contract to assert implied contractual indemnity against the public entity. *E.L. White, Inc. v City of Huntington Beach* (1978) 21 C3d 497, 146 CR 614.

© The Regents of the University of California

§7.312 D. Equitable Indemnity

The equitable indemnity doctrine as it relates to indemnity agreements is enveloped within the definition of implied contractual indemnity. Therefore, there will be no independent discussion in this regard. See 5 Levy, California Torts, ch 74 (Matthew Bender, 2005); 6 Witkin, Summary of California Law, *Torts* §§1357-1370 (10th ed 2005). See the claims presentation requirements discussed in §§13.42-13.85 relevant to the issue of equitable indemnity.

© The Regents of the University of California

E. Toxic and Hazardous Wastes

§7.313 1. Statutory Authority

The law covering indemnification agreements relating to toxic and hazardous wastes relies primarily on one statute. See CC §2782. This statute states that construction contracts that purport to indemnify public entities from their sole negligence, willful misconduct, or active negligence are void and unenforceable. A special exception exists for contracts with engineers and geologists whose services are in connection with hazardous materials evaluation and remedial actions. CC §2782.6. This exemption does not apply to public entities. CC §2782.6(f). Therefore, in contracting for toxic and hazardous wastes services, public entities will only be able to request indemnification for their own passive negligence. This makes it important to have the entity named in the contractor's insurance policy, if possible. Any contract clause that purports to indemnify public agencies by design professionals is unenforceable, except for claims arising from the design professional's negligence, recklessness, or willful misconduct. CC §2782.8. Cities should pay attention to the potential impact of this new legislation.

© The Regents of the University of California

§7.314 2. Questions to Consider

Regardless of the legal limits on seeking indemnification for toxic and hazardous wastes, the city attorney, when dealing with such concerns, should be particularly careful not to expose the public entity to indemnification for such liability. Claims involving toxic and hazardous wastes usually involve substantial costs. The issues discussed in §§7.315-7.320 should be addressed in indemnity agreements covering toxic and hazardous wastes.

© The Regents of the University of California

§7.315 a. Covered Parties

Which party is providing indemnity? The indemnitor is not automatically obligated to indemnify the public entity or any other third party; the obligation is only to the parties within the indemnification contract.

© The Regents of the University of California

§7.316 b. Identity of Beneficiary

Which party is the beneficiary of the indemnity? The public entity must be certain that, in addition to itself, all employees, officers, and/or directors are covered, as well as all agents, contractors, or subcontractors hired by the indemnitee. All subcontractors hired by the original indemnitor should be asked also to sign the indemnity provision of the contract.

© The Regents of the University of California

§7.317 c. Specific Acts Covered

What specific acts are intended to be covered? When a public entity enters into an indemnity agreement with a third party, such as a hazardous waste cleanup crew, it should ensure that it is only indemnifying for the claims it intended versus such other claims as nonpayment of wages by the indemnitee.

© The Regents of the University of California

§7.318 d. Types of Acts Covered

What types of acts are covered? In a construction contract, indemnity provisions attempting to cover active negligence or intentional acts are void.

© The Regents of the University of California

§7.319 e. Impact of Insurance

Many public entities maintain self-insured coverage only up to a certain point. Consequently, if the indemnitor becomes judgment-proof or insolvent, the public entity should have a backup plan in which its own insurance coverage would be triggered.

© The Regents of the University of California

§7.320 f. Control of Defense and Settlement

Once a public entity tenders defense and indemnification of a claim to the indemnitor, it should continue to actively supervise the claim in order to ensure that the defense is being handled properly; ensure that the attorneys for the indemnitor do not attempt to direct the investigation so as to focus on characterizing the public entity's wrongful acts, if any, as active or intentional and therefore not indemnified; and to prevent the settling of a claim against the public entity when such settlement would have adverse public policy consequences.

© The Regents of the University of California

§7.321 F. Further Reference

For additional material related to indemnity agreements and bonds in this handbook, see the following:

- General contract provisions and issues: indemnification (§§7.217-7.225);
- Public property: leases of city property (§§8.115-8.118);
- Bonds and insurance (§§7.95-7.105);
- Hazardous material (liability under the Resource Conservation and Recovery Act (RCRA) (42 USC §§6901-6992k) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund") (42 USC §§9601-9675)) (§§11.237-11.255); and
- Affirmative action (§§4.6-4.11)

.See also Glossary of Insurance and Risk Management Terms (International Risk Management Institute, Inc., 9th ed 2004) (www.irmi.com)); The Additional Insured Book (International Risk Management Institute, Inc., 5th ed 2004) (www.irmi.com)); and Drafting Business Contracts: Principles, Techniques & Forms, chap 11 (Cal CEB 1994).

© The Regents of the University of California

8

Public Property

I. PROPERTY ACQUISITION
A. Legal Authority §8.1
B. Common Prerequisites for Acquisition by Purchase or by Eminent Domain §8.2
1. Compliance With Statutory and Regulatory Guidelines §8.3
2. Conformity With General Plan §8.4
3. Preliminary Work §8.5
4. Environmental Review Under CEQA §8.6
5. Title Search §8.7
6. Appraisal §8.8
7. Notice of Intent to Appraise §8.9
8. Environmental (Contamination) Assessment §8.10
a. Purpose of Assessment §8.11
b. Further Assessment §8.12
c. Consequences of Failing to Perform Assessment §8.13
9. Relocation Assistance §8.14
a. What Triggers Relocation Obligations? §8.15
b. Advisory Assistance §8.16
(1) Role of Relocation Representative §8.17
(2) Representative's Understanding of Displacee's Needs §8.18
(3) Representative's Availability §8.19
c. Relocation Plans §8.20
d. Comparable Replacement/Last Resort Housing §8.21
e. Relocation Payments §8.22
f. Duplication of Payments §8.23
g. Claim Procedure §8.24
h. Grievance Procedure §8.25
10. Acquisition Offer
a. Offer When Eminent Domain Contemplated §8.26
(1) Statement of Basis for Offer §8.27
(2) Statutory Exceptions §8.28
(3) Lessees §8.29
b. Offer When Eminent Domain Not Contemplated (Negotiated Purchase) §8.30
11. Acquisition by Eminent Domain
a. Limitations on Use of Eminent Domain Under Homeowners and Private Property Protection Act §8.31
b. Compliance With CEQA §8.32
c. Setting Just Compensation §8.33
(1) Disclosure §8.34
(2) Extent of Compensation §8.35
d. Precondemnation Offer §8.36
(1) Conditional Offer §8.37
(2) Specific Contents of Written Statement Accompanying Offer §8.38
e. Relocation Information to Occupants §8.39
f. Precondemnation Negotiations §8.40
g. Notice of Hearing on Proposed Adoption of Resolution of Necessity §8.41
h. Hearing on Proposed Adoption of Resolution of Necessity §8.42
i. Adoption of the Resolution of Necessity §8.43
j. Findings §8.44
k. Eminent Domain Complaint and Lis Pendens §8.45
l. Deposit of Probable Compensation §8.46
(1) Deposit Prerequisite to Order for Possession §8.47
(2) Deposit Available for Withdrawal by Defendants §8.48
(3) Notice of Application for Withdrawal §8.49
(4) Withdrawal Waives All Defenses Except Additional Compensation §8.50
(5) Interest on Award §8.51
(6) Interest on Deposit §8.52
m. Service §8.53

n. Obtaining Actual Possession §8.54
o. Prosecution of Eminent Domain Action
(1) Alternative Dispute Resolution §8.55
(2) Preliminary Court Proceedings §8.56
(3) Trial of Legal Issues §8.57
(4) Appraisal Exchange §8.58
(5) Final Pretrial Conference §8.59
(6) Mandatory Settlement Conference; Statutory Settlement Offers §8.60
(7) Motions Affecting Compensation §8.61
(8) Valuation Trial §8.62
(9) Judgment; Payment of Judgment §8.63
(10) Final Order of Condemnation §8.64
12. Acquisition of Real Property by Gift, Bequest, or Offer of Dedication §8.65
a. Terms of Gift, Bequest, or Devise §8.66
b. Restrictions §8.67
c. Tax Consequences §8.68
13. Adverse Possession and Easements by Prescription and Implied Dedication
a. Adverse Possession §8.69
b. Easements by Prescription §8.70
c. Easements by Implied Dedication §8.71
(1) Statutory Constraint §8.72
(2) When *Gion* Applies §8.73
(3) Implied Dedication With Consent §8.74
14. Effect of Debt Limitation on Property Acquisition §8.75
15. Acceptance of Interests in Real Property §8.76
16. Acquisitions of Personal Property §8.77
17. Acquisition by Other Means
a. Other Common Law and Statutory Easements §8.78
b. Lost and Unclaimed Property §8.79

II. PROPERTY DISPOSITION
A. Real Property §8.80
1. Optional Procedure
a. Findings §8.81
b. Content of Resolution of Intent §8.82
c. Publication §8.83
d. Overriding Protests §8.84
2. Surplus Property
a. Inventory §8.85
b. Offer Required §8.86
(1) Housing Providers §8.87
(2) Sale and Reverter §8.88
(3) Park and Recreation; Open Space Property §8.89
(4) Enterprise Zone Property §8.90
(5) School Property §8.91
(6) Infill Opportunity or Transit Village Property §8.92
c. Notification §8.93
d. Good Faith Negotiations §8.94
B. Parkland §8.95
1. Dedicated Lands
a. Original Dedications §8.96
b. Parks Dedicated by City §8.97
c. Private Dedications §8.98
2. Parks Not Used for Park Purposes §8.99
3. Parks Acquired From Counties §8.100
4. Intergovernmental Transfers §8.101
C. Personal Property §8.102
D. Streets and Highways Owned in Fee §8.103
E. Restrictions Applicable to Disposal of Both Real and Personal Property
1. Government Grant Funds §8.104
a. Federal Community Development Block Grant (CDBG) §8.105
b. California Park and Recreational Facilities Act of 1984 §8.106
2. Redevelopment §8.107
a. Hearing §8.108
b. Report §8.109

c. Required Provisions §8.110
3. Donations
a. For Public Purpose §8.111
b. Other Permissible Donations Under State Law §8.112
4. Conflicts of Interest §8.113
F. Adverse Possession §8.114

III. LEASES OF CITY PROPERTY
A. General Leasing Authority §8.115
B. Authority for Specific Kinds of Leases §8.116
C. Statement Concerning Taxable Interest §8.117
D. Recordation §8.118

IV. LIMITATIONS ON USE OF CITY PROPERTY
A. Obstructions and Encroachments §8.119
B. Removal of Obstructions §8.120
C. Deed Restrictions §8.121

V. STREETS AND EASEMENTS
A. Utility Relocation
1. Case Law §8.122
2. Statutory Obligation §8.123
3. Exceptions
a. Statutory §8.124
b. Property Rights §8.125
B. Streets, Highways, and Other Easement Vacations §8.126
C. Nonsummary Vacation Procedure
1. Prehearing Procedure
a. Planning Commission Role §8.127
b. Initiation of Proceedings §8.128
c. Hearing and Notice §8.129
d. Receipt of Evidence §8.130
2. Posthearing Procedure
a. Resolution Vacating Easement §8.131
b. Conditions §8.132
c. Recordation §8.133
3. Reservations
a. Future Sewers, Storm Drains, and Other Utilities §8.134
b. Future Streets §8.135
c. Existing Utilities §8.136
d. Trails §8.137
4. Effect of Vacation §8.138
a. City Owns Easement Only §8.139
b. City Owns Underlying Property §8.140
5. Agreements Not to Vacate §8.141
D. Summary Vacation Procedure §8.142
1. Circumstances in Which Summary Vacation May Occur
a. Superseded by Relocation §8.143
b. Impassability and Nonmaintenance §8.144
c. Surplus §8.145
d. Dead Ends §8.146
e. Offers of Dedication on Subdivision Maps §8.147
f. Public Service Easements §8.148
2. Procedures for Summary Vacation
a. Resolution §8.149
b. Recordation §8.150
E. Challenges to Vacation §8.151

VI. STREETS AND SIDEWALKS
A. General Regulatory Requirements §8.152
B. Vehicular Regulations
1. Preemption §8.153
2. Road Closures §8.154
a. To Implement Circulation Element §8.155

b. Selective Access §8.156
3. Parking
a. Preemption §8.157
b. Broad Delegation to Local Entities §8.158
c. Local No-Parking Regulations §8.159
d. Permitted Regulations
(1) Time Restrictions §8.160
(2) Commercial Vehicles on Residential Streets; Two- or Three-Wheeled Motor Vehicles; Vending Vehicles §8.161
(3) State Highways; Private Driveways; Off-Street Parking Facilities §8.162
(4) Street Cleaning; Preferential Parking Regulations §8.163
(5) Other Regulations §8.164
4. Trucks §8.165
a. Height Restriction for Parking §8.166
b. Routes
(1) Highway and Residential Street Restrictions §8.167
(2) Restrictions Based on Cargo §8.168
(3) Local Regulation of Transportation of Explosives §8.169
(4) Standard for Local Height, Weight, and Routing Regulations §8.170
5. Bicycles, Roller Skates, and Skateboards
a. Bicycles and Electric Carts on Sidewalks §8.171
b. Bicycle Parking; Bicycle Lanes §8.172
c. Roller Skates §8.173
d. Skateboarding and Nonmotorized Scooters §8.174
e. Motorized Scooters; Segways and Other Mobility Devices §8.175
C. Regulation of Activities on Streets and Sidewalks §8.176
1. Freedom of Speech and Assembly §8.177
2. Permitted Regulation §8.178
D. Streets and Sidewalks: Americans with Disabilities Act Requirements
1. Existing Facilities §8.179
2. New Construction and Alterations §8.180
3. *Barden v City of Sacramento* §8.181
4. Requirements and Deadlines §8.182
5. Transition Plans §8.183
6. Curb Ramps §8.184

© The Regents of the University of California

I. PROPERTY ACQUISITION

§8.1 A. Legal Authority

Cities are statutorily authorized to acquire property in any one of the following alternative ways: eminent domain, grant, purchase, lease, gift, devise, contract, "or other means." Govt C §§37350, 37350.5; CCP §1240.130. The California State Constitution and several statutes deal directly with the requirements for property acquisitions, including among others Cal Const art I, §19; the Eminent Domain Law (CCP §§1230.010-1273.050); relocation assistance statutes (Govt C §§7260-7277); the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177); and laws relating to environmental contamination.

For further discussion of topics covered by this chapter, see generally Condemnation Practice in California (3d ed Cal CEB 2005); California Land Use Practice (Cal CEB 2006); California Easements and Boundaries: Law and Litigation (Cal CEB 2008).

© The Regents of the University of California

§8.2 B. Common Prerequisites for Acquisition by Purchase or by Eminent Domain

The two most common means of acquiring real property are by negotiated agreements with owners and by eminent domain, both of which are acquisitions by purchase. Generally, the issues to be considered before acquisition by either of these means are the same. However, the procedures to be followed may be different. This chapter will first discuss the common issues and permissible requirements for negotiated purchases, and then the unique procedures of eminent domain that must be followed if purchase cannot be negotiated.

© The Regents of the University of California

§8.3 1. Compliance With Statutory and Regulatory Guidelines

Whether acquisition is by negotiated purchase agreement or by eminent domain, the city must, to the greatest extent practicable, adhere to the applicable statutory guidelines described in Govt C §§7260-7277. Additional implementing guidelines are described in 25 Cal Code Regs §§6000-6198. Projects receiving federal funds are subject to both federal acquisition and relocation guidelines and the state guidelines. See 42 USC §§4621-4638; *United Auto Workers, Local 887 v Department of Transp.* (1993) 20 CA4th 1462, 25 CR2d 290. The state guidelines constitute an extensive statutory scheme and are treated by the courts as mandatory requirements rather than mere guidelines, even though Govt C §7274 suggests otherwise. See *City of San Jose v Great Oaks Water Co.* (1987) 192 CA3d 1005, 237 CR 845.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.4 2. Conformity With General Plan

§8.4 2. Conformity With General Plan

If real property is being acquired either by negotiated purchase or by eminent domain for a proposed public improvement, the location, purpose, and extent of the acquisition must have been submitted to and reported on by the city planning agency as to conformity with the adopted general plan. Govt C §65402.

© The Regents of the University of California

§8.5 3. Preliminary Work

Regardless of whether acquisition is by negotiation or eminent domain, preliminary work should be done to ascertain the property interests to be acquired, including their characterization as, *e.g.,* fee, permanent easement, or temporary construction easement, and to provide their legal descriptions. The areas of the property being acquired ("part taken") and of the larger parcel, if any, from which it is being taken ("larger parcel") should be computed, and a suitable plot plan showing both the part taken and the larger parcel should be prepared for use by the appraiser. The plot plan is also needed in the event a complaint is subsequently filed. An integral part of the appraisal map is the location of existing improvements and the relationship of those improvements to the subject acquisition and existing property lines.

© The Regents of the University of California

§8.6 4. Environmental Review Under CEQA

The acquisition of property by a public agency is a project within the meaning of the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177). The steps required under CEQA must be completed before the decision to acquire. Pub Res C §21065; 14 Cal Code Regs §15004(b)(1); *Burbank-Glendale-Pasadena Airport Auth. v Hensler* (1991) 233 CA3d 577, 284 CR 498. But see *Stand Tall on Principles v Shasta Union High Sch. Dist.* (1991) 235 CA3d 772, 777, 1 CR2d 107 (appellate court upheld school district making offer to purchase property "contingent upon completion of the EIR process and final state approval"). There are also several categorical exemptions under CEQA that apply to certain types of land acquisitions. See 14 Cal Code Regs §§15304-15305, 15313, 15316, 15325-15327.

© The Regents of the University of California

§8.7 5. Title Search

The public entity will need a litigation guarantee or preliminary title report to ascertain the parties to whom an offer must be made and, in the event of a subsequent eminent domain action, the parties to be named. The litigation guarantee or title report should cover both the interests being acquired and the larger parcel, if any, from which these interests are being carved. A litigation guarantee protects the public entity against failure to name, in a subsequent eminent domain action, persons who have interests of record in the subject property other than those identified in the litigation guarantee, up to the face amount of the guarantee. A preliminary title report contains similar information, but provides no guarantee or insurance. A litigation guarantee is therefore a necessary prerequisite to filing an eminent domain action. For a negotiated purchase, a preliminary title report may be used instead of a litigation guarantee because the closing of the purchase will be made contingent on the issuance of a title policy, usually through an escrow.

© The Regents of the University of California

§8.8 6. Appraisal

The state guidelines generally require that real property be appraised before negotiations for purchase begin. Govt C §7267.1(b). Minor exceptions are enumerated and provision is made for waiver of an appraisal of property with low market value. Govt C §§7267, 7267.1(b). An appraisal to be used in eminent domain proceedings must meet the valuation requirements of CCP §§1263.010-1263.770.

Public agencies must offer to pay the reasonable costs, not to exceed $5000, of an independent appraisal for the property owner. CCP §1263.025(a). The offer is to be made at the time of the offer to purchase "under a threat of eminent domain" (CCP §1263.025(a)), which means upon the filing of an eminent domain action, after adoption of a resolution of necessity authorizing condemnation, or following a statement that the public entity might take the property by eminent domain (CCP §1263.025(b)). The appraisal must be performed by a state-licensed appraiser. CCP §1263.025(a).

PRACTICE TIP 1: An appraisal that does not meet Code of Civil Procedure valuation requirements is legally adequate if the property is acquired by a negotiated purchase. A more comprehensive (and more expensive) condemnation appraisal is required if negotiations are unsuccessful and eminent domain proceedings become necessary. The more comprehensive appraisal should be prepared at the outset unless it is reasonably certain that purchase can be negotiated (in which case the main purpose of the appraisal is to provide assurance that the purchase will not result in a gift of public funds). If a less comprehensive appraisal is used in expectation that the purchase will be negotiated and such negotiations fail, it will be necessary to obtain a condemnation appraisal and start the entire process again, complying with all prerequisites for eminent domain.

PRACTICE TIP 2: Appraisers typically require 4 to 12 weeks to complete an appraisal from the time it is ordered. The appraiser selected must be familiar with the rules of valuation applicable in eminent domain cases, if that is the type of appraisal ordered. Cities should choose an appraiser as they would any other expert, taking care to inquire about potential conflicts. The engineering data (legal descriptions, plot plans, and computed areas) must be supplied to the appraiser to enable the appraiser to begin this work. An adequate appraisal map is necessary to begin the appraisal.

PRACTICE TIP 3: Selection of a qualified appraiser is critical to the acquisition process. Early involvement by the city attorney and, if necessary, special counsel, is critical. For a summary of considerations and helpful practice tips, see Rypinski, Eminent Domain: A Step-by-Step Guide to the Acquisition of Real Property at 31-46 (Solano Press Books 2002).

© The Regents of the University of California

§8.9 7. Notice of Intent to Appraise

The California Relocation Assistance and Real Property Acquisition Guidelines (25 Cal Code Regs §§6000-6198) provide that a public entity must give the owner written notice of its decision to appraise real property being considered for acquisition for a public use. See 25 Cal Code Regs §§6184, 6188. Generally, the owner of the property must be given an opportunity to accompany the appraiser during the inspection of the property. See Govt C §§7267-7267.1; 25 Cal Code Regs §6188.

Premature statements by a public agency regarding an intent to acquire private property may result in subsequent claims by property owners for unreasonable precondemnation conduct by the agency. *Klopping v City of Whittier* (1972) 8 C3d 39, 104 CR 1.

PRACTICE TIP: Agencies with the power of condemnation frequently appraise properties for planning and other purposes; the fact that property is being appraised does not necessarily mean the agency involved intends to acquire that property. Accordingly, any statements issued in this regard should be prepared carefully and reviewed. This includes statements made by relocation consultants and other persons who are acting as agents of the public agency and whose statements can be legally attributed to the public agency. The agency should state in the notice of appraisal that the notice is not a notice to vacate the property nor a notice that the property will be acquired. Additionally, this notice does not establish eligibility for relocation payments or other relocation assistance.

© The Regents of the University of California

§8.10 8. Environmental (Contamination) Assessment

Before acquiring property, a public agency must satisfy itself that the property does not contain environmental contamination or, if it does, the agency must determine the nature and extent of such contamination. The assessment should be made before making the offer to purchase, or the offer may be contingent on a satisfactory assessment.

© The Regents of the University of California

§8.11 a. Purpose of Assessment

Federal and state laws relating to contaminated properties impose liability without fault for cleanup costs on the present and former owners of the property. The public agency should perform a preliminary assessment on the real property before making the decision to acquire it. The purpose of such assessment is to uncover indicia that contamination may exist at the site. Contamination may significantly affect appraisal value.

© The Regents of the University of California

§8.12 b. Further Assessment

If the preliminary contamination assessment indicates contamination and the agency still wishes to consider acquiring the property, a further assessment should be performed to determine the nature and extent of the contamination. Property owners normally will allow entry onto their property for this purpose (and other customary preacquisition purposes, such as appraisals) as a matter of courtesy. If the owner is one of the rare owners who does not, CCP §§1245.010-1245.060 provide the procedure for obtaining an order for such entry.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.13 c. Consequences of Failing to Perform Assessment

§8.13 c. Consequences of Failing to Perform Assessment

Acquiring real property without performing the appropriate investigations beforehand can lead to the agency's incurring liability for cleanup costs in excess of the value of the property. See Clean Water Act of 1977 (33 USC §§1251-1387); Porter-Cologne Water Quality Control Act (Wat C §§13000-13999.19); Health & S C §§25360-25367. The costs saved by not properly investigating the possibility of contamination are usually not worth the risks associated with the subsequent discovery of contamination.

PRACTICE TIP: It is the policy of Caltrans to acquire the property at fair market value, less the cleanup cost.

© The Regents of the University of California

§8.14 9. Relocation Assistance

Relocation obligations for a city arise whenever residents or businesses are displaced as a direct result of eminent domain or certain other public projects or programs. Govt C §§7260-7277. Relocation payments to businesses in lieu of a payment for moving expenses (for which a business must show a loss of patronage) cannot, however, duplicate the payments for loss of goodwill provided for in CCP §1263.510. All public agencies must adopt relocation rules and regulations that conform to relocation regulations adopted by the state and federal government, when applicable. Govt C §7267.8.

Relocation benefits arise under federal and state redevelopment law when displacement occurs as a result of code enforcement that is a part of a city's redevelopment plans and is funded with redevelopment monies. See *Price v City of Stockton* (ED Cal 2005) 394 F Supp 2d 1256, 1264. See Govt C §§7260(c)(1)(A)(ii) and 7262 regarding when a public entity's actions regarding rehabilitation, demolition, or other displacing activities may trigger relocation obligations.

The state law governing relocation is found in Govt C §§7260-7277 and the regulations are found in 25 Cal Code Regs §§6000-6198. The federal law is found at 42 USC §§4601-4638. The federal regulations are found at 49 CFR pt 24; these regulations apply only when federal money is involved.

PRACTICE TIP: If federal monies are used for a project, federal relocation rules must be followed. However, if only state funds are used for the project, only California relocation laws and regulations must be followed. If there is a mixture of both state and federal funds, federal relocation rules must be followed. Govt C §§7267.8(b); 25 Cal Code Regs §§6018; *United Auto Workers, Local 887 v Department of Transp.* (1993) 20 CA4th 1462, 25 CR2d 290.

© The Regents of the University of California

§8.15 a. What Triggers Relocation Obligations?

What constitutes a "program" or "project" triggering relocation obligations is not always clear. A typical change in land use regulation, such as a zone change, would likely not trigger relocation obligations. However, a city that initiates a very aggressive program to achieve zoning compliance in a short period of time may be subject to relocation requirements. Likewise, a city exercising its powers solely for health and safety reasons would likely not trigger relocation obligations. However, if a city carried out code enforcement in a certain area as part of a program to rehabilitate or redevelop an area to bring about rehabilitation or other improvements to the area, the code enforcement actions may be subject to relocation requirements. Compare *Price v City of Stockton* (9th Cir 2004) 390 F3d 1105, 1116, with *Price v City of Stockton* (ED Cal 2005) 394 F Supp 2d 1256, 1264.

If displacement occurs as a result of a redevelopment agency disposition and development agreement (DDA) or owner participation agreement (OPA), relocation obligations would arise. (Although under an OPA a redevelopment agency is not acquiring property, the agency usually enters into an OPA to ensure that the owner proceeds with a project and to assist in the development of the property.) The OPA makes the project possible and causes the displacement of the tenants, if any. Therefore, the redevelopment agency would be responsible for relocation obligations. The payment of these obligations can be part of the terms negotiated with the developer.

PRACTICE TIP: Premature statements by a public agency bearing on the agency's intent to acquire private property may result in subsequent claims by property owners of unreasonable precondemnation conduct by the agency. *Klopping v City of Whittier* (1972) 8 C3d 39, 104 CR 1. Relocation consultants are agents of the public agency. Therefore, keep in mind the fact that a relocation consultant's statements regarding the public agency's intent to acquire private property may end up being attributed to the public agency in a claim for damages arising out of unreasonable precondemnation conduct

© The Regents of the University of California

§8.16 b. Advisory Assistance

A governmental agency must provide assistance to and advise a "displaced person," as defined in Govt C §7260(c), of his or her rights regarding relocation. Typically, this advice is provided through contracts with various relocation experts. Govt C §§7261, 7261.5.

© The Regents of the University of California

§8.17 (1) Role of Relocation Representative

When carrying out the relocation advisory program, the public agency's relocation representative should deliver and explain in person the public agency's relocation program and the written relocation information to persons to be displaced. The 'relocation representative should be prepared to spend as much time as necessary at this first meeting with the displacees, as it will be the foundation of the public agency's and the displacees' relationship throughout the entire relocation process. It is key to a successful relocation program that the persons to be displaced understand and feel that although the public agency's relocation representative is hired by the public agency, he or she has a responsibility to the displacees to ensure they are made aware of and receive all of the benefits and assistance to which they are entitled under the law. By the end of this first meeting, displacees should feel that they know what is going on, when and how they will be affected, and how they will be assisted. Ideally, they will feel comfortable contacting the relocation representative if they have any questions or need assistance.

© The Regents of the University of California

§8.18 (2) Representative's Understanding of Displacee's Needs

In addition, the public agency's representative should have a clear understanding of the type of replacement dwelling that is needed to meet the "comparable replacement housing" test (including size of unit, special needs, and affordability), or the location preferences and special needs of a business. Based on the first interview, the public agency's representative should also be able to estimate the relocation costs to the public agency.

© The Regents of the University of California

§8.19 (3) Representative's Availability

The person carrying out the public agency's relocation program should not only be knowledgeable about the relocation benefits and assistance requirements in the state law and guidelines, but should also be readily available to displacees to respond to their questions and provide assistance in a timely manner. The difference between a displacee finding a replacement dwelling and being able to obtain it sometimes hinges on how quickly he or she can get a deposit to the landlord to hold the unit, which is often contingent on how quickly the public agency can process a displacee's claim and get the money to him or her.

© The Regents of the University of California

§8.20 c. Relocation Plans

A public agency must prepare a detailed and specific "relocation plan" before proceeding with the program or project that will cause displacement, if there is a significant amount of non-residential displacement or more than 15 residential displacements. 25 Cal Code Regs §6038. Also, a redevelopment agency must include a general method or plan for relocation in its "report to city council" during the process to adopt and amend a redevelopment plan. Health & S C §33352(f). See *Gonzales v City of Santa Ana* (1993) 12 CA4th 1335, 16 CR2d 132.

© The Regents of the University of California

§8.21 d. Comparable Replacement/Last Resort Housing

In general, no residential displaced person may be required to move until a comparable replacement dwelling is provided. Govt C §7261(c)(4). "Comparable replacement dwelling" is defined in Govt C §7260(i).

If a program or project cannot be timely implemented because no comparable replacement dwelling is available, the public agency can provide last resort housing by either constructing comparable replacement housing or expending funds for relocation over and above what it otherwise may be authorized to expend for such relocation. Govt C §7264.5.

© The Regents of the University of California

§8.22 e. Relocation Payments

The following is a brief summary of relocation benefits to which an eligible displaced person is entitled. See Govt C §§7262-7265.4; 25 Cal Code Regs §§6080-6114. Relocation benefits are all subject to individual needs determined on a case-by-case basis.

Residential owner/occupants are entitled to the following:

- All moving costs paid (within 50 miles);
- Up to $22,500 in addition to property purchase price, to assist with down payment on replacement unit or other associated costs;
- Storage of personal property for up to 1 year; and
- Utility connection charges paid.

Residential tenants are entitled to the following:

- All moving costs (within 50 miles);
- Up to $5250 for rent differential or down payment;
- Storage of personal property for up to 1 year; and
- Utility connection charges paid.

Business owners/tenants are entitled to all actual moving costs under Govt C §7262(a), including but not limited to:

- Transportation of cartage within 50 miles;
- Stationery replacement costs, *e.g.,* letterhead, business cards, invoices;
- Reconnection of machinery/equipment and cost of licenses/permits for reestablishment;
- Up to $1000 for lodging/transportation costs while searching for replacement site;
- Up to $10,000 to reestablish the business;
- Storage of personal property/equipment for up to 1 year;

In lieu of the above actual moving costs, a payment of not less than $1000 nor more than $20,000 may be made to a business owner or tenant based on average annual net earnings subject to certain specific eligibility criteria. Govt C §7262(c).

© The Regents of the University of California

§8.23 f. Duplication of Payments

Relocation payments should not be made for items that the displacee has or will be compensated for as part of the public agency's acquisition costs. For instance, a public agency may acquire certain fixtures and equipment as part of acquisition of the real property, such as attached bookshelves or a restaurant's built-in kitchen equipment. Usually these items are still in the building when the displacee is obtaining moving bids, and unless there is good coordination between the public agency's acquisition representative and relocation representative, the moving bids will include the disconnection, moving, and reconnection of the shelves or equipment. Many times the public agency cannot sell the fixtures and equipment and, therefore, authorizes the displacee to remove them. However, in this case it does not mean that the public agency should be paying for their removal, as this would be considered a duplication of payments.

Another example is the relocation payment that a business may elect to receive in lieu of being paid for their actual moving costs. To be eligible for this payment, in addition to other requirements, a business must be able to show a "loss of patronage." If the business claims a "loss of goodwill" payment under the eminent domain law, this payment is already compensating the business for "loss of patronage." Therefore, this relocation payment should not be made, or the amount paid for loss of goodwill should be reduced.

© The Regents of the University of California

§8.24 g. Claim Procedure

Before any relocation payment can be made, a claim for such payment must be made. Such claim must be presented to the public agency within 18 months after the date on which the relocatee receives final payment for the real property acquired or the date the property is vacated, whichever is later. 25 Cal Code Regs §6088.

PRACTICE TIP: The public agency should process relocation payments as soon as possible after the necessary claim forms have been filed. The public agency should make sure that its accounting systems for relocation payments are set up to enable the relocation representative to have checks drawn up immediately. Prompt ability to pay can be essential to a displacee's ability to secure a replacement location. Landlords and real estate agents have no obligation to hold a property that is available for rent or sale without the appropriate deposit, and displacees often need their relocation monies for the deposit.

© The Regents of the University of California

§8.25 h. Grievance Procedure

A relocatee disputing a determination regarding eligibility or relocation benefits paid has a right to have such determination reviewed by the public entity. If a redevelopment agency has appointed a relocation appeals board, the city, by ordinance, may designate such board to hear all appeals regarding relocation that occur within the city. Govt C §7266; Health & S C §33417.5.

© The Regents of the University of California

10. Acquisition Offer

§8.26 a. Offer When Eminent Domain Contemplated

When a public agency contemplates the acquisition of real property by eminent domain, the agency must establish an amount that it believes to be just compensation for the property based on the agency-approved appraisal of the fair market value of the property, and it must make an offer to the owner or owners of record to acquire the property for the full amount established as just compensation unless the owner cannot be located. Govt C §7267.2(a).

© The Regents of the University of California

§8.27 (1) Statement of Basis for Offer

In all cases, the property owner is entitled to a written statement and summary of the basis for the amount established as just compensation. The statement and summary must include specific valuation information. Govt C §7267.2(b). In the case of owner-occupied residential property of four dwelling units or less, the property owner must also be provided with an opportunity to review the appraisal on request. The agency may, but is not required to, satisfy the written statement, summary, and review requirements by providing the owner with a copy of the appraisal report. Govt C §7267.2(c).

© The Regents of the University of California

§8.28 (2) Statutory Exceptions

Under the statutory guidelines, the public agency may acquire the property for less than the amount it believes to be just compensation, when all of the following occur (see Govt C §7267.2):

- The owner has directly offered the property to the acquiring agency for a specified price before any negotiations have taken place with the acquiring agency, or when the owner has offered the property to the general public at a specific advertised price which was set no more than 6 months before, and is still available at, the time that the acquiring agency initiates contact with the owner concerning the proposed acquisition;
- The acquiring agency offers the exact amount for which the property is being offered by the owner; and
- No federal funds are involved in the project.

© The Regents of the University of California

§8.29 (3) Lessees

Settlement with the fee owner of the real property does not always cover the compensable interest of lessee(s). Lessees are entitled to receive an offer for the value of trade fixtures and equipment. See CCP §§1263.205, 1263.210.

© The Regents of the University of California

§8.30 b. Offer When Eminent Domain Not Contemplated (Negotiated Purchase)

An offer in the full amount of an appraisal is required only when a public agency would exercise its power of eminent domain if a negotiated purchase cannot be achieved. A negotiated purchase may thus be made at less than the agency's appraised value. Govt C §7267.2; *Melamed v City of Long Beach* (1993) 15 CA4th 70, 18 CR2d 729. But see 25 Cal Code Regs §6182 (interpreting Govt C §§7260-7277 as requiring an appraisal and any offer in the full amount of the agency's determination of just compensation before initiating negotiations).

© The Regents of the University of California

11. Acquisition by Eminent Domain

§8.31 a. Limitations on Use of Eminent Domain Under Homeowners and Private Property Protection Act

Proposition 99, the Homeowners and Private Property Protection Act, approved by the voters on June 3, 2008, amended Cal Const art I, §19 in response to the decision of the United States Supreme Court in *Kelo v City of New London* (2005) 545 US 469, 162 L Ed 2d 439, 125 S Ct 2655.

Under the Homeowners and Private Property Protection Act, a redevelopment agency is prohibited from using eminent domain to acquire a single-family home (including a condominium) for the purpose of transferring the property to another private person or business, unless any of the following conditions apply (Cal Const art I, §19):

- The property owner does not live in the home, or has lived there for less than 1 year;
- The property is being acquired for a public work or improvement; or
- The property is being acquired to:
- Abate a nuisance;
- Protect public health and safety;
- Prevent serious criminal activity;
- Respond to an emergency; or
- Remedy environmental contamination that poses a threat to public health and safety.

On acquisitions by redevelopment agencies, see §§5.301-5.439.

© The Regents of the University of California

§8.32 b. Compliance With CEQA

Compliance with the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) is a precondition of the institution of eminent domain proceedings. *City of Stockton v Marina Towers LLC* (2009) 171 CA4th 93, 108, 88 CR3d 909. See also 14 Cal Code Regs §15004(b)(1).

© The Regents of the University of California

§8.33 c. Setting Just Compensation

If acquisition is to be by eminent domain, the setting of just compensation is required. The city council approves the appraisal of the property and sets an amount it believes to be just compensation for the interests to be acquired. Govt C §§7267, 7267.2. Note that as with eminent domain actions generally, the Outdoor Advertising Act (Bus & P C §§5200-5486) provides that fair and just compensation must be paid when removal of on premises advertising displays is required. Bus & P C §5412. For a discussion of the Outdoor Advertising Act, including amortization procedures that may be used in lieu of compensation in certain circumstances, see §§9.137-9.145.

© The Regents of the University of California

§8.34 (1) Disclosure

The authority to negotiate or litigate just compensation is normally granted in closed session. Govt C §54956.8 (real property negotiations), §54956.9 (litigation). The amount set as just compensation need not be disclosed publicly at this stage. The appraisal is exempt from disclosure under the Public Records Act (Govt C §§6250-6276.48). Govt C §6254(h). When the subject property is owner-occupied residential property containing no more than four residential units, the homeowner-occupier is, on request, entitled to review a copy of the appraisal after the written pre-acquisition offer has been made. Govt C §7267.2(c).

© The Regents of the University of California

§8.35 (2) Extent of Compensation

The compensation must cover the real property interests to be acquired (land and improvements), severance damages (if any), and, in the case of business premises, fixtures, equipment, and in certain circumstances, inventory of the business. Hypothetical future property rights however, are not compensable interests. *San Diego Metro. Transit Dev. Board v Handlery Hotel* (1999) 73 CA4th 517, 86 CR2d 473. Tenants also may have compensable interests under their leaseholds and/or ownership of trade fixtures and equipment. See *City of Vista v Fielder* (1996) 13 C4th 612, 54 CR2d 861.

© The Regents of the University of California

§8.36 d. Precondemnation Offer

If acquisition is to be by eminent domain, a written offer to acquire the property that complies with Govt C §7267.2 must be made. Valuation must be in accordance with CCP §§1263.010-1263.770. The offer must comply with requirements of law; the form of the offer should be reviewed by counsel before it is sent. The offer must contain a statement of, and summary of the basis for, the amount established as just compensation. Govt C §7267.2(b). The required contents of the written statement and summary are set forth in Govt C §7267.2(b).

When the property involved is owner-occupied residential property with no more than four residential units, the homeowner, on request, must be allowed to review a copy of the appraisal on which the offer is based. Govt C §7267.2(c). The public entity may satisfy the Govt C §7267.2 written statement, summary, and review requirements by providing the owner a copy of the appraisal. Govt C §7267.2(c).

At the time of making the written offer, the public entity must also provide the property owner with an informational pamphlet outlining the eminent domain process and the property owner's rights under the Eminent Domain Law. Govt C §7267.2(a)(2). See 25 Cal Code Regs §6188 for a list of items to be considered for inclusion in the informational pamphlet.

In addition, at the time of the offer, the public entity must offer to pay the reasonable costs of an independent appraisal ordered by the property owner, not to exceed $5000. CCP §1263.025(a).

© The Regents of the University of California

§8.37 (1) Conditional Offer

The offer may be conditioned on the city council's ratification of the offer, for example by the execution of a contract of acquisition. The Eminent Domain Law (CCP §§1230.010-1273.050) also does not prohibit conditioning the offer on other matters, such as the absence of soil contamination. This procedure, however, does not obviate the requirement that the city council set the just compensation before making the offer. Govt C §§7267, 7267.2.

© The Regents of the University of California

§8.38 (2) Specific Contents of Written Statement Accompanying Offer

Under 25 Cal Code Regs §6182(d), the written statement accompanying the offer must include the following six items:

(1) A general statement of the public use for which the property is to be acquired.

(2) A description of the property to be acquired and of the interest (*e.g.,* fee, permanent easement, temporary construction easement) to be acquired. The preferred procedure is to include the legal description of the interests to be acquired.

(3) An inventory of buildings, structures, fixtures, and other improvements.

(4) A statement that the amount offered:

(a) Is the full amount that the public entity believes to be just compensation for the property taken;

(b) Is not less than the approved appraisal of the fair market value of the property taken;

(c) Does not include any increase and is not reduced by any decrease in the value of the property caused by the public improvement for which the property is being acquired; and

(d) Does not reflect or include any relocation assistance and payments or other benefits that the owner may be entitled to receive.

(5) If the real property is a portion of a larger parcel, an apportionment of the total estimated just compensation for the partial acquisition between the value of the property being taken and the amount of damage, if any, to the remainder of the larger parcel from which such property is taken. This analysis must include a discussion of benefits, if any, relied on by the appraiser to offset severance damages. See Govt C §7267.2(b)(3).

PRACTICE TIP: Consult with your appraiser to verify the appraiser is not relying on the old rule concerning "special" benefits. Some appraisers practicing eminent domain valuation still refer to offsets against severance damages as special benefits. There is no longer a distinction between special and general benefits. *Los Angeles County Metro. Transp. Auth. v Continental Dev. Corp.* (1997) 16 C4th 694, 66 CR2d 630.

(6) If a business is located on the property, the statement must include an "indication" of the amount of compensation for loss of goodwill. 25 Cal Code Regs §6182(d)(6). See also 25 Cal Code Regs §6182(b)(2), (c)(3), and (e). In connection with compensation for loss of goodwill, the offer package should also include a copy of CCP §1263.510. See 25 Cal Code Regs §6182(b)(2), (e). A public agency is obligated to compensate any business located on the property for loss of business goodwill, whether the owner of that business also owns the real estate or merely has a leasehold right. *Chhourr v Community Redev. Agency of Buena Park* (1996) 46 CA4th 273, 53 CR2d 585.

PRACTICE TIP: At the offer stage, loss of goodwill can only be assessed with the business owner's cooperation by providing, *e.g.,* financial statements and tax returns. It is therefore usually impractical to make a specific offer for loss of goodwill at this stage. See Govt C §7267.2; 25 Cal Code Regs §6182.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.39 e. Relocation Information to Occupants

§8.39 e. Relocation Information to Occupants

The public agency must inform persons eligible for relocation benefits within 60 days following the initiation of negotiations as to the availability of relocation benefits and the procedures for obtaining those benefits. Govt C §7267.8; 25 Cal Code Regs §§6006, 6040. The "initiation of negotiations" has been interpreted to mean the date the offer to acquire is made to the owner. 49 CFR §24.2(15); 25 Cal Code Regs §6008(n). For regulations governing relocation assistance, see §8.14.

PRACTICE TIP: Providing relocation assistance can be a time-consuming task. The relocation assistance process should be started early in the acquisition process.

© The Regents of the University of California

§8.40 f. Precondemnation Negotiations

The offer should give the owner a reasonable time to respond, usually 2 to 4 weeks. If the owner requests it, and if the agency's schedule permits, this time may be extended. To the greatest extent practicable, condemning agencies must make every reasonable effort to acquire real property expeditiously by negotiation. Govt C §§7267-7267.1. No firm rules exist on how long an agency should negotiate or how much it can pay for the property. The purchase price cannot be less than the amount of the approved appraisal once the resolution of necessity has been adopted. *Melamed v City of Long Beach* (1993) 15 CA4th 70, 18 CR2d 729. It cannot be so high as to constitute a gift of public funds. Cal Const art XVI, §6; *People v Giumarra Farms, Inc.* (1971) 22 CA3d 98, 105, 99 CR 272. Reasonableness under all the circumstances is probably the best test.

© The Regents of the University of California

§8.41 g. Notice of Hearing on Proposed Adoption of Resolution of Necessity

If the public entity does not succeed in acquiring the property by negotiation, a notice of hearing on the proposed adoption of a resolution of necessity must be sent to the owners of the property as shown on the last equalized county assessment roll. CCP §1245.235. The notice must state that owners who wish to be heard on the issues identified in CCP §1240.030, including issues of public interest and necessity as described in the notice must file a request to appear and be heard. Such a request must be filed within 15 days after the notice is mailed. CCP §1245.235(b)(3).

The notice of hearing must contain certain information specified by the Eminent Domain Law. In addition, the notice should state that the agency's compliance with the Relocation Assistance Act is an issue at the hearing. See *People ex rel Dep't of Transp. v Cole* (1992) 7 CA4th 1281, 9 CR2d 750. Failure to object to a statement of valuation at hearing waives objection of noncompliance with Govt C §7267.2. Failure to assert objections at the hearing will result in waiver of certain rights. See chap 13 on exhaustion of administrative remedies.

PRACTICE TIP: It is recommended that the notice lay out the issues to be addressed in detail to demonstrate that the owner was put on notice.

© The Regents of the University of California

§8.42 h. Hearing on Proposed Adoption of Resolution of Necessity

A hearing is held on the proposed adoption of a resolution of necessity, authorizing the filing of an action in eminent domain. If any owners have filed a timely request to be heard, they are entitled to be heard on the issues of public use and necessity. The resolution enjoys a conclusive presumption as to the findings made therein. CCP §§1240.030, 1245.235, 1245.250.

PRACTICE TIP: Some agencies have time limits for speakers. Agencies should consider waiving time limits for an owner wishing to speak about the facts related to the acquisition of his or her property. Allowing the aggrieved owner the opportunity to present all facts before a decision is made supports the presumption.

© The Regents of the University of California

§8.43 i. Adoption of the Resolution of Necessity

Unless a greater vote is required by statute, charter, or ordinance, the resolution of necessity requires a two-thirds vote of all members of the city council. CCP §1245.240. The adoption of a resolution of necessity is a legislative act within the discretion of the governing body of the public entity; the public entity is therefore prohibited from contractually committing itself to adopt a resolution of necessity. *Anaheim Redev. Agency v Dusek* (1987) 193 CA3d 249, 239 CR 319; *Redevelopment Agency of the City of Huntington Park v Norm's Slauson* (1985) 173 CA3d 1121, 219 CR 365.

© The Regents of the University of California

§8.44 j. Findings

The resolution must contain certain findings. In addition to the four findings required under CCP §1245.230(c)(1)-(4), the resolution should also find that the agency has complied with CEQA for the project for which the property is being acquired. Additionally, resolutions for redevelopment projects must make blight findings. *Anaheim Redev. Agency v Dusek* (1987) 193 CA3d 249, 239 CR 319. If the property involved is used for religious purposes, there is a concern that the exercise of eminent domain may be deemed a land use regulation that imposes a substantial burden on religious exercise. See Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 USC §§2000cc—2000cc-5); *Cottonwood Christian Ctr. v Cypress Redev. Agency* (CD Cal 2002) 218 F Supp 2d 1203.

© The Regents of the University of California

§8.45 k. Eminent Domain Complaint and Lis Pendens

An eminent domain complaint is filed and a lis pendens notice is recorded. CCP §§1250.010-1250.310. The complaint can be filed shortly following the adoption of the resolution of necessity and must be filed within 6 months after that adoption. CCP §1245.260.

PRACTICE TIP: Before filing an eminent domain action, the condemnor's attorney should obtain an update of the litigation guarantee and of the appraisal. Requirements regarding the date of the appraisal vary from jurisdiction to jurisdiction, so be sure to check with the county's eminent domain judge as to how old an appraisal can be for the judge to accept it as the basis for just compensation.

© The Regents of the University of California

§8.46 I. Deposit of Probable Compensation

The amount of probable compensation is deposited with either the state treasurer or the county treasurer (on court order). CCP §§1255.010, 1255.070.

The written summary of the basis of the appraisal used for the deposit must contain detail sufficient to indicate (CCP §1255.010(b)(A)-(B)):

- the date of valuation;
- the highest and best use and applicable zoning restrictions; and
- the principal transactions, reproduction or replacement cost analysis, or capitalization analysis supporting the appraisal.

If the appraisal includes compensation for injury to the remainder, the summary must separately indicate (CCP §1255.010(b)(C)):

- the compensation for the property and for damages to the remainder; and
- the calculations for making such a determination and a narrative explanation supporting the compensation, including any offsetting benefits.

The statement of valuation also must include information on the loss of goodwill, if any, and the method used to determine the loss and a summary of the supporting data. CCP §1258.260(a)(9).

A motion to increase the deposit must be supported with detail sufficient to indicate clearly the basis for the motion. CCP §1255.030. Such supporting detail must address the same information required for the written summary of the basis of the appraisal to the extent such information is relevant to the motion. CCP §1255.030.

Once the amount of probable compensation has been deposited, the amount on deposit is available for withdrawal by the defendants. The considerations discussed in §§8.47-8.52 relate to the condemnor's decision to deposit the funds and to the defendant's decision to withdraw those funds.

© The Regents of the University of California

§8.47 (1) Deposit Prerequisite to Order for Possession

The deposit of probable compensation is a prerequisite to obtaining an order for possession. CCP §1255.410. The deposit also fixes the date of value to be used by the trier of fact in determining just compensation. The date of value cannot be later than the date of such deposit, but in some circumstances it can be earlier. CCP §§1263.110-1263.150.

© The Regents of the University of California

§8.48 (2) Deposit Available for Withdrawal by Defendants

Once the funds have been deposited, they are available for withdrawal, in whole or in part, by the defendants. CCP §§1255.210-1255.280.

© The Regents of the University of California

§8.49 (3) Notice of Application for Withdrawal

If a defendant applies for withdrawal of any portion of the funds, the condemnor must see to it that all of the other defendants are served with notice of that application, so that those defendants have an opportunity to object to the withdrawal. CCP §1255.230.

© The Regents of the University of California

§8.50 (4) Withdrawal Waives All Defenses Except Additional Compensation

The withdrawal by a defendant of any portion of the funds on deposit constitutes a waiver by operation of law of all defenses in favor of that defendant except a claim for greater compensation than the amount deposited. For example, a defendant waives any challenge to the condemnor's right to take the property if that defendant withdraws any of the funds on deposit. However, withdrawal of the funds on deposit does not preclude that defendant from claiming a larger amount of compensation (CCP §1255.260) and does not waive the defendant's right to have the eminent domain action transferred to a neutral court. *Clayton v Superior Court* (1998) 67 CA4th 28, 78 CR2d 750.

© The Regents of the University of California

§8.51 (5) Interest on Award

The defendant is entitled to recover from the condemnor interest on the compensation awarded to that defendant in the condemnation action. When the condemnor has taken possession of the property, that interest begins running on the date on which the condemnor takes possession or the date on which the condemnor is authorized to take possession of the property, whichever is earlier. CCP §1268.310. The interest on any amount deposited into court as probable compensation ceases to run when that amount is withdrawn by the defendant. CCP §1268.320. The rate at which the condemnor must pay interest is determined for each semester of the calendar year by the State Department of Transportation (CalTrans). CCP §1268.350. Possession by the defendant after interest begins to accrue is an offset against interest accrual. CCP §1268.330(a).

© The Regents of the University of California

§8.52 (6) Interest on Deposit

While funds are on deposit as probable compensation, they are held in the state treasury. CCP §1255.010. If the condemnor prefers, and on court order, the money may be held by the county treasurer. CCP §§1255.070, 1268.150. If funds are on deposit with the state treasury, interest on the deposit is paid to the condemnor every quarter. Govt C §16429. Payment of interest on county deposits may vary depending on the particular county's practice. This payment of interest to the condemnor should not be confused with the payment of interest from the condemnor to the defendant, which is discussed in §8.51.

PRACTICE TIP: Deposits with the State Treasury Condemnation Deposits Fund are usually preferred. Interest earned by the state treasury is usually more than that earned by county treasuries, and the state treasury procedures for payment of interest are standardized.

© The Regents of the University of California

§8.53 m. Service

The complaint, summons, and other related papers, including any motion for order for possession, are served on the record owners and on the occupants of the property. CCP §1255.450. Service of the complaint and summons, or a diligent attempt to serve the same, must take place no later than 6 months after the complaint is filed. CCP §1245.260(a). Service of the complaint, summons, and motion for order for possession typically requires from 2 days to 2 weeks, depending on the accessibility of the persons to be served.

© The Regents of the University of California

§8.54 n. Obtaining Actual Possession

Under specific circumstances, the public entity may obtain possession of the property before the date that final judgment is entered by filing a motion for order of possession of the property. If a public entity files a motion for order of possession, the motion must include specific language informing the record owners and any occupants that they have the right to oppose the motion. CCP §1255.410(a).

If the property is unoccupied, the hearing must be held not less than 60 days after service of the notice of the motion. CCP §1255.410(b). If the property is lawfully occupied, then the public entity must serve notice of the motion at least 90 days before the hearing. CCP §1255.410(b).

If the motion for order of possession is not opposed within 30 days after the notice of motion is served, then the court must grant the order of possession if it can make specific findings. CCP §1255.410(d)(1). If the motion is opposed within 30 days after the notice of motion is served, then the court may grant the order of possession on consideration of the relevant facts and any opposition, if it can make specific findings, including findings that the balance of hardships tips in favor of the public entity. CCP §1255.410(d)(2). If a defendant opposes the motion for possession and asserts a hardship in the written opposition, the opposition must be supported by a declaration signed under penalty of perjury stating facts supporting the hardship. CCP §1255.410(a).

Regardless of whether a public entity becomes entitled to possession of a property by an order of possession or by a final judgment, replacement housing must be made available before occupants of residential property must move. Govt C §7264.5. In difficult cases, such as a business with a great deal of equipment and other personal property to be moved or otherwise disposed of, an owner or occupant who refuses to move can sometimes cause delays.

© The Regents of the University of California

o. Prosecution of Eminent Domain Action

§8.55 (1) Alternative Dispute Resolution

Eminent domain law expressly authorizes alternative dispute resolution. CCP §1250.420. By agreement, the parties may refer the case to mediation, binding arbitration, or non-binding arbitration. CCP §1250.420. A party dissatisfied with the result of non-binding arbitration may request a trial de novo by motion within 30 days. CCP §1250.420. If the moving party does not achieve a more favorable result at trial, the court will order the moving party to pay the other party's litigation costs incurred following the motion for new trial, unless the court finds that the imposition of costs would create such a substantial economic hardship as not to be in the interest of justice. CCP §1250.420. Trial may be postponed if it is demonstrated to the court's satisfaction that the parties are actively engaged in resolving the dispute, the parties appear to be making progress, and the parties agree that additional time for alternative dispute resolution is desirable. CCP §1250.430.

© The Regents of the University of California

§8.56 (2) Preliminary Court Proceedings

Preliminary court proceedings include the first pretrial conference, discovery, and other customary pretrial proceedings. Unless a local rule provides for another method (see CCP §1258.300), no later than 10 days after the trial date is selected, a demand for the exchange of expert witness and valuation data should be made. CCP §1258.210(a). Once a demand for exchange has been filed and served, the parties are required to deposit with the clerk of court a list of expert witnesses and statements of valuation data no later than the date of exchange. Failure to do so will constitute a waiver of a party's right to call unlisted expert witnesses during its case in chief and of the party's right to introduce on direct examination during its case in chief any matter that is required to be, but is not, set forth in the statements of valuation data. CCP §1258.210(b)(2).

© The Regents of the University of California

§8.57 (3) Trial of Legal Issues

When applicable, a trial of legal issues is held. Depending on the county in which the case is pending and on the nature of the legal issues involved, this trial may be a separate trial held a number of weeks or months before the valuation trial, or it may be held immediately before the valuation trial. When the outcome of the legal issue trial affects the appraisal process (*e.g.,* when the issue is the scope of the larger parcel for purposes of assessing severance damages), it is essential that the legal issue trial be held sufficiently in advance of the valuation trial to enable the appraisals to be completed thereafter. In either case, legal issues are tried before a judge, but in the valuation trial the parties are entitled to have a jury decide the amount of compensation.

© The Regents of the University of California

§8.58 (4) Appraisal Exchange

Before trial, counsel may demand an exchange of expert witness lists and appraisals. The contents and timing of this pretrial exchange is governed by CCP §§1258.210-1258.300. The "date of exchange" is the date agreed to for the exchange or, failing agreement, a date 90 days before commencement of trial, and may take place no sooner than 9 months after the complaint is filed. CCP §1258.220. Unless a demand for exchange has been made, the 90-day provision of CCP §1258.220 does not apply.

PRACTICE TIP: Counsel should also carefully review local court rules on exchange requirements as well as other eminent domain matters.

© The Regents of the University of California

§8.59 (5) Final Pretrial Conference

The final pretrial conference is held. In counties which so provide (including Los Angeles County), the exchange of appraisals normally takes place at this time. In counties in which an exchange of the actual appraisals is not provided for, a corresponding "statement of valuation data" is exchanged 90 days before the commencement of trial. CCP §1258.220.

© The Regents of the University of California

§8.60 (6) Mandatory Settlement Conference; Statutory Settlement Offers

The mandatory settlement conference is held. When the parties have so stipulated, the statutory exchange of offer and demand usually takes place at this time. Otherwise, the exchanges must occur at least 20 days before trial. The offer should be carefully considered, since its "reasonableness" may affect the recovery of the defendant's litigation expenses. CCP §1250.410. Also, the final offer must include all required compensation, including goodwill, if any, and must specify whether costs and interest are included. CCP §1250.410.

© The Regents of the University of California

§8.61 (7) Motions Affecting Compensation

If there is a dispute between the parties over evidentiary or other legal issues affecting the determination of compensation, either party may move the court for a ruling on the issue. Such motions must be filed at least 60 days before commencement of the trial on compensation. CCP §1260.040.

© The Regents of the University of California

§8.62 (8) Valuation Trial

The valuation trial usually takes place within 2 years after the filing of the complaint. The issue at the valuation trial, insofar as the condemnor is concerned, is the total amount of compensation that is to be paid by reason of the condemnation of the interests being acquired. Neither party has the burden of proof as to the amount of compensation. CCP §1260.210(b). Any issue concerning the division ("apportionment") of that total compensation among owners, tenants, holders of encumbrances, or any other persons, is made the subject of a separate determination to which the condemnor is not a party. CCP §1260.220. The compensation at the valuation trial includes the following:

- The fair market value of the property taken. CCP §§1263.310, 1263.320.
- When the property acquired is part of a larger parcel, compensation for damage, if any, to the remainder ("severance damages"). Severance damages are defined as damage caused to the remainder by its severance from the part taken, or by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff, whether or not the damage is caused by a portion of the project located on the part taken. CCP §1263.410. Severance damages may also be awarded when the parcel partly taken is proposed for development with separate, contiguous parcels under common ownership. *City of San Diego v Neumann* (1993) 6 C4th 738, 25 CR2d 480. Non-speculative benefits caused by the project may be used to offset the amount of severance damages. *Los Angeles County Metro. Transp. Auth. v Continental Dev. Corp.* (1997) 16 C4th 694, 66 CR2d 630.
- Improvements located on the part taken are included in the compensation. Severance damages include damage, if any, to the improvements located on the remainder. Under certain circumstances, compensation must be paid for machinery and equipment installed on the part taken or on the remainder. For details of those circumstances and of the extent of such compensation, see CCP §§1263.205-1263.270.
- Compensation for loss of business goodwill, provided that: (1) the loss is caused by the taking of the property or the injury to the remainder; (2) the loss cannot reasonably be prevented by relocation or other steps; (3) compensation for the loss will not be included in payments under the relocation laws; and (4) compensation for the loss will not be duplicated in compensation otherwise awarded to the owner. CCP §1263.510. The business owner has the burden of establishing the existence of conditions (1) through (4) above, but neither party has the burden of proof as to the amount of compensation for loss of goodwill. *Redevelopment Agency of the City of Pomona v Thrifty Oil Co.* (1992) 4 CA4th 469, 474, 5 CR2d 687. In addition, to recover compensation under this section, the business owner must show that a positive goodwill value existed before the public taking. *City of San Diego v Sobke* (1998) 65 CA4th 379, 76 CR2d 9. But see *Inglewood Redev. Agency v Aklilu* (2007) 153 CA4th 1095, 64 CR3d 519 (cost to create, rather than excess profits, was permissible valuation of lost goodwill when business was new and had not yet experienced excess profits, but property owner had spent money to place business in good location near newly constructed marketplace).
- Compensation for precondemnation damages, if applicable. *Klopping v City of Whittier* (1972) 8 C3d 39, 104 CR 1; *Barthelemy v Orange County Flood Control Dist.* (1998) 65 CA4th 558, 76 CR2d 575.

© The Regents of the University of California

§8.63 (9) Judgment; Payment of Judgment

Judgment is entered. CCP §1235.130.

The condemnor pays into court any excess of the judgment over the probable compensation deposited earlier; or, the defendants repay any excess of the probable compensation deposited earlier and withdrawn by them over the amount of the judgment. CCP §§1268.010, 1255.280.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.64 (10) Final Order of Condemnation

§8.64 (10) Final Order of Condemnation

The recordation of the final order of condemnation vests title to the property interests being acquired in the condemnor. CCP §1268.030(c).

PRACTICE TIP: Once recorded in the county where the property is located, the final order is the equivalent of a grant deed.

© The Regents of the University of California

§8.65 12. Acquisition of Real Property by Gift, Bequest, or Offer of Dedication

A city may acquire real property by gift, bequest, or devise. Govt C §37354; Prob C §6102. A city may also accept an irrevocable offer to dedicate real property. Govt C §§7050; CC §1009(c). A city may only dispose of an irrevocable offer of dedication through summary vacation procedures. Govt C §7050. On summary vacation procedures, see §§8.142-8.150.

© The Regents of the University of California

§8.66 a. Terms of Gift, Bequest, or Devise

Cities may hold and dispose of the property and the income and increase from the property for such uses as are prescribed in the terms of the gift, bequest, or devise. Govt C §37354. If the terms of a gift, bequest, or devise do not prescribe or limit the uses to which the property received or the income or increase from it may be put, it may be put to such uses as the legislative body prescribes. Govt C §37355. Use limitations in a gift deed or bequest or devise generally are subject to strict construction. See *Save the Welwood Murray Mem. Library Comm. v City Council* (1989) 215 CA3d 1003, 263 CR 896.

© The Regents of the University of California

§8.67 b. Restrictions

Acceptance of gifts by charter cities can be regulated through their city charters within constitutional limitations. *Egan v San Francisco* (1913) 165 C 576, 133 P 294. Acceptance of conditions violative of charter provisions invalidates the gift. *O'Melveney v Griffith* (1918) 178 C 1, 5, 171 P 934. Similarly, conditions that violate any statutory or constitutional provision would likely be invalidated.

© The Regents of the University of California

§8.68 c. Tax Consequences

Gifts to a city are deductible as a charitable contribution from the donor's income for purposes of income taxes. 26 USC §170.

© The Regents of the University of California

13. Adverse Possession and Easements by Prescription and Implied Dedication

§8.69 a. Adverse Possession

A city can acquire title to property through adverse possession, in the same manner as a private party. *Beckett v City of Petaluma* (1915) 171 C 309, 313, 153 P 20. For a general discussion of the requirements for claiming title through adverse possession, see 12 Witkin, Summary of California Law*, Real Property* §§212-235 (10th ed 2005).

© The Regents of the University of California

§8.70 b. Easements by Prescription

A city can acquire an easement by prescription, granting the city the right to use private lands. *Reinsch v City of Los Angeles* (1966) 243 CA2d 737, 744, 52 CR 613. A prescriptive easement is obtained by showing that the easement was: (1) used continuously for a period of 5 years; (2) under a claim of title or right; (3) possessed in a manner that was open, notorious, and clearly visible to the owner of the burdened land; and (4) hostile and adverse to the owner. CC §1007; CCP §§318-319, 321-322, 325; *Reinsch*, 243 C2d at 745. No use can ever ripen into an easement by prescription, however, if signs are erected under CC §1008.

PRACTICE TIP: In the context of adverse possession and prescription, practitioners are advised to consider the nature of the use to determine if the use created an interest in the public or in the city.

© The Regents of the University of California

§8.71 c. Easements by Implied Dedication

A city can also acquire the right to use private lands by means of implied dedication. *Gion v City of Santa Cruz* (1970) 2 C3d 29, 38, 84 CR 162. To do so, the city must establish that the public used the land "for a period of more than 5 years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone." 2 C3d at 38. What must be shown is that various groups of persons (as opposed to a limited and definable number) used the property believing the public had a right to such use. 2 C3d at 39. Statutory dedication is governed by provisions of the Subdivision Map Act (Govt C §§66410-66499.37).

© The Regents of the University of California

§8.72 (1) Statutory Constraint

The holding in *Gion v City of Santa Cruz* (1970) 2 C3d 29, 38, 84 CR 162, was severely curtailed by the enactment of CC §1009, which states that an easement by implied dedication can be obtained only through one of two circumstances:

(1) The public entity is using private lands by an expenditure of public funds on visible improvements or maintenance in such a manner that the owner knows or should know that the public is making such use of his land, without the express permission or prohibition of the owner, for a period of 5 years. CC §1009(b), (d).

(2) The private property is certain specified coastal property, and the owner has not posted signs or published notice granting a right to pass, or recorded a notice of consent to use land, or entered into an agreement with a federal, state, or local agency providing for the public use of such land. CC §1009(b), (e)-(f). See also CC §813 (amended in response to *Gion* and permitting the owner to record a notice of permissive public use and preclude a finding of implied dedication).

© The Regents of the University of California

§8.73 (2) When *Gion* Applies

Gion v City of Santa Cruz (1970) 2 C3d 29, 38, 84 CR 162, still applies to situations involving roads, beaches, and shoreline areas when the use occurred for the prescriptive period before the enactment of CC §1009 in 1971. CC §1009(b); *Bess v County of Humboldt* (1992) 3 CA4th 1544, 1550 n3, 5 CR2d 399. See also *Richmond Ramblers Motorcycle Club v Western Title Guar. Co.* (1975) 47 CA3d 747, 758, 121 CR 308 (refusing to apply the holding in *Gion* to property other than roads, beaches, and shoreline areas).

© The Regents of the University of California

§8.74 (3) Implied Dedication With Consent

A city may also acquire an easement by implied dedication when the property has been used for less than 5 years. To do so, the city must prove the actual consent or acquiescence of the owner. *Western Aggregates, Inc. v County of Yuba* (2002) 101 CA4th 278, 130 CR2d 436. However, any such implied dedications after 1971 would also be subject to CC §1009.

PRACTICE TIP: There is a close relationship between acquisition of a prescriptive easement and the creation of an easement in favor of the public by implied dedication. There are very few decisions that have considered the public's acquisition of an easement by prescription because in those cases when there has been continuous use of private property by the public, the issue has been whether such usage was sufficient to accomplish a common law dedication of an easement. 6 Miller and Starr, California Real Estate §15:30 (3d ed 2000). Carefully review the elements of both an easement by prescription and an easement by implied dedication to determine if one or the other fits the facts at hand.

© The Regents of the University of California

§8.75 14. Effect of Debt Limitation on Property Acquisition

Cities may not acquire real property by entering into installment sales contracts or mortgage agreements unless the total amount of the purchase price is appropriated in the year the property is acquired. Cal Const art XVI, §18.

PRACTICE TIP: If property is sought to be acquired by payments over time, consider lease/purchase, lease/lease-back, or similar lease-based financing arrangements.

© The Regents of the University of California

§8.76 15. Acceptance of Interests in Real Property

Deeds conveying an interest in real property cannot be recorded without a certificate of acceptance by the city council. Govt C §27281. The city council may delegate the authority to accept real property. Govt C §27281.

For related material on redevelopment, see §§5.301-5.439; relocation assistance, see §§8.14-8.25; the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177), see §§11.10-11.79; hazardous materials and obligations of owners of property, see §§11.237-11.255.

© The Regents of the University of California

§8.77 16. Acquisitions of Personal Property

General law cities have the power to purchase, lease, receive, hold, and enjoy personal property (Govt C §37350), both within and without the city. Govt C §37351. Charter cities may exercise similar powers through their municipal charters, and all city charters generally do so. *Law v San Francisco* (1904) 144 C 384, 77 P 1014. General law cities may not use installment sales contracts to acquire property unless all necessary funds are appropriated and reserved during the fiscal year when the city enters into the contract. Cal Const art XVI, §18. For discussion of purchasing goods and services, see chap 7.

The power to purchase, lease, receive, hold, enjoy, and dispose of personal property is an inherent power of a charter city by virtue of its charter and the California Constitution (specifically Cal Const art XI, §5). As a "municipal affair," such matters are not necessarily subject to state statutory control absent a finding of express state preemption (which finding is also not controlling on courts). *Piledrivers' Local Union v City of Santa Monica* (1984) 151 CA3d 509, 511, 198 CR 731.

© The Regents of the University of California

17. Acquisition by Other Means

§8.78 a. Other Common Law Easements

In addition to the easements discussed in §§8.70-8.74, other common law easements also apply to public agencies. Generally, an easement by implication develops when the easement is reasonably necessary for the beneficial use and enjoyment of property conveyed from the same owner. An easement by necessity will be established only when strict necessity exists.

© The Regents of the University of California

§8.79 b. Lost and Unclaimed Property

Various statutes apply to the procedures by which a city can acquire abandoned property.

A city may elect to be governed by CC §§2080-2080.10, with respect to disposition of property which is "found or saved on property subject to its jurisdiction, or in the alternative, may provide by ordinance for the care, restitution, sale or destruction of such property subject to the requirement that the property be held for at least three months and, thereafter, sold at public auction to the highest bidder." CC §2080.4. However, such property need not be sold if retained by the city for a public use. CC §2080.4. The Unclaimed Property Law (CCP §§1500-1582) addresses escheat of property to the state when property is not covered by other statutes. See CCP §1510.

State law also provides a procedure by which a city can obtain ownership of money, excluding restitution to victims, that is not the property of the city, and that remains unclaimed in the city treasury for 3 years. Govt C §§50050-50057.

© The Regents of the University of California

II. PROPERTY DISPOSITION

§8.80 A. Real Property

A city may dispose of real property essentially in any way it chooses, if the disposition is for the common benefit. See Cal Const art XI, §5; Govt C §37350. The planning commission staff must prepare a report that indicates that the disposition of the property conforms with the general plan. Govt C §65402(a). This requirement does not apply to a charter city unless such provisions are adopted by charter or ordinance. Govt C §65700. There is no requirement that the city formally declare the property as surplus. But see Govt C §50569 (regarding annual inventory requirement). Unique real property disposition provisions apply to redevelopment agencies under the Community Redevelopment Law (Health & S C §§33000-33855). Property that is dedicated under the Subdivision Map Act (Govt C §§66410-66499.37) must be reconveyed to the subdivider or successor in interest if not used for the public purpose originally dedicated, except for property used for public utilities. Govt C §66477.5(c).

PRACTICE TIP: A city is generally not legally required to obtain an appraisal before selling real property. However, appraisals will help to ensure that a city is obtaining a reasonable price for the property and can prevent a challenge that the sale constitutes a gift of public funds. See also *Winkelman v City of Tiburon* (1973) 32 CA3d 834, 108 CR 415 (sale of public agency property to nonprofit corporation for less than fair market value is for public purpose and not a gift of public funds).

© The Regents of the University of California

1. Optional Procedure

§8.81 a. Findings

State law provides an optional procedure for cities to use in disposing of real property. See Govt C §§37420-37430. The procedure involves finding that the public interest and convenience require the sale of the public building (or site dedicated to a public use) and adopting a resolution of intent to sell the property. Govt C §37421.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.82 b. Content of Resolution of Intent

§8.82 b. Content of Resolution of Intent

The resolution of intent must fix a time for public hearing, provide for publication of the notice of the hearing, fix the time that final action will be taken, and contain an accurate description of the property to be sold. Govt C §37422.

© The Regents of the University of California

§8.83 c. Publication

The resolution must be published at least once in a daily newspaper published and circulated in the city or, if there is none, a newspaper within the county, designated by the city, and also posted at least 10 days in three conspicuous places on the property. Govt C §37423.

© The Regents of the University of California

§8.84 d. Overriding Protests

A four-fifths vote of the city council is needed to override any protests to the sale. Govt C §37425.

© The Regents of the University of California

2. Surplus Property

§8.85 a. Inventory

On or before December 31 of each year, a city must prepare an inventory of all property and determine which property "is in excess of its foreseeable needs" and must provide the inventory or description of the property without charge to any person who requests a copy. Govt C §50569.

© The Regents of the University of California

§8.86 b. Offer Required

Before disposing of surplus real property, a city must send a written offer to sell or lease the property to certain entities. Govt C §54222. There are exceptions to this requirement. See, *e.g.,* Govt C §§54222.3, 54226. However, failure to comply does not invalidate a transfer to a purchaser or encumbrancer for value. Govt C §54230.5.

© The Regents of the University of California

§8.87 (1) Housing Providers

Before disposing of surplus real property, the city must send a written offer to sell or lease the surplus property for the purpose of developing low- or moderate-income housing to any local agency as defined in Health & S C §50079. Govt C §54222(a). The offer must also be sent to any "housing sponsor," as defined by Health & S C §50074, who requests it. Govt C §54222(a).

© The Regents of the University of California

§8.88 (2) Sale and Reverter

Notwithstanding the requirements of Govt C §§54222-54223, the city may sell or lease the property to any housing corporation, limited dividend corporation, or nonprofit corporation, as provided by law, for the development of housing available to persons of low- or moderate-income at affordable housing cost, as defined by Health & S C §50052.5. The deed or other instrument of conveyance must include a clause reverting the property to the city if the property is no longer owned by a majority of the nonprofit or limited dividend sponsors. Govt C §50570. A public hearing is required before the transfer. Govt C §50572.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.89 (3) Park and Recreation; Open Space Property

§8.89 (3) Park and Recreation; Open Space Property

Offers to sell or lease surplus property for park and recreation or open-space purposes must be sent to the park or recreation department of the city and county in which the property is situated, any regional park authority having jurisdiction over the area in which the property is situated, and the California Resources Agency. Govt C §54222(b).

© The Regents of the University of California

§8.90 (4) Enterprise Zone Property

Offers to sell or lease surplus property located in an enterprise zone established under Govt C §7073 must be sent to the nonprofit neighborhood enterprise association corporation in that enterprise zone. Govt C §54222(d).

© The Regents of the University of California

§8.91 (5) School Property

Offers to sell or lease surplus property suitable for school facilities construction purposes must be sent to the public school districts that have jurisdiction over the area where the property is located. Govt C §54222(c).

© The Regents of the University of California

§8.92 (6) Infill Opportunity or Transit Village Property

An offer for the purpose of developing property within an infill opportunity zone designated under Govt C §65088.4 or within an area covered by a transit village plan adopted under Govt C §§65460-65460.11 must be sent to any public agency within whose jurisdiction the surplus property is located.

© The Regents of the University of California

§8.93 c. Notification

Entities desiring to purchase or lease surplus property for low- and moderate-income housing, park and recreation or open space purposes, school purposes, or enterprise zone purposes must notify the city within 60 days after receipt of notice from the city. Govt C §54222(f).

© The Regents of the University of California

§8.94 d. Good Faith Negotiations

On receipt of timely notification from an entity desiring to purchase or lease the surplus property, the city must enter into good faith negotiations with that entity to determine a mutually satisfactory sales price or lease terms. If the parties cannot agree on the price or terms after a negotiation period of not less than 60 days, the city may dispose of the property without regard to the surplus property disposition rules. Govt C §54223.

© The Regents of the University of California

§8.95 B. Parkland

With certain restrictions, a general law city may convert a park to a different municipal purpose. Govt C §§37111-37111.1. State law provides for conversion of land purchased for park purposes or land used for park purposes. Adoption of an ordinance by a four-fifths vote is required, and a public hearing and special findings may be required. Govt C §§37111-37111.1. By contrast, a charter city has the inherent power to control, govern, and supervise its parks subject to any limitations in its charter. *Simons v City of Los Angeles* (1976) 63 CA3d 455, 133 CR 721. "If the charter is silent on the matter of abandonment or change in use of such park, that power nevertheless inheres in such a municipality." 63 CA3d at 468, citing *City of Marysville v Boyd* (1960) 181 CA2d 755, 757, 5 CR 598.

PRACTICE TIP: Several alternative statutes apply to the disposal of property dedicated and/or used for park purposes. Review each statute carefully to determine whether it applies to a particular transaction. Consider whether the city's general plan and zoning ordinance should be amended before offering the property for sale or lease to reflect a new use for the property.

© The Regents of the University of California

1. Dedicated Lands

§8.96 a. Original Dedications

State law provides a procedure for abandoning and selling parkland originally dedicated by a private dedication or an original town site map or plat. See Govt C §§38400-38418. If the original dedicator or a majority of adjoining property owners protest the abandonment, the city must terminate the proceedings for at least 6 months. Govt C §38407. When ordering the park abandoned, the city may have to compensate the abutting landowners. Govt C §§38409, 38414.

© The Regents of the University of California

§8.97 b. Parks Dedicated by City

Procedures also exist for a city to "discontinue and abandon the use as a public park of any land owned in fee by it and dedicated or placed in such use by such city" and then dispose of the property. Govt C §38440. See generally Govt C §§38440-38462. These statutes require the city council to hold a public hearing on the proposed sale. Govt C §38444. If the city council overrules by a two-thirds vote any protests received at the public hearing, the city council may call an election on whether to discontinue and abandon the park. Govt C §38450. No election is required to convey a "minor" portion of a park in exchange for an equal or greater area of value of privately owned contiguous property, but a public hearing and findings are required. Govt C §38441.

© The Regents of the University of California

§8.98 c. Private Dedications

Parkland that was dedicated to a general law or charter city by a third party may be limited by the terms of the private deed. See *Simons v City of Los Angeles* (1976) 63 CA3d 455, 133 CR 721. There is a "well-settled principle of law that land that has been dedicated as a public park must be used in conformity with the terms of the dedication, and it is without the power of a municipality to divert or withdraw the land from use for park purposes." *Slavich v Hamilton* (1927) 201 C 299, 303, 257 P 60. See Govt C §37111.1 (providing that state law permitting conversion of park to different municipal purpose not applicable to land dedicated for park purposes by donor). Examples of uses that have been found consistent with park purposes include parking structures, museums, zoos, botanical gardens, libraries, and even hotels and restaurants. See *Slavich v Hamilton* (1927) 201 C 299, 303, 257 P 60; *Spires v City of Los Angeles* (1906) 150 C 64, 66, 87 P 1026. Construction of a school, however, is not consistent with a dedication for park purposes. *San Vicente Nursery School v Los Angeles County* (1956) 147 CA2d 79, 85, 304 P2d 837; 78 Ops Cal Atty Gen 181 (1995).

© The Regents of the University of California

§8.99 2. Parks Not Used for Park Purposes

The Municipal Park Abandonment Law of 1939 (Govt C §§38501-38510) provides, in certain limited circumstances, a procedure for abandoning and disposing of parks that have not been used for park purposes. An election is required if the park was purchased with proceeds from bonds authorized for the purpose of acquiring the park. Govt C §38502.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.100 3. Parks Acquired From Counties

§8.100 3. Parks Acquired From Counties

The provisions of Govt C §25550.7 establish limitations on the disposal of park property acquired from a county.

© The Regents of the University of California

§8.101 4. Intergovernmental Transfers

Restrictions exist on transfers of park land from one government agency to another for the purpose of using the park land for nonpark purposes. See Pub Res C §§5400-5409.

© The Regents of the University of California

§8.102 C. Personal Property

A city may dispose of personal property in any way it chooses if the disposition is for the common benefit. Cal Const art XI, §5; Govt C §§37350- 37351. There is no requirement that the city formally declare the property as "surplus."

PRACTICE TIP: To avoid allegations that the sale of personal property constitutes a gift of public funds or involves favoritism, many cities enact procedures providing that surplus personal property will be sold at auction.

© The Regents of the University of California

§8.103 D. Streets and Highways Owned in Fee

If the city owns the underlying fee to property used for a street or highway, the city may sell or exchange the property after determining that it is no longer needed by the public. Str & H C §8355. The purchase price for the property must be paid to the city treasury and credited to any fund available for the same purposes for which the property was used. Str & H C §8357. See also §§8.138-8.141.

© The Regents of the University of California

E. Restrictions Applicable to Disposal of Both Real and Personal Property

§8.104 1. Government Grant Funds

Property purchased with federal or state grant money is subject to conditions of the grant. Examples are discussed in §§8.105-8.106.

© The Regents of the University of California

§8.105 a. Federal Community Development Block Grant (CDBG)

The city may sell, lease, or otherwise dispose of property acquired with federal community development block grant (CDBG) funds, but proceeds are "program income" subject to federal restrictions. 24 CFR §570.201(b). See generally 42 USC §§5301-5320.

© The Regents of the University of California

§8.106 b. California Park and Recreational Facilities Act of 1984

The city must agree to use property acquired or developed with grant funds only for the purpose for which the funds were requested. See generally the California Park and Recreational Facilities Act of 1984 (Pub Res C §§5096.225-5096.267). If the property use is changed or the property is sold, the city must use the funds for an authorized grant purpose or reimburse the state fund. Pub Res C §5096.237.

© The Regents of the University of California

§8.107 2. Redevelopment

A redevelopment agency may sell or dispose of property for purposes of redevelopment. Health & S C §33430. See §§8.108-8.110. On redevelopment, see also §§5.307-5.454.

© The Regents of the University of California

§8.108 a. Hearing

If property is not sold or leased through a public bidding process, an agency may approve the sale or lease only after considering the matter at a noticed public hearing. Health & S C §33431. However, if the property to be sold or leased was acquired in whole or in part with tax increment revenues, the sale or lease must be approved by both the agency and by resolution of the city council after considering the matter at a noticed public hearing or hearings. Health & S C §33433(a)(1).

© The Regents of the University of California

§8.109 b. Report

If property to be sold or leased was acquired with tax increment monies, disclosure of the terms of the lease or the sale is necessary in the form of a report. Health & S C §33433(a)(2). See *Contra Costa Theatre, Inc. v Redevelopment Agency of the City of Concord* (1982) 131 CA3d 860, 865, 184 CR 630.

© The Regents of the University of California

§8.110 c. Required Provisions

Disposition documents must contain nondiscrimination covenants. Health & S C §§33435-33436. The agency must require purchasers or lessees to use the property for the purpose designated in the redevelopment plan, begin redevelopment within a period of time designated by the agency, and comply with other conditions and restrictions deemed necessary by the agency. Health & S C §33437. The redevelopment agency may provide that obligations of the purchaser are covenants running with the land whose breach shall cause the fee to revert to the agency. Health & S C §33438. The agency must retain controls and establish covenants running with the land for such periods of time and under such conditions as are provided in the redevelopment plan. Health & S C §33439.

© The Regents of the University of California

3. Donations

§8.111 a. For Public Purpose

Donations of land by a public entity must be for a public purpose of the donor Cal Const art XVI, §6; *County of Alameda v Janssen* (1940) 16 C2d 276, 106 P2d 11; *Golden Gate Bridge & Highway Dist. v Luehring* (1970) 4 CA3d 204, 84 CR 291. This requirement does not apply to charter cities. *Social Workers Union Local 535 v Los Angeles County* (1969) 270 CA2d 65, 75 CR 566. Courts defer to a legislative determination of "public purpose" as long as the determination has a reasonable basis. See *Board of Supervisors v Dolan* (1975) 45 CA3d 237, 243, 119 CR 347 (expanding definition of "public use").

© The Regents of the University of California

§8.112 b. Other Permissible Donations Under State Law

In addition, state law specifically allows certain kinds of donations by local agencies. See Govt C §§50330-50335 (providing that local agencies may donate land and buildings to public universities, community college districts, agricultural associations, the State of California, the federal government, or to create public or private utilities easements).

© The Regents of the University of California

§8.113 4. Conflicts of Interest

A city may be precluded from acquiring or disposing of property if a city official has a financial interest in the acquisition, sale, or other transfer of the property, and the acquisition, sale, or other transfer is made under a contract approved by the city body or board of which the city official is a member. Govt C §1090. On conflicts of interest and prohibited contracts, see also §§2.151-2.161.

PRACTICE TIP: It is important to ascertain the source of funds used to purchase the property before initiating any action to sell it, as the proceeds from the sale of such property may be restricted depending on the source of the purchase money.

© The Regents of the University of California

§8.114 F. Adverse Possession

The city may not lose title to or any interest in property through adverse possession. CC §1007.

© The Regents of the University of California

III. LEASES OF CITY PROPERTY

§8.115 A. General Leasing Authority

A city may lease property owned, held, or controlled by it for a period not to exceed 55 years. Govt C §37380(a). The term of the lease can be for up to 99 years, if all of the following conditions are met: (1) the lease is subject to periodic review by the city and takes into consideration the then current market conditions; (2) the lease is authorized by an ordinance adopted by the city council; (3) the council holds a noticed public hearing on the lease (notice of the hearing must be published as prescribed in Govt C §6066 and must also be given to all owners of land adjoining the property, to any person requesting special notice, and to any present tenant of the property); and (4) after a notice inviting competitive bids is issued, the lease is awarded to the bidder who offers the greatest economic return to the city. Govt C §37380(b). The requirements outlined in (2), (3), and (4) do not apply to charter cities. Govt C §37380. See also CC §§718-719 (containing similar provisions). An argument can be made that Govt C §37380 does not apply to charter cities. On bidding requirements, see §7.3.

A city may lease property to private individuals or organizations. See Cal Const art XI, §§3, 5; Govt C §§37350, 37380, 37395. A lease of a public building to a private nonprofit religious group in an arm's-length transaction without preference being given to religion per se would not constitute a violation of either the federal or state constitutions. See 81 Ops Cal Atty Gen 189 (1998); 45 Ops Cal Atty Gen 89 (1965); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos* (1987) 483 US 327, 334, 97 L Ed 2d 273, 107 S Ct 2862.

The issuance and approval of a lease by a city is considered a "project" under the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177). See §§11.19-11.23.

© The Regents of the University of California

§8.116 B. Authority for Specific Kinds of Leases

In addition to the general grant of authority provided by Govt C §37380, the Government Code contains various provisions authorizing the lease of city property for certain purposes, under specified conditions, for terms not to exceed a specified length. See generally Govt C §§37382-37396. These uses include the following:

- agriculture and the production of minerals, oil, and gas (see Govt C §§37382-37383);
- tidelands, and tidelands for waterfront and harbor facility development or for non-industrial uses (see Govt C §§37384-37387);
- nonprofit corporation for housing development (see Govt C §37388);
- airport and related uses (see Govt C §37389);
- sewage, sewage effluent, and sewers and sewage treatment (see Govt C §§37390, 37392.1);
- fair and exposition purposes (see Govt C §37391);
- to the state for housing personnel and equipment or State Adjutant General (see Govt C §37392);
- dams and reservoirs (see Govt C §37392.2);
- off-street parking (see Govt C §37394);
- commercial development (see Govt C §37395); and
- stadium, recreational purposes, or general sports purposes (see Govt C §37396).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.117 C. Statement Concerning Taxable Interest

§8.117 C. Statement Concerning Taxable Interest

Any lease that may create a possessory interest subject to property taxation must include a statement that the property interest may be subject to property taxes and that the lessee may be subject to the payment of such property taxes. Rev & T C §107.6. Failure of the city to include such a provision in the lease may result in damages in the amount of the possessory interest taxes. Rev & T C §107.6.

© The Regents of the University of California

§8.118 D. Recordation

A lease of city property must be recorded. Govt C §37393.

© The Regents of the University of California

IV. LIMITATIONS ON USE OF CITY PROPERTY

§8.119 A. Obstructions and Encroachments

Municipalities may prohibit encroachments into and obstructions on public property and may provide for the removal of any prohibited encroachments. Govt C §38775. A right to maintain an obstruction cannot be acquired by prescription as against a city. *Laura Vincent Co. v City of Selma* (1941) 43 CA2d 473, 111 P2d 17. A city may regulate encroachments on public property, including but not limited to, sidewalks, alleys, streets, and other public places by requiring an encroachment permit and permitting the encroachment under specified conditions. However, any such regulatory scheme must have a just relation to the object in view and have a reasonable tendency to preserve or protect the public safety or convenience. 43 CA2d at 476. Municipalities have broad discretion in this regard. Thus, a city council's determination of what constitutes an obstruction or encroachment will not be upset by the courts in the absence of fraud, oppression, or a manifest abuse of discretion. 43 CA2d at 476. See also *Irwin v City of Manhattan Beach* (1966) 65 C2d 13, 51 CR 881.

© The Regents of the University of California

§8.120 B. Removal of Obstructions

General nuisance and trespass law are tools to enforce removal of obstructions or encroachments that unlawfully obstruct the free passage or use of public property, if permit issuance is not desired or granted by the city. See, *e.g.,* CC §3479; Govt C §38771; Pen C §370. In addition, general legal principles that would apply to private property encroachments can also be used to force removal of items such as fences, walls, marquees, and other encroachments. See, *e.g.,* CCP §§731-736.

© The Regents of the University of California

§8.121 C. Deed Restrictions

Property may be donated to the city subject to conditions imposed by the grantor regarding its use. Restrictions or limitations on use may prohibit commercial activities or require use for recreational, or similar, purposes. Reasonable restrictions honoring the intent of the grantor will be upheld. Thus, when land is donated to the city with a restriction on its use, the city usually cannot divert the use of the property to purposes inconsistent with the terms of the grant, including transferring an interest in the donated land to private parties for nonpublic uses. *Big Sur Props. v Mott* (1976) 62 CA3d 99, 132 CR 835.

© The Regents of the University of California

V. STREETS AND EASEMENTS

A. Utility Relocation

§8.122 1. Case Law

In the absence of a statute or an express contractual provision to the contrary, a utility must pay the cost of relocating its equipment or facilities caused by the exercise of a municipality's police power. See, *e.g., Norfolk Redev. & Hous. Auth. v Chesapeake & Potomac Tel. Co. of Virginia* (1983) 464 US 30, 78 L Ed 2d 29, 104 S Ct 304; *Pacific Tel. & Telegraph Co. v Redevelopment Agency of the City of Glendale* (1978) 87 CA3d 296, 151 CR 68 (in absence of provision to contrary, public utility accepts franchise rights in public streets subject to implied obligation to relocate its facilities at its own expense when necessary to make way for proper governmental use of streets). The same rule applies when the utility is publicly owned. *City of Los Angeles v Metropolitan Water Dist.* (1981) 115 CA3d 169, 171 CR 217.

© The Regents of the University of California

§8.123 2. Statutory Obligation

When dealing with gas, electric, and water municipal franchises, the grantee must remove or relocate without expense to the municipality any facilities installed, used, and maintained under the franchise if and when made necessary by any lawful change of grade, alignment, or width of any public street, way, alley, or place, including the construction of any subway or viaduct, by the municipality. Pub Util C §6297. See also *City of Livermore v PG&E* (1997) 51 CA4th 1410, 59 CR2d 852 (funding mechanism chosen by city does not justify exception to rule that franchise utility pay for relocation of its equipment when required due to street widening project); *PG&E v San Jose* (1985) 172 CA3d 598, 601, 218 CR 400 (noting cases interpreting Pub Util C §6297 and the common law indicate almost unanimous refusal to allow utility company franchisees to recover reimbursement for relocation expenses). The Public Utilities Commission has exclusive jurisdiction to decide whether a utility must pay to put its facilities underground in an underground utility district. *City of Anaheim v Pacific Bell Tel. Co.* (2004) 119 CA4th 838, 14 CR3d 725.

© The Regents of the University of California

3. Exceptions

§8.124 a. Statutory

Several California statutory provisions provide varying degrees of relief to a utility that is forced to relocate. See Str & H C §§702 (requiring Department of Transportation to reimburse utilities for cost of having to relocate outside rights-of-way), 27261 (requiring bridge and highway districts to pay certain relocation expenses), 32950.5 (requiring parking authorities to pay certain relocation expenses); Pub Util C §25703 (requiring transit districts to pay cost of removal and relocation of public utility equipment).

© The Regents of the University of California

§8.125 b. Property Rights

A utility may be entitled to reimbursement for relocation expenses if a court finds that the utility's rights stem from an interest other than a franchise. See, *e.g., PG&E v County of San Mateo* (1965) 233 CA2d 268, 271, 43 CR 450 (upholding trial court's award of damages to plaintiff PG&E when county's improvements were an interference with plaintiff's easement, which specifically enjoined construction of "any building or other structure" along right-of-way).

PRACTICE TIP: Review the terms of any applicable franchise when determining the extent of a utility company's obligations to relocate its facilities. The franchise frequently provides greater rights and protection for the city than the easement or the applicable Public Utilities Code provisions.

© The Regents of the University of California

§8.126 B. Streets, Highways, and Other Easement Vacations

Vacation of public streets, highways, and service easements is governed by the Public Streets, Highways, and Service Easements Vacation Law (Str & H C §§8300-8363). The vacation can follow either a nonsummary or a summary procedure.

© The Regents of the University of California

C. Nonsummary Vacation Procedure

1. Prehearing Procedure

§8.127 a. Planning Commission Role

Before vacating a street, the city council must consider the city's general plan and submit the matter of the proposed vacation to the planning commission, according to the procedures established in Govt C §65402; Str & H C §8313. The planning commission must make a report as to the conformity of the proposed street vacation with the city's general plan within 40 days or some other period of time designated by the city council. Govt C §65402. If the planning commission fails to make its report, it will be conclusive evidence that the vacation is in conformity with the city's general plan. Govt C §65402. Vacation of a public service easement may be submitted to the planning commission. Str & H C §8313.

© The Regents of the University of California

§8.128 b. Initiation of Proceedings

The city council may initiate vacation proceedings by setting a hearing on the proposed vacation. Str & H C §8320. On summary vacation procedures, see §§8.142-8.150.

© The Regents of the University of California

§8.129 c. Hearing and Notice

The notice of hearing must set a time and place for a hearing on the proposed vacation. Str & H C §8320. Notice of the hearing must be published (Str & H C §8322) and posted (Str & H C §8323).

© The Regents of the University of California

§8.130 d. Receipt of Evidence

At the hearing, the city council must hear evidence presented by interested persons. Str & H C §8324.

© The Regents of the University of California

2. Posthearing Procedure

§8.131 a. Resolution Vacating Easement

If, at the conclusion of the hearing, the city council finds that the easement proposed to be vacated is unnecessary for present or prospective public use, the city council may adopt a resolution vacating the easement. The California appellate districts are split on whether easement vacation procedures are legislative or quasi-judicial. Compare *City of Rancho Palos Verdes v City Council of the City of Rolling Hills Estates* (1976) 59 CA3d 869, 129 CR 173 (holding procedure to be quasi-judicial), with *Heist v County of Colusa* (1984) 163 CA3d 841, 213 CR 278 (holding procedure to be legislative).

© The Regents of the University of California

§8.132 b. Conditions

The resolution of vacation may provide that the vacation must occur only after conditions imposed by the city council have been satisfied. Str & H C §8324(b).

© The Regents of the University of California

§8.133 c. Recordation

The resolution of vacation must be recorded in the office of the county recorder. From the date of recordation and compliance with conditions, if any, the vacation is complete. Str & H C §8325.

© The Regents of the University of California

3. Reservations

§8.134 a. Future Sewers, Storm Drains, and Other Utilities

In any proceeding to vacate a street, the city council may reserve from the vacation the easement and right at any time, or from time to time, to construct, maintain, operate, replace, remove, and renew sanitary sewers and storm drains and appurtenant structures in, on, over, or across the street to be vacated, and under any existing franchise or renewals thereof, to construct, maintain, operate, replace, remove, renew, and enlarge pipes and other structures, equipment, and fixtures for the operation of gas pipelines, telegraphic and telephone lines, and railroad lines, and for the transportation and distribution of electrical energy, petroleum, ammonia, and water. Str & H C §8340(a).

© The Regents of the University of California

§8.135 b. Future Streets

The city council may reserve and except from the vacation an easement for a future street unless the city council finds that the street is unnecessary for prospective public use. Str & H C §8340(b).

© The Regents of the University of California

§8.136 c. Existing Utilities

If there are public utility facilities in place that are in use, the city council should, unless the city council determines that the public convenience and necessity require otherwise, reserve and except from the vacation any easement and right necessary to maintain, operate, remove, replace, or renew the public utility facilities. Str & H C §8340(c).

When a public street is vacated, a utility using that street may lose its franchise. Pub Util C §6001; *Kachadoorian v Calwa County Water Dist.* (1979) 96 CA3d 741, 158 CR 223 (even though there was an operating water line in place, municipal water district lost its franchise rights under Pub Util C §10101 when public street was abandoned).

The nature of the property right held by the utility, whether the right is a franchise, an easement, or some other property right, will determine if the use right continues after a street is vacated or abandoned in the absence of a specific reservation by the city council. The agreements or easement deeds providing for the utility's use of the street or road should be consulted before presentation of the proposed vacation to the planning commission for a determination of consistency with the general plan.

© The Regents of the University of California

§8.137 d. Trails

The city council may reserve and except from the vacation an easement for future vehicular and nonvehicular trails for use by the public. Str & H C §8340(d).

© The Regents of the University of California

§8.138 4. Effect of Vacation

Unless the city council makes any reservations as described above, the vacation of an easement extinguishes all city-owned easements therein. Str & H C §8350. The effect of the vacation of a street varies depending on whether the city owns an easement or the title to underlying property. See §§8.139-8.140.

© The Regents of the University of California

§8.139 a. City Owns Easement Only

If the city owns only an easement, title to the property previously subject to the easement reverts to the owner of the fee free from the easement. Str & H C §8351. A rebuttable presumption exists that "an owner of land bounded by a road or street" owns to "the center of the way." CC §831. But see CC §1105 ("A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended").

© The Regents of the University of California

§8.140 b. City Owns Underlying Property

If the city owns the title, the city council may sell or exchange the property previously subject to the easement if it is no longer needed by the public. Str & H C §8355. The purchase price for any property sold must be paid into the city treasury to the credit of a fund available for the same purposes for which the property was used that the city council designates. Str & H C §8357.

With respect to the presumption of CC §1105, a fee simple title is presumed "to pass by a grant of real property." However, this is a presumption that affects real property in general; it may yield to more specific presumptions dealing with public roads. *City of Los Angeles v Pacific Elec. Ry. Co.* (1959) 168 CA2d 224, 228, 335 P2d 1042.

The primary rule to be applied in California is that the intention of the parties governs as to whether the conveyance is of an easement or fee title. No presumption is to be applied if the words of the deed are clear. It is when the language is ambiguous that a statutory presumption controls. The phrase "right of way," for example, may be construed as referring to the transfer of either an easement or fee title, depending on the circumstances. See *City of Manhattan Beach v Superior Court* (1996) 13 C4th 232, 240 n6, 52 CR2d 82; *Severns v Union Pac. R.R. Co.* (2002) 101 CA4th 1209, 1215, 125 CR2d 100; *Machado v Southern Pac. Transp. Co.* (1991) 233 CA3d 347, 354, 359, 284 CR 560; 6 Miller & Starr, California Real Estate §15:17 (3d ed 2000). Likewise, the phrase "for road purposes" may be construed as referring either to an easement or fee title, again depending on the circumstances. *Machado,* 233 CA3d at 354, 359; *Cooper v Selig* (1920) 48 CA 228, 191 P 983. See 6 Miller & Starr §15.17. In these situations, all the relevant facts must be considered to determine the nature of the interest intended to be conveyed. See the discussion in 88 Ops Cal Atty Gen 136 (2005).

© The Regents of the University of California

§8.141 5. Agreements Not to Vacate

Local agencies may enter into written contracts providing that certain streets or highways cannot be vacated without the consent and agreement of both agencies. Str & H C §8360. Any such agreement, once ratified by resolution by both agencies, limits each agency's power to vacate or close a street except in accordance with the law and the written agreement. Str & H C §8362. The agreement must be recorded in each county in which any property through which the street or highway runs is situated. Str & H C §8363.

© The Regents of the University of California

§8.142 D. Summary Vacation Procedure

Under certain circumstances, a city may use a summary procedure for vacating a portion of a street. See generally Public Streets, Highways, and Service Easements Vacation Law (Str & H C §§8300-8363). Summary vacation procedures are not available if there are in-place public utility facilities that are in use that would be affected by the vacation. Str & H C §8334.5.

© The Regents of the University of California

1. Circumstances in Which Summary Vacation May Occur

§8.143 a. Superseded by Relocation

Summary vacation may occur when the street or highway has been superseded by relocation, unless such vacation would (Str & H C §8330):

- cut off all access to a person's property, which before relocation adjoined the street or highway; or
- terminate a public service easement unless the easement meets the criteria for summary vacation of a public service easement.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.144 b. Impassability and Nonmaintenance

§8.144 b. Impassability and Nonmaintenance

Summary vacation may occur when the street or highway has been impassable for vehicular travel for 5 years and no public money has been expended for maintenance during that period. Str & H C §8331.

© The Regents of the University of California

§8.145 c. Surplus

Summary vacation may occur when an excess right-of-way of a street or highway is not required for street or highway purposes. Str & H C §8334.

© The Regents of the University of California

§8.146 d. Dead Ends

Summary vacation may occur when a portion of a street or highway lies within property under one ownership and does not continue through such ownership or end touching the property of another. Str & H C §8334.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.147 e. Offers of Dedication on Subdivision Maps

§8.147 e. Offers of Dedication on Subdivision Maps

Summary vacation may occur when an offer of dedication is provided for on a subdivision map. Govt C §66477.2(c). Under the Subdivision Map Act, offers to dedicate on a final map are irrevocable by the grantor and can be terminated only by a statutory process by the city. See Govt C §§66463, 66475, 66477.2; *Mikels v Rager* (1991) 232 CA3d 334, 284 CR 87.

© The Regents of the University of California

§8.148 f. Public Service Easements

Cities may summarily vacate public service easements in any of the following circumstances (Str & H C §8333):

- The easement has not been used for the purpose for which it was dedicated or acquired for 5 consecutive years immediately preceding the proposed vacation.
- The date of dedication or acquisition is less than 5 years and more than 1 year immediately preceding the proposed vacation and the easement has not been used continuously since that date.
- The easement has been superseded by relocation and there are no other public facilities located within the easement.

© The Regents of the University of California

2. Procedures for Summary Vacation

§8.149 a. Resolution

The city council summarily vacates the street by adopting a resolution of vacation after submission to the planning commission. Govt C §65402. The planning commission need not review summary vacation of public service easements. Govt C §65402.

© The Regents of the University of California

§8.150 b. Recordation

The resolution of vacation must then be recorded in the office of the recorder of the county in which the property is located. From the date of such recording the vacation will be complete and the street will no longer constitute a street. Str & H C §8336(b).

PRACTICE TIP: Real property law establishes certain presumptions regarding title to land encumbered by a street easement. Vacation of a public street easement does not affect private rights in the parcel

© The Regents of the University of California

§8.151 E. Challenges to Vacation

In a decision to vacate, the governing agency must find that the street is unnecessary for present or future public use. Str & H C §8324(b). The decision is subject to judicial review. However, the decision will be overturned only if the agency has acted in an arbitrary or capricious manner. *Citizens for Improved Sorrento Access, Inc. v City of San Diego* (2004) 118 CA4th 808, 814, 13 CR3d 259.

An adjoining landowner may claim that vacation of the public street is a taking resulting in an inverse condemnation claim. *Leonard v People ex rel Dept. of Transp.* (1998) 62 CA4th 1296, 73 CR2d 328 (owners sought compensation when freeway off-ramp was moved; inverse claim was denied). Landowners abutting public roads have a collection of easement rights including the rights of view, access, light, and air. *People ex rel Dept. of Transp. v Wilson* (1994) 25 CA4th 977, 980, 31 CR2d 52.

© The Regents of the University of California

VI. STREETS AND SIDEWALKS

§8.152 A. General Regulatory Requirements

Any local regulation of the use of streets and sidewalks must be reconciled with the fact the state has preempted the field of traffic control (see §8.153). Therefore, there must be express legislative authority for the local regulation. Local regulation of streets and sidewalks cannot be arbitrary, unreasonable, or discriminatory. Govt C §37100. See also *Laura Vincent Co. v City of Selma* (1941) 43 CA2d 473, 111 P2d 17.

© The Regents of the University of California

B. Vehicular Regulations

§8.153 1. Preemption

The state has plenary power and has preempted the entire field of traffic control. See Veh C §21 ("Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein"). Unless expressly authorized by the legislature, a city, whether charter or general law, has no police power over vehicular traffic control. *Rumford v City of Berkeley* (1982) 31 C3d 545, 550, 183 CR 73; *County of Los Angeles v City of Alhambra* (1980) 27 C3d 184, 192, 165 CR 440, superseded on other grounds as stated in *County of Alameda v City of Oakland* (1987) 193 CA3d 858, 863, 238 CR 646 (parking meter regulation is a form of traffic control as to which state statutes supersede even ordinances authorized by charter); *City of Lafayette v County of Contra Costa* (1979) 91 CA3d 749, 754, 154 CR 374. But see *Xiloj-Itzep v City of Agoura Hills* (1994) 24 CA4th 620, 29 CR2d 879 (city ordinance to prohibit solicitations of persons traveling in vehicles neither preempted by state law nor facially invalid).

© The Regents of the University of California

§8.154 2. Road Closures

State law allows cities to close streets and highways under certain circumstances. See Veh C §21101. This includes closing streets for driver training (Veh C §21101(d)), for parades and special events (Veh C §21101(e)), and for school safety when the road divides school grounds (see Veh C §21102). Cities may also temporarily close a highway under its jurisdiction to through traffic under certain circumstances as a way of dealing with criminal activity in that area after a public hearing and based on certain findings. See Veh C §21101.4. Certain state approval and public notice requirements may apply to street closures. See Veh C §§21103-21104. Cities may also restrict vehicular or pedestrian traffic through alleys where such restriction is necessary for the protection or preservation of the public peace, safety, health, or welfare subject to certain conditions. See Veh C §21102.1.

© The Regents of the University of California

§8.155 a. To Implement Circulation Element

State law authorizes cities to prohibit entry to, or exit from, or both entry to and exit from, any street by means of islands, curbs, traffic barriers, or other roadway design features to implement the circulation element of the general plan. See Veh C §21101(f). Compare *Uhler v City of Encinitas* (1991) 227 CA3d 795, 278 CR 157 (because city had not adopted rules and regulations required to be adopted under Veh C §21101(f) before approval of traffic barrier with curb, barrier was in violation of Vehicle Code), with *City of Poway v City of San Diego* (1991) 229 CA3d 847, 280 CR 368 (section confers no authority to close portion of regional road) and *Carsten v City of Del Mar* (1992) 8 CA4th 1642, 1650, 11 CR2d 252 (concerning adoption of traffic control plan). Any action to close a street must be consistent with local government's duty to provide for the health and safety of its citizens and nonresident members of the public. *City of Hawaiian Gardens v City of Long Beach* (1998) 61 CA4th 1100, 72 CR2d 134.

© The Regents of the University of California

§8.156 b. Selective Access

Local authorities may not place gates or other selective devices on any street that have the effect of denying or restricting the access of certain members of the public to the street, while permitting others unrestricted access to the street. Veh C §21101.6. See *Citizens Against Gated Enclaves v Whitley Heights Civic Assoc.* (1994) 23 CA4th 812, 28 CR2d 451 (homeowners association precluded from excluding public notwithstanding city's purported withdrawal of streets from public use). See also *Rumford v City of Berkeley* (1982) 31 C3d 545, 550, 183 CR 73; *City of Lafayette v County of Contra Costa* (1979) 91 CA3d 749, 154 CR 374 (striking down ordinance closing road to all but certain "exempt" motorists); 68 Ops Cal Atty Gen 101 (1985). But see Veh C §21107.7 (relating to private roads).

© The Regents of the University of California

3. Parking

§8.157 a. Preemption

The regulation of parking on public streets, as an adjunct to traffic regulation, is preempted by state law. *County of Los Angeles v City of Alhambra* (1980) 27 C3d 184, 192, 165 CR 440, superseded on other grounds as stated in *County of Alameda v City of Oakland* (1987) 193 CA3d 858, 863, 238 CR 646 (parking meter regulation is a form of traffic control as to which state statutes supersede even ordinances authorized by charter).

© The Regents of the University of California

§8.158 b. Broad Delegation to Local Entities

"The initial grant of power in [California Vehicle Code] section 22507 broadly empowered localities to regulate parking within their jurisdictions. The subsequent statutory amendments to section 22507 have expanded rather than restricted the powers accorded local government over parking matters." *Friedman v Beverly Hills* (1996) 47 CA4th 436, 54 CR2d 882.

© The Regents of the University of California

§8.159 c. Local No-Parking Regulations

The parking of any type vehicle on certain streets or highways may be prohibited or restricted, during all or certain hours of a day, where signs or markings giving adequate notice of such regulations have been placed. Veh C §22507. "The language of section 22507, harmonized and read as a whole, shows that the state … decided to turn over regulation of parking minutiae to localities." *Friedman v City of Beverly Hills* (1996) 47 CA4th 436, 443, 54 CR2d 882.

© The Regents of the University of California

d. Permitted Regulations

§8.160 (1) Time Restrictions

Cities may, by ordinance or resolution, prohibit or otherwise restrict the stopping, parking, or standing of vehicles on certain streets or highways, or portions thereof, during all or certain hours of the day. Veh C §22507. Restrictions can be applied to "any type of vehicle." *People v Garth* (1991) 234 CA3d 1797, 1800, 286 CR 451 (involving the parking of a boat trailer). Signs or markings giving adequate notice are required. *Homes on Wheels v City of Santa Barbara* (2004) 119 CA4th 1173, 15 CR3d 132.

Cities may, by ordinance or resolution, prohibit or restrict the parking of vehicles on certain streets or highways or portions thereof, between the hours of 2:00 a.m. and 6:00 a.m. Veh C §22507.5. The local law may provide for a permit system for purposes of exempting certain individuals. Veh C §22507.5.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.161 (2) Commercial Vehicles on Residential Streets; Two- or Three-Wheeled Motor Vehicles; Vending Vehicles

§8.161 (2) Commercial Vehicles on Residential Streets; Two- or Three-Wheeled Motor Vehicles; Vending Vehicles

Cities may, by ordinance or resolution, prohibit or restrict the parking of vehicles on residential streets or portions thereof, of commercial vehicles having a manufacturer's gross vehicle weight rating of 10,000 pounds or more. Veh C §22507.5.

Cities may establish special parking regulations for two-wheeled or three-wheeled motor vehicles. Veh C §22503.5.

Cities have authority to impose public safety regulations on vehicles vending on city streets, including regulating the type of vending and the time, place, and manner of vending. Veh C §22455; Health & S C §§113709, 114315.

© The Regents of the University of California

§8.162 (3) State Highways; Private Driveways; Off-Street Parking Facilities

Cities may, with approval of the state Department of Transportation, prohibit or restrict parking of vehicles on a state highway within the city. Veh C §22506.

Cities may adopt ordinances authorizing a property owner to park a vehicle in front of the property owner's private driveway on issuance of a permit. Veh C §22507.2.

Cities may adopt ordinances regulating or prohibiting the parking of vehicles in any off-street parking facility that the locality owns or operates. Veh C §22519.

© The Regents of the University of California

§8.163 (4) Street Cleaning; Preferential Parking Regulations

Cities may prohibit or restrict parking on designated streets or highways for the purpose of street cleaning. Veh C §22507.6.

Cities may authorize preferential parking permits for members of organizations, professions, school personnel, or other designated groups to park on specified streets if the city determines that the use of the permits will not adversely affect parking conditions for residents and merchants in the area. Veh C §22507(b).

© The Regents of the University of California

§8.164 (5) Other Regulations

Cities may adopt ordinances:

- establishing parking meter zones and white-lined designated parking spaces within which a vehicle must park (Veh C §22508);
- requiring the blocking of wheels when vehicles are on hills in business or residential districts (Veh C §22509);
- prohibiting parking on streets or highways for the purpose of snow removal (Veh C §22510);
- designating special parking for disabled persons and disabled veterans (Veh C §§22511.7-22511.8);
- reducing the state's 15-foot prohibited distance from a fire hydrant (Veh C §22514); and
- establishing programs and procedures for the abatement and removal, as public nuisances, of abandoned, wrecked, dismantled, or inoperable vehicles from private or public property (Veh C §§22660-22661, 22671).

© The Regents of the University of California

§8.165 4. Trucks

The legislature has made a limited delegation of authority to cities to regulate the height, weight, routes, and parking of vehicles. Local authorities face greater limitations in attempting to regulate the routing of hazardous materials and explosives. See §§8.166-8.170. Any regulation in this area cannot be arbitrary, unreasonable, or confiscatory. See Govt C §37100. See also *Pipoly v Benson* (1942) 20 C2d 366, 125 P2d 482; *People v Tolman* (1980) 110 CA3d Supp 6, 168 CR 328.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.166 a. Height Restriction for Parking

§8.166 a. Height Restriction for Parking

Local authorities may prohibit or restrict the stopping, parking, or standing of vehicles, including trucks, that are six feet or more in height (including any load thereon) within 100 feet of any intersection. Veh C §22507.

© The Regents of the University of California

b. Routes

§8.167 (1) Highway and Residential Street Restrictions

Local authorities may prohibit the use of particular highways by certain vehicles. Veh C §21101(c). This has been interpreted to prohibit certain classes of vehicles, "such as trucks, or tractors, or oversize or 'excessively noisy' vehicles, or those lacking air-inflated tires," from using particular highways. *City of Lafayette v County of Contra Costa* (1979) 91 CA3d 749, 756 n2, 154 CR 374. See also 73 Ops Cal Atty Gen 13, 20 (1990). However, local restrictions related to price, route, or service of any commercial vehicles must be based on a safety concern or a size or weight restriction; otherwise they will be preempted by federal law. *California Dump Truck Owners Ass'n v Davis* (ED Cal 2002) 302 F Supp 2d 1139, 1144 (citing 49 USC §14501(c)(1)). Cities may prohibit certain commercial vehicles that exceed a maximum gross weight from using residential streets. Veh C §35701.

© The Regents of the University of California

§8.168 (2) Restrictions Based on Cargo

The Attorney General has opined that Veh C §21101(c) grants a city very limited authority to restrict the roadways on which hazardous material is transported within its jurisdiction. 67 Ops Cal Atty Gen 1 (1984). The city may not use this limited authority to circumvent the legislature's statewide program of licensing and inspection by the California Highway Patrol (CHP) of those transporting hazardous material. When the CHP adopts regulations under Veh C §33000 designating, among other things, routes for hazardous wastes, those regulations will prevail over conflicting local ordinances. 67 Ops Cal Atty Gen 1, 5 (1984).

© The Regents of the University of California

§8.169 (3) Local Regulation of Transportation of Explosives

When transporting explosives through or into a city or any other congested area for which a route has not been designated by the CHP, state law requires drivers to follow such routes as may be prescribed or established by local authorities. Veh C §31614(a). See also Veh C §31616 (pertaining to CHP's routing regulations); 67 Ops Cal Atty Gen 1, 6, 7 (1984).

© The Regents of the University of California

§8.170 (4) Standard for Local Height, Weight, and Routing Regulations

Local height, weight, and routing regulations cannot be arbitrary, unreasonable, or confiscatory. *Skyline Materials, Inc. v City of Belmont* (1961) 198 CA2d 449, 454, 18 CR 95. See also *San Leandro Rock Co. v City of San Leandro* (1982) 136 CA3d 25, 185 CR 829.

© The Regents of the University of California

5. Bicycles, Roller Skates, and Skateboards

§8.171 a. Bicycles and Electric Carts on Sidewalks

Local authorities may regulate the "operation of bicycles" and the operation of electric carts by physically disabled persons, or persons over 50 years of age, on the public sidewalks. Veh C §21100(h). See also Veh C §21114.5. Bicycle riders under 18 must wear a helmet. Veh C §21212.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.172 b. Bicycle Parking; Bicycle Lanes

§8.172 b. Bicycle Parking; Bicycle Lanes

Local authorities may prohibit bicycle parking in designated areas of the public highway. No person may leave a bicycle on its side on a sidewalk. Veh C §21210.

Local authorities may establish bicycle lanes by ordinance or resolution. Veh C §21207.

© The Regents of the University of California

§8.173 c. Roller Skates

A local authority may adopt rules and regulations regulating persons engaged in roller skating on a highway, sidewalk, or roadway. Veh C §21969. Roller skaters under 18 must wear a helmet. Veh C §21212.

© The Regents of the University of California

§8.174 d. Skateboarding and Nonmotorized Scooters

Except as provided in Veh C §21968, a local authority may regulate, prohibit, or restrict persons from riding or propelling skateboards on highways, sidewalks, or roadways. Veh C §21967. Motorized skateboards may not be used on any sidewalk, roadway, highway, bikeway, bicycle path or trail, equestrian trail, or hiking or recreational trail. Veh C §21968. Skateboarders and operators of nonmotorized scooters under 18 must wear a helmet while operating a skateboard or nonmotorized scooter on a public street, bikeway, or other public bike path or trail. Veh C §21212.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/8 Public Property/§8.175 e. Motorized Scooters; Segways and Other Mobility Devices

§8.175 e. Motorized Scooters; Segways and Other Mobility Devices

The operation and licensing requirements for motorized scooters is described in Veh C §§21220-21235. Regulations relating to personal assistive mobility devices are found in Veh C §§21280-21282.

© The Regents of the University of California

§8.176 C. Regulation of Activities on Streets and Sidewalks

When the state has relinquished its power to regulate the use of streets in favor of local authorities, the latter may enact regulating ordinances. But the regulations must not conflict with the general law, must be reasonable, and must not abridge constitutional rights. *In re Bodkin* (1948) 86 CA2d 208, 194 P2d 588; *Simpson v Los Angeles* (1935) 4 C2d 60, 47 CR 474; 37 Cal Jur 3d, Highways and Streets §63.

© The Regents of the University of California

§8.177 1. Freedom of Speech and Assembly

A municipal ordinance against crowding of sidewalks by persons congregating so as to obstruct free passage is a valid regulation though it may result in the incidental curtailment of the constitutional right of peaceable assembly and free speech. The same is true of an ordinance prohibiting the holding of meetings in streets or regulating loud speakers on highways. *Roulette v City of Seattle* (9th Cir 1996) 97 F3d 300 (ordinance prohibiting sleeping on sidewalks in commercial areas between certain hours did not violate free speech or substantive due process rights); *Los Angeles Alliance for Survival v City of Los Angeles* (2000) 22 C4th 352, 93 CR2d 1 (only intermediate scrutiny review need be done on ordinances regulating aggressive panhandling); *Chavez v Municipal Court of Visalia Judicial Dist.* (1967) 256 CA2d 149, 64 CR 76; *Haggerty v County of Kings* (1953) 117 CA2d 470, 256 P2d 393; *In re Bodkin* (1948) 86 CA2d 208, 194 P2d 588; *In re Thomas* (1909) 10 CA 375, 102 P 19. But see *American Civil Liberties Union v City of Las Vegas* (9th Cir 2003) 333 F3d 1092, cert denied (2004) 540 US 1110 (applying First Amendment "forum analysis" to conclude that public street cannot be turned into pedestrian mall that is nonpublic forum where leafleting, vending of materials with messages, solicitation, and use of tables can be barred).

For discussion of free speech and the First Amendment, see §§9.118-9.153.

© The Regents of the University of California

§8.178 2. Permitted Regulation

State law authorizes local rules and regulations on several matters other than traffic and parking (Veh C §21100):

- Processions or assemblages on the highways.
- Vehicles for hire and drivers of passenger vehicles for hire. See also Veh C §21112.
- Tow truck service or tow truck drivers. See Veh C §§21100(g), 22650, 22651.1, 22658(k)-(*l*), 22658.1, 22850.5; *City of Columbus v Ours Garage & Wrecker Serv., Inc.* (2002) 536 US 424, 153 L Ed 2d 430, 122 S Ct 2226 (local regulation of prices, routes, or services of tow trucks involved in consensual tows must be genuinely responsive to safety concerns to be exempt from federal preemption; on the other hand, regulation of non-consensual tows are not preempted). See also *People v Servantes* (2001) 86 CA4th 1081, 103 CR2d 870 (city regulation based on safety aspect of towing not preempted; court upholds unlawful business practices judgment in favor of city). But see *CPF Agency Corp. v R & S Towing Serv.* (2005) 132 CA4th 1014, 34 CR3d 106 (criticizing *Servantes* but upholding statute based on nonconsensual towing exception).
- Bicycles and electric carts.
- Crossing guards.
- Methods of deposit of garbage and refuse in streets and highways for collection.
- Cruising.

Cities also have authority to license and regulate the location of stands for taxicabs and other public carriers for hire. Veh C §21112. But see *People v Levering* (1981) 122 CA3d Supp 19, 176 CR 297.

Local authorities may permit limited use of golf carts on highways. Veh C §21115.

© The Regents of the University of California

D. Streets and Sidewalks: Americans with Disabilities Act Requirements

§8.179 1. Existing Facilities

If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan must include a schedule for providing curb ramps or other sloped areas where pedestrians cross curbs, giving priority to walkways serving entities covered by the Americans with Disabilities Act of 1990 (ADA) (42 USC §§12101-12213), including state and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas. 28 CFR §35.150(d)(2).

© The Regents of the University of California

§8.180 2. New Construction and Alterations

Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway. Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways. 28 CFR §35.151(e).

© The Regents of the University of California

§8.181 3. *Barden v City of Sacramento*

In *Barden v City of Sacramento* (9th Cir 2002) 292 F3d 1073, the Ninth Circuit decided that public sidewalks are a service, program, or activity of the city within the meaning of Title II of the Americans with Disabilities Act (ADA) (42 USC §§12131-12165). When the city petitioned the United States Supreme Court for a writ of certiorari, which the Court denied (*City of Sacramento v Barden* (2003) 539 US 958, 156 L Ed 2d 656, 123 S Ct 2639), the Supreme Court asked the Solicitor General to express the views of the United States on the case. See *City of Sacramento v Barden* (2003) 537 US 1231, 155 L Ed 2d 195, 123 S Ct 1383. In its amicus curiae brief, the Solicitor General expressed the following views (Brief for the Solicitor General as Amicus Curiae at 16, *City of Sacramento v Barden,* US. No. 02-815 (May 2003), cert denied (2003) 539 US 958.

(1) With respect to existing sidewalks, the Title II regulations require only that the city's *system* of public sidewalks—when viewed "in its entirety"—be generally accessible to and usable by individuals with disabilities. As a result, petitioners were incorrect in stating that "Sacramento must undertake to make *each* sidewalk accessible, … much less that every sidewalk … [in] the Ninth Circuit arguably must now be made ADA compliant."

(2) With respect to existing sidewalks, the city is not required to take any action that would result in undue financial or administrative burdens. At the same time, it is likely that many basic impediments to sidewalk access could be removed by the city at relatively small burden or expense. For example, common barriers to sidewalk access by those with disabilities include newspaper boxes, benches, and plant growth that likely could be moved to widen sidewalks to allow wheelchair access or eliminate obstacles posing a danger to visually impaired pedestrians without great effort or expense. In addition, in the case of obstacles that are more difficult to remove or structural flaws, a court might conclude that a city's adoption of a plan designed to address such flaws over a reasonable period of time was sufficient to comply with Title II and Section 504. Certainly, the existence of some potentially costly modifications should not provide an excuse for failing to make less costly adjustments, especially in light of the regulatory exception that exists for alterations that would entail *undue* financial burdens.

© The Regents of the University of California

§8.182 4. Requirements and Deadlines

Title II of the Americans with Disabilities Act (ADA) (42 USC §§12131-12165) requires public agencies to perform a self-evaluation. 28 CFR §35.105. This assessment of policies and practices is required to be kept for public inspection for a period of 3 years for those public agencies that employ 50 or more people. 28 CFR §35.105(c). Public agencies are further required to do a transition plan for structural changes to existing facilities and to complete structural modifications as quickly as possible. 28 CFR §35.150(c)-(d). New construction or alterations have to meet either the Uniform Federal Accessibility Standards (UFAS) or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) standards for new construction. 28 CFR §35.151. Public agencies that employ 50 or more people are required to have a person designated as the ADA coordinator and to have a grievance procedure to resolve complaints. 28 CFR §35.107.

© The Regents of the University of California

§8.183 5. Transition Plans

The minimum requirements for a transition plan are the following (28 CFR §35.150(d)(3)):

- Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
- Describe in detail the methods that will be used to make the facilities accessible;
- Specify the schedule for taking the steps necessary to achieve compliance with this section, and, if the time period of the transition plan is longer than 1 year, identify steps that will be taken during each year of the transition period; and
- Indicate the official responsible for implementation of the plan.

© The Regents of the University of California

§8.184 6. Curb Ramps

The technical requirements for curb ramps are found in §4.7 of the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) standards. The truncated dome requirement is at §4.29.2 of the ADAAG standards. 28 CFR pt 36, App A.

© The Regents of the University of California

9

Regulating Businesses and Personal Conduct

I. INTRODUCTION §9.1

II. REGULATING BUSINESSES AND OCCUPATIONS
- A. Business Licensing and Regulation
  - 1. Authority §9.2
  - 2. Limitations
    - a. Preemption §9.3
    - b. Commerce Clause §9.4
    - c. First Amendment §9.5
- B. Specific Types of Regulated Businesses
  - 1. Adult Businesses
    - a. Bans on Public Nudity §9.6
    - b. Location Restrictions §9.7
      - (1) Content Neutrality §9.8
      - (2) Substantial Governmental Interest §9.9
      - (3) Narrowly Tailored §9.10
      - (4) Reasonable Alternative Avenues of Communication §9.11
    - c. Permit Requirements and Operating Restrictions §9.12
    - d. Adult Publications
      - (1) Newsrack Restrictions §9.13
      - (2) Display Restrictions §9.14
    - e. Nuisance §9.15
    - f. Other Resources on Regulating Adult Businesses §9.16
  - 2. Alcoholic Beverages §9.17
    - a. Nuisance §9.18
    - b. Alcohol Consumption §9.19
    - c. Combined Alcohol and Gasoline Sales §9.20
    - d. Licensing §9.21
  - 3. Ambulances §9.22
    - a. Constitutional Authority §9.23
    - b. Statutory Authority §9.24
    - c. Pre-Hospital Emergency Medical Services §9.25
  - 4. Auctions §9.26
  - 5. Bingo §9.27
  - 6. Dance Halls §9.28
  - 7. Gambling Establishments
    - a. Gaming Under California Law §9.29
    - b. Indian Gaming §9.30
      - (1) Tribal-City Compacts §9.31
      - (2) Indian Gaming Special Distribution Fund §9.32
  - 8. Hot Air Balloons §9.33
  - 9. Limousines §9.34
  - 10. Massage Parlors §9.35
  - 11. Pawnbrokers §9.36
  - 12. Private Patrols §9.37
    - a. Authority to Regulate §9.38
    - b. Licensing §9.39
  - 13. Shopping and Laundry Carts §9.40
  - 14. Taxicabs §9.41
    - a. Consequences of Violations §9.42
    - b. Taxicab Drivers' Drug and Alcohol Testing Requirements §9.43
  - 15. Tow Trucks §9.44
  - 16. Vendors and Solicitors §9.45
  - 17. Junk Dealers and Recyclers §9.46
- C. Rent Control
  - 1. Residential Rent Control Only §9.47

2. Permissible Rent Control Regulation §9.48
a. Governmental Purposes §9.49
b. Just and Reasonable Return §9.50
c. Impermissible Rent Control Regulations §9.51
d. Vacancy Decontrol and Exemptions From Rent Control §9.52
3. Administration of Rent Control Ordinances §9.53
a. Annual Rent Increases §9.54
b. Pass-Throughs and Rent Decreases §9.55
c. Procedural Due Process §9.56
d. Standard of Review §9.57
e. Preemption §9.58
4. Special Considerations for Mobile Home Rent Control
a. Preemption §9.59
b. Vacancy Control §9.60

III. REGULATING PERSONAL CONDUCT
A. Camping in Parks §9.61
1. Equal Protection §9.62
2. Vagueness §9.63
B. Curfews §9.64
1. Authority to Impose Curfews
a. Police Power Regulation §9.65
b. Fundamental Rights §9.66
2. Types of Curfew Ordinances §9.67
a. Youth or Juvenile Ordinances §9.68
(1) Exceptions §9.69
(2) Standard of Review §9.70
b. Emergency Curfews §9.71
3. Common Challenges to Curfews
a. Overbreadth §9.72
b. Vagueness §9.73
C. Disorderly Conduct §9.74
1. Public Lewdness
a. Vagueness and Overbreadth §9.75
b. Freedom of Expression §9.76
2. Public Intoxication §9.77
D. Drugs, Drug Paraphernalia, and Gangs
1. Drugs §9.78
2. Drug Paraphernalia §9.79
3. Gangs §9.80
E. Constitutional Issues §9.81
1. Due Process
a. Notice §9.82
b. Overbreadth §9.83
2. Equal Protection §9.84
F. Gambling §9.85
G. Graffiti §9.86
1. Definition of Graffiti §9.87
2. State Law Sanctions for Graffiti
a. Graffiti Is Punishable as Vandalism §9.88
b. Aerosol Paint Containers §9.89
c. Driver's License Restrictions §9.90
3. Graffiti Removal
a. Public Funds for Cleanup §9.91
b. Cleanup by Vandal §9.92
c. Nuisance Abatement Procedures §9.93
H. Guns and Weapons §9.94
1. Second Amendment §9.95
2. Preemption §9.96
3. Weapons Confiscation and Forfeitures
a. Weapons Confiscation §9.97
b. Post-Confiscation Hearing §9.98
c. Procedure for Return of Firearm §9.99
I. Loitering §9.100
1. Equal Protection §9.101

2. Due Process
a. Vagueness §9.102
b. Overbreadth §9.103
3. Right to Free Assembly and Association §9.104
4. Preemption §9.105
5. Cruel and Unusual Punishment §9.106
J. Noise §9.107
1. Freedom of Speech §9.108
2. Vagueness §9.109
3. Overbreadth §9.110
4. Special Issues Relating to Noise Regulations
a. Vehicles and Sound Amplification §9.111
b. Airports §9.112
K. Nuisance §9.113
1. State Nuisance Law §9.114
a. Public Nuisance §9.115
b. Private Nuisance §9.116
2. Local Authority to Declare Nuisance §9.117
L. Speech §9.118
1. Government as Property Owner
a. Forum Analysis §9.119
b. Three Types of Forums
(1) Traditional Public Forum §9.120
(2) Designated or Limited Public Forum §9.121
(3) Nonpublic Forum (All Remaining Public Property) §9.122
2. Government as Regulator
a. Type of Speech §9.123
(1) Charitable Fund-Raising §9.124
(2) "Mixed" Commercial Speech §9.125
(3) Political Speech §9.126
b. Prior Restraints
(1) Injunctions Against Speech §9.127
(2) Permit Requirements §9.128
(3) Newsracks §9.129
(4) Internet §9.130
c. Time, Place, and Manner Restrictions §9.131
(1) Adult Entertainment §9.132
(2) Leafleting §9.133
(3) Curfews §9.134
(4) Free Speech Zones §9.135
d. Permissible Content-Based Restrictions §9.136
e. Sign Regulations §9.137
(1) Content-Based Regulations §9.138
(2) Regulation of Commercial Speech §9.139
(3) Commercial Versus Non-Commercial Regulations §9.140
(4) Billboards §9.141
(5) Amortization of Nonconforming Signs §9.142
(6) Political Signs §9.143
(7) Severance §9.144
(8) Government Approval §9.145
f. Parades and Parade Permits §9.146
(1) Processing Time §9.147
(2) Exercise of Discretion §9.148
(3) Fees §9.149
(4) Indemnity and Insurance §9.150
(5) Police Protection §9.151
g. Charitable Street Vending or Solicitations §9.152
h. Taxation on First Amendment Activity §9.153
M. Trespassing §9.154
1. Trespass to Real Property §9.155
2. Interference With Lawful Business §9.156

IV. REGULATING ANIMALS §9.157
A. Domestic Animals §9.158
1. Zoning Regulations §9.159

2. Nuisances §9.160
B. Dog Regulations
1. Authority §9.161
2. Licensing Regulations §9.162
3. Impounding of Dogs §9.163
4. Potentially Dangerous and Vicious Dogs §9.164
a. Destruction of Dog §9.165
b. Other Sanctions on Owner of Potentially Dangerous or Vicious Dog §9.166
5. Spay or Neuter Programs and Breeding Requirements §9.167
6. Dog Attacks
(1) Trained Attack Dogs §9.168
(2) Attacks on Livestock/Poultry §9.169
C. Cats and Other Domestic Animal Regulations
1. Cats §9.170
2. Other Domestic Animals §9.171
D. Animal Relinquishment/Redemption by Owner §9.172
E. Liability Issues §9.173
F. Animal Control Officers §9.174
G. Animal Shelters
1. Information and Records §9.175
2. Spaying/Neutering §9.176
H. Wild Animals §9.177
1. Definition §9.178
2. Ownership §9.179
I. Animal Abandonment and Mistreatment
1. Willful Abandonment §9.180
2. Abandoned Pets in Foreclosed-on Homes §9.181
J. Service Animals §9.182
K. Disease §9.183

© The Regents of the University of California

§9.1 I. INTRODUCTION

Municipal licensing or permitting is a device commonly used for generation of revenue and enforcement of police power regulations. McQuillin, Municipal Corporations §26.22 (3d rev ed 1988). This chapter discusses municipal licensing of businesses and occupations (see §§9.2-9.60), personal conduct (see §§9.61-9.156), and animals (see §§9.157-9.183).

For further discussion of topics covered by this chapter, see generally California Land Use Practice (Cal CEB 2006); California Landlord-Tenant Practice (2d ed Cal CEB 1997); Financing and Protecting California Businesses, chap 14 (Cal CEB 2006); Professional Licensing: Disciplinary Practice in California (Cal CEB 2008).

© The Regents of the University of California

II. REGULATING BUSINESSES AND OCCUPATIONS

A. Business Licensing and Regulation

§9.2 1. Authority

With certain exceptions, cities may license, for revenue and regulation, every kind of lawful business transacted in the city. Govt C §37101; Bus & P C §16000. The validity of such delegation of the licensing power is well settled. *West Coast Adver. Co. v San Francisco* (1939) 14 C2d 516, 95 P2d 138.

Cities may regulate rates absent legislative enactment conferring jurisdiction elsewhere (see, *e.g.,* Cal Const art XII, §3 (Public Utilities Commission jurisdiction over privately owned utilities' rates)). For example, a city may establish the rate to be charged for taxicab service within its limits. Govt C §53075.5; *In re Martinez* (1943) 22 C2d 259, 138 P2d 10, overruled on other grounds in *People v Western Airlines, Inc.* (1954) 42 C2d 621, 642, 268 P2d 723.

On business license taxes, see §§5.35-5.46.

© The Regents of the University of California

2. Limitations

§9.3 a. Preemption

Although the enabling legislation authorizes licensing for "revenue-raising" as well as "regulatory" purposes, the distinction between the two is important. An attempt to regulate under the guise of revenue-raising in an area in which city regulation is preempted will be found invalid. See, *e.g., City & County of San Francisco v Boss* (1948) 83 CA2d 445, 189 P2d 32 (city ordinance went beyond revenue-raising purpose to regulate field occupied by State Contractors' Law); *Verner, Hilby & Dunn v City of Monte Sereno* (1966) 245 CA2d 29, 53 CR 592 (city's ordinance invalid to extent it regulated provision of civil engineering and surveying services, both fields having been preempted by state law).

© The Regents of the University of California

§9.4 b. Commerce Clause

Only Congress has the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." US Const art I, §8, cl 3. In addition to being an affirmative grant of authority to Congress, the commerce clause also prohibits state and local regulations that unduly interfere with interstate commerce. See *Quill Corp. v North Dakota* (1992) 504 US 298, 119 L Ed 2d 91, 112 S Ct 1904, cited in *Woosley v State* (1992) 3 C4th 758, 13 CR2d 30 (finding state's practice of imposing higher vehicle license fees on vehicles originally purchased outside of California violates dormant commerce clause).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/9 Regulating Businesses and Personal Conduct/§9.5 c. First Amendment

§9.5 c. First Amendment

Certain businesses have First Amendment protection and thus cannot be singled out for regulation or taxation. See *Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue* (1983) 460 US 575, 75 L Ed 2d 295, 103 S Ct 1365, discussed in §5.98.

PRACTICE TIP: When drafting a business license ordinance, be sure to consider the following exemptions:

- Manufacture, sale, purchase, possession, and transportation of alcoholic beverages (see Cal Const art XX, §22);
- Bail bond agents (see *Hughes v Los Angeles* (1914) 168 C 764);
- Banks and financial corporations (see Rev & T C §23182);
- Blind person operating a vending facility (see Welf & I C §19633);
- Café musicians (see Bus & P C §16000.5);
- Minister, rabbi, or priest (see Bus & P C §16000(b) and Rev & T C §7284.1);
- Insurance company that pays an in-lieu tax or premium (see Cal Const art XIII, §28);
- Intercity transportation business (see Pub Util C §5327);
- Laundry equipment (see Bus & P C §16002.2);
- Public utility franchise (see Pub Util C §§1011, 6001);
- Real estate auctioneer (see Bus & P C §16002.1);
- Veterans (see Bus & P C §§16000.7, 16001, 16001.5);
- Wholesaler/commercial traveler (see Bus & P C §16002);
- Residential care facility or residential family day care home of six people or less, or a small family day care home of eight children or less (see Health & S C §§1523.1(1), (3), 1566.2, 1568.05(b), 1569.185(a), 1596.803(a)(3), 1597.45(b));
- Nonprofit organizations (see Cal Const art XIII, §26).

© The Regents of the University of California

B. Specific Types of Regulated Businesses

1. Adult Businesses

§9.6 a. Bans on Public Nudity

The United States Supreme Court has established that nude dancing is on the outer margins of First Amendment protection. Although the United States Supreme Court has approved certain restrictions on full nudity, *e.g.,* pasties and g-string requirements, lower courts have not consistently followed suit.

The analysis for determining whether a nudity restriction is constitutional is as follows (*U.S. v O'Brien* (1968) 391 US 367, 376, 20 L Ed 2d 672, 88 S Ct 1673): [good re-org]

- Is the governmental interest sufficiently justified by being within the constitutional powers of government?
- Does the regulation further an important or substantial governmental interest?
- Is the governmental interest unrelated to the suppression of free expression?
- Is the incidental restriction on alleged First Amendment freedoms not greater than what is essential to the furtherance of that interest?

See *Barnes v Glen Theatre, Inc.* (1991) 501 US 560, 115 L Ed 2d 504, 111 S Ct 2456 (applying four-part test enunciated in *U.S. v O'Brien, supra*). See also *City of Erie v Pap's A.M.* (2000) 529 US 277, 146 L Ed 2d 265, 120 S Ct 1382 (upholding city's ban on public nudity on ground that its substantial interest in combating negative secondary effects resulted in only de minimus intrusion on expressive activity). But see *Triplett Grille, Inc. v City of Akron* (6th Cir 1994) 40 F3d 129.

© The Regents of the University of California

§9.7 b. Location Restrictions

Restrictions on where adult businesses may be located are analyzed as content-neutral, "time, place and manner" restrictions. See *City of Renton v Playtime Theatres, Inc.* (1986) 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (upholding zoning ordinance that prohibited adult motion picture theaters within 1000 feet of any residential dwelling, church, park, or school). See also *City of Nat'l City v Wiener* (1992) 3 C4th 832, 12 CR2d 701, cert denied (1993) 510 US 824 (upholding ordinance prohibiting adult business from locating within 1500 feet of another adult business, 1500 feet of school or public park, or 1000 feet of any residentially zoned property). The analysis for determining whether a location restriction is constitutional is as follows:

- Is the restriction indeed a content-neutral "time, place and manner" regulation on where such businesses may locate?
- Is the restriction designed to serve a substantial governmental interest?
- Is the restriction narrowly tailored to serve that interest?
- Does the restriction allow for reasonable alternative avenues of communication?

See *City of Renton v Playtime Theatres, Inc.* (1986) 475 US 41, 89 L Ed 2d 29, 106 S Ct 925.

© The Regents of the University of California

§9.8 (1) Content Neutrality

Government regulation of expressive activity is content-neutral if it is justified without reference to the content of the regulated speech. *Clark v Community for Creative Non-Violence* (1984) 468 US 288, 293, 82 L Ed 2d 221, 104 S Ct 3065. The courts will not look behind the city's stated motivation to find some allegedly illicit motivation. *City of Renton v Playtime Theatres, Inc.* (1986) 475 US 41, 48, 89 L Ed 2d 29, 106 S Ct 925 (quoting *U.S. v O'Brien* (1968) 391 US 367, 383, 20 L Ed 2d 672, 88 S Ct 1673).

© The Regents of the University of California

§9.9 (2) Substantial Governmental Interest

A city's interest in attempting to preserve the quality of urban life qualifies as a "substantial governmental interest." See *City of Renton v Playtime Theatres, Inc.* (1986) 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (quoting *Young v American Mini Theatres, Inc.* (1976) 427 US 50, 49 L Ed 2d 310, 96 S Ct 2440). A city may show this interest by presenting evidence that adult businesses are a source of urban decay and have in fact led to the secondary effects the restriction seeks to curtail. *City of Nat'l City v Wiener* (1992) 3 C4th 832, 12 CR2d 701, cert denied (1993) 510 US 824 (finding that city demonstrated that distance regulations are designed to serve substantial governmental interest in decreasing blight and crime, shifting part of regulatory burden to private sector by placing adult businesses in enclosed shopping malls designed to minimize negative secondary effects, and protecting city's tax base).

© The Regents of the University of California

§9.10 (3) Narrowly Tailored

A restriction is "narrowly tailored" if it promotes a substantial governmental interest that would be achieved less effectively absent the regulation. As long as the means chosen are not substantially broader than necessary to achieve the government's interest, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative. *Ward v Rock Against Racism* (1989) 491 US 781, 105 L Ed 2d 661, 109 S Ct 2746.

© The Regents of the University of California

§9.11 (4) Reasonable Alternative Avenues of Communication

The lack of currently available sites for adult businesses, the unwillingness of owners of available sites to rent them for adult uses, and the considerable cost of buying and building one's own site does not establish that an ordinance fails to provide reasonable alternative avenues of communication. *City of Nat'l City v Wiener* (1992) 3 C4th 832, 847, 12 CR2d 701, cert denied (1993) 510 US 824. See also *City of Vallejo v Adult Books* (1985) 167 CA3d 1169, 1180, 213 CR 143, cert denied (1986) 475 US 1064 (evidence of considerable economic difficulty of locating adult uses at legally permissible sites in city falls far short of establishing that owner is foreclosed or unreasonably restricted from effectively operating within city limits).

© The Regents of the University of California

§9.12 c. Permit Requirements and Operating Restrictions

Licensing ordinances must provide objective standards for the exercise of discretion in whether to grant the license; licensing schemes that place "unbridled discretion in the hands of a government official or agency" constitute an impermissible prior restraint on First Amendment rights. *FW/PBS, Inc. v City of Dallas* (1990) 493 US 215, 225, 107 L Ed 2d 603, 110 S Ct 596 (plurality opinion); *Smith v County of Los Angeles* (1989) 211 CA3d 188, 259 CR 231. The ordinance must also place limits on the time within which the decision-maker must issue the license. *Smith v Los Angeles County, supra*. See also *J.L. Thomas, Inc. v County of Los Angeles* (1991) 232 CA3d 916, 283 CR 815; *People v Library One* (1991) 229 CA3d 973, 280 CR 400; *Ebel v City of Garden Grove* (1981) 120 CA3d 399, 176 CR 312.

A licensing scheme involving a prior restraint must provide an avenue for prompt judicial review and decision in the event the license is denied, suspended, or revoked. *City of Littleton v Z. J. Gifts D-4, L.L.C.* (2004) 541 US 774, 159 L Ed 2d 84, 124 S Ct 2219; *Baby Tam & Co. v City of Las Vegas* (9th Cir 2000) 199 F3d 1111; *4805 Convoy, Inc. v City of San Diego* (9th Cir 1999) 183 F3d 1108. An ordinance prohibiting adult cabaret patrons from touching performers and imposing a requirement for a two-foot separation between patrons and dancers has been upheld against a freedom of speech and expression challenge. *Gammoh v City of La Habra* (9th Cir 2005) 395 F3d 1114, amended (9th Cir 2005) 402 F3d 875, cert denied (2005) 546 US 871.

PRACTICE TIP: Although cities cannot control the time within which judicial review is provided, cities should take all steps to ensure prompt administrative decisions. The provisions of CCP §1094.8 now provide for expedited judicial review and procedures for permits involving First Amendment activities.

© The Regents of the University of California

d. Adult Publications

§9.13 (1) Newsrack Restrictions

An ordinance restricting sale of adult newspapers from newsracks is unconstitutional when it is not aimed at preventing the secondary effects of such newsracks on the surrounding neighborhood. *Sebago, Inc. v City of Alameda* (1989) 211 CA3d 1372, 259 CR 918 (finding ordinance was not content-neutral and thus had to be justified by compelling state interest).

The provisions of Pen C §313.1 make it unlawful to sell or display harmful matter, as defined in Pen C §313(c), by means of an unsupervised vending machine located in a public place. The Attorney General has opined that this statute is constitutional, distinguishing *Sebago, Inc. v City of Alameda, supra,* on grounds that the ordinance regulated material that the state had not determined to be harmful to minors. See 77 Ops Cal Atty Gen 235 (1994). On regulation of newsracks, see §9.129.

© The Regents of the University of California

§9.14 (2) Display Restrictions

The California Penal Code prohibits the display of certain kinds of adult publications in areas accessible to minors. Pen C §313.1(d). Such prohibitions have withstood constitutional challenge. See *Crawford v Lungren* (9th Cir 1996) 96 F3d 380, cert denied (1997) 520 US 1117 (upholding constitutionality of ban on sale, display, or offer of "harmful matter" from unsupervised vending machines under Pen C §313.1(c)). A city may adopt an ordinance that restricts the display of adult publications to minors in public places by requiring the use of blinder racks to shield a portion of the involved materials from view. Pen C §313.1(d). See *Berry v City of Santa Barbara* (1995) 40 CA4th 1075, 47 CR2d 661. Attempts to restrict the display of adult publications by other means have met with mixed results. See *American Booksellers Ass'n, Inc. v Superior Court* (1982) 129 CA3d 197, 181 CR 33 (invalidating requirement that adult publications be sealed or stapled because it prevented adults as well as minors from accessing materials); *Gluck v County of Los Angeles* (1979) 93 CA3d 121, 155 CR 435 (upholding ordinance prohibiting display of certain adult materials from public view from highway).

© The Regents of the University of California

§9.15 e. Nuisance

The Red Light Abatement Law defines the following as public nuisances: buildings or places used for illegal gambling, lewdness, assignation, or prostitution, or places used as bathhouses whose activities promote sexually transmitted diseases. The city attorney may maintain an action to abate and enjoin the nuisance. See Pen C §§11225-11235.

© The Regents of the University of California

§9.16 f. Other Resources on Regulating Adult Businesses

For more information on this topic, see *Current Adult Business Issues* (City Attorney's Department Meeting, May 1999); and *Regulation of Adult Businesses —Traps for the Unwary* (City Attorney's Department Meeting, May 2000).

Related material is also discussed in the following sections in this handbook:

- Constitutional limits on municipal authority and First Amendment (see §§1.58-1.64);
- Business license taxes (see §§5.35-5.46);
- Municipal services and utilities, public transportation (see §§6.120-6.138);
- Rent control (see §§9.47-9.60);
- Special zoning issues involving adult entertainment (see §§10.131-10.132);
- Protecting the environment (see chap 11); and
- Code enforcement (see chap 12).

© The Regents of the University of California

§9.17 2. Alcoholic Beverages

The state has the exclusive right and power to license and regulate the sales of alcoholic beverages. Cal Const art XX, §22. Nevertheless, cities retain the right to regulate specific matters related to the sale, possession, and consumption of alcohol.

© The Regents of the University of California

§9.18 a. Nuisance

A city may adopt an ordinance regulating nuisance or criminal activities associated with alcohol sales. *Korean Am. Legal Advocacy Found. v City of Los Angeles* (1994) 23 CA4th 376, 28 CR2d 530. See also *City of Oakland v Superior Court* (1996) 45 CA4th 740, 53 CR2d 120 (municipal ordinance regulating nuisance or criminal activities associated with alcohol sales, and imposing regulatory fee based on costs of administering ordinance, not preempted). However, there may be limited preemption of city regulations for uses that preexisted an ordinance regulating alcohol sales. See Bus & P C §23790; *Boccato v City of Hermosa Beach* (1994) 29 CA4th 1797, 35 CR2d 282.

Cities may also declare a building or place where liquor is unlawfully sold a public nuisance. See Pen C §11200. The city attorney may maintain an action to abate and prevent the nuisance. Pen C §§11200-11201.

© The Regents of the University of California

§9.19 b. Alcohol Consumption

Cities retain authority to regulate the consumption of alcoholic beverages. See *People v Brewer* (1991) 235 CA3d 909, 1 CR2d 146; *People v Butler* (1967) 252 CA2d Supp 1053, 59 CR 924. Regulation of mere possession of alcohol, however, is unconstitutional absent specific legislative authorization. *People v Duran* (1995) 43 CA4th Supp 1, 52 CR2d 79 (ordinance prohibiting possession in public of open container with intent to consume void). See Pen C §647(e) (authorizing city regulation of possession of open container on certain licensed premises); Bus & P C §25620 (authorizing city regulation of open container in city-owned public place).

© The Regents of the University of California

§9.20 c. Combined Alcohol and Gasoline Sales

Cities have limited authority to regulate the concurrent sale of gasoline and beer or wine at a given location as defined by statute. See Bus & P C §23790.5.

© The Regents of the University of California

§9.21 d. Licensing

All businesses wishing to sell alcohol in California must submit an application for and obtain a license from the State Department of Alcoholic Beverage Control (the Department). A city may determine that there is an "undue concentration" of off-sale beer and wine licenses in a given location and that the public convenience and necessity would not be served by approval of the proposed license. See Bus & P C §23958.4. If the city makes that determination, that by itself will preclude the Department from issuing the license. Bus & P C §§23958, 23958.4.

© The Regents of the University of California

§9.22 3. Ambulances

Cities may regulate the operations of ambulances within their jurisdiction. Govt C §§38794, 53313(b). Many cities provide paramedic and/or ambulance services through their fire departments. The provisions of Health & S C §1797.201 allow cities that provided pre-hospital emergency services within their jurisdictions on June 1, 1980, the option to continue to provide such services, or to contract with the county to provide all or a portion of such services. *County of San Bernardino v City of San Bernardino* (1997) 15 C4th 909, 64 CR2d 814. However, the provisions of Health & S C §1797.201 do not allow such cities to expand the pre-hospital emergency services they provide beyond those provided as of June 1, 1980.

© The Regents of the University of California

§9.23 a. Constitutional Authority

The provisions of Cal Const art XI, §9 provide specific constitutional authority for a city to provide public transportation to its citizens. Under Cal Const art XI, §7, a city has the police power to make and enforce ordinances and regulations not in conflict with the general laws. *Carlin v City of Palm Springs* (1971) 14 CA3d 706, 92 CR 535.

© The Regents of the University of California

§9.24 b. Statutory Authority

A city may contract for ambulance service to serve city residents. Govt C §38794. "Municipal services or functions" include ambulance services. Govt C §54980(c).

© The Regents of the University of California

§9.25 c. Pre-Hospital Emergency Medical Services

A city that has been providing pre-hospital emergency medical care services since June 1, 1980, may enter into an agreement with the local emergency medical services agency. Before such an agreement is entered into, however, the city must continue to provide such services at "not less than the existing level" absent a city council determination, after public hearing, that a reduction in the level of services is necessary. Health & S C §1797.201. See *County of San Bernardino v City of San Bernardino* (1997) 15 C4th 909, 64 CR2d 814 (interpreting Health & S C §1797.201).

A county may designate exclusive operating areas for the provision of pre-hospital emergency medical services without competitive bidding if agreements are reached with providers of such services who have been continuously providing service since July 1, 1980, and will continue in the same manner and scope. A city may be the recipient of such an exclusive operating permit. Health & S C §1797.224.

NOTE: The provision of pre-hospital emergency medical services by a city is subject to the medical control and direction of the county emergency medical services agency. Health & S C §§1798-1798.6.

© The Regents of the University of California

§9.26 4. Auctions

The provisions of CC §§1812.600-1812.609 regulate auctioneers, auction companies, and the business of auctioneering. The state requires that auctioneers and auction companies maintain a $20,000 bond with a surety company admitted to do business in the state. See CC §1812.600(a). This bond is payable to "the people of the State of California" for the benefit of any person or person damaged by auctioneers or auction companies doing business in the state. CC §1812.600(b). It is a misdemeanor to violate any provisions in this title. CC §1812.604. There is no authority for the city to regulate auctioneers, auction companies, or the business of auctioneering in this state.

© The Regents of the University of California

§9.27 5. Bingo

Cities may enact ordinances to allow the operation of bingo games, as long as they are conducted only by the following (Pen C §326.5):

- Organizations exempted from the payment of bank and corporation tax by Rev & T C §§23701-23712,
- Mobile home park associations, and
- Senior citizens organizations.

See also Cal Const art IV, §19(c) (authorizing legislature to enact such law).

The receipts of such games may be used only for charitable purposes. In *Arden Carmichael, Inc. v County of Sacramento* (2001) 93 CA4th 507, 113 CR2d 248, a fee imposed under Pen C §326.5 to recover law enforcement and public safety costs from a nonprofit bingo operator based on a percentage of prize payouts was found not to violate Cal Const art XIII, §26(d) (exempting nonprofit organizations from all business license taxes or fees measured by income or gross receipts), notwithstanding that prize payouts could be shown to be a roughly constant percentage of gross receipts. See also Pen C §§11225-11226 (Red Light Abatement Law).

© The Regents of the University of California

§9.28 6. Dance Halls

An ordinance that has a rational basis to exclude certain-aged persons from admission to a dance hall will survive attack based on equal protection principles. *Dallas v Stanglin* (1989) 490 US 19, 25, 104 L Ed 2d 18, 109 S Ct 1591. See *Burnett v San Francisco Police Dept.* (1995) 36 CA4th 1177, 42 CR2d 879 (city ordinance excluding persons under 21 from after-hours clubs was not unconstitutionally vague or overbroad and did not deny such persons equal protection of law).

However, nuisance abatement efforts directed at changing the "clientele" of a nightclub or the "format" of the music played may lead to municipal liability for violations of the Equal Protection Clause (racial discrimination) and First Amendment (proscribing speech or expressive conduct). In *RK Ventures, Inc. v City of Seattle* (9th Cir 2002) 307 F3d 1045, summary judgment for the city was reversed on appeal due to evidence supporting allegations that the city pursued a campaign designed to stop downtown nightclubs from playing rap and hip-hop music because the music attracted African Americans and crime to the area. The nightclub owner provided evidence that the city withdrew an offer to settle an abatement action against the nightclub because it learned that rap music was still being played occasionally and agreed to postpone the abatement hearing only after the owner agreed never to play rap music again. Interestingly, the court stated that a councilmember's notes and the statements of the then-city attorney "constitute direct evidence of discrimination." 307 F3d at 1062. See also Pen C §§11225-11226 (Red Light Abatement Law).

© The Regents of the University of California

7. Gambling Establishments

§9.29 a. Gaming Under California Law

The provisions of Pen C §330 specify the types of games that are illegal in California. They include roulette, twenty-one, slot machines, and any banking or percentage games. A vote of the electorate is necessary before a city may legalize or expand gaming. A moratorium on such elections exists until at least January 1, 2010. See Bus & P C §§19960-19962; Bus & P C §19965 (providing for limited expansion of number of gambling tables without voter approval).

Gaming establishments are regulated by the Gaming Control Act. Bus & P C §§19800-19987.

© The Regents of the University of California

§9.30 b. Indian Gaming

Under the federal Indian Gaming Regulatory Act of 1988 (IGRA) (18 USC §§1166-1168; 25 USC §§2701-2721), the state is authorized to enter into tribal-state gaming compacts for operation of gaming casinos by federally recognized Indian tribes on Indian lands. The California Constitution prohibits "casinos of the type currently operating in Nevada and New Jersey." Cal Const art IV, §19(e). But the constitution nevertheless authorizes the Governor to negotiate and conclude compacts for the operation of slot machines, lottery games, and banking and percentage card games on Indian lands in accordance with federal law. Cal Const art IV, §19(f). These compacts for what are known as "Class III games" define various aspects of the intergovernmental and regulatory relationships between the tribe and state. Such compacts are not effective until ratified by the legislature and approved by the Secretary of the Interior.

The National Indian Gaming Commission (NIGC) has general oversight authority on Indian gaming facilities, and whether they are being operated in compliance with congressionally mandated provisions in tribal gaming ordinances. The provisions of 25 CFR pt 501 establish the regulatory framework governing Indian gaming.

© The Regents of the University of California

§9.31 (1) Tribal-City Compacts

Whether a tribe can locate a casino within or near a city is governed by federal law. The property must be "Indian lands," as defined by the Indian Gaming Regulatory Act of 1988 (IGRA) (18 USC §§1166-1168; 25 USC §§2701-2721). This means it must either be an Indian reservation, or land held in trust by the federal government for the tribe, over which the tribe exercises governmental authority. Generally, no gaming is allowed on such lands unless they are within or contiguous to a reservation existing on October 17, 1988 (25 USC §2719(a)(1)), or (25 USC §2719(b)(1)(A)):

- The Secretary of Interior, after consultation with the tribe, neighboring tribes, and state and local officials, determines that gaming on the subject lands would be in the best interests of the tribe and would not be detrimental to the surrounding community, and
- The Governor concurs.

These "two part determinations" have only rarely been made. If no "two part determination" is made, gaming may still be allowed if the land was taken into trust as part of (25 USC §2719(b)(1)(B)):

- "a settlement of a land claim";
- the initial reservation of a tribe "acknowledged" by the Secretary under the federal acknowledgement process; or
- the restoration of lands for a tribe that is "restored" to federal recognition.

© The Regents of the University of California

§9.32 (2) Indian Gaming Special Distribution Fund

State law provides for a fund called the Indian Gaming Special Distribution Fund for the receipt and deposit of moneys received by the state from Indian tribes under the terms of tribal-state gaming compacts. The funds are available for, among other things, grants for the support of local government agencies impacted by tribal government gaming. Govt C §12012.85. The method for calculating and distributing appropriations from the Fund is provided at Govt C §§12710-12718.

© The Regents of the University of California

§9.33 8. Hot Air Balloons

Persons providing transportation by hot air balloon are no longer subject to regulation by the California Public Utilities Commission. Instead, balloon operators are required to comply with local business license requirements. Operators must obtain and keep in effect levels of insurance specified by statute and provide the city issuing the business license with proof of this insurance. In addition, operators must provide the city issuing the business license a new certificate of insurance on at least an annual basis. Cities must give reasonable notice of these requirements along with any business license renewal notification they provide. Cities may charge a reasonable fee to cover the costs of providing such notice. Pub Util C §5513.

© The Regents of the University of California

§9.34 9. Limousines

The California Public Utilities Commission regulates the operators of charter-party limousines. Charter-party carriers are required by state law to operate on a "prearranged" basis, *i.e.,* the transportation is arranged either by written contract or by telephone. Cities may establish reasonable rules for the inspection of waybills to verify valid prearranged travel. Pub Util C §5371.4(g).

© The Regents of the University of California

§9.35 10. Massage Parlors

Cities may regulate massage businesses. See Govt C §§51030-51034. However, city ordinances requiring local licensing or permitting of massage practitioners and massage therapists are preempted as to those massage practitioners and massage therapists that have been issued certificates by the Massage Therapy Organization. In addition, local regulations, other than business licensing, zoning, and reasonable health and safety regulations, that treat massage businesses differently from similarly situated businesses are also preempted if all personnel administering massage at the business have been issued the Massage Therapy Organization certification. See Bus & P C §§4600-4620.

As to massage businesses using personnel that do not have Massage Therapy Organization certification, an ordinance may condition the issuance of a license on proof that the massage business meets reasonable standards, including the following (Govt C §51031):

- Minimum age of massage personnel;
- Minimum education and experience of massage personnel;
- Passage by massage personnel of a practice examination of competence;
- Sanitary conditions of the massage establishment;
- Hours of operations of the massage establishment; and
- Prohibition of the sale or serving of food or beverage, or the conducting of non-massage business on the premises of the massage business.

See *Owens v City of Signal Hill* (1984) 154 CA3d 123, 201 CR 70 (upholding city's ordinance regulating massage establishments and technicians as constitutional business regulations). See also Pen C §§11225-11226 (Red Light Abatement Law); *Kim v Dolch* (1985) 173 CA3d 736, 219 CR 248 (massage parlor ordinance authorizing warrantless inspections did not violate Fourth Amendment because comprehensive nature of regulation under ordinance gave massage parlor owners notice that they could be subject to periodic inspections, inspections were critical to achievement of city's objectives, and purpose of inspections was limited to determining compliance with ordinance).

Any ordinance must require license denial on a showing of proof that the massage personnel or the owners or operators of a massage business must register as sex offenders. Govt C §51032(b). The ordinance may provide for license denial on a showing of proof that the massage personnel or the owners or operators of a massage business have been convicted of specified criminal offenses. Govt C §51032(a).

© The Regents of the University of California

§9.36 11. Pawnbrokers

Cities may adopt rules and regulations by ordinance or resolution for the purpose of permitting, inspecting, and recordkeeping of pawnbrokers. See *Malish v City of San Diego* (2000) 84 CA4th 725, 101 CR2d 18. See also Bus & P C §21638; Fin C §21300.

© The Regents of the University of California

§9.37 12. Private Patrols

Regulation of private patrols includes "private patrol operators" that furnish watchmen, security guards/officers, street patrol persons, or other persons to protect persons and property or performing such services themselves. It also includes "armored contract carriers" and "armored vehicle guards." See Bus & P C §7582.1.

State law declares that any person who operates private patrols, but is not licensed under the California Business and Professions Code, is guilty of an infraction punishable by a fine of $1000. See Bus & P C §§7582, 7582.05.

© The Regents of the University of California

§9.38 a. Authority to Regulate

Cities or counties may adopt rules and regulations by ordinance that require private patrol operators to register with the city, including registering their names and filing copies of their state identification cards. See Bus & P C §7582.5(a), (c). A city may not, however, require a registration application or charge a fee for registration. Bus & P C §7582.5(c). A city or county may adopt rules and regulations by ordinances that govern private patrol operators' employees who are unable to furnish evidence of current registration. Bus & P C §7582.5(b).

A city or county may impose "reasonable additional requirements to regulate and control protection dogs according to their local needs" that are not inconsistent with the provisions of the Private Security Services Act (Bus & P C §§7582-7582.28). Bus & P C §7582.5.

© The Regents of the University of California

§9.39 b. Licensing

Licensing of private patrol operators and their employees is extensively regulated by state law. See Bus & P C §§7583-7583.46. A city may, however, regulate uniforms and insignias worn by and vehicles used by private patrols to clearly distinguish between private patrols and local regular law enforcement officers. See Bus & P C §7583.38.

© The Regents of the University of California

§9.40 13. Shopping and Laundry Carts

Removal from the owner's premises or possession of a properly marked shopping or laundry cart is a misdemeanor. Cities are authorized to regulate businesses having shopping and laundry carts and to retrieve, impound, and impose fines for carts found off-site. Bus & P C §§22435-22435.13.

© The Regents of the University of California

§9.41 14. Taxicabs

Cities are permitted to adopt rules and regulations on the operation of taxicabs. *People v Galena* (1937) 24 CA2d Supp 770, 70 P2d 724; Veh C §21112.

© The Regents of the University of California

§9.42 a. Consequences of Violations

Violation of local licensing requirements may subject the taxicab business to immediate seizure and removal of vehicles being operated as taxicabs or other passenger vehicles for hire, fines up to $5000, and disconnection of telephone service. Veh C §21100.4; Govt C §§53075.8-53075.9.

© The Regents of the University of California

§9.43 b. Taxicab Drivers' Drug and Alcohol Testing Requirements

All cities, including charter cities, must establish a policy that makes mandatory drug and alcohol testing an absolute condition for issuance and/or renewal of a taxicab driver permit. Govt C §53075.5. The drug and alcohol testing and procedure must comply with 49 CFR part 40.

Drug or alcohol testing consortiums must mail a copy of all positive drug and alcohol test results to the Department of Motor Vehicles within 3 days of the test. Veh C §34520. It is a misdemeanor to willfully violate this requirement under the Vehicle Code.

© The Regents of the University of California

§9.44 15. Tow Trucks

Cities may adopt rules and regulations by ordinance or resolution for licensing and regulating the operation of tow truck service or tow truck drivers whose principal place of business or employment is within the city's jurisdiction. See Veh C §§21100(g), 22671; *People v PKS, Inc.* (1994) 26 CA4th 400, 31 CR2d 543. However, the ability of cities to regulate certain aspects of the routes followed or the service provided by tow truck operators is preempted by federal law. 49 USC §14501(c). See *City of Columbus v Ours Garage & Wrecker Serv., Inc.* (2002) 536 US 424, 153 L Ed 2d 430, 122 S Ct 2226 (regulatory power reserved to states may be delegated to municipalities).

© The Regents of the University of California

§9.45 16. Vendors and Solicitors

A municipality's ability to restrain and regulate huckstering, hocking, peddling, soliciting, and canvassing is an aspect of municipal police power and is justified to the extent it bears a reasonable relationship to public health, safety, morals, welfare and convenience. See *New Orleans v Dukes* (1976) 427 US 297, 49 L Ed 2d 511, 96 S Ct 2513.

The propriety of cities' seeking identification information from those who wish to go door-to-door in their jurisdictions has been recognized for over half a century. See *Martin v City of Struthers* (1943) 319 US 141, 87 L Ed 1313, 63 S Ct 862 (finding complete-ban approach went too far, but noting city had option of using "identification devices" to prevent or dissuade criminals from posing as canvassers). See also *Secretary of State of Maryland v J.H. Munson Co.* (1984) 467 US 947, 967 n16, 81 L Ed 2d 786, 104 S Ct 2839 ("concerns about unscrupulous professional fund-raisers, like concerns about fraudulent charities, can and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct"). But see *Watchtower Bible & Tract Soc'y, Inc. v Village of Stratton* (2002) 536 US 150, 153 L Ed 2d 205, 122 S Ct 2080 (law requiring registration and issuance of ministerial permit as prior condition for all door-to-door canvassing and solicitation found to be overbroad).

PRACTICE TIP: Due to the significant First Amendment implications of regulating door-to-door solicitors, many cities adopt ordinances making illegal the act of vending to property where the owner has posted a "no solicitors" or similar sign.

© The Regents of the University of California

§9.46 17. Junk Dealers and Recyclers

Junk dealers and recyclers are subject to reporting requirements similar to those required of secondhand dealers and coin dealers. Junk dealers and recyclers are generally prohibited from providing payment for certain material earlier than 3 days after the date of sale, and the dealer or recycler is required to obtain a photograph or video of the seller and certain other identifying information, including the thumbprint of the seller. Cities may enact ordinances affecting these requirements (*i.e.,* override state preemption) only by a two-thirds majority vote of a city's legislative body, supported by clear and convincing evidence that the state laws are ineffective with respect to the individual jurisdiction. Bus & P C §§21606-21609.5.

© The Regents of the University of California

C. Rent Control

§9.47 1. Residential Rent Control Only

Regulation of the rent charged for residential rental units (duplexes, multi-family apartment buildings, and mobile home spaces) is within cities' police power. See Cal Const art XI, §§5 (charter cities), 7 (general law cities). However, with few exceptions, units constructed after February 1, 1995, and units that are separately alienable from the title of any other dwelling (single-family homes and condominiums) are statutorily exempt from rent regulation. See CC §1954.52. Low vacancy rates in rental housing units and monopolies or other market imbalances leading to tenant exploitation and excessive rents have precipitated such regulation. *Pennell v City of San Jose* (1988) 485 US 1, 11, 99 L Ed 2d 1, 108 S Ct 849; *Carson Mobilehome Park Owners' Ass'n v City of Carson* (1983) 35 C3d 184, 187 n1, 197 CR 284; *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 160, 130 CR 465.

NOTE: The general legal principles applicable to rent control are the same for all types of residential rent control, including control of rents for mobile home spaces. However, mobile home rent control raises additional issues. See §§9.59-9.60.

PRACTICE TIP: Rent control generates a lot of litigation and landlords frequently develop new theories for challenging the validity of rent control or its application. It is helpful to subscribe to publications that target landlords because they often provide the earliest information concerning new strategies by landlords for challenging or evading rent control.

Regulation of the rent charged for commercial uses has been invalidated. See *Ross v City of Berkeley* (ND Cal 1987) 655 F Supp 820. State law also prohibits commercial rent control. CC §§1954.25-1954.31.

© The Regents of the University of California

§9.48 2. Permissible Rent Control Regulation

Rent control must serve a legitimate governmental purpose and permit the landlord to earn a just and reasonable return. See *Santa Monica Beach, Ltd. v Superior Court* (1999) 19 C4th 952, 81 CR2d 93, cert denied (1999) 526 US 1131.

© The Regents of the University of California

§9.49 a. Governmental Purposes

Reported cases have expressly upheld protection of tenants from excessive rents and protection of tenant welfare as a legitimate purpose for rent control. *Pennell v City of San Jose* (1988) 485 US 1, 11, 99 L Ed 2d 1, 108 S Ct 849; *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 159, 130 CR 465; *Sierra Lake Reserve v City of Rocklin* (9th Cir 1991) 938 F2d 951, 958, vacated (1992) 506 US 802, 121 L Ed 2d 4, 113 S Ct 31, reinstated in part (9th Cir 1993) 987 F2d 662. Moreover, a rent control ordinance's failure to achieve its objectives does not constitute a regulatory taking; a rent control ordinance's effectiveness and the need for a repeal are questions for the legislature, not the courts, as long as the ordinance enables a landlord to earn a fair return. *Santa Monica Beach, Ltd. v Superior Court* (1999) 19 C4th 952, 974, 81 CR2d 93, cert denied (1999) 526 US 1131. See also *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074 ("substantially advances" test is not valid method for determining whether rent control ordinance causes taking). An ordinance that serves a legitimate purpose is not an unconstitutional impairment of contract even if it interferes with the rental rates in a preexisting contract. *Interstate Marina Dev. Co. v County of Los Angeles* (1984) 155 CA3d 435, 202 CR 377; *Berman v Downing* (1986) 184 CA3d Supp 1, 5, 229 CR 660.

PRACTICE TIP 1: The "constitutional facts," such as a market imbalance and rapidly rising and excessive rents, justifying rent control will be presumed, but can be rebutted. *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 160, 130 CR 465. Thus, it is useful to develop a record of the facts justifying rent control before adopting an ordinance.

PRACTICE TIP 2: There is no reported case requiring California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) compliance before adopting or amending a rent control ordinance. However, there have been several challenges to ordinances on this ground and a few trial courts and at least one unpublished appellate opinion set aside an ordinance for failure to comply with CEQA.

PRACTICE TIP 3: Frequently check for changes in the law when concerned with rent control.

© The Regents of the University of California

§9.50 b. Just and Reasonable Return

Various formulas or methods for granting rent increases have been upheld as facially valid because they are reasonably related to providing a "just and reasonable return" and do not preclude a just and reasonable return or necessitate unconstitutional results. See *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 768, 777, 66 CR2d 672, cert denied (1998) 522 US 1077; *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 165, 130 CR 465 (non-exclusive list of factors). See also *Fisher v City of Berkeley* (1984) 37 C3d 644, 679, 209 CR 682, aff'd (1986) 475 US 260 (net operating income (NOI) formula); *Carson Mobilehome Park Owners' Ass'n v City of Carson* (1983) 35 C3d 184, 189, 197 CR 284 (list of factors); *West Hollywood Concerned Citizens v City of West Hollywood* (1991) 232 CA3d 486, 283 CR 470 (registration fees not confiscatory); *Palos Verdes Shores Mobile Estates, Ltd. v City of Los Angeles* (1983) 142 CA3d 362, 371, 190 CR 866 (profit maintenance guidelines).

No case has concretely defined the term "just and reasonable return." The supreme court in *Fisher* expressly reserved the issue of how to determine whether the application of a rent control regulation to a particular landlord has denied a just and reasonable return. *Fischer,* C3d 681 at 37 n34. A just and reasonable return has been described as one that is high enough to encourage good management, reward efficiency, and discourage the flight of capital; and is commensurate with returns on comparable investments, but not so high as to defeat the purpose of preventing excessive rents. There is a range of rents that can be characterized as providing a just and reasonable return. See *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 778, 66 CR2d 672, cert denied (1998) 522 US 1077; *City of Berkeley v City of Berkeley Rent Stabilization Bd.*(1994) 27 CA4th 951, 33 CR2d 317 (rent control board did not abuse its discretion in permitting debt service to be factor in NOI); *Vega v City of W. Hollywood* (1990) 223 CA3d 1342, 273 CR 243; *San Marcos Mobilehome Park Owners' Ass'n v City of San Marcos* (1987) 192 CA3d 1492, 1502, 238 CR 290; *Oceanside Mobilehome Park Owners' Ass'n v City of Oceanside* (1984) 157 CA3d 887, 204 CR 239.

© The Regents of the University of California

§9.51 c. Impermissible Rent Control Regulations

A denial of a just and reasonable return constitutes an unconstitutional taking of property that requires compensation. The denial of a just and reasonable return is not reasonably related to the legitimate governmental purpose of protecting tenants and is thus arbitrary, unconstitutional, and "confiscatory." *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 160, 164, 169, 173, 130 CR 465. In analyzing the sufficiency of the return permitted, most California cases and earlier federal authorities have focused on whether the return is so low as to be confiscatory. 17 C3d at 169; *Federal Power Comm'n v Hope* (1944) 320 US 591, 88 L Ed 333, 64 S Ct 281; *Federal Power Comm'n v Natural Gas Pipeline Co.* (1942) 315 US 575, 86 L Ed 1037, 62 S Ct 736. But see *Apartment Ass'n of Greater Los Angeles v Santa Monica Rent Control Bd.* (1994) 24 CA4th 1730, 30 CR2d 228 (property owners with base rents substantially below market not constitutionally entitled to increase rents).

For examples of cases involving challenges to the sufficiency of individual rent increase decisions on the ground that a fair return has been denied, see *Galland v City of Clovis* (2001) 24 C4th 1003, 103 CR2d 711; *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 66 CR2d 672, cert denied (1998) 522 US 1077; *Carson Harbor Village, Ltd. v City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 CA4th 281, 82 CR2d 569; *Yee v Mobilehome Park Rental Review Bd.* (1993) 17 CA4th 1097, 23 CR2d 1; *Palomar Mobilehome Park Ass'n v Mobile Home Rent Review Comm'on* (1993) 16 CA4th 481, 20 CR2d 371; *West Hollywood Concerned Citizens v City of West Hollywood* (1991) 232 CA3d 486, 283 CR 470; *El Dorado Palm Springs Ltd. v Rent Review Comm'n* (1991) 230 CA3d 335, 281 CR 327; *Vega v City of W. Hollywood* (1990) 223 CA3d 1342, 273 CR 243; *Palacio de Anza v Palm Springs Rent Review Comm'n* (1989) 209 CA3d 116, 257 CR 121; *Whispering Pines Mobile Home Park, Ltd. v City of Scotts Valley* (1986) 180 CA3d 152, 225 CR 364. Some federal courts have applied a taking or inverse condemnation analysis to the issue and the terms "confiscation" and "taking" are sometimes used synonymously. *Pennell v City of San Jose* (1988) 485 US 1, 12, 99 L Ed 2d 1, 108 S Ct 849. See also *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 770, 773, 782, 66 CR2d 672, cert denied (1998) 522 US 1077.

PRACTICE TIP: In the California courts, the remedy for denial of a fair return is remand to the rent review board or commission to grant a rent increase sufficient to compensate for any past confiscation (a *Kavanau* Adjustment; see *Kavanau v Santa Monica Rent Control Bd., supra*). If a legal challenge based on denial of a fair return includes a takings or other constitutional cause of action, including a claim under 42 USC §1983, in addition to a petition for writ of mandate, it is important to have the writ petition tried first. If the writ petition is denied, there will probably be no remaining ground for a constitutional challenge. If the petition is granted, the increase granted at the remand hearing should eliminate any constitutional violation.

© The Regents of the University of California

§9.52 d. Vacancy Decontrol and Exemptions From Rent Control

With certain exceptions, California's Costa-Hawkins Act allows a landlord to increase the rent for an apartment otherwise subject to rent control once it is vacated. CC §§1954.52-1954.53. The Act does not apply to mobile home parks, but residents of such parks are exempted from rent control if they sign long-term leases meeting the requirements of CC §798.17 during the duration of those leases. The rents for spaces constructed and first offered for rental after January 1, 1990, are exempted from rent control. CC §§798.7, 798.45. Under certain circumstances, the rent for a space occupied by a resident whose mobile home is not that resident's primary residence is also exempt from rent control. CC §798.21.

© The Regents of the University of California

§9.53 3. Administration of Rent Control Ordinances

Some cities have created separate boards and staff to administer rent control regulations. Others are under the city council and regular city departments.

© The Regents of the University of California

§9.54 a. Annual Rent Increases

Most rent control ordinances allow an annual increase based on the percentage change in the Consumer Price Index, or a portion thereof, in the preceding twelve months. However, such a provision is not required, as long as a reasonably prompt procedure for reviewing applications by individual landlords for rent increases can be provided. *Carson Mobilehome Park Owners' Ass'n v City of Carson* (1983) 35 C3d 184, 191, 197 CR 284.

NOTE: Even with an annual increase provision, there must be a procedure by which an applicant can seek an additional increase on the ground the annual increase is insufficient to provide a just and reasonable return. On just and reasonable return, see §9.50.

© The Regents of the University of California

§9.55 b. Pass-Throughs and Rent Decreases

Some ordinances provide for, in addition to automatic annual increases, a variety of "pass-through" increases (*e.g.,* based on utilities) that require only minimal staff review. Such provisions tend to decrease administrative costs and provide greater rent increases. However, mobile home park tenants may not be charged "fees" or "pass-throughs" (*e.g.,* for capital improvements) in addition to rent, except for services rendered, unless expressly authorized by statute. CC §§798.31, 798.33-798.37, 798.41-798.44, 798.49; *Karrin v Ocean-Aire Mobile Home Estates* (1991) 1 CA4th 1066, 2 CR2d 581. But "rent increases" based on capital improvements or specified costs may be permissible in mobile home park ordinances. *Robinson v City of Yucaipa* (1994) 28 CA4th 1506, 34 CR 291.

Some ordinances also provide for rent decreases based on reductions in services or amenities and provide standards for maintenance of rental units. All these regulations have been upheld in the context of regulating apartment rents. See *McHugh v Santa Monica Rent Control Bd.* (1989) 49 C3d 348, 261 CR 318; *Berman v City of West Hollywood Rent Stabilization Dept.* (1988) 197 CA3d 837, 243 CR 144; *Sterling v Santa Monica Rent Control Bd.* (1985) 168 CA3d 176, 214 CR 71. These regulations involve greater administrative costs, but also provide for greater "fine tuning" of rent amounts.

© The Regents of the University of California

§9.56 c. Procedural Due Process

Review of individual rent adjustment applications is a quasi-judicial procedure that requires a duly noticed public hearing. Due process entitles the applicant to notice, a meaningful opportunity to be heard, and a fair hearing. CCP §1094.5. A proceeding based primarily on documents or similar evidence (*i.e.,* financial or economic data) does not require providing the right to cross-examine witnesses. However, if administrative decisions turn on the factual testimony of live witnesses, the park owner must have the right to cross-examination. *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 CA4th 705, 84 CR3d 367.

© The Regents of the University of California

§9.57 d. Standard of Review

The decision of any hearing officer, rent review commission, or appeal board will be sustained if supported by factual findings and substantial evidence. CCP §1094.5; *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 515, 113 CR 836; *Carson Harbor Village, Ltd. v City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 CA4th 281, 287, 82 CR2d 569; *San Marcos Mobilehome Park Owners' Ass'n v City of San Marcos* (1987) 192 CA3d 1492, 1459-1502, 238 CR 290; *Whispering Pines Mobile Home Park, Ltd. v City of Scotts Valley* (1986) 180 CA3d 152, 156, 225 CR 364. See also *Kirkpatrick v City of Oceanside* (1991) 232 CA3d 267, 283 CR 191; *Cotati Alliance for Better Housing v City of Cotati* (1983) 148 CA3d 280, 195 CR 825.

PRACTICE TIP: When a local agency hires ad hoc hearing officers to adjudicate rent control issues, the agency should take steps to ensure that the hearing officers have no expectation of future employment with the agency. *Haas v County of San Bernardino* (2002) 27 C4th 1017, 119 CR2d 341. If a city ordinance provides for an appeal procedure, the legal advisor to the original decision-maker (*e.g.,* a rent review board or commission or hearing officer) cannot also advise the body (*e.g.,* a city council) or person (*e.g.,* an independent hearing officer) hearing the appeal. *Nightlife Partners, Ltd. v City of Beverly Hills* (2003) 108 CA4th 81, 133 CR2d 234.

© The Regents of the University of California

§9.58 e. Preemption

State law governing landlord/tenant relationships must be considered in drafting and implementing rent control ordinances. State laws regulating eviction procedures and requiring hearings to establish base rents preempt local regulation. *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 148, 130 CR 465. See, *e.g.,* CC §§827, 1159-1165 (repealed 1984), 1942, 1945, 1947, 1947.7-1947.8, 1950.5 (amended by statute; see Stats 2006, ch 167 (AB 2618)).

The Ellis Act (Govt C §§7060-7060.7), which gives landlords the right to withdraw their property from the rental market, also authorizes cities to require payment of relocation assistance to residents displaced from rent-controlled housing. Govt C §7060.2(b); *Bullock v City & County of San Francisco* (1990) 221 CA3d 1072, 1101, 271 CR 44; *City of Santa Monica v Yarmark* (1988) 203 CA3d 153, 167, 249 CR 732. In addition to preventing wrongful evictions, the Act authorizes actual and exemplary damages if the withdrawn units are re-rented within 2 years of being withdrawn from the market and imposes "vacancy control" rent regulation if the units are re-rented during the 5 years immediately following the withdrawal. Govt C §7060.2(a)-(b). The procedure to be followed is expressly governed by the Act, which does not apply to mobile home parks. On preemption with regard to mobile homes parks, see §9.59.

© The Regents of the University of California

4. Special Considerations for Mobile Home Rent Control

§9.59 a. Preemption

Mobile homes and mobile home parks are extensively regulated by state law. See CC §§798-798.14 (Mobilehome Residency Law); Health & S C §§18000-18700 (Mobilehomes and Manufactured Housing Act of 1980); Govt C §§65863.7-65863.13 (governing park closures and relocation assistance); Govt C §66427.4 (governing park closures and relocation assistance when subdivision map is required). See also Govt C §66427.5 (conversion to resident ownership and exemption from rent control).

The following laws preempt mobile home rent control: CC §§798.7, 798.45 (rent regulation of newly constructed spaces initially held out for rent after January 1, 1990), 798.17 (certain leases exempt from rent control), §798.30 (notices of rent increases), 798.31-798.38, 798.41, 798.44, 798.49 (charges for certain services and fees), 798.39 (security deposits), 798.56 (grounds for eviction). But see *Vance v Villa Park Mobilehome Estates* (1995) 36 CA4th 698, 42 CR2d 723 (discussing limitations on charges for fees); *Robinson v City of Yucaipa* (1994) 28 CA4th 1506, 34 CR 291. These specific laws usually prevail over general California Civil Code provisions governing landlord-tenant relations.

For related material regarding land use and challenges to land use decisions, see §§10.362-10.445; on municipal liability and constitutional claims, see §13.113.

© The Regents of the University of California

§9.60 b. Vacancy Control

The term "vacancy" in the context of a mobile home park has a special meaning. If a homeowner/tenant removed a mobile home from a park there would, of course, be a vacant space. However, that rarely happens because mobile homes are expensive and difficult to move, there is a shortage of rental spaces in most areas, and state law gives homeowners the right to sell a mobile home in-place in a park. See CC §§798.70-798.83. Thus, the term "vacancy" generally means a transfer of ownership to a new homeowner/tenant.

Some cities regulate rent so that the new homeowner/tenant can only be charged the same rent as the selling homeowner/tenant, or the city puts a cap on the amount of the vacancy increase. This is known as "vacancy control." Such "vacancy control" is neither a "physical taking" (see *Yee v City of Escondido* (1992) 503 US 519, 118 L Ed 2d 153, 112 S Ct 1522) nor a "regulatory taking" (see *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074) of property. *Lingle* overrules the Ninth Circuit's findings in *Richardson v City & County of Honolulu* (9th Cir 1997) 124 F3d 1150 and *Cashman v City of Cotati* (9th Cir 2004) 374 F3d 887, rev'd (9th Cir 2005) 415 F3d 1027 that vacancy control rent regulation of ground or pad leases results in a regulatory taking. California court decisions agree with *Lingle*. See *Sandpiper Mobile Village v City of Carpinteria* (1992) 10 CA4th 542, 12 CR2d 623, cert denied (1992) 507 US 1032; *Casella v City of Morgan Hill* (1991) 230 CA3d 43, 280 CR 876, cert denied (1992) 503 US 983.

© The Regents of the University of California

III. REGULATING PERSONAL CONDUCT

§9.61 A. Camping in Parks

As the homeless situation has become more severe, cities are having to cope with homeless people using public spaces, including parks, as their homes. A city may enact reasonable laws and regulations on the use of a municipality's public facilities to promote park purposes and ensure the public's health, safety, and welfare. See *People v Trantham* (1984) 161 CA3d Supp 1, 208 CR 535 (park regulation is municipal affair); *Simons v City of Los Angeles* (1976) 63 CA3d 455, 133 CR 721. Several "unlawful camping" ordinances have withstood constitutional challenges. See *Tobe v City of Santa Ana* (1995) 9 C4th 1069, 40 CR2d 402; *Joyce v City of San Francisco* (ND Cal 1994) 846 F Supp 843. But see *In re Eichorn* (1998) 69 CA4th 382, 81 CR2d 535 ("necessity" defense recognized for homeless sleeping in parks).

© The Regents of the University of California

§9.62 1. Equal Protection

An anti-camping ordinance should withstand equal protection challenge if it:

- Is neutral on its face;
- Is enforced equally vigorously against all groups; and
- Has as its purpose to protect reasonably full access to a park and the park itself, and not to exclude any discrete group that it may disproportionately affect.

See *Parr v Municipal Court* (1971) 3 C3d 861, 92 CR 153, cert denied sub nom *City of Carmel-By-The-Sea v Parr* (1971) 404 US 869; *People v Scott* (1993) 20 CA4th Supp 5, 26 CR2d 179.

© The Regents of the University of California

§9.63 2. Vagueness

An ordinance that defines "camping" by describing activities which, taken in context, reasonably appear to constitute residing in a park can be constitutionally sufficient without drawing absolute bright lines. See *Clark v Community for Creative Non-Violence* (1984) 468 US 288, 292, 82 L Ed 2d 221, 104 S Ct 3065 (validating United States Park Service's definition of camping in face of vagueness challenge); *U.S. v Musser* (DC Cir 1989) 873 F2d 1513 (same); *U.S. v Thomas* (DC Cir 1988) 864 F2d 188 (same). See also *Tobe v City of Santa Ana* (1995) 9 C4th 1069, 40 CR2d 402 (ordinance prohibiting use of public property for "camping purposes or storage of personal property" held not vague or overbroad).

PRACTICE TIP: Use the United States Park Service's definition of camping as a starting point in drafting anti-camping ordinances because it has withstood three challenges. The more this definition is embellished, the less uncertainty there will be as to whether such a definition will withstand a vagueness challenge.

© The Regents of the University of California

§9.64 B. Curfews

Curfews have been enacted by local agencies to control the presence of individuals in public places at night to diminish the opportunity for nocturnal criminal activity. This protects the general public safety and promotes the good order of the community. Curfew ordinances are authorized provided they do not go too far in infringing on fundamental rights.

© The Regents of the University of California

1. Authority to Impose Curfews

§9.65 a. Police Power Regulation

A city has the authority to impose curfews in an effort to protect the general safety and welfare of the public under its police powers. See Cal Const art XI, §5 (charter cities), art XI, §7 (general law cities). These powers must, however, be balanced against fundamental rights. *Carroll v U.S.* (1925) 267 US 132, 153, 69 L Ed 543, 45 S Ct 280 (right to travel); *Nunez v City of San Diego* (9th Cir 1997) 114 F3d 935 (freedom of expression).

© The Regents of the University of California

§9.66 b. Fundamental Rights

Both the freedom of movement and freedom of expression are fundamental rights whose exercise can be limited only when necessary to further a compelling state interest. *Carroll v U.S.* (1925) 267 US 132, 153, 69 L Ed 543, 45 S Ct 280; *People v Horton* (1971) 14 CA3d 930, 933, 92 CR 666; *Nunez v City of San Diego* (9th Cir 1997) 114 F3d 935. In addition, any local regulations must be narrowly drawn to overcome vagueness and overbreadth challenges. *In re Hoffman* (1967) 67 C2d 845, 852, 64 CR 97.

NOTE: The parent of a juvenile may also have a substantive due process right to control and direct the juvenile. *Nunez v City of San Diego* (9th Cir 1997) 114 F3d 935, 951. See *In re Cynthia D.* (1993) 5 C4th 242, 19 CR2d 698.

© The Regents of the University of California

§9.67 2. Types of Curfew Ordinances

Curfew ordinances typically fall into two categories:

- juvenile curfews (the most common type of curfew), and
- emergency curfews drawn during emergency, riot, or wartime conditions.

© The Regents of the University of California

§9.68 a. Youth or Juvenile Ordinances

Cities may enact youth curfews under the police power in an effort to protect minors' safety and general welfare. Youth curfew ordinances typically prohibit minors under a certain age from "tarrying or remaining" in or on public streets between certain hours. See generally McQuillin, Municipal Corporations §24.111 (3d rev ed 1988).

An ordinance that prohibits school-age children subject to compulsory education from being in public during the hours that school is in session is not preempted by state law. *Harrahill v City of Monrovia* (2002) 104 CA4th 761, 128 CR2d 552.

© The Regents of the University of California

§9.69 (1) Exceptions

To survive constitutional challenges, these ordinances must contain reasonable exceptions, including exceptions for (*In re Nancy C.* (1972) 28 CA3d 747, 105 CR 113):

- minors accompanied by a parent or guardian,
- minors who are performing an errand for a parent, and
- minors who are returning directly home from a meeting, dance, or recreational activity.

An exception should also be added to allow for the exercise of First Amendment rights, such as the free exercise of religion and freedom of speech, and the right of assembly. *Nunez v City of San Diego* (9th Cir 1997) 114 F3d 935. For an extensive discussion of exceptions, see *Schleifer v City of Charlottesville* (4th Cir 1998) 159 F3d 843, cert denied (1999) 526 US 1018.

© The Regents of the University of California

§9.70 (2) Standard of Review

Federal courts of appeals are divided on the standard to be applied in reviewing juvenile curfew ordinances. The Ninth Circuit has applied the strict scrutiny standard of determining whether the ordinance has been narrowly tailored to promote a compelling interest, but has recognized that the government interests in protecting minors is compelling and different from its interests in protecting adults. *Nunez v City of San Diego* (9th Cir 1997) 114 F3d 935, 945. Other Circuits have applied the lesser standard of intermediate scrutiny, *i.e.,* that the ordinance be substantially related to an important government interest. *Ramos v Town of Vernon* (2d Cir 2003) 353 F3d 171 (discussing issue and competing decisions at length).

© The Regents of the University of California

§9.71 b. Emergency Curfews

In addition to the authority contained in Cal Const art XI, §7, Govt C §8634 expressly allows cities and counties to promulgate orders and regulations imposing a curfew to preserve public order and safety during a local emergency. See *Davis v Justice Court* (1970) 10 CA3d 1002, 89 CR 409 (curfew regulations to control rioting in Contra Costa County during state of emergency were not preempted by state disaster statutes, nor did they unduly interfere with right to travel). A county may even be able to impose a curfew within a city's limits under this authority. 62 Ops Cal Atty Gen 701 (1979).

An emergency curfew ordinance, order, or regulation must be definite enough to provide adequate notice of the prohibited activity and cannot be subject to arbitrary and discriminatory enforcement. *In re Juan C.* (1994) 28 CA4th 1093, 33 CR2d 919. Generally, that is accomplished by prohibiting anyone except specially exempted persons, such as emergency personnel, from being present on streets after curfew. *People v Richardson* (1994) 33 CA4th Supp 11, 15, 39 CR2d 17.

© The Regents of the University of California

3. Common Challenges to Curfews

§9.72 a. Overbreadth

A law is overbroad, and thus void, if it does not aim specifically at conduct or matter that is prohibited and instead proscribes other activities that are protected under the law. For example, a Los Angeles curfew ordinance was held constitutional because it was drafted to narrowly apply to minors who remained or loitered on streets or in public places and not to "those minors who are using or are on such street or places while actually in the process of going to or from places of business, amusement or otherwise." *People v Walton* (1945) 70 CA2d Supp 862, 866, 161 P2d 498. See also *Alves v Justice Court* (1957) 148 CA2d 419, 306 P2d 601.

© The Regents of the University of California

§9.73 b. Vagueness

A law that does not fairly inform a person of what is prohibited or permitted is considered vague, and thus unconstitutional. *Kolender v Lawson* (1983) 461 US 352, 75 L Ed 2d 903, 103 S Ct 1855. Usually, ordinances that proscribe "presence" or "being in" certain places at certain times are held unconstitutional, although those proscribing "loitering" are typically upheld. But see *Nunez v City of San Diego* (9th Cir 1997) 114 F3d 935, 943 (phrase "loiter, wander, idle, stroll or play" is unconstitutionally vague).

PRACTICE TIP 1: In the evidentiary record and the ordinance findings, the underlying reasons for adopting the ordinance must be carefully documented. Youth curfew ordinances should be supported by statistics of criminal activity related to juveniles—whether as perpetrators or victims—with particular reference to ages, hours, involvement, and general locations. Although city-specific information is most helpful, information and trends from the local area or region as well as state or national levels may be supportive as well. Review of the federal courts of appeals decisions is helpful to understanding the required documentation.

PRACTICE TIP 2: Particularly with a youth curfew ordinance, exceptions are mandatory to protect basic rights in travel and free speech and validate the ordinance. The federal courts of appeals decisions provide lengthy discussions of the basic exceptions that are expected.

© The Regents of the University of California

§9.74 C. Disorderly Conduct

Disorderly conduct laws replaced the vagrancy statutes and now define crimes by specific acts, rather than mere status. Newer laws make acts such as soliciting to engage in lewd acts, loitering for the purpose of engaging in lewd acts, actually engaging in lewd acts, solicitation for prostitution, and public intoxication misdemeanors.

A statute stating "no person shall conduct himself in a disorderly manner" is unconstitutionally vague. *Baker v Bindner* (WD Ky 1967) 274 F Supp 658.

© The Regents of the University of California

1. Public Lewdness

§9.75 a. Vagueness and Overbreadth

To prove that someone has engaged in or solicited criminal "lewd or dissolute" conduct in public, the city must prove, among other things, that there was actual touching of the genitals, buttocks, or female breasts. *Pryor v Municipal Court* (1979) 25 C3d 238, 244, 158 CR 330. This requirement is to avoid having the phrase "lewd and dissolute" conduct declared unconstitutionally vague.

© The Regents of the University of California

§9.76 b. Freedom of Expression

The First Amendment does not protect obscenity. *Kaplan v California* (1973) 413 US 115, 37 L Ed 2d 492, 93 S Ct 2680. A law prohibiting public nudity regulates conduct "regardless of whether that nudity is accompanied by expressive activity." *City of Erie v Pap's A.M.* (2000) 529 US 277, 290, 146 L Ed 2d 265, 120 S Ct 1382. In addition, the prevention of obscene acts does not hinder the marketplace of ideas or freedom to distribute information and opinion. *People ex rel Hicks v Sarong Gals* (1972) 27 CA3d 46, 51, 103 CR 414. Lastly, courts have held that "a statute which by judicial construction prohibits only the solicitation of criminal acts does not abridge freedom of speech." *Pryor v Municipal Court* (1979) 25 C3d 238, 254, 158 CR 330.

© The Regents of the University of California

§9.77 2. Public Intoxication

Disorderly conduct laws that penalize the specific act of being drunk in public instead of punishing a person for being an alcoholic, have been held constitutional and do not rise to the level of cruel and unusual punishment. *In re Spinks* (1967) 253 CA2d 748, 61 CR 743.

© The Regents of the University of California

D. Drugs, Drug Paraphernalia, and Gangs

§9.78 1. Drugs

An ordinance that proscribes use of narcotics except when administered by or under direction of persons authorized by the state is essentially duplication of California Penal Code sections and is unconstitutional. *People v Villarino* (1955) 134 CA2d Supp 893, 286 P2d 86.

The Drug House Abatement Act (Health & S C §§11570-11587) defines as public nuisances buildings or places used for the manufacture, sale, or use of illegal drugs. The city attorney may maintain an action under the Act to abate a drug nuisance and to enjoin the violator from maintaining it. Health & S C §11571.

© The Regents of the University of California

§9.79 2. Drug Paraphernalia

Since January 1, 1983, the field of drug paraphernalia regulation has been preempted. See Health & S C §§11014.5, 11364.7; *A & B Cattle Co. v City of Escondido* (1987) 192 CA3d 1032, 238 CR 580. See also Bus & P C §24200; *Mehret Ghirmai d/b/a Liquor to Go v Department of Alcoholic Beverage Control,* Appeal No. AB-7579 (Alcoholic Beverage Control Appeals Board, March 31, 2001) at www.abcappealsbd.ca.gov (revocation of convenience store liquor license for violation of California drug paraphernalia laws).

© The Regents of the University of California

§9.80 3. Gangs

Anti-gang violence statutes have recently been enacted to deal with the societal harm caused by the activities of violent groups and individuals. Some potential issues regarding these statutes concern First Amendment rights of freedom of expression and association, due process, and preemption.

Although the case did not involve an anti-gang statute, the California Supreme Court in *People ex rel Gallo v Acuna* (1997) 14 C4th 1090, 60 CR2d 277, found that gang activities in a neighborhood constituted a public nuisance and that an injunction issued against members of the gang did not violate the First Amendment or the Fifth Amendment. The City of Chicago's anti-gang loitering ordinance was found to be unconstitutionally vague by failing to provide notice of impermissible conduct and to establish minimum guidelines for enforcement. *City of Chicago v Morales* (1999) 527 US 41, 144 L Ed 2d 67, 119 S Ct 1849.

The California Street Terrorism Enforcement and Prevention Act (Pen C §§186.20-186.33) does not preempt local governments from adopting and enforcing laws consistent with its provisions on gangs and gang violence. Local laws may duplicate or supplement the state law's provisions; the state provides alternative remedies. See Pen C §§186.22a, 186.25; *People ex rel Gallo v Acuna* (1997) 14 C4th 1090, 1119, 60 CR2d 277.

© The Regents of the University of California

§9.81 E. Constitutional Issues

Both the state and federal constitutions require that no person be deprived of life, liberty, or property without due process of law. See US Const amend XIV; Cal Const art I, §7; *People v Trantham* (1984) 161 CA3d Supp 1, 208 CR 535.

Substantive due process protects individuals' liberty and property interests against unreasonable government action. To determine whether the action taken was reasonable, the statute on which such action is based must be rationally related to and justified by public necessity.

© The Regents of the University of California

1. Due Process

§9.82 a. Notice

Due process of law requires providing sufficient notice about what actions constitute prohibited activity. The "void for vagueness" doctrine requires criminal statutes to define an offense with such specificity that an ordinary person would know precisely what conduct is prohibited. *Connally v General Constr. Co.* (1926) 269 US 385, 391, 70 L Ed 322, 46 S Ct 126 ("a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law"). See also McQuillin, Municipal Corporations §15.24 (3d rev ed 1988).

© The Regents of the University of California

§9.83 b. Overbreadth

Due process requires that laws not prohibit both protected and unprotected conduct. For example, a Cincinnati ordinance making it a crime for "three or more persons to assemble … on any of the sidewalks … and there conduct themselves in a manner annoying to persons passing by" was held unconstitutional as violating the right to due process of law due to vagueness and overbreadth. *Coates v Cincinnati* (1971) 402 US 611, 29 L Ed 2d 214, 91 S Ct 1686.

© The Regents of the University of California

§9.84 2. Equal Protection

Equal protection requires laws to be enacted and enforced in a non-arbitrary manner against similarly situated people. A law that involves a suspect classification or curtails a fundamental right is subjected to strict scrutiny and will be upheld only if the law furthers a compelling state interest. *Weber v City Council* (1973) 9 C3d 950, 958, 109 CR 553. However, if the law involves a non-suspect classification or does not involve the curtailment of a fundamental interest, it will be upheld if it bears a rational relationship to a legitimate state purpose.

PRACTICE TIP: Even though a defendant may challenge an ordinance on equal protection grounds, allegedly "unequal" treatment from passive enforcement, laxity in enforcement, or the non-arbitrary selective enforcement of a law "has never been considered a denial of equal protection. … The equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling-out individuals for disparate treatment on an individually discriminatory basis." *Murgia v Municipal Court* (1975) 15 C3d 286, 296, 124 CR 204.

© The Regents of the University of California

§9.85 F. Gambling

The provisions of Pen C §330 prohibit specified gambling games by name and description. Those games not specifically prohibited are not illegal under state law.

Control of gambling activities, both private games and those conducted in commercial establishments, is a matter over which local governments have the power to enact and enforce local regulations not in conflict with general laws. See *In re Portnoy* (1942) 21 C2d 237, 131 P2d 1; *Francis v County of Stanislaus* (1967) 249 CA2d 862, 57 CR 881. On regulation of gambling establishments, see §§9.29-9.32.

© The Regents of the University of California

§9.86 G. Graffiti

A city has police power authority to regulate graffiti. See *Sherwin-Williams Co. v City of Los Angeles* (1993) 4 C4th 893, 904, 16 CR2d 215; *Sherwin-Williams Co. v City & County of San Francisco* (ND Cal 1994) 857 F Supp 1355. In addition, state law specifically authorizes cities to use city funds to do the following:

- Remove graffiti or other inscribed material (Govt C §53069.3),
- Provide rewards for information related to property destruction (Govt C §53069.5),
- Abate graffiti as a nuisance (Govt C §38773.5),
- Collect abatement expenses from the responsible person (Govt C §§38772-38773), and
- Adopt administrative fines and penalties (Govt C §53069.4).

However, a charter city ordinance making it a crime to place graffiti on real or personal property located within the city would be void due to its duplication of state criminal statutes, *i.e.,* Pen C §§594.05-640.6. See 78 Ops Cal Atty Gen 143 (1995).

For related material, see the following topics in this handbook:

- redevelopment (see §§5.301-5.439);
- nuisances (§§9.113-9.117);
- zoning and use permits (§§10.99-10.112);
- subdivisions, local ordinances, map approval conditions (§10.156); and
- code enforcement, chap 12.

© The Regents of the University of California

§9.87 1. Definition of Graffiti

"Graffiti" includes any unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on any real or personal property. See Govt C §53069.3. See also Pen C §§594(e) (defining graffiti for purpose of crime of vandalism), 640.5 (defining graffiti for purpose of crime of putting graffiti on governmental vehicles or facilities).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/9 Regulating Businesses and Personal Conduct/ 2. State Law Sanctions for Graffiti/§9.88 a. Graffiti Is Punishable as Vandalism

2. State Law Sanctions for Graffiti

§9.88 a. Graffiti Is Punishable as Vandalism

State law declares graffiti to be a form of vandalism, punishable according to the degree of defacement, damage, or destruction. See Pen C §594. Special penalties apply for graffiti on governmental facilities and vehicles. Pen C §640.5.

© The Regents of the University of California

§9.89 b. Aerosol Paint Containers

State law makes it a misdemeanor for minors (those under the age of 18) to purchase an aerosol container of paint or etching cream capable of defacing property. Pen C §594.1(b), (f). Selling or furnishing aerosol paint cans or etching cream to minors is also a misdemeanor. Pen C §594.1(a), (f).

No one may carry aerosol paint containers or etching cream "in plain view" while in any specified posted facilities. See Pen C §594.1(d). Minors may not possess aerosol paint containers or etching cream for the purpose of defacing property in public places. See Pen C §594.1(e). Violation of these possession restrictions is also a misdemeanor. Pen C §594.1(f).

NOTE: Although state law preempts local agencies from regulating sales and possession of aerosol paints and etching cream (see Stats 1981, ch 1125, §2), local agencies are not preempted from regulating the display of aerosol paints. See *Sherwin-Williams Co. v City of Los Angeles* (1993) 4 C4th 893, 906, 16 CR2d 215 (upholding city ordinance requiring retailers to display aerosol paint and broad-tipped marker pens out of public's reach to prevent shoplifting of such items); *Sherwin-Williams Co. v City & County of San Francisco* (ND Cal 1994) 857 F Supp 1355.

© The Regents of the University of California

§9.90 c. Driver's License Restrictions

For each conviction for graffiti, the state may suspend or delay the issuance of the individual's driver's license. See Veh C §13202.6.

© The Regents of the University of California

3. Graffiti Removal

§9.91 a. Public Funds for Cleanup

Cities may use public funds for graffiti removal from both publicly and privately owned structures if it adopts an ordinance to do so and makes certain findings. See Govt C §53069.3. Graffiti removal requires the consent of the owner of the structure. Govt C §53069.3. Redevelopment agencies may take actions necessary to remove graffiti from public and private property within a project area. Health & S C §33420.2.

PRACTICE TIP: Develop a form for documenting owner consent. This form should also release the city from liability for property damage connected with the abatement effort.

State law authorizes cities to impose, with two-thirds voter approval, a tax on items that may be used for graffiti. See Rev & T C §§7287-7287.10. The tax is collected as a sales tax by the State Board of Equalization for remittance to the taxing agency. See Rev & T C §§7287.2, 7287.6. Proceeds from the tax may only be used for graffiti removal and prevention, including educational programs for at-risk youth. Rev & T C §7287.6.

© The Regents of the University of California

§9.92 b. Cleanup by Vandal

A court must, if appropriate and feasible, order the defendant convicted for acts of graffiti vandalism to clean up or repair the damaged property and to keep the damaged property or other property in the community free of graffiti for up to 1 year. Pen C §594(c). The court may also order the defendant, or his or her parents if a minor, to undergo counseling. Pen C §594(f). A city may also seek restitution for costs resulting from restoring public or private property that has been defaced with graffiti. Pen C §1202.4(a)(1), (k)(5).

© The Regents of the University of California

§9.93 c. Nuisance Abatement Procedures

The city may declare graffiti to be a public and private nuisance either in its general nuisance ordinance or in one specifically relating to graffiti issues. See Govt C §38772 (providing for summary abatement of nuisances at expense of minor or other person "creating, causing, or committing" the act, and making minor's parents/guardians jointly and severally liable). See also Govt C §§38773.1-38773.2, 38773.5 (alternative mechanisms for recouping costs of abatement).

PRACTICE TIP: Consider using the definition of "graffiti" in Govt C §53069.3 in any such abatement effort.

© The Regents of the University of California

§9.94 H. Guns and Weapons

Cities have the power to suppress, prohibit, or regulate all things that are injurious to the public welfare. See Cal Const art XI, §7. Deadly weapons are a proper item for these regulations. Challenges to a city's power to regulate weapons have primarily focused on state preemption.

© The Regents of the University of California

§9.95 1. Second Amendment

The Second Amendment of the United States Constitution provides that "the right of the people to keep and bear arms shall not be infringed." The Second Amendment protects an individual's right to possess and use a firearm for traditionally lawful purposes, such as self-defense within the home. *District of Columbia v Heller* (2008) __ US __, 171 L Ed 2d 637, 128 S Ct 2783 (District of Columbia's ban on handgun possession in home, and prohibition against rendering any lawful firearm in home operable for immediate self-defense, violates Second Amendment). See *U.S. v Miller* (1939) 307 US 174, 83 L Ed 1206, 59 S Ct 816 (Second Amendment protects only those firearms that have "some reasonable relationship to the preservation or efficiency of a well regulated militia"). The Supreme Court's decision in *Heller* did not address whether the Second Amendment is applicable to the states through the Fourteenth Amendment. 128 S Ct at 2813 n23. However, this issue is currently before the Supreme Court in another case. See *National Rifle Ass'n v City of Chicago* (7th Cir 2009) 567 F3d 856, cert granted sub nom *McDonald v City of Chicago* (2009) ___ US ___, 174 L Ed 2d 632, 130 S Ct 48. See also *Nordyke v King* (9th Cir 2009) 563 F3d 439, vacated and rehearing en banc granted July 29, 2009, 575 F3d 890.

© The Regents of the University of California

§9.96 2. Preemption

The California State Legislature has chosen to preempt discrete areas of gun regulation, permitting local governments to tailor firearms legislation in other substantial areas. *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 905, 70 CR3d 324. State law expressly preempts the following:

- Regulation of the registration or licensing of firearms (Govt C §53071);
- Manufacture, sale, or possession of imitation firearms (Govt C §53071.5);
- Restrictions on handgun possession in an individual's home, business, or private property (Pen C §12026(b); *Fiscal v City & County of San Francisco* (2008) 158 CA4th 895, 905, 70 CR3d 324); and
- Certain ammunition sales (see, *e.g.,* Pen C §§12020, 12304, 12321; 77 Ops Cal Atty Gen 147 (1994) (state law preempts city in prohibiting sale of handgun ammunition)).

State law does *not* preempt the following:

- Local regulations on the display and discharge of firearms by police officers (*Long Beach Police Officers Ass'n v City of Long Beach* (1976) 61 CA3d 364, 132 CR 348);
- Ordinances restricting gun dealerships to commercial areas and requiring land use and police permits (*Suter v City of Lafayette* (1997) 57 CA4th 1109, 67 CR2d 420); and
- Ordinances banning the wholesale or retail sale of "Saturday Night Specials" (*California Rifle & Pistol Ass'n, Inc. v City of West Hollywood* (1998) 66 CA4th 1302, 78 CR2d 591).

Additionally, state law expressly authorizes counties to "prohibit and prevent the unnecessary firing and discharge of firearms" (see Govt C §25840), and to approve or deny permits to sell guns (see Pen C §12071). State law does not preempt ordinances prohibiting gun or ammunition sales on county property. *Great Western Shows, Inc. v County of Los Angeles* (2002) 27 C4th 853, 118 CR2d 746 (discussing preemption of local firearms regulation in context of counties).

© The Regents of the University of California

3. Weapons Confiscation and Forfeitures

§9.97 a. Weapons Confiscation

A law enforcement agency's officers are required to confiscate firearms or other deadly weapons found to be in the possession or under the control of an individual, when there is probable cause to believe that the individual represents some danger to him or herself and has been taken into custody for examination of his or her mental condition under Welf & I C §5150. See Welf & I C §8102; *Rupf v Yan* (2000) 85 CA4th 411, 102 CR2d 157. A similar requirement is imposed on an officer at the scene of a family violence incident involving a threat to human life or physical assault in which the officer reasonably believes that the return of the firearm or other deadly weapon would be likely to result in endangering the victim or the person reporting the assault or threat. Pen C §12028.5.

© The Regents of the University of California

§9.98 b. Post-Confiscation Hearing

To afford due process to the individual whose property has been confiscated, the confiscating law enforcement agency must initiate a petition in the superior court for a hearing on the issue of the return of the weapon(s) (within 30 days of the date of release from custody under Welf & I C §8102; within 60 days after seizure of weapons under Pen C §12028.5). If the person from whom the weapons were confiscated does not request a hearing within 30 days from receipt of notice of the petition, the agency may request a default order allowing forfeiture and destruction of the weapons or weapon. Welf & I C §8102; Pen C §12028.5.

If a Welf & I C §8102 hearing is set, the court must determine whether the return of the firearms or other deadly weapon would be likely to result in endangering the individual or others. Welf & I C §8102. Under Pen C §12028.5, the owner has an opportunity for a second hearing on the question of the return of the firearm. If the owner pursues the second hearing within 12 months of the first, the law enforcement agency bears the burden of proving by clear and convincing evidence that the firearm should not be returned, and the prevailing party is entitled to its attorney fees.

PRACTICE TIP: Due to a lack of statutory specificity, there is very little consistency from one court to the next with respect to the applicable procedure for a post-confiscation hearing. Check with your local court for filing and hearing requirements.

© The Regents of the University of California

§9.99 c. Procedure for Return of Firearm

Before a city may return a firearm, the individual must present the city with a notification of determination by the Department of Justice certifying that the individual is eligible to possess firearms, and the city must verify that the firearm is not listed as stolen and that the firearm has been recorded in the Automated Firearms System in the name of the individual who seeks its return. Pen C §12021.3(b)(1)-(2).

PRACTICE TIP: It is important to bring this statute to the court's attention if it orders the return of a firearm, so that the court can properly instruct the individual on the procedure for the return of the firearm. Because long guns (*i.e.,* rifles) are rarely registered on the Automated Firearms System, it may be necessary for the individual to affirmatively register a long gun with the Department of Justice so that the city can verify that the individual is the owner.

© The Regents of the University of California

§9.100 I. Loitering

Because loitering itself is generally lawful, any statute regulating loitering must specifically differentiate between loitering for a lawful purpose and loitering for an unlawful purpose. See *City of Chicago v Morales* (1999) 527 US 41, 53, 144 L Ed 2d 67, 119 S Ct 1849. The most common constitutional challenge to loitering laws is that they are void for vagueness. However, loitering laws are also challenged on theories of equal protection, due process, and the First Amendment rights to free assembly and association. They may also be challenged as being preempted by state law.

© The Regents of the University of California

§9.101 1. Equal Protection

Loitering laws that vest a great amount of discretion in police officers violate equal protection if they allow arbitrary and discriminatory enforcement. *People v Superior Court (Caswell)* (1988) 46 C3d 381, 250 CR 515. Many loitering laws improperly make the condition of poverty a crime. This violates the equal protection clause of the Fourteenth Amendment because it seeks to make criminal a status, as opposed to a specific act. *Robinson v California* (1962) 370 US 660, 8 L Ed 2d 758, 82 S Ct 1417 (addiction to narcotics is a status that legislature cannot validly declare a crime; punishing status constitutes cruel and unusual punishment in violation of Eighth Amendment of the United States Constitution).

© The Regents of the University of California

2. Due Process

§9.102 a. Vagueness

A law is not void for vagueness if it is (*U.S. v L. Cohen Grocery Co.* (1921) 255 US 81, 89, 65 L Ed 516, 41 S Ct 298):

- Written so that there is "an ascertainable standard of guilt"; and
- "[A]dequate to inform persons accused of violation … of the nature and cause of the accusation against them."

See *City of Chicago v Morales* (1999) 527 US 41, 144 L Ed 2d 67, 119 S Ct 1849 (criminal street gang loitering ordinance that failed to establish minimal guidelines for law enforcement was found to be unconstitutional).

Some aspects of Pen C §647 have failed this test. For example, Pen C §647(e) requires a person who is loitering or wandering from place to place to provide credible and reliable identification on request of a police officer. The court found this requirement was unconstitutionally vague because it did not specify what constituted "credible and reliable identification." *Kolender v Lawson* (1983) 461 US 352, 75 L Ed 2d 903, 103 S Ct 1855. The provisions of Pen C §647(e) still exist in its unconstitutional form, but are no longer enforced. See *People v Superior Court (Caswell)* (1988) 46 C3d 381, 250 CR 515 (upholding Pen C §647(d)).

© The Regents of the University of California

§9.103 b. Overbreadth

A statute is overbroad if it proscribes expressive conduct protected by the First Amendment. *Roulette v City of Seattle* (9th Cir 1996) 97 F3d 300. To successfully challenge a loitering statute for being overbroad, the challenger must show that the statute punishes the First Amendment activities and does not regulate criminal conduct. However, the Supreme Court has held that it is inappropriate to entertain an overbreadth challenge absent a realistic danger that an ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court. See *City of Los Angeles v Taxpayers for Vincent* (1984) 466 US 789, 801, 80 L Ed 2d 772, 104 S Ct 2118.

© The Regents of the University of California

§9.104 3. Right to Free Assembly and Association

Use of loitering statutes to disperse groups of people perceived as undesirable violates the right to free assembly and association. The First Amendment and Fourteenth Amendment do not permit government to criminalize the exercise of the right of assembly simply because its exercise may annoy some people. *Coates v Cincinnati* (1971) 402 US 611, 29 L Ed 2d 214, 91 S Ct 1686; *Roulette v City of Seattle* (9th Cir 1996) 97 F3d 300 (on facial challenge to ordinance prohibiting sitting or lying on sidewalk, Seattle's ordinance was found not to be directed at homeless persons on public sidewalks and thus did not violate substantive due process of these persons). See also *Amster v City of Tempe* (9th Cir 2001) 248 F3d 1198 (upholding under facial challenge ordinance requiring permit to sit on sidewalk but leaving open question of validity under future as-applied challenge).

© The Regents of the University of California

§9.105 4. Preemption

Local vagrancy and loitering statutes generally are not preempted by state law. See *Yuen v Municipal Court* (1975) 52 CA3d 351, 125 CR 87. However, a local ordinance that criminalizes conduct that is already criminal under state law may encounter preemption problems. For example, at least one court has determined that an ordinance prohibiting loitering for soliciting an act of prostitution was preempted by state law regulating criminal sexual conduct. *Gates v Municipal Court* (1982) 135 CA3d 309, 185 CR 330 (constitutionally of ordinance may be challenged on grounds of vagueness and overbreadth).

© The Regents of the University of California

§9.106 5. Cruel and Unusual Punishment

A city ordinance designed to address sleeping by homeless persons in public places by criminalizing sitting, lying, or sleeping at all times on public streets and sidewalks violated the Eighth Amendment's prohibition against cruel and unusual punishment. See *Jones v City of Los Angeles* (9th Cir 2006) 444 F3d 1118, vacated as moot (9th Cir 2007) 505 F3d 1006.

© The Regents of the University of California

§9.107 J. Noise

Noise is recognized by federal, state, and local governments as jeopardizing the public health and welfare if it is excessive. The federal Environmental Protection Agency administers the federal Noise Control Act of 1972 (42 USC §§4901-4918, and California enacted its own Noise Control Act in 1973. Health & S C §§46010-46080. See also Pen C §415 ("any person who maliciously and willfully disturbs another person by loud and unreasonable noise" is subject to fine and imprisonment).

Local governmental entities may regulate excessive noise within their jurisdictions to protect the general welfare (see Cal Const art XI, §7) as long as these local regulations do not infringe on constitutional or preemptive statutory rights.

© The Regents of the University of California

§9.108 1. Freedom of Speech

Although cities may regulate noise if the ordinance is narrowly drawn to prohibit specific evils, ordinances that "indiscriminately" inhibit communicating messages impermissibly invade the right of free speech. See *Wollam v City of Palm Springs* (1963) 59 C2d 276, 29 CR 1 (court struck restrictions on sound trucks that amounted to blanket prohibition on stationary sound trucks). An ordinance that requires individuals or organizations seeking to amplify sound, either for commercial or non-commercial purposes, to secure a permit is unconstitutional when it gives municipal officials unfettered discretion to grant or deny the permit. *Saia v New York* (1948) 334 US 558, 92 L Ed 1574, 68 S Ct 1148.

© The Regents of the University of California

§9.109 2. Vagueness

Noise ordinances that use standards such as "loud and raucous" noise or other similarly objective terms to describe excessive noise have been upheld. *Kovacs v Cooper* (1949) 336 US 77, 93 L Ed 513, 69 S Ct 448 (finding "loud and raucous" noise had acquired sufficient definite definition through daily use so as to put people on notice of what noise is forbidden). Many noise ordinances seek to prohibit loud or excessive noise based on subjective standards rather than on the basis of decibel level. Under the vagueness doctrine, a law that does not fairly inform a person of what is prohibited or permitted is unconstitutional. However, ordinances that prohibit noise characterized as "loud, unnecessary and unusual" or "which disturbs or tends to disturb the peace or good order" have survived vagueness challenges. *Grayned v City of Rockford* (1972) 408 US 104, 33 L Ed 2d 222, 92 S Ct 2294; *Mann v Mack* (1984) 155 CA3d 666, 202 CR 296.

© The Regents of the University of California

§9.110 3. Overbreadth

A law is overbroad, and thus void, if it "does not aim specifically at evils within the allowable area of [governmental] control, but. … sweeps within its ambit other activities that constitute an exercise" of protected expressive rights. *Thornhill v Alabama* (1940) 310 US 88, 60 S Ct 736, 84 L Ed 1093. Noise ordinances that regulate the volume of sound, rather than the content, typically withstand overbreadth challenges. *Broadrick v Oklahoma* (1973) 413 US 601, 37 L Ed 2d 830, 93 S Ct 2908. But see *U.S. Labor Party v Pomerleau* (4th Cir 1977) 557 F2d 410 (ordinance prohibiting noise in excess of certain volume as measured from "any point on the property line of use" is vague and overbroad and susceptible to arbitrary enforcement).

© The Regents of the University of California

4. Special Issues Relating to Noise Regulations

§9.111 a. Vehicles and Sound Amplification

No driver of a vehicle may operate, or permit the operation of, a sound amplification system that can be heard outside of a vehicle from a distance of 50 feet or more. Veh C §27007.

NOTE: Section 27007 is inapplicable to vehicles used for advertisement or in parades, political, or other events. A city may regulate amplification for these purposes by ordinance. Veh C §27007. See *Wollam v City of Palm Springs* (1963) 59 C2d 276, 29 CR 1.

© The Regents of the University of California

§9.112 b. Airports

Despite the fact that airport noise tends to be intrusive and annoying to nearby residents and would be a likely target of cities' noise ordinances, local regulation of airport noise is frequently preempted. If the city owns the airport, local regulation of airport noise will be upheld as long as it regulates the volume (100 decibels per single event noise exposure) and not the airspace or flight patterning, which is preempted by the Federal Aviation Administration. *Santa Monica Airport Ass'n v City of Santa Monica* (9th Cir 1981) 659 F2d 100. See *City of Burbank v Lockheed Air Terminal, Inc.* (1973) 411 US 624, 36 L Ed 2d 547, 93 S Ct 1854 (city unsuccessfully attempted to prohibit takeoffs between 11:00 p.m. and 7:00 a.m.).

For related material, see §§6.139-6.155 (municipal services and utilities, airports).

© The Regents of the University of California

§9.113 K. Nuisance

A city has police power authority to declare what activities or uses constitute a nuisance and to enact regulations designed to eliminate or reduce the occurrence of a nuisance in an effort to protect the general welfare. Cal Const art XI, §7. City ordinances regulating nuisances are not limited to things that are nuisances under state law. *People v Johnson* (1954) 129 CA2d 1, 277 P2d 45.

© The Regents of the University of California

§9.114 1. State Nuisance Law

State law defines a "nuisance" in part as being "[a]nything which is injurious to health, including, but not limited to the illegal sale of controlled substances, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." CC §3479.

Unlawfully obstructing a navigable lake, river, bay, stream, canal, or basin; or any public park, square, street, or highway also constitutes a nuisance under state law. CC §3479; Pen C §370 (defining such obstruction as "public" nuisance).

© The Regents of the University of California

§9.115 a. Public Nuisance

A public nuisance is an act or omission that interferes with the interests of the community or the comfort or convenience of the general public and interferes with the public's health, comfort, and convenience. *Venuto v Owens Corning Fiberglass Corp.* (1971) 22 CA3d 116, 123, 99 CR 350. A public nuisance affects an entire community or neighborhood, or any considerable number of persons at the same time, although the extent of the annoyance or damage inflicted on individuals may be unequal. CC §3480; Pen C §370. A private person may maintain an action for a public nuisance if it is specially injurious to the person, but not otherwise. CC §3493. A class action for an alleged public nuisance cannot be maintained if establishing class members' right to recover depends on facts peculiar to each member's case because common questions of law or fact will not predominate. *Frieman v San Rafael Rock Quarry, Inc.* (2004) 116 CA4th 29, 10 CR3d 82 (blasting and noise levels varied infinitely for plaintiffs, thus depriving them of requisite commonality).

On remedies available to address public nuisances, see chap 12.

© The Regents of the University of California

§9.116 b. Private Nuisance

Every nuisance that is not included in the definition of public nuisance (see §9.115) is a private nuisance. CC §3481. In other words, a private nuisance is one that is injurious or offensive to an individual as opposed to the community at large. *Venuto v Owens Corning Fiberglass Corp.* (1971) 22 CA3d 116, 123, 99 CR 350. An action for a private nuisance is designed to compensate.

© The Regents of the University of California

§9.117 2. Local Authority to Declare Nuisance

A city legislative body may, by ordinance, declare what constitutes a nuisance. Govt C §38771. See also *City of Costa Mesa v Soffer* (1992) 11 CA4th 378, 13 CR2d 735. Because state law does not shed much light on what is considered to be a nuisance, a city will have an easier time prosecuting a nuisance action if it defines certain conduct or an activity as being a nuisance.

PRACTICE TIP: A city should exercise caution, however, when the invocation of its power to abate a nuisance might be perceived as a pretext for what is substantively a taking. *Hurwitz v City of Orange* (2004) 122 CA4th 835, 19 CR3d 213 (city took plaintiff's property in violation of preliminary injunction, then tried to justify taking by declaring property public nuisance).

These defined activities or conditions are considered to be a nuisance per se and the city has no burden of proof beyond the fact the nuisance actually exists. See *IT Corp. v County of Imperial* (1983) 35 C3d 63, 196 CR 715 (proof of violation of local ordinance declaring nuisance creates rebuttable presumption that potential harm to public outweighs potential harm to defendant). See also *City of Costa Mesa v Soffer* (1992) 11 CA4th 378, 13 CR2d 735. An injunction may issue without proof of irreparable injury. *People ex rel Dep't of Pub. Works v Adco Advertisers* (1973) 35 CA3d 507, 110 CR 849.

NOTE: Cities typically declare certain items, conduct, or activities nuisances per se in zoning, building, environmental protection, grading, noise, fire protection, and other similar ordinances.

© The Regents of the University of California

§9.118 L. Speech

A citizen is entitled to constitutional protections relating to speech when the government acts either as a regulator of citizen conduct or as a property owner (proprietor). Within certain limits, government employees are also entitled to free expression. For example, an employee's speech is protected under the First Amendment if the employee is speaking as a private citizen addressing a matter of public concern. However, if the speech is done under the employee's official duties, the speech is not protected speech. *Garcetti v Ceballos* (2006) 547 US 410, 164 L Ed 2d 689, 126 S Ct 1951 (in First Amendment retaliation case, employee's statements made under his official duties is not protected speech). However, the degree of protection and the standard of review applied to the government's regulations differ according to the government's role.

© The Regents of the University of California

1. Government as Property Owner

§9.119 a. Forum Analysis

"Even protected speech is not equally permissible in all places and at all times." *Clark v Burleigh* (1992) 4 C4th 474, 482, 14 CR2d 455, quoting *Cornelius v NAACP Legal Defense & Educ. Fund* (1985) 473 US 788, 799, 87 L Ed 2d 567, 105 S Ct 3439. The United States Constitution does not require that the government freely grant access to all wishing to exercise their right to free speech on every type of government property without regard to the property's nature or the disruption that might be caused by the speaker's activities. "Recognizing that the Government, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," the Supreme Court adopted a forum analysis to determine when its interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Thus, "the extent to which the Government can control access depends on the nature of the relevant forum." *Clark v Burleigh, supra*.

© The Regents of the University of California

b. Three Types of Forums

§9.120 (1) Traditional Public Forum

A "traditional public forum" is a place that by long tradition has been used by the public at large for the free exchange of ideas. Laws regulating the content of speech in such forums are subject to strict scrutiny, *i.e.,* speakers can be excluded from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.

Examples of traditional public forums include:

- Public parks (see *Ward v Rock Against Racism* (1989) 491 US 781, 790, 105 L Ed 2d 661, 109 S Ct 2746);
- Public streets (see *Frisby v Schultz* (1988) 487 US 474, 481, 101 L Ed 2d 420, 108 S Ct 2495; *Boos v Barry* (1988) 485 US 312, 318, 99 L Ed 2d 333, 108 S Ct 1157); and
- Publicly owned pedestrian malls (see *American Civil Liberties Union v City of Las Vegas* (9th Cir 2003) 333 F3d 1092, 1094, cert denied (2004) 540 US 1110).

But see *Madsen v Women's Health Ctr.* (1994) 512 US 753, 129 L Ed 2d 593, 114 S Ct 2516 (injunction restricting anti-abortion protestors to 36-foot buffer not subject to heightened scrutiny but rather to test asking whether injunction "burdens no more speech than necessary to serve a significant governmental interest"); *S.O.C., Inc. v County of Clark* (9th Cir 1998) 152 F3d 1136 (anti-leafleting ordinance that was not expressly limited to commercial speech met test for issuance of preliminary injunction). For a contrary opinion on an anti-leafleting ordinance, see *Klein v City of San Clemente* (9th Cir 2009) 584 F3d 1196, cert denied ___ US ___, 176 L Ed 2d 183, ___ S Ct ___ (city failed to show that leafleting of vehicle windshields created more litter than city could clean up). For further discussion of leafleting, see §9.133.

© The Regents of the University of California

§9.121 (2) Designated or Limited Public Forum

A designated or limited public forum is property that the state has opened for expressive activity by part or all of the public. A designated public forum can either be limited or unlimited in character. A designated public forum is not created by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.

Examples of designated or limited public forums include:

- City council chambers (see *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421);
- School district's literature distribution program (see *Hills v Scottsdale Unified Sch. Dist. No. 48* (9th Cir 2003) 329 F3d 1044); and
- University's student activity fund (see *Rosenberger v Rector & Visitors of the Univ. of Virginia* (1995) 515 US 819, 132 L Ed 2d 700, 115 S Ct 2510).

A content-based regulation of speech in a designated public forum is subject to strict scrutiny. But see *Hopper v City of Pasco* (9th Cir 2001) 241 F3d 1067, 1075, cert denied (2001) 534 US 951 (Ninth Circuit differentiates between designated and limited public forums and applies lower level "reasonableness test" to latter).

© The Regents of the University of California

§9.122 (3) Nonpublic Forum (All Remaining Public Property)

A nonpublic forum is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose. *International Soc'y for Krishna Consciousness, Inc. v Lee* (1992) 505 US 672, 120 L Ed 2d 541, 112 S Ct 2711 (public airport solicitation of funds is nonpublic forum). See *Children of the Rosary v City of Phoenix* (9th Cir 1998) 154 F3d 972, cert denied (1999) 526 US 1131 (advertising panel on municipal bus is nonpublic forum); *Jacobsen v Bonine* (9th Cir 1997) 123 F3d 1272 (highway rest area is nonpublic forum).

Limitations on expressive activity conducted on nonpublic forums must survive a much more limited review. The challenged regulation need only be reasonable as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.

Examples of nonpublic forums include:

- Ballot pamphlet (see *Clark v Burleigh* (1992) 4 C4th 474, 14 CR2d 455; *Cogswell v City of Seattle* (9th Cir 2003) 347 F3d 809);
- Political advertising on city-owned buses (see *Lehman v City of Shaker Heights* (1974) 418 US 298, 41 L Ed 2d 770, 94 S Ct 2714);
- Political advertising on utility poles on public sidewalks (see *City of Los Angeles v Taxpayers for Vincent* (1984) 466 US 789, 80 L Ed 2d 772, 104 S Ct 2118);
- Solicitation on walkways leading to post office (see *U.S. v Kokinda* (1990) 497 US 720, 111 L Ed 2d 571, 110 S Ct 3115);
- Teachers' mailboxes (see *Perry Educ. Ass'n v Perry Local Educators' Ass'n* (1983) 460 US 37, 74 L Ed 2d 794, 103 S Ct 948); and
- Leafleting and speechmaking in airport terminals (see *Springfield v San Diego Unified Port Dist.* (SD Cal 1996) 950 F Supp 1482).

© The Regents of the University of California

2. Government as Regulator

§9.123 a. Type of Speech

Commercial speech is not entitled to the same level of protection as non-commercial speech when the regulation (*Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n* (1980) 447 US 557, 65 L Ed 2d 341, 100 S Ct 2343)

- is designed either to prevent false or misleading advertising,
- directly advances a substantial governmental interest, and
- is no more extensive than necessary to further that interest.

See *Gerawan Farming Inc. v Kawamura* (2004) 33 C4th 1, 22, 14 CR3d 14 (adopting United States Supreme Court intermediate scrutiny test for commercial speech).

Messages directed by a commercial speaker to a commercial audience making representations of fact about the speaker's own business operations to promote sales of its products are commercial speech and can be effectively regulated without undue risk of chilling public debate. *Kasky v Nike, Inc.* (2002) 27 C4th 939, 946, 119 CR2d 296; *Nike, Inc. v Kasky* (2003) 539 US 654, 156 L Ed 2d 580, 123 S Ct 2554 (writ of certiorari dismissed). When commercial speech is treated differently from non-commercial speech for reasons wholly unrelated to the particular interest that the city asserts, the regulation fails to meet First Amendment standards. *City of Cincinnati v Discovery Network, Inc.* (1993) 507 US 410, 123 L Ed 2d 99, 113 S Ct 1505 (city regulation banning newsracks containing strictly "commercial publications" violates First Amendment).

© The Regents of the University of California

§9.124 (1) Charitable Fund-Raising

Fund-raising for charities is fully protected speech. *Riley v National Fed'n of the Blind of North Carolina, Inc.* (1988) 487 US 781, 101 L Ed 2d 669, 108 S Ct 2667. See *People v Zimmerman* (1993) 15 CA4th Supp 7, 19 CR2d 486 (upheld constitutionality of Pen C §647(c), which prohibits public begging, finding that charitable solicitations fell outside its scope).

State law regulates solicitation for charitable purposes (see Bus & P C §17510.3), but does not preempt local legislation (see Bus & P C §17510.7).

© The Regents of the University of California

§9.125 (2) "Mixed" Commercial Speech

When a commercial transaction does more than inform private economic decisions and is not primarily concerned with providing information about the cost of goods and services, it is not treated as a variety of purely commercial speech and is thus entitled to more protection than purely commercial speech. *Village of Schaumburg v Citizens for a Better Environment* (1980) 444 US 620, 63 L Ed 2d 73, 100 S Ct 826. See also *Perry v Los Angeles Police Dept.* (9th Cir 1997) 121 F3d 1365, cert denied (1998) 523 US 1047 (content-neutral ban on solicitations was not narrowly tailored when ordinance banned all solicitations except those made by nonprofit organizations); *Gaudiya Vaishnava Soc'y v City & County of San Francisco* (9th Cir 1991) 952 F2d 1059, 1066, cert denied (1992) 504 US 914 (when commercial transaction is "inextricably intertwined" with expressive activity, entire activity enjoys First Amendment protection).

© The Regents of the University of California

§9.126 (3) Political Speech

In a public forum, the regulation of political speech must be subjected to the most exacting scrutiny. *Boos v Barry* (1988) 485 US 312, 321, 99 L Ed 2d 333, 108 S Ct 1157.

© The Regents of the University of California

b. Prior Restraints

§9.127 (1) Injunctions Against Speech

The First Amendment prevents censorship or prohibition of publication by injunction. *Near v State of Minnesota* (1931) 283 US 697, 75 L Ed 1357, 51 S Ct 625.

© The Regents of the University of California

§9.128 (2) Permit Requirements

Ordinary court procedural rules and practices provide the prompt judicial review and prompt judicial determination required for First Amendment challenges. *City of Littleton v Z. J. Gifts D-4, L.L.C.* (2004) 541 US 774, 159 L Ed 2d 84, 124 S Ct 2219 (upheld adult business licensing ordinance). Legislative delegation of permit approval authority must have objective standards. See *Gaudiya Vaishnava Soc'y v City & County of San Francisco* (9th Cir 1991) 952 F2d 1059, cert denied (1992) 504 US 914. Government may not condition permit on organizers' promise not to trespass. *U.S. v Baugh* (9th Cir 1999) 187 F3d 1037. Law requiring registration and issuance of ministerial permit as a prior condition for all door-to-door canvassing and solicitation is overbroad. *Watchtower Bible & Tract Soc'y, Inc. v Village of Stratton* (2002) 536 US 150, 153 L Ed 2d 205, 122 S Ct 2080. An ordinance granting unfettered discretion to city officials to impose conditions when issuing a conditional use permit for cybercafés was unconstitutional, but city-imposed operational regulations including daytime curfew, number of employees, and security guard and video surveillance requirements were upheld as reasonable time, place, or manner restrictions. *Vo v City of Garden Grove* (2004) 115 CA4th 425, 9 CR3d 257. See *White v City of Sparks* (9th Cir 2007) 500 F3d 953 (city's pre-approval policy for free speech exemption from its ordinance restricting display or sale of art in parks and other areas lacked objective criteria and was thus unconstitutional prior restraint on speech).

The provisions of CCP §1094.8 provide for expedited judicial review and procedures for permits involving First Amendment activities.

© The Regents of the University of California

§9.129 (3) Newsracks

Newspaper vending machines on public sidewalks are a means of distributing speech that cannot be wholly prohibited. *City of Cincinnati v Discovery Network, Inc.* (1993) 507 US 410, 123 L Ed 2d 99, 113 S Ct 1505 (city regulation banning newsracks containing strictly "commercial publications" violates First Amendment). However, a ban on the sale, display, or offer of "harmful matter" from unsupervised vending machines under "newsrack" statute (Pen C §§313-313.5) is constitutional. *Crawford v Lungren* (9th Cir 1996) 96 F3d 380, cert denied (1997) 520 US 1117. See §9.13.

Ordinance requiring "blinders" on newsracks selling material deemed harmful to minors is narrowly tailored to serve compelling state interest in protecting minors. *Berry v City of Santa Barbara* (1995) 40 CA4th 1075, 47 CR2d 661. Summary seizure and removal of newsracks without a hearing is unconstitutional prior restraint of speech. *Kash Enters. v City of Los Angeles* (1977) 19 C3d 294, 302, 138 CR 53. Unfettered discretion over which publishers may place newsracks on public property and where the newsracks may be placed is also an unconstitutional prior restraint. See *City of Lakewood v Plain Dealer Publ'g Co.* (1988) 486 US 750, 100 L Ed 2d 771, 108 S Ct 2138. But see *Honolulu Weekly, Inc. v Harris* (9th Cir 2002) 298 F3d 1037 (ordinance requiring use of limited number of government-provided newsracks held constitutional).

Any licensing system must contain these procedural safeguards (see *Freedman v Maryland* (1965) 380 US 51, 13 L Ed 2d 649, 85 S Ct 734):

- Licensor must act on the permit application within specified time limits;
- Either the license must be issued or the licensor must enforce the restraint by court action;
- Mere denial of the license cannot be used to create a prohibition on First Amendment activities; and
- System must provide for prompt and final judicial review of any interim license denial.

Height restrictions have been upheld based on the determination that unregulated height could obstruct the view of a pedestrian, motorist, or bicyclist; and that the aesthetic quality of the environment would be improved by standardizing the size and shape of newsracks. *Duffy v City of Arcadia* (1987) 195 CA3d 308, 243 CR 87.

© The Regents of the University of California

§9.130 (4) Internet

In *Reno v American Civil Liberties Union* (1997) 521 US 844, 138 L Ed 2d 874, 117 S Ct 2329, federal law prohibiting the display of "patently offensive" or "indecent" material over the Internet to persons under 18 was found to be a content-based restriction on speech and unconstitutionally overbroad in its regulation of speech. In response to *Reno*, Congress passed the Child Online Protection Act (COPA) (47 USC §231), but COPA was also determined to be an unconstitutionally overbroad restriction on speech. *Ashcroft v American Civil Liberties Union* (2004) 542 US 656, 159 L Ed 2d 690, 124 S Ct 2783 (preliminary injunction against enforcement of COPA affirmed because government failed to meet its burden of showing that less restrictive means, such as blocking or filtering technology, were insufficient alternatives to meet goal of protecting minors).

Speech that is not obscene is protected by the First Amendment. Moreover, the state's interest in protecting children from harmful material does not justify an overbroad suppression of speech directed at adults and there is no practical way to prevent children from seeing information on the Internet directed at adults.

NOTE: Internet access in public libraries is neither a "traditional" nor a "designated" public forum. *U.S. v American Library Ass'n* (2003) 539 US 194, 156 L Ed 2d 221, 123 S Ct 2297 (library's decision to use Internet filtering software did not violate its patrons' First Amendment rights).

© The Regents of the University of California

§9.131 c. Time, Place, and Manner Restrictions

Time, place, and manner restrictions must be content-neutral; "[r]egulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." *City of Renton v Playtime Theatres, Inc.* (1986) 475 US 41, 46, 89 L Ed 2d 29, 106 S Ct 925. Valid content-neutral time, place, and manner regulations are acceptable as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *Sebago, Inc. v City of Alameda* (1989) 211 CA3d 1372, 1382, 259 CR 918.

The analysis for determining whether a regulation that restrains speech is valid is as follows:

- Is the regulation content-neutral?
- Is the regulation narrowly tailored to serve a significant governmental interest?
- Does the regulation leave open ample alternative channels of communication?

See *Ward v Rock Against Racism* (1989) 491 US 781, 790, 105 L Ed 2d 661, 109 S Ct 2746. See also, *e.g., Johnson v City of Pleasanton* (9th Cir 1992) 982 F2d 350 (height, screening, and set-back requirements for satellite receive-only antennae are valid content-neutral time, place, and manner regulations as long as they further substantial governmental interest and do not unreasonably limit alternative means of communication).

© The Regents of the University of California

§9.132 (1) Adult Entertainment

A provision of the Telecommunications Act of 1996 requiring cable television operators to either scramble sexually explicit channels in full or limit such programming to certain hours was held unconstitutional as a content-based regulation. *U.S. v Playboy Entertainment Group, Inc.* (2000) 529 US 803, 146 L Ed 2d 865, 120 S Ct 1878. See also *City of Renton v Playtime Theatres, Inc.* (1986) 475 US 41, 89 L Ed 2d 29, 106 S Ct 925; *E.W.A.P., Inc. v City of Los Angeles* (1997) 56 CA4th 310, 65 CR2d 325 (upholding ordinance restricting hours of operation of adult entertainment establishment). On adult business regulations, see §§9.6-9.16.

© The Regents of the University of California

§9.133 (2) Leafleting

City regulation prohibiting door-to-door distribution of advertisements and unauthorized newspapers is impermissibly content-based. *City of Fresno v Press Communications, Inc.* (1994) 31 CA4th 32, 36 CR2d 456. See *Los Angeles Alliance for Survival v City of Los Angeles* (2000) 22 C4th 352, 93 CR2d 1 (aggressive solicitation ordinance prohibiting in-person requests for immediate donation or payment of funds is content-neutral).

© The Regents of the University of California

§9.134 (3) Curfews

A juvenile curfew ordinance is invalid if it restricts access of children to any and all public forums during curfew hours, without sufficiently exempting legitimate First Amendment activities. *Nunez v City of San Diego* (9th Cir 1997) 114 F3d 935 (ordinance infringed on minors' fundamental rights). But see *Schleifer v City of Charlottesville* (4th Cir 1998) 159 F3d 843, cert denied (1999) 526 US 1018 (narrowly tailored ordinance served city's compelling interests).

On curfews, see §§9.64-9.73.

© The Regents of the University of California

§9.135 (4) Free Speech Zones

When restricting demonstrations to designated free speech zones, the regulation should be narrowly tailored to address a significant government interest, such as maintaining public safety by regulating the flow of pedestrian traffic. *Kuba v 1-A Agric. Ass'n* (9th Cir 2004) 387 F3d 850. See also *Berger v City of Seattle* (9th Cir 2009) 569 F3d 1029 (ordinance requiring permit before conducting performance in city's public park violated First Amendment because ordinance was not sufficiently narrow to be valid time, place, and manner regulation).

When the location is an essential part of the message sought to be conveyed, a court must consider the degree to which the message will be distorted as a result of the restriction. *Galvin v Hay* (9th Cir 2004) 374 F3d 739 (relegation of prayer service to "First Amendment area" burdened speech to substantially greater degree than was necessary when visual connection with desired location was partially obstructed, remote, and oblique).

© The Regents of the University of California

§9.136 d. Permissible Content-Based Restrictions

The following speech may be restricted based on content:

- Fighting words, *i.e.,* speech that is of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality;

NOTE: "Fighting words" include conduct that inflicts injury or tends to incite immediate violence. *Chaplinsky v State of New Hampshire* (1942) 315 US 568, 86 L Ed 1031, 62 S Ct 766. But see *R.A.V. v City of St. Paul* (1992) 505 US 377, 120 L Ed 2d 305, 112 S Ct 2538 (striking down anti-"hate crime" law).

- Defamation (see *New York Times Co. v Sullivan* (1964) 376 US 254, 11 L Ed 2d 686, 84 S Ct 710; CC §§44-45);
- Obscenity (see *Miller v State* (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607); and
- Clear and present danger (see *Schenck v U.S.* (1919) 249 US 47, 63 L Ed 470, 39 S Ct 247).

© The Regents of the University of California

§9.137 e. Sign Regulations

Local regulation of signs must be consistent with the constitutionally protected First Amendment right to free speech. In general, cities have more leeway to regulate commercial speech than non-commercial speech. In addition, the type of public forum affects the degree of regulation. See §§9.119-9.122.

© The Regents of the University of California

§9.138 (1) Content-Based Regulations

Content-based restrictions must be necessary to serve a compelling interest and must be narrowly drawn to achieve that end. See *Desert Outdoor Adver., Inc. v City of Moreno Valley* (9th Cir 1996) 103 F3d 814, 820, cert denied (1997) 522 US 912; *National Adver. Co. v City of Orange* (9th Cir 1988) 861 F2d 246, 248 (traffic safety and aesthetics are substantial government interests, when statement of intent or purpose so declares, but not compelling). But see *Foti v City of Menlo Park* (9th Cir 1998) 146 F3d 629, 637 (cities may have compelling interest in traffic safety).

A sign ordinance that creates exemptions for certain types of non-commercial speech is content based. For example, exemptions for temporary political signs, directional signs, official signs, and notices are invalid because no compelling interests justify the content-based exceptions. *Desert Outdoor Adver., Inc. v City of Moreno Valley, supra*; *National Adver. Co. v City of Orange, supra*. Restrictions on tobacco advertising may be subject to strict scrutiny. *Lorillard Tobacco Co. v Reilly* (2001) 533 US 525, 558, 150 L Ed 2d 532, 121 S Ct 2404 (prohibition on advertisement of smokeless tobacco within 1000 feet of schools invalidated).

© The Regents of the University of California

§9.139 (2) Regulation of Commercial Speech

A regulation of speech that concerns a lawful commercial activity and is not misleading must (*Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n* (1980) 447 US 557, 65 L Ed 2d 341, 100 S Ct 2343):

- Seek to implement a substantial government interest;
- Directly advance that interest; and
- Reach no further than necessary to accomplish its objective.

A sign ordinance must include a statement of purpose to satisfy the first prong of this test. *Desert Outdoor Adver., Inc. v City of Moreno Valley* (9th Cir 1996) 103 F3d 814, 819 n2, cert denied (1997) 522 US 912. As a matter of law, traffic safety and aesthetics are substantial interests that justify regulation of commercial signs. *National Adver. Co. v City of Orange* (9th Cir 1988) 861 F2d 246, 248; *Foti v City of Menlo Park* (9th Cir 1998) 146 F3d 629. But see *Ackerley Communications of the Northwest, Inc. v Krochalis* (9th Cir 1997) 108 F3d 1095, 1097 (proposition that traffic safety and aesthetics may be presumed as a matter of law).

PRACTICE TIP: Sign regulations should be limited to size, height, number, location, and physical attributes and should be content-neutral. Findings explaining non-content concerns, such as traffic and pedestrian safety or community aesthetics, can be included in an ordinance to reinforce its content neutrality. Sign regulations can prohibit the display of trademark signs altogether, but cannot require alteration of a registered trademark. *Blockbuster Videos, Inc. v City of Tempe* (9th Cir 1998) 141 F3d 1295.

© The Regents of the University of California

§9.140 (3) Commercial Versus Non-Commercial Regulations

Commercial speech may not be favored over non-commercial speech. *Metromedia, Inc. v City of San Diego* (1981) 453 US 490, 513, 69 L Ed 2d 800, 101 S Ct 2882. Courts have invalidated ordinances that attempt to limit commercial property signs to onsite "advertising of goods sold, business conducted or services rendered," on the ground that such restrictions favor commercial speech over non-commercial speech (the latter of which is entitled to greater constitutional protection) because they precluded the usage of non-commercial speech. *Desert Outdoor Adver., Inc. v City of Moreno Valley* (9th Cir 1996) 103 F3d 814, 819, cert denied (1997) 522 US 912. Conversely, the Supreme Court invalidated an ordinance banning commercial newsracks but permitting non-commercial newsracks on the ground that the ordinance was content based and bore no relationship to the city's aesthetic goals. *City of Cincinnati v Discovery Network, Inc.* (1993) 507 US 410, 425, 123 L Ed 2d 99, 113 S Ct 1505.

Non-commercial messages should be expressly allowed wherever commercial messages are permitted. Cities may not regulate some non-commercial messages but not others. *Brown v California Dep't. of Transp.* (9th Cir 2003) 321 F3d 1217 (striking down practice of allowing American flags on freeway overpasses after 9/11). But see *Children of the Rosary v City of Phoenix* (9th Cir 1998) 154 F3d 972, cert denied (1999) 526 US 1131 (upholding regulation allowing commercial speech on buses but banning non-commercial advertising, given its nonpublic forum and viewpoint neutrality).

PRACTICE TIP: The Ninth Circuit has approved a "substitution clause" to cure ordinances that appear to limit on-site signs to commercial speech. A substitution clause would provide that "any non-commercial message may be substituted for the copy on any commercial sign allowed by the [ordinance]." See *Outdoor Sys., Inc. v City of Mesa* (9th Cir 1993) 997 F2d 604, 611.

© The Regents of the University of California

§9.141 (4) Billboards

Commercial off-site billboard signs generally advertise a service or product not available or provided on the premises (in contrast to on-site signs that advertise or identify business at its location). Cities may allow on-site commercial signage and prohibit off-site advertising billboards. *Outdoor Sys., Inc. v City of Mesa* (9th Cir 1993) 997 F2d 604, 611; *Metromedia, Inc. v City of San Diego* (1981) 453 US 490, 512, 69 L Ed 2d 800, 101 S Ct 2882.

The Outdoor Advertising Act (Bus & P C §§5200-5486) generally prohibits billboards and off-site advertising displays within 660 feet of highway rights-of-way. Cities may enact more restrictive ordinances and may require permits to erect billboards. Bus & P C §§5230-5231.

© The Regents of the University of California

§9.142 (5) Amortization of Nonconforming Signs

Cities should provide for amortization of nonconforming signs after a certain period of time. Courts will uphold an amortization scheme when the amortization period is "reasonable." *City of Salinas v Ryan Outdoor Adver., Inc.* (1987) 189 CA3d 416, 234 CR 619 (upholding 5-year amortization clause); *United Bus. Comm'n v City of San Diego* (1979) 91 CA3d 156, 179, 154 CR 263 (upholding 7-year amortization period for nonconforming signs); *Art Neon Co. v City & County of Denver* (10th Cir 1973) 488 F2d 118, cert denied (1974) 417 US 932 (upholding 5-year amortization clause). Courts evaluate the reasonableness of an amortization period by considering the cost of the sign, its depreciated value, remaining useful life, remaining length of leases, and harm to the public if nonconforming sign remains.

NOTE: Despite amortization clauses, the Outdoor Advertising Act (Bus & P C §§5200-5486) provides that fair and just compensation must be paid when removal of on-premises advertising displays is required. Bus & P C §§5491-5493. In certain areas, a city may permit amortization in lieu of compensation. Bus & P C §§5412.1-5412.3, 5495-5497.

Any ordinance or regulation governing use of on-premises advertising displays must provide for an inventory of illegal and abandoned signs within the city's jurisdiction. Bus & P C §5491.1. Rotating or flashing on-premises signs may be prohibited without compensation or amortization. Bus & P C §5496. Cities may not prohibit signs based solely on height and size if "special topographic circumstances would result in a material impairment of visibility of the display [or its effectiveness]." Bus & P C §5499; *Denny's Inc. v City of Agoura Hills* (1997) 56 CA4th 1312, 66 CR2d 382.

PRACTICE TIP: Amortization is necessarily a fact-based analysis. Any amortization period should provide an administrative appeal process to avoid an unconstitutional taking in any particular instance.

© The Regents of the University of California

§9.143 (6) Political Signs

Cities may ban the posting of signs on public property, including political signs. *City of Los Angeles v Taxpayers for Vincent* (1984) 466 US 789, 80 L Ed 2d 772, 104 S Ct 2118. Less than a total ban is more legally complicated. Cities may not limit the number of signs erected in support of or opposition to a candidate or issue. *Baldwin v Redwood City* (9th Cir 1976) 540 F2d 1360, 1366, cert denied (1977) 431 US 913. As long as size limits do not infringe on the ability to effectively exercise free speech or unjustifiably treat signs unequally to other non-commercial signage, courts have accepted limits on the size of signs. 540 F2d at 1368 (upholding 16-square-foot size limit on signs); *Candidates' Outdoor Graphic Serv. v City & County of San Francisco* (ND Cal 1983) 574 F Supp 1240 (upholding 11-inch height limit on signs posted on utility poles).

Courts have struck down time limits relating to how far in advance of an election political signs may be posted, when such signage would be effectively banned other times of the year. *City of Antioch v Candidates' Outdoor Graphic Serv.* (ND Cal 1982) 557 F Supp 52 (60-day limit invalidated); *Orazio v Town of North Hempstead* (ED NY 1977) 426 F Supp 1144 (6-week limit invalidated). A requirement that the signs be summarily removed 10 days after the election survived challenge. *Baldwin v Redwood City* (9th Cir 1976) 540 F2d 1360, 1374, cert denied (1977) 431 US 913. Summary pre-election removal of signs is unlawful, absent an immediate public health or safety justification; cities must give notice to the candidate and/or sign owner and provide a reasonable opportunity to respond before agency action. *Verrilli v City of Concord* (9th Cir 1977) 548 F2d 262, 264.

© The Regents of the University of California

§9.144 (7) Severance

If a sign ordinance can function independently of a constitutionally infirm provision, only the unconstitutional portion will be invalidated. See *Tahoe Reg'l Planning Agency v King* (1991) 233 CA3d 1365, 1408, 285 CR 335 (court severed content-based exception for temporary political signs); *National Adver. Co. v City of Orange* (9th Cir 1988) 861 F2d 246, 249 (court severed only noncommercial restrictions). But see *Desert Outdoor Adver., Inc. v City of Moreno Valley* (9th Cir 1996) 103 F3d 814, 821, cert denied (1997) 522 US 912 (court declared entire ordinance invalid because it could not function independently when severed). See also *City of Ladue v Gilleo* (1994) 512 US 43, 129 L Ed 2d 36, 114 S Ct 2038.

© The Regents of the University of California

§9.145 (8) Government Approval

Requiring permits to erect signs on public property may be constitutional, provided the process is governed by clear, content-neutral guidelines. Official discretion will render the scheme unconstitutional. See *Hynes v Borough of Oradell* (1976) 425 US 610, 48 L Ed 2d 243, 96 S Ct 1755; *Gaudiya Vaishnava Soc'y v City & County of San Francisco* (9th Cir 1991) 952 F2d 1059, 1065, cert denied (1992) 504 US 914. A decision to issue or deny a permit must be made within a brief, specified, and reasonably prompt period of time, which time period should be described in the ordinance. *Baby Tam & Co. v City of Las Vegas* (9th Cir 2000) 199 F3d 1111; *North Olmsted Chamber of Commerce v City of North Olmsted* (ND Ohio 2000) 108 F Supp 2d 792.

© The Regents of the University of California

§9.146 f. Parades and Parade Permits

Parades or marches on public streets are constitutionally protected expressions of free speech. *U.S. v Grace* (1983) 461 US 171, 75 L Ed 2d 736, 103 S Ct 1702. Content-neutral time, place, and manner limitations may be applied. *Cox v New Hampshire* (1941) 312 US 569, 85 L Ed 1049, 61 S Ct 762; *Long Beach Lesbian & Gay Pride, Inc. v City of Long Beach* (1993) 14 CA4th 312, 17 CR2d 861. However, due process requires that statutes clearly state what conduct is required or prohibited, and that regulation of protected activity incorporate narrowly drawn, reasonable, and definite standards. *Long Beach Lesbian & Gay Pride, Inc. v City of Long Beach*, *supra*. Enactment of an ordinance that meets all of the constitutional requirements is a prerequisite to being able to require permit for parades. *Niemotko v State of Maryland* (1951) 340 US 268, 95 L Ed 267, 71 S Ct 325.

NOTE: Because courts are reluctant to enjoin a free speech event such as a parade, a city that denies a parade permit may be required to go to court to test the validity of the denial. Such a procedure is not required to be a part of the ordinance. *Freedman v State of Maryland* (1965) 380 US 51, 13 L Ed 2d 649, 85 S Ct 734.

© The Regents of the University of California

§9.147 (1) Processing Time

Although advance notice requirements are content-neutral, they have been found to inhibit and reduce the quantity of speech. When such advance notice requirements are excessively long, they are struck down as not being narrowly tailored to serve a significant governmental interest. *NAACP Western Region v City of Richmond* (9th Cir 1984) 743 F2d 1346.

© The Regents of the University of California

§9.148 (2) Exercise of Discretion

Any discretion exercised by a permitting official must be supported with specific facts and reasons based on objective standards contained within the ordinance delegating the discretion. *Niemotko v State of Maryland* (1951) 340 US 268, 95 L Ed 267, 71 S Ct 325. The ordinance must provide that the permit is either approved, denied, or approved with conditions. Incidental effects on some, but not all, speech are allowed if the reason for the differential effects or treatment is not content-based. *Courtemanche v General Servs. Admin.* (D Mass 2001) 172 F Supp 2d 251. Concerns that have been upheld seem to focus on how well a governmental facility can meet its function without application of the conditions at issue. *Perry v Los Angeles Police Dept.* (9th Cir 1997) 121 F3d 1365, cert denied (1998) 523 US 1047 (ordinance banning sales and solicitations on sidewalk valid to further free flow, protect local merchants from unfair competition).

© The Regents of the University of California

§9.149 (3) Fees

A city may require permittees to prepay fees to defray the municipal expense of ensuring traffic control and related functions occasioned by the parade. Such charges must reflect the actual amounts required to defray specific public costs engendered by the permittee's own activity and cannot be based on the content of the message. *Forsyth County v Nationalist Movement* (1992) 505 US 123, 120 L Ed 2d 101, 112 S Ct 2395.

To ensure content-neutral fees, the content of the message and the listeners' possible hostile reaction to it cannot be taken into account in establishing the fee.

© The Regents of the University of California

§9.150 (4) Indemnity and Insurance

A permittee may be required to defend and indemnify a city and its officers and employees from all claims arising from the permittee's alleged acts or omissions. *Long Beach Lesbian & Gay Pride, Inc. v City of Long Beach* (1993) 14 CA4th 312, 17 CR2d 861.

NOTE: Although the court in *Long Beach* did not rule out the possibility of writing lawful insurance requirements, it cautioned that an insurance requirement is likely to be content-based and thus in violation of the First Amendment. 14 CA4th at 340.

© The Regents of the University of California

§9.151 (5) Police Protection

A city must furnish police protection to a parade with First Amendment protection at no cost to the participants to avoid a chilling effect on the exercise of First Amendment rights. *Forsyth County v Nationalist Movement* (1992) 505 US 123, 120 L Ed 2d 101, 112 S Ct 2395. However, an ordinance may be enacted limiting its police protection to what it can reasonably supply. *Hurwitt v City of Oakland* (ND Cal 1965) 247 F Supp 995. Insufficient police personnel to protect the applicant is a possible basis to deny the permit based on violent reactions to same or similar groups in similar situations in similar communities, as is the likelihood that requested outside federal or state assistance will not be available.

© The Regents of the University of California

§9.152 g. Charitable Street Vending or Solicitations

Efforts to solicit support or promote causes on public property by nonprofit groups have been classified as pure speech, the regulation of which is subject to First Amendment scrutiny. Such regulation may not delegate vague or overly broad licensing discretion; time, place, and manner restrictions must be content-neutral, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. *Riley v National Fed'n of the Blind of North Carolina, Inc.* (1988) 487 US 781, 101 L Ed 2d 669, 108 S Ct 2667.

A city may regulate charitable street vending, just as it may regulate other forms of pure speech on public property. Such regulations must be content-neutral, must be narrowly tailored to serve a significant government interest, and must retain ample alternative channels of communication. See *Doucette v City of Santa Monica* (CD Cal 1997) 955 F Supp 1192 (ordinance prohibiting abusive solicitation in both public and nonpublic forums is content-neutral and narrowly tailored to protect citizens from harassment). Regulation of non-commercial solicitors can raise First Amendment concerns. *Watchtower Bible & Tract Soc'y, Inc. v Village of Stratton* (2002) 536 US 150, 153 L Ed 2d 205, 122 S Ct 2080.

When informative and persuasive speech seeking support for particular causes (pure speech fully protected under the First Amendment) is "inextricably intertwined" with the sale of merchandise seeking such support, then the sale of the merchandise is fully protected speech. *Gaudiya Vaishnava Soc'y v City & County of San Francisco* (9th Cir 1991) 952 F2d 1059, cert denied (1992) 504 US 914. If the "speech element" is purely commercial and a political or religious message is not intertwined with that commercial message, then this is insufficient to transform the entire activity into protected speech. Nonprofit merchandise sales deemed "protected speech" are still subject to time, place, and manner restrictions. *One World One Family Now v City & County of Honolulu* (9th Cir 1996) 76 F3d 1009, cert denied (1996) 519 US 1009 (upholding ordinance banning sales of goods and services on sidewalks, including message-bearing T-shirts).

© The Regents of the University of California

§9.153 h. Taxation on First Amendment Activity

A tax that singles out the media for special treatment in a way that could have a censoring effect violates the constitutional protection of the First Amendment. *Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue* (1983) 460 US 575, 75 L Ed 2d 295, 103 S Ct 1365 (paper and ink tax). Selective taxation of the media violates the First Amendment. *Arkansas Writers' Project, Inc. v Ragland* (1987) 481 US 221, 95 L Ed 2d 209, 107 S Ct 1722.

Taxation of First Amendment activity is valid if tax applies to all similarly situated business. *Leathers v Medlock* (1991) 499 US 439, 113 L Ed 2d 494, 111 S Ct 1438 (sales tax on cable television); *Sacramento Cable Television v City of Sacramento* (1991) 234 CA3d 232, 286 CR 470 (utility users' tax on cable television).

© The Regents of the University of California

§9.154 M. Trespassing

Police officers often cite people for violating Pen C §602(m), which prohibits "[e]ntering and occupying real property or structures of any kind without the consent of the owner, the owner's agent or the person in lawful possession."

© The Regents of the University of California

§9.155 1. Trespass to Real Property

It is not a violation of Pen C §602(m) to enter private property without consent unless such entry is followed by occupation without consent. It also is not a violation to occupy property without consent if the entry was made with consent. *People v Wilkinson* (1967) 248 CA2d Supp 906, 909, 56 CR 261. The legislative intent behind §602(m) was to prevent squatter occupancy and thus does not apply to transient or overnight occupancy. 248 CA2d Supp at 910. To successfully prosecute under §602(m), there must be proof of more than merely sitting or sleeping on someone's property, to meet the requirement of "occupancy" as intended by the legislature.

PRACTICE TIP: Many cities have ordinances that prohibit a person from staying or entering on a business premises when directed not to do so by the proprietor. Such ordinances should have exceptions to prevent them from being applied to protected activity or in a discriminatory manner.

© The Regents of the University of California

§9.156 2. Interference With Lawful Business

The provisions of Pen C §602(k) make it a misdemeanor to enter any land "for the purpose of … interfering with, obstructing, or injuring any lawful business … carried on by the owner of such land."

First Amendment activities on the owner's property may be prohibited if there is intentional interference with, or obstruction of, the owner's lawful business activities. *In re Ball* (1972) 23 CA3d 380, 386, 100 CR 189. Further, statutes forbidding entrance onto one's land with the intent to obstruct business, regulate conduct instead of speech; such laws are thus an appropriate exercise of state control. *People v Poe* (1965) 236 CA2d Supp 928, 47 CR 670, overruled on other grounds in vacated opinion in *In re Hayes* (1968) 69 CR 310, 442 P2d 366. See also *United Food & Commercial Workers Union, Local No. 324, AFL-CIO, CLC v Superior Court* (2000) 83 CA4th 566, 99 CR2d 849 (special provision for injunction against picketing). Nevertheless, California also recognizes that, in certain instances, an owner's right to control his or her property is subordinated to an individual's right of expression. See *Robins v Pruneyard Shopping Ctr.* (1979) 23 C3d 899, 153 CR 854, aff'd (1980) 447 US 74 (large retail shopping center is functional equivalent of public forum). But see *Trader Joe's Co. v Progressive Campaigns, Inc.* (1999) 73 CA4th 425, 86 CR2d 442 (political group had no right to gather petitions in front of stand-alone grocery store that had no areas for patrons to congregate); *Albertson's, Inc. v Young* (2003) 107 CA4th 106, 131 CR2d 721 (shopping center is not functional equivalent of public forum under *Pruneyard* if it lacks features such as plazas or courtyards that invite public to congregate).

© The Regents of the University of California

§9.157 IV. REGULATING ANIMALS

A city's police power allows it to regulate animals in accordance with the health, safety, and welfare of the general public. See Cal Const art XI, §7. This includes maintaining sanitary conditions within the city and collecting fees sufficient to continue providing animal control services.

© The Regents of the University of California

§9.158 A. Domestic Animals

The law treats domestic animals as property. See CC §655; Pen C §§487(d)(1) (various animals), 491 (dogs). Domestic animals are defined as "animals that are tame or domesticated by nature, which no longer possess the disposition to escape." 4 Am Jur 2d, Animals §2 (2d ed 1962). These animals include cattle, horses, sheep, cats, and dogs. See *Butler v City of Palos Verdes Estates* (2005) 135 CA4th 174, 37 CR3d 199 (peafowl considered feral, rather than domesticated).

A city, under its police powers (see §9.157), may provide reasonable regulations of domestic animals as long as arbitrary and unreasonable burdens have not been imposed. The presumption is in favor of reasonableness. *County of Plumas v Wheeler* (1906) 149 C 758, 87 P 909; *In re Miller* (1910) 13 CA 564, 110 P 139.

© The Regents of the University of California

§9.159 1. Zoning Regulations

Many cities use zoning to control the number and type of animals that are allowed in areas of the city. The keeping of animals, including a limit on the number to be kept, is a proper subject for municipal regulation. *In re Jones* (1943) 56 C2d 658, 664, 133 P2d 418. A city may prohibit the keeping of bees within certain designated districts. *Ex Parte Ellis* (1938) 11 C2d 571, 575. Ordinances limiting the number of dogs within residential areas are valid because private property is held subject to the lawful exercise of the police power. *Miller v City of Arcadia* (1932) 121 CA 660, 9 P2d 587.

© The Regents of the University of California

§9.160 2. Nuisances

The possession of dogs or cats is not a nuisance per se. *People v Cooper* (1944) 64 CA2d Supp 946, 149 P2d 86. However, the "barking, howling, yelping, etc.," of dogs in a pet hospital has been held to be a nuisance. *Wilms v Hand* (1951) 101 CA2d 811, 226 P2d 728. Dust, odors, and sound emanating from a feed mill and cattle corrals have been held in some instances to be a nuisance. *Wade v Campbell* (1962) 200 CA2d 54, 19 CR 173; CC §3479.

PRACTICE TIP: A common provision of a municipal code prohibits a dog owner from keeping or maintaining a dog whose barking interrupts the peace and quiet of the neighborhood. Many of these provisions have been the subject of successful challenge on the basis that the ordinance is void for vagueness because it fails to establish just how much barking is necessary to disturb the peace and quiet of the neighborhood. Another approach is to require three or more neighbors to complain about the same barking dog before a violation of the ordinance occurs. See Susan Burns Cochran, ARF: Animal Regulations and Forms (League of California Cities Spring Conference, City Attorney's Department Session, 2000).

© The Regents of the University of California

B. Dog Regulations

§9.161 1. Authority

The board of supervisors of any county or the governing body of any city may enact ordinances concerning the regulation and licensing of dogs. Food & A C §30501. Penalties for violations of regulations relating to dogs are described in Food & A C §§31401-31402. A county may not be required to enforce county ordinances within the territorial limits of any city located with the county. Food & A C §30501(a).

On service dogs, see §9.182.

© The Regents of the University of California

§9.162 2. Licensing Regulations

State law governs the regulation and licensing of dogs (and cats) and mandates certain holding periods and procedural requirements related to stray dogs. Food & A C §§30801-30807 (dogs), 31751-31754 (cats). The term "board of supervisors," "county," "county clerk," or "animal control officer" is deemed to include the city council, a city, the city clerk, or the city animal control officer, respectively. Food & A C §30501(b).

State law allows cities to impose and collect license fees to offset the cost of maintaining services related to dogs (*e.g.,* animal shelters and control programs). Govt C §38792; Food & A C §§30501-30504. A licensing system that requires dogs to wear tags is a reasonable city regulation. *Simpson v City of Los Angeles* (1953) 40 C2d 271, 253 P2d 464. State law provides that cities may authorize veterinarians to issue dog licenses. Food & A C §30801(b).

© The Regents of the University of California

§9.163 3. Impounding of Dogs

Cities must arrange for the impounding of dogs that are running at large in violation of Food & A C §§30501-31683 and for the disposal of impounded dogs. Food & A C §31105(a). This applies even in sparsely populated areas. *Markus v Justice's Court* (1953) 117 CA2d 391, 255 P2d 883. Cities may adopt provisions for impounding dogs if the owner does not comply with licensing ordinances and fees. *In re Ackerman* (1907) 6 CA 5. Cities must fix the fees for impounding dogs. Food & A C §31251. Female dogs may not run at large at any time when they are in heat or breeding condition. Food & A C §30954. The owner of a nonspayed or unneutered dog is subject to fine when such dog is impounded. Food & A C §30804.7.

The destruction and disposition of dogs is a proper subject for police power regulation. *Simpson v City of Los Angeles* (1953) 40 C2d 271, 253 P2d 464; Food & A C §31105(b). Cities may appoint persons to impound and destroy dogs or may enter into a contract with a third party to perform these functions. Food & A C §31106. The third party's fees for taking up, impounding, and keeping the dog is a charge on the city treasury. Food & A C §31252. However, when an owner claims a dog, the owner must pay the fee for impounding and keeping the dog, and no charge will be paid by the city. Food & A C §31253. The owner's refusal to pay the fees is held to be an abandonment of the dog. Food & A C §31254.

A stray dog may not be destroyed or disposed of without notice to its owner, if known. Food & A C §31107. With certain exceptions, stray dogs must be held 6 business days (not including the day of impoundment). The first 3 days is for owner redemption. On request, stray dogs will be released to an animal rescue or adoption organization. Food & A C §31108.

© The Regents of the University of California

§9.164 4. Potentially Dangerous and Vicious Dogs

Under the state law's default provisions, depending on the severity of the attack, dogs that have committed certain unprovoked attacks on humans or more than once on other domestic animals are referred to as "vicious dogs" or "potentially dangerous dogs." Food & A C §§31602-31603.

© The Regents of the University of California

§9.165 a. Destruction of Dog

Although state law provides for the regulation of vicious and potentially dangerous dogs, animal control agencies of a city may impound or destroy a dog that is determined to be vicious or potentially dangerous. Food & A C §§31625, 31645. A city may impose more restrictive programs to control vicious or potentially dangerous dogs, as long as it does not regulate in a manner specific to breed (*e.g.,* pit bulls). Food & A C §31683.

Because animals are considered property, the owner is entitled to notice and a hearing before the animal is destroyed. *Phillips v San Luis Obispo County* (1986) 183 CA3d 372, 228 CR 101. A dog must first be determined to be vicious or potentially dangerous by the court or an administrative agency set up by the city. The owner must be notified of the hearing. Food & A C §31621. The owner also must receive notice before the animal is to be destroyed. Food & A C §31622. If circumstances justify an immediate seizure, a hearing promptly after seizure is required. *Carrera v Bertaini* (1976) 63 CA3d 721, 134 CR 14.

© The Regents of the University of California

§9.166 b. Other Sanctions on Owner of Potentially Dangerous or Vicious Dog

The city may prevent the owner of a vicious dog from owning any dog for 3 years if the hearing officer determines that such ownership or possession would create a significant threat to the public health, safety, and welfare. Food & A C §31646.

If the potentially dangerous or vicious dog is impounded pending a hearing, the owner is liable to the city for the cost of housing the dog if it is found to be vicious or potentially dangerous. Food & A C §31625.

© The Regents of the University of California

§9.167 5. Spay or Neuter Programs and Breeding Requirements

Cities may enact dog breed-specific ordinances pertaining to mandatory spay or neuter programs and breeding requirements. Health & S C §122331(a). However, cities that implement such programs must measure the effect of those programs by compiling statistical information on dog bites and must submit such information to the State Public Health Veterinarian. Health & S C §122331(b).

© The Regents of the University of California

6. Dog Attacks

§9.168 (1) Trained Attack Dogs

A person who possesses a dog that is trained to attack or kill is guilty of a misdemeanor or felony if he or she is aware, or reasonably should have been aware, of the dog's nature and negligently allows it to bite a human being on two occasions or one occasion when the injury is substantial. Pen C §399.5. See also Pen C §399 (dangerous dogs at large); CC §3342.5 (civil action by city attorney for removal or destruction of dangerous dog); *People v Nealis* (1991) 232 CA3d Supp 1, 283 CR 376 (dog determined to be deadly weapon within meaning of Pen C §245).

© The Regents of the University of California

§9.169 (2) Attacks on Livestock/Poultry

With certain exceptions, dogs may not run at large on farms on which livestock or domestic animals are kept without the landowner's consent. Food & A C §30955. Any person may kill a dog that is found on land not owned or possessed by the dog's owner when such dog (Food & A C §31102):

- Is found in the act of killing, wounding, or persistently pursuing or worrying livestock or poultry; or
- There is conclusive proof that the dog recently killed or wounded livestock or poultry on land not owned or possessed by its owner.

An owner or tenant of land where livestock or poultry is confined may seize or kill any dog that enters on such land. Food & A C §31103. The provisions of Food & A C §§31102-31103, however, do not apply within the corporate limits of any city or to a dog that is under the reasonable care of its owner or keeper unless actually caught in the act of worrying, wounding, chasing, or killing livestock or poultry. Food & A C §31104. If the dog is wearing a license at the time, it may be impounded. The person impounding the dog may recover from the owner any fees charged by the local agency for keeping the dog, together with costs. Food & A C §31109. The amount of liquidated damages and the process for assessing civil liability for injury to livestock or poultry are described in Food & A C §§31501-31508.

© The Regents of the University of California

C. Cats and Other Domestic Animal Regulations

§9.170 1. Cats

With certain exceptions, stray cats must be held 6 business days (not including the day of impoundment). The first 3 days will be for owner redemption. On request, the stray cat will be released to an animal rescue or adoption organization. Food & A C §31752. During the holding period, the cat must be scanned for a microchip that identifies the owner of the cat. Reasonable efforts must be made to contact the owner. Feral cats that go unclaimed for 3 days may be euthanized or relinquished to an animal adoption organization that agrees to spay or neuter the cat. Food & A C §31752.5. For the purpose of Food & A C §§31751-31754, each member of a litter of kittens is treated as an individual animal. Food & A C §31751. The owner of an unspayed or unneutered cat is subject to fine when such cat is impounded. Food & A C §31751.7.

NOTE: State law does not prohibit or regulate the practice of animal declawing, known as onychectomy. Absent local legislation, veterinarians are free to declaw cats. At least one city in California has enacted a ban on the practice under its general police powers, on the grounds that it is inhumane, and that less invasive techniques exist to address feline clawing problems.

© The Regents of the University of California

§9.171 2. Other Domestic Animals

Rabbits, guinea pigs, hamsters, potbellied pigs, birds, lizards, snakes, turtles, and tortoises are subject to the same impoundment laws that apply to dogs and cats. Food & A C §31753.

© The Regents of the University of California

§9.172 D. Animal Relinquishment/Redemption by Owner

A person relinquishing a dog or cat to a shelter must present proof of ownership to the shelter. Food & A C §§31108.5, 31752.2. Unless the animal suffers from an untreatable illness or injury, the shelter must hold the animal for a prescribed period of time to allow reclamation by its owner. Food & A C §31752. Relinquished kittens and puppies must be available for immediate adoption. Food & A C §31754. A known vicious or dangerous dog may be immediately euthanized on relinquishment. Food & A C §31108.5(b).

© The Regents of the University of California

§9.173 E. Liability Issues

If a public officer wrongfully kills or injures an animal while carrying out his or her duties, he or she may be liable for tort damages and for a violation of the Fourth Amendment. *Lertora v Riley* (1936) 6 C2d 171, 57 P2d 140; *Fuller v Vines* (9th Cir 1994) 36 F3d 65. In a case involving claims for "wrongful conversion" for destroying a dog, the owner was entitled to the value of the dog, plus interest, from the local agency. *Kane v County of San Diego* (1969) 2 CA3d 550, 83 CR 19.

© The Regents of the University of California

§9.174 F. Animal Control Officers

By ordinance, cities may authorize employees of public pounds and humane societies to provide animal care and issue notices to appear in court for violation of state or local animal control laws. Corp C §14503. See also Corp C §14502 (qualifications for humane officers). Humane officers are empowered to interfere and prevent any act of cruelty on animals. They may also use such force as is necessary to prevent it. Corp C §14502(h)(i)(1)(A). Although animal control officers are not peace officers, they may exercise the powers of arrest of a peace officer as specified in Pen C §836 and the power to serve warrants specified in Pen C §§1523 and 1530 during the course and within the scope of their employment, if they complete a course in the exercise of those powers under Pen C §832. See Corp C §14502(h)(i)(1); Pen C §830.9.

© The Regents of the University of California

G. Animal Shelters

§9.175 1. Information and Records

Animal shelters must provide the owners and finders of lost animals with a method for listing lost animals on a list maintained by the shelter, referrals to animals on that list, contact information on other nearby shelters, advice on disseminating information about lost animals, and contact information on volunteer groups that assist in locating lost animals. Food & A C §32001. Animal shelters also must keep accurate records on each animal taken in. Food & A C §32003.

© The Regents of the University of California

§9.176 2. Spaying/Neutering

Special provisions exist on spaying and neutering of animals depending on the size of the county. See Food & A C §§30503, 31751.3 (cities within counties exceeding 100,000 residents), 30522, 31762 (cities within counties with less than 100,000).

© The Regents of the University of California

§9.177 H. Wild Animals

Cities have authority to enact ordinances concerning wild animals provided that any ordinances related to the care of wild animals are more restrictive than those provided for by the state. Fish & G C §2156.

© The Regents of the University of California

§9.178 1. Definition

"Wild animals" are defined as animals "not normally domesticated in this State." Fish & G C §2116. The distinction between wild and domestic animals is not always clear. An extensive discussion occurs in a 1976 Attorney General opinion analyzing the validity of a Los Angeles ordinance requiring a permit for keeping of any "wild, exotic, dangerous or non-domestic animal or reptile." 59 Ops Cal Atty Gen 557 (1976). See also *Butler v City of Palos Verdes Estates* (2005) 135 CA4th 174, 37 CR3d 199 (peafowl considered feral rather than domesticated).

© The Regents of the University of California

§9.179 2. Ownership

Wild animals belong to the people in their collective sovereignty. *Ex Parte Maier* (1894) 103 C 476. As a general rule, wild animals are not subject to ownership except when (CC §656):

- On the land of the person claiming them;
- Tamed;
- Taken and held in possession; or
- Disabled and immediately pursued.

© The Regents of the University of California

I. Animal Abandonment and Mistreatment

§9.180 1. Willful Abandonment

The willful abandonment of an animal is a misdemeanor. Pen C §597f. A person who fails to give proper care and attention to an animal is guilty of a misdemeanor. Such animals may be impounded until the animal is in suitable condition to be returned to its owner. Pen C §597.1. See also *Broden v Marin Humane Soc'y* (1999) 70 CA4th 1212, 83 CR2d 235. For other crimes against animals, see Pen C §§596-600.5.

© The Regents of the University of California

§9.181 2. Abandoned Pets in Foreclosed-on Homes

Any person or private entity that discovers a live animal abandoned in a foreclosed-on home must immediately notify animal control officials for the purpose of retrieving the animal. CC §§1816, 1981.

© The Regents of the University of California

§9.182 J. Service Animals

Almost any type of animal trained to do work or perform tasks for the benefit of a disabled person is considered a "service animal" under the federal Americans with Disabilities Act of 1990 (ADA) (42 USC §§12101-12213). 28 CFR §36.104. Many forms of disability or medical condition are considered a "disability" under the ADA. Dogs (and other animals) trained to assist the disabled are referred to collectively in the ADA as "service animals." 28 CFR §36.104.

NOTE: Generic use of the term "guide dog" is outmoded, but the term is still defined in California law, along with "signal dog" and "service dog." CC §54.1(b)(6)(C).

Under California law, discrimination based on the use of a service dog is prohibited. CC §§54-54.3; Pen C §365.5. Such sections make any violation of the ADA a violation of CC §§54-54.3, and this may make certain requirements under Title III of the ADA applicable to California public agencies. See ADA Technical Assistance Manual (TAM) §III-4.2300 (any alteration to admittance policies that would work a "fundamental alteration" to nature of facility, or would result in "undue hardship" is not required). The ADA Technical Assistance Manual is available on the ADA website of the Department of Justice at www.ada.gov/.

In California, the owner of a service dog may apply for an assistance dog identification tag. Food & A C §30850. A person wrongfully representing to be an owner or trainer of an assistance dog is guilty of a misdemeanor. Pen C §365.7. Assistance dog identification tags may only be used by a disabled person or the dog's trainer. Food & A C §30852. However, because the ADA does not allow public accommodations to require proof that an animal is a "service animal," such tags only benefit the disabled handler in educating a gatekeeper about the animal. Most service animal handlers who sue for discrimination do not show the identification.

PRACTICE TIP: Be sure to train public facility staff appropriately on the liberal admission policies for service animals required under state and federal law. If a staff person identifies a reason to deny access to a service animal, both the animal's impact on the facility *and* the risk of litigation should be weighed equally. Many service animal handlers are willing to discuss their access rights after they have been admitted the first time, and before they return.

Dogs trained as guide, signal, or service dogs are collectively referred to as "assistance dogs." Discrimination based on the use of an assistance dog is prohibited. See, *e.g.,* CC §54.1(b)(6)(A) (housing); CC §§54.1-54.3, Pen C §365.5 (places and conveyances open to general public). See also 70 Ops Cal Atty Gen 105 (1987); Health & S C §114259.5 (food service areas). Attacks on assistance animals are prohibited. Pen C §§417.27(d) (laser pointer directed at assistance dog), 600.2 (injuries by other dogs), 600.5 (injury or death by person).

© The Regents of the University of California

§9.183 K. Disease

The provisions of Health & S C §§121575-121710 regulate rabies and any other animal disease determined to be dangerous to human beings. The state preliminarily investigates all reported animal disease cases. See Health & S C §121595. If necessary, it declares quarantine and then thoroughly investigates the extent of the disease, the probable number of persons and animals exposed, and the area affected. See Health & S C §§121600, 121605.

In areas where animal diseases constitute a public health hazard, state law requires that the responsible city require by ordinance that all dogs older than 4 months be licensed no less than once every 2 years. See Health & S C §121690(a). A city may, however, regulate by ordinance that a dog 12 months or older, who has had a rabies vaccination, be licensed for a period not to exceed 3 years or beyond current rabies vaccination. See Health & S C §121690(g).

Additionally, state law requires that each city maintain a pound system and an animal disease control program (see Health & S C §121690(e)), as well as dog vaccination clinic services throughout the city (see Health & S C §121690(f)).

A city may enact more stringent regulatory requirements within its jurisdiction. See Health & S C §121695.

© The Regents of the University of California

10

Land Use

I. OVERVIEW OF LAND USE REGULATION §10.1
- A. Planning and Zoning Law §10.2
- B. Planning Commission §10.3
- C. Planning Agency §10.4
- D. Notice and Hearing Requirements for Quasi-Judicial Proceedings §10.5
  - 1. Notice to Affected Property Owners §10.6
  - 2. Adequate Notice §10.7
  - 3. Type of Notice §10.8
- E. Notice and Hearing Requirements for Legislative Acts §10.9
- F. Permit Streamlining Act
  - 1. Basic Requirement §10.10
  - 2. Elements of Complete Application §10.11
  - 3. Applies Only to Adjudicatory Acts §10.12
  - 4. Directory, Not Mandatory, as to CEQA §10.13
  - 5. Due Process Required for Automatic Approval §10.14
  - 6. Appeal §10.15

II. GENERAL PLAN
- A. Purpose and Effect §10.16
- B. Basic Requirements §10.17
  - 1. Land Use Element §10.18
    - a. Correlation With Rest of Plan §10.19
    - b. Consistency Requirement Applied to Prezoned Territory §10.20
    - c. Population Density and Building Intensity Standards §10.21
    - d. Flooding/Timber Production §10.22
    - e. Military Facilities §10.23
    - f. Urban Form and Design §10.24
  - 2. Circulation Element §10.25
  - 3. Housing Element §10.26
    - a. Mandated Goals §10.27
    - b. Other Factors §10.28
    - c. Assessment §10.29
      - (1) Land Inventory §10.30
      - (2) Examination of Alternative Regulations §10.31
      - (3) Emergency Shelters §10.32
      - (4) Special Housing Needs §10.33
      - (5) Energy Conservation §10.34
      - (6) Decreases in Low-Income Housing §10.35
    - d. Objectives §10.36
    - e. Action Program §10.37
      - (1) Identifying Adequate Sites §10.38
      - (2) Addressing Conservation of Existing Housing §10.39
      - (3) Removing Governmental Constraints §10.40
      - (4) Ensuring Consistency §10.41
      - (5) Promoting Opportunities Without Discrimination §10.42
      - (6) Providing for Numerous Forms of Housing §10.43
    - f. Housing Share
      - (1) Regional Housing Needs Determination §10.44
      - (2) Subregional Entities §10.45
      - (3) Local Methodologies §10.46
      - (4) Local Allocations §10.47
    - g. Department of Housing and Community Development Findings §10.48
      - (1) Department of Housing and Community Development Review §10.49
      - (2) Rebuttable Presumption of Validity §10.50
    - h. Required City Review and Revision §10.51
    - i. Impact of Defective Housing Element §10.52
    - j. Coastal Provisions §10.53

4. Conservation Element §10.54
a. Optional Considerations §10.55
b. Water Agency Involvement §10.56
5. Open Space Element §10.57
a. Mandated Programs §10.58
b. Action Program §10.59
c. Goals and Inventory §10.60
6. Noise Element §10.61
a. Implementation §10.62
b. Guidelines §10.63
7. Safety Element §10.64
a. Importance of Element §10.65
b. Required Consultation With State Agencies §10.66
C. Administration
1. Annual Report §10.67
2. Consistency Requirements for Land Use Decisions §10.68
3. Requirements Imposed on Other Agencies §10.69
D. Adoption Procedures and Hearing Requirements §10.70
1. Additional Requirements for Certain Changes to Land Use Element §10.71
2. Additional Requirements for Housing Element §10.72
E. Initiative/Referendum §10.73
F. Extensions §10.74
1. Relief From General Plan Requirements §10.75
2. Attack Under Previous General Plan §10.76
3. Consistency With Housing Element §10.77
4. Conditions §10.78
5. Consistency With Draft General Plan §10.79
G. Amendments and Updates §10.80
H. Limitations Period for General Plan Challenges §10.81
I. Avoiding a Taking Challenge §10.82
J. Specific Plans §10.83

III. ZONING §10.84
A. Authority §10.85
B. Statutory Restrictions §10.86
C. Zoning Ordinances
1. General Plan Consistency
a. General Law Cities §10.87
b. Charter Cities With Populations Greater Than Two Million §10.88
c. Other Charter Cities §10.89
d. Judicial Review §10.90
2. Procedures for Adoption and Amendment
a. Legislative Acts §10.91
b. Urgency Measures §10.92
c. Urgency Measures in Coastal Zone §10.93
3. Notice and Hearing Requirements §10.94
4. Legislative Acts
a. Findings Not Generally Required §10.95
b. When Findings Required §10.96
5. Typical Provisions §10.97
6. Limitations of Challenges §10.98
D. Use Permits §10.99
1. Procedures for Issuance
a. Quasi-Judicial Action §10.100
b. Decision-Maker §10.101
c. Appeals §10.102
2. Due Process Requirements
a. Notice and Hearing §10.103
b. Findings and Decision §10.104
3. Standards for Issuance and Denial
a. Criteria Required §10.105
b. General Welfare §10.106
c. Nuisance Standard §10.107
d. Different Standards for Renewals §10.108
4. Rights Granted

a. Nature of Conditions §10.109
b. Runs With Land §10.110
5. Revocations/Terminations §10.111
6. Other Remedies for Noncompliance §10.112
E. Variances
1. Purpose §10.113
2. Procedures
a. Standards §10.114
b. Local Ordinances §10.115
c. Parking Variances §10.116
d. Findings §10.117
3. Notice and Hearing Requirements §10.118
4. Rights Granted
a. Runs With Land §10.119
b. No Special Privileges §10.120
F. Nonconforming Uses and Structures §10.121
1. Elimination §10.122
2. Expansion §10.123
G. Vested Rights §10.124
1. Common Law §10.125
2. Vesting Tentative Maps §10.126
3. Development Agreements §10.127
H. Conditional Zoning §10.128
I. Special Issues
1. Historic Preservation §10.129
2. View Protection §10.130
3. Adult Entertainment
a. Method of Regulating §10.131
b. Regular and Substantial Course of Conduct §10.132
4. Exercise of Religion
a. Churches, Temples, and Other Houses of Worship §10.133
b. RLUIPA §10.134
5. Hazardous Materials and Waste Management §10.135
6. Schools and Community Colleges §10.136
7. Flood Plains §10.137
8. Alcohol Sales §10.138
9. Telecommunications Act of 1996 §10.139
10. Agricultural Preservation (Williamson Act)
a. Agricultural Preserves §10.140
b. Contracts §10.141
c. Nonrenewal §10.142
d. Cancellation §10.143
e. Public Improvements §10.144
11. Signs §10.145
12. "Big Box" Stores §10.146
J. Site/Design Review §10.147

IV. SUBDIVISIONS
A. Basic Requirements
1. Map Approval §10.148
2. Tentative, Final, and Parcel Maps §10.149
3. Vesting Tentative Maps §10.150
4. Lot Line Adjustments §10.151
B. Local Ordinances
1. Local Flexibility §10.152
2. Map Approval §10.153
3. Findings for Map Denial §10.154
4. Automatic Approval §10.155
5. Map Approval Conditions §10.156
6. Imposition of Fees and Dedications §10.157
7. Limit on Conditions to Map Approval §10.158
8. Time Extensions for Tentative Maps §10.159
9. Antiquated Subdivisions §10.160

V. HOUSING

A. Non-Discrimination §10.161
B. Affordable Housing §10.162
1. Findings Required to Reject Projects §10.163
2. Election Required for Certain Housing §10.164
3. Restrictions on "Downzoning" of Residential Property §10.165
4. Second Units §10.166
a. Remaining Discretion §10.167
b. Unit Size Standards §10.168
c. Parking Requirements §10.169
d. Less Restrictive Requirements Allowed §10.170
e. No Local Ordinance §10.171
5. Density Bonuses §10.172
a. When Applicable §10.173
(1) Percentage of Units Reserved for Low-Income Housing §10.174
(2) Land Donated for Low-Income Housing §10.175
(3) Senior Housing §10.176
(4) Child Care Facility Included in Development Proposal §10.177
b. Percentage Increase §10.178
(1) Basic Density Bonus §10.179
(2) Incremental Increases §10.180
(3) Additional Local Density Bonus §10.181
c. Types of Incentives and Concessions §10.182
d. Number of Incentives §10.183
e. Grounds for Denial of Incentives or Concessions §10.184
f. Waiver of Development Standards §10.185
g. Limitation on Required Parking §10.186
h. Conformance With General Plan and Zoning Ordinance §10.187
i. Durational Requirements
(1) Continued Affordability of Very-Low and Lower-Income Units §10.188
(2) Moderate-Income For-Sale Units §10.189
(3) Operation of Child Care Facility §10.190
6. Limitation on Authority to Require Conditional Use Permits §10.191
a. Attached Housing Developments §10.192
(1) "Affordable" §10.193
(2) "Infill" §10.194
(3) Population Requirements: Developments of Maximum 100 Units §10.195
(4) Population Requirements: Attached Housing Developments of Maximum 50 Units §10.196
b. Attached Housing Developments Permitted When Certain CEQA Exemptions Apply §10.197
7. Special Requirements for Coastal Communities §10.198
C. Privacy §10.199

VI. GROWTH MANAGEMENT §10.200
A. Public Facilities Planning §10.201
1. Limiting Expansion §10.202
2. Other Controls §10.203
B. Housing Obligation Conflicts §10.204
1. Findings Required for Housing Limits
a. General Requirement §10.205
b. No Findings for Initiatives §10.206
2. Burden of Proof §10.207

VII. MORATORIA
A. Authority
1. Police Power §10.208
2. Statutory Provisions §10.209
B. Takings §10.210

VIII. EXACTIONS: FEES AND DEDICATIONS
A. Definitions
1. Fee §10.211
2. Dedication §10.212
B. Authority
1. Police Power §10.213
2. Public Works Power §10.214
3. Statutory Provisions §10.215

4. Case Law §10.216
C. Limitations
1. Constitutional §10.217
a. Standards Applied to Takings Issue
(1) General Rule §10.218
(2) Dedications §10.219
(3) Fees §10.220
b. Special Tax §10.221
2. Statutory Procedure §10.222
a. Nexus §10.223
b. Findings §10.224
c. Relationship to Cost §10.225
d. Notice and Hearing §10.226
e. Waiting Period §10.227
f. Exclusions §10.228
g. Statute of Limitations §10.229
3. Fees and Dedications: Practice Tips §10.230

IX. BUILDING PERMITS §10.231
A. Building, Grading, and Other Regulations
1. Authority §10.232
2. Reasonable Relationship §10.233
B. Basic Requirements §10.234
1. Application §10.235
2. Dedication of Land, Construction of Improvements, and Payment of Fees §10.236
C. Uniform Codes
1. State Standards §10.237
2. Modifications §10.238
D. Effect of Permit Issuance
1. Vested Rights §10.239
2. No Vested Right for Invalid Permit §10.240
3. Limit on Vested Right §10.241
E. Building Permit Duration/Revocation
1. Time Frames to Begin and Complete Work §10.242
2. Extension §10.243
3. Suspension §10.244
4. Revocation §10.245
5. Incomplete Work
a. Civil Nuisance Action §10.246
b. Criminal Prosecution §10.247
c. Contract Remedies §10.248
d. State Housing Law Remedies §10.249

X. REGIONAL PLANNING ISSUES
A. Office of Planning and Research §10.250
B. Transportation Planning
1. Transportation Planning Agency §10.251
2. Preparation of Regional Transportation Plan §10.252
3. Congestion Management Program §10.253
C. Airport Planning
1. Airport Land Use Plan (ALUP) §10.254
2. Before ALUCP Approval §10.255
3. After ALUCP Approval
a. Airport Land Use Commission (ALUC) Approval §10.256
b. Resubmission of Plan §10.257
c. Mandamus §10.258
4. City Override §10.259
5. Local Regulation §10.260
D. Waste Management §10.261
1. Elements of Integrated Waste Management Plan (IWMP)
a. Source Reduction and Recycling §10.262
b. Household Hazardous Waste §10.263
c. Siting §10.264
(1) Consistency With General Plans §10.265
(2) Reserved Sites §10.266

(3) Revision §10.267
2. Waste Management Problems §10.268
3. Approval of IWMP
a. Submittal §10.269
b. Public Hearing §10.270
c. Failure to Act §10.271
4. Periodic Review of Integrated Waste Management Plan (IWMP)
a. Every 5 Years §10.272
b. Progress Reports §10.273
c. Penalties §10.274
E. Housing Obligations §10.275
F. Joint Powers Authorities §10.276

XI. CALIFORNIA COASTAL ACT
A. Basic Regulatory Scheme
1. Purpose of Act §10.277
2. California Coastal Commission
a. Membership §10.278
b. Action §10.279
3. Geographic Extent of Coastal Zone §10.280
4. Coastal Policies §10.281
5. Interpretive Guidelines §10.282
B. Local Coastal Programs §10.283
1. Local Discretion
a. Content §10.284
b. Local General Plans and Zoning Ordinances §10.285
c. Submittal for Coastal Commission Review §10.286
d. Delay in Submittal §10.287
e. Limited Application of CEQA §10.288
2. Land Use Plan (LUP) Certification
a. Standard §10.289
b. Commission Hearing §10.290
c. Public Hearing §10.291
3. Effect of Local Coastal Program (LCP) Certification
a. Full Certification §10.292
b. Partial Certification §10.293
4. Denial of Certification
a. Findings §10.294
b. Modifications §10.295
5. Approval of Zoning and Other Implementing Actions
a. Standard §10.296
b. Commission Actions §10.297
c. Modifications §10.298
6. Amendments to Certified Local Coastal Program §10.299
7. Periodic Review of Local Coastal Programs §10.300
C. Coastal Development Permits
1. Basic Requirement §10.301
2. Issuing Agency
a. Pre-LCP Certification §10.302
b. Post-LCP Certification §10.303
3. Development
a. Statutory Standard §10.304
b. Interpretations §10.305
4. Standards
a. Wetlands §10.306
b. Public Access §10.307
c. Housing §10.308
5. Statutory Exemptions §10.309
6. Coastal Commission Permit Procedures §10.310
a. Other Agency Permits §10.311
b. Hearings §10.312
c. Pre-LCP Permits §10.313
d. Revocation §10.314
7. Post-Certification Local Government Permit §10.315
D. Post-Certification Appeals From Local Government Permit Decisions

1. Appeal Jurisdiction
a. Beachfront Development §10.316
b. Other Appellate Jurisdiction §10.317
2. Grounds for Appeal and Scope of Review §10.318
3. Who May Appeal §10.319
4. Timing of Appeal §10.320
5. Commission Appeal Procedures §10.321
E. Judicial Review
1. Mandate §10.322
2. Bonds §10.323
3. Collateral Attack §10.324
4. Ripeness §10.325
F. Enforcement
1. Basic Provisions §10.326
2. Cease and Desist Authority
a. Permit Violations §10.327
b. Certified LCPs and Port Master Plans §10.328
c. Terms and Conditions §10.329
d. Penalties §10.330
3. Civil Penalties
a. Amounts §10.331
b. Use of Funds §10.332
4. Restoration §10.333

XII. TIDELANDS, BEACHES, AND STREAMS
A. Public Trust Doctrine §10.334
1. Protection of Traditional Uses §10.335
2. Flexibility §10.336
3. Effect on Water Rights §10.337
4. Enforcement §10.338
B. Areas Protected
1. Navigable Waters, Tidelands, and Submerged Lands §10.339
2. Nontidal Lakes and Streams §10.340
3. Access to and Use of Waterways §10.341
a. Subdivisions §10.342
b. Coastal Development Projects §10.343
c. Public Streets and Highways §10.344
d. Access in Sale of Public Lands §10.345
e. Reservoirs §10.346
C. Regulatory Authority
1. California Coastal Commission §10.347
2. State Department of Fish and Game §10.348
a. Fees §10.349
b. Streambed Alteration Permit §10.350
c. Navigation Dredging Permit §10.351
3. Army Corps of Engineers §10.352
a. Statutory Authority §10.353
(1) Section 404 of Clean Water Act (33 USC §1344) §10.354
(2) Rivers and Harbors Act of 1899 §10.355
b. Corps' Definition of Wetlands §10.356
c. Waters of the United States §10.357
d. Nationwide Permits §10.358
e. Individual Permits §10.359
4. State Lands Commission §10.360
5. Department of Boating and Waterways §10.361

XIII. CHALLENGES TO LAND USE DECISIONS §10.362
A. Regulatory and Physical Takings
1. Overview
a. Source of Law §10.363
b. What Constitutes "Property" §10.364
c. "Regulatory Taking" Versus "Physical Taking" §10.365
d. Availability of Damages §10.366
e. Caveat §10.367
2. Initial Characterization Essential to Analysis

a. Suggested Approach §10.368
b. Is the Case Ripe? §10.369
c. Physical Taking or Regulatory Taking? §10.370
3. Ripeness Requirements and Other Limitations on Challenges
a. Ripeness Is Jurisdictional §10.371
b. Facial Attacks §10.372
c. As-Applied Claims §10.373
(1) "Final Determination" Requirement §10.374
(2) Multiple Applications §10.375
(3) Repeal or Waiver §10.376
(4) Exhaustion of Administrative and Judicial Remedies §10.377
(5) Futility §10.378
(6) State Remedies §10.379
(7) Limitations on Actions §10.380
d. "Public Use" Limitation §10.381
4. Facial Regulatory Takings Disfavored §10.382
5. Regulatory Taking Liability Analysis
a. Same Analysis for Permanent and Temporary Takings §10.383
b. Extraordinary Delay §10.384
c. Temporary Physical Taking §10.385
d. *Penn Central* Ad Hoc Test §10.386
e. Two-Prong *Agins* Standard §10.387
(1) *Agins* Partly Overturned §10.388
(2) Categorical Taking/Deprivation of All Economic Use §10.389
(3) Some Economic Use Remains §10.390
f. Exactions: *Nollan*/*Dolan* "Nexus" Test §10.391
(1) Direct Nexus §10.392
(2) Rough Proportionality §10.393
(3) Fees for Public Improvements §10.394
(4) Fees to Mitigate Loss of Housing Units §10.395
(5) Development Denials §10.396
(6) Ad Hoc Factual Inquiry §10.397
g. Diminution of Value Cases §10.398
h. Exceptions: When *Nollan/Dolan* Nexus Test Inapplicable §10.399
6. Regulations Authorizing Physical Occupation
a. Analysis §10.400
b. Permanent Physical Occupation §10.401
c. *Penn Central-Agins-Nollan* Nexus Standard Inapplicable to Permanent Physical Taking §10.402
d. Temporary Physical Occupation §10.403
7. Remedy
a. Invalidation §10.404
b. Accrual of Damages §10.405
c. Damages Not Necessarily Required §10.406
B. Procedural Due Process
1. Constitutional Provisions §10.407
2. Statutory Requirements §10.408
a. Ralph M. Brown Act §10.409
b. Planning and Zoning Law §10.410
c. Subdivision Map Act §10.411
d. California Environmental Quality Act (CEQA) §10.412
e. Judicial Review §10.413
3. Fair Hearing Requirements
a. Ex Parte Contacts §10.414
b. Evidence §10.415
c. Bias
(1) Campaign Contributions §10.416
(2) Actual Bias or Appearance of Bias §10.417
(3) Advance Knowledge of Facts §10.418
C. Substantive Due Process and Equal Protection
1. Constitutional Provision §10.419
2. Substantive Due Process
a. Overview §10.420
b. Deferential Judicial Review §10.421
c. Companion Claims §10.422
d. Ripeness §10.423

e. Rational-Basis Test §10.424
f. Comparison to Rational-Relationship Test §10.425
g. Vested Rights §10.426
(1) No Right to Develop §10.427
(2) Common Law Vested Rights §10.428
(3) Mines, Quarries, Timber, and Other Extractive Industries §10.429
(4) Statutes Affecting Vested Rights Doctrine §10.430
3. Equal Protection
a. Overview §10.431
b. Application to Land Use Regulations §10.432
c. Rational-Relationship Test §10.433
(1) Nature of Test §10.434
(2) When Not Applied §10.435
(3) Development §10.436
(4) Class of One Property Owner §10.437
d. Strict Scrutiny or Compelling State Interest Test §10.438
(1) Fundamental Right §10.439
(2) Suspect Classifications §10.440
(3) Nature of Test §10.441
(4) When Not Applied §10.442
e. Statutory Provisions §10.443
D. Civil Rights §10.444
E. CEQA Challenges §10.445

© The Regents of the University of California

§10.1 I. OVERVIEW OF LAND USE REGULATION

In California, the basis for all land use regulations is the police power. See Cal Const art XI, §7. Its use by general law cities (and with respect to certain matters, charter cities) is governed by a complicated statutory scheme that mandates long-range, coherent planning. Despite this complexity, it is the intent of the legislature to impose "only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." Govt C §65800; *DeVita v County of Napa* (1995) 9 C4th 763, 782, 38 CR2d 699.

For further discussion of topics covered by this chapter, see generally California Land Use Practice (Cal CEB 2006); Practice Under the California Environmental Quality Act (2d ed Cal CEB 2008); California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001); Forming California Common Interest Developments (Cal CEB 2004); California Administrative Mandamus (3d ed Cal CEB 2003).

© The Regents of the University of California

§10.2 A. Planning and Zoning Law

California's Planning and Zoning Law (Govt C §65000-66499.58) is the framework for local land use regulation. Every city must have a general plan for its physical development. The plan must be comprehensive, long-term, and up-to-date. All local land use decisions must be consistent with the general plan, with a limited exception for charter cities. See Govt C §65803; *Lesher Communications, Inc. v City of Walnut Creek* (1990) 52 C3d 531, 277 CR 1.

© The Regents of the University of California

§10.3 B. Planning Commission

A planning commission is an optional, permanent advisory committee of citizens appointed by the city council or mayor to review matters related to planning and development. The commission holds regularly scheduled public meetings to consider land use matters, such as zone changes, conditional use permits, variances, subdivisions, and general plan amendments. Govt C §§65100-65106. Public hearings apply to certain land use matters.

For further discussion of appointed commissions, see §§1.249-1.254. See also Planning Commissioner's Handbook (League of California Cities, 1400 K Street, Sacramento, California 95814, telephone (916) 658-8200); The Planning Commissioner's Book (May 1998) (State of California, Governor's Office of Planning and Research, 1400 Tenth Street, Sacramento, California 95814).

© The Regents of the University of California

§10.4 C. Planning Agency

Each city has a planning agency with the power to carry out the city's land use responsibilities. That function may be exercised by the city council or delegated to a planning commission, another administrative body, a hearing officer, or any combination of these entities. The city's planning or community development department provides staff support to the commission on land use regulations and other proposals before the city. Govt C §§65100-65106.

© The Regents of the University of California

§10.5 D. Notice and Hearing Requirements for Quasi-Judicial Proceedings

Procedural due process requirements generally apply only to quasi-judicial/ adjudicatory hearings except as otherwise required by state law. *Horn v County of Ventura* (1979) 24 C3d 605, 156 CR 718.

© The Regents of the University of California

§10.6 1. Notice to Affected Property Owners

When notice is required, it must be given to all residents within the chosen or required radius and to all persons whose property interest will be affected. *Scott v City of Indian Wells* (1972) 6 C3d 541, 99 CR 745. In unusual circumstances, using a radius of greater than the 300 feet required by Govt C §65091 may be advisable. *Horn v County of Ventura* (1979) 24 C3d 605, 156 CR 718.

© The Regents of the University of California

§10.7 2. Adequate Notice

A notice must adequately describe the action under consideration to satisfy the right to due process. Govt C §65094; *Drum v Fresno County Dept. of Pub. Works* (1983) 144 CA3d 777, 192 CR 782. Actual notice of the issues to be considered may cure the failure of a notice to disclose the issues to be considered at the hearing. *Benson v California Coastal Comm'n* (2006) 139 CA4th 348, 42 CR3d 580.

© The Regents of the University of California

§10.8 3. Type of Notice

Notice by publication and posting is constitutionally adequate, unless a statute or ordinance requires notice by mail. *Hayssen v Board of Zoning Adjustments* (1985) 171 CA3d 400, 217 CR 464.

© The Regents of the University of California

§10.9 E. Notice and Hearing Requirements for Legislative Acts

Certain legislative acts, such as the adoption of a general or specific plan, require a noticed public hearing. See Govt C §§65350-65362, 65453. The amendment of a zoning ordinance is subject to notice and hearing under Govt C §§65090-65091 if the amendment affects the permitted uses of real property. Govt C §65853.

PRACTICE TIP: The notice for the city council public hearing must be published after the planning commission has made its recommendation, and the notice must include the recommendation of the planning commission. *Environmental Defense Project of Sierra County v County of Sierra* (2008) 158 CA4th 877, 70 CR3d 474.

© The Regents of the University of California

F. Permit Streamlining Act

§10.10 1. Basic Requirement

The Permit Streamlining Act (PSA) (Govt C §§65920-65964) applies to certain land use decisions. *Findleton v Board of Supervisors of El Dorado County* (1993) 12 CA4th 709, 15 CR2d 665 (describing when a project is not subject to the PSA). A city must review and make these decisions on these proposals within stated time limits. Govt C §65950. The city's failure to observe the time limits may result in the project's being automatically "deemed" approved, if all prescribed public notice requirements have been met. Govt C §65956(b). The ordinary public notice provided by cities for project approvals is not sufficient to trigger the PSA. *Mahon v San Mateo County* (2006) 139 CA4th 812, 43 CR3d 235. Note that it is the decision that approves or denies the project that must be made within the PSA's time frames, not any subsequent adoption of a resolution memorializing the decision. *El Dorado Palm Springs, Ltd. v City of Palm Springs* (2002) 96 CA4th 1153, 118 CR2d 15. The applicant and city can agree to extend these time limits for 90 days. Govt C §65957. Individual applicants may not waive the time limits of the PSA. Govt C §65957. Special time limits apply to the approval of tentative subdivision maps. Govt C §§66452.1-66452.4.

© The Regents of the University of California

§10.11 2. Elements of Complete Application

After the city has received an application, it has 30 days to inform the applicant in writing whether the application is complete and accepted for filing. If the application is considered incomplete, the city must point out in detail the application's deficiencies. Govt C §65943. Before a city accepts an application as complete or before it can be deemed complete, the applicant must meet the following requirements:

- The application must include a statement that it is an application for a development project. Govt C §65943(a).
- The applicant must consult the "Cortese lists" relating to hazardous materials and sign a statement. Govt C §65962.5(f) (form of statement).
- For non-residential projects, the applicant must submit information regarding hazardous materials. Govt C §65850.2.

© The Regents of the University of California

§10.12 3. Applies Only to Adjudicatory Acts

The PSA's deadlines apply only to adjudicatory or quasi-judicial decisions. *Landi v County of Monterey* (1983) 139 CA3d 934, 189 CR 55. The PSA will not cause automatic approval of a nonlegislative or adjudicatory project when such permanent application would require legislative changes in applicable general plans, zoning ordinances, or other controlling land use regulations. *Land Waste Mgmt. v Contra Costa County Bd. of Supervisors* (1990) 222 CA3d 950, 271 CR 909.

© The Regents of the University of California

§10.13 4. Directory, Not Mandatory, as to CEQA

There is authority that the PSA's time limits are directory, not mandatory, with respect to the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177). *Eller Media Co. v City of Los Angeles* (2001) 87 CA4th 1217, 105 CR2d 262; *Riverwatch v San Diego County (Palomar Aggregates)* (1999) 76 CA4th 1428, 91 CR2d 322.

© The Regents of the University of California

§10.14 5. Due Process Required for Automatic Approval

If the applicable time limits are not met, failure to act on the application may result in approval of the project if the public notice requirements regarding the project have been met. The applicant may take steps to satisfy public notice requirements if the public agency has not done so. Govt C §65956; *Horn v County of Ventura* (1979) 24 C3d 605, 156 CR 718.

© The Regents of the University of California

§10.15 6. Appeal

Opponents of a project that is deemed approved under the PSA have the same right of appeal as they would have if the city had affirmatively approved the project. Govt C §65922; *Ciani v San Diego Trust & Sav. Bank* (1991) 233 CA3d 1604, 285 CR 699.

© The Regents of the University of California

II. GENERAL PLAN

§10.16 A. Purpose and Effect

The general plan is a comprehensive, long-term plan for the development of the city, including any land outside its boundaries that the city believes is related to its planning. Govt C §65300. The general plan is the preeminent land use regulation of the local government; zoning and other land use decisions must conform to the general plan. *Lesher Communications, Inc. v City of Walnut Creek* (1990) 52 C3d 531, 541, 277 CR 1, 6 (zoning decisions); *Citizens of Goleta Valley v Board of Supervisors* (1990) 52 C3d 553, 573, 276 CR 410 (EIRs). But see *Garat v City of Riverside* (1991) 2 CA4th 259, 281, 3 CR2d 504, disapproved on other grounds in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 743 n11, 29 CR2d 804 (noting that charter city's legislative zoning enactments do not necessarily have to be consistent with its general plan). See also Govt C §§65803, 65860(d). Every city and county in California, including charter cities, must have a comprehensive general plan. Govt C §65300; *Endangered Habitats League, Inc. v County of Orange* (2005) 131 CA4th 777, 32 CR3d 177.

For further information on general plans, see Curtin & Talbert, California Land Use and Planning Law (updated annually) (Solano Press, P.O Box 773, Point Arena, California 95468); California General Plan Glossary (2003), Knox & Knox, eds. (California Planning Roundtable, Palo Alto, California), available at www.cproundtable.org/publications/california-general-plan-glossary/; General Plan Guidelines (2003) (State of California, Governor's Office of Planning and Research, 1400 Tenth Street, Sacramento, California 95814); The Planner's Guide to Specific Plans (1998) (State of California, Governor's Office of Planning and Research, 1400 Tenth Street, Sacramento, California 95814); Element Consolidation: Streamlining Local General Plans (1998) (State of California, Governor's Office of Planning and Research, 1400 Tenth Street, Sacramento, California 95814).

© The Regents of the University of California

§10.17 B. Basic Requirements

The general plan consists of seven mandatory elements and any optional elements that the city chooses to adopt. Govt C §§65302-65303. All mandatory elements have equal legal status and no mandatory element may be subordinated to another. The provisions of all of the elements must be internally consistent. *Sierra Club v Board of Supervisors* (1981) 126 CA3d 698, 708, 179 CR 261. See also Govt C §65300.5.

© The Regents of the University of California

§10.18 1. Land Use Element

The land use element of the general plan must designate the proposed general distribution, location, and extent of land uses for housing, industry, business, open space, natural resources, public facilities, waste disposal sites, and other categories of public and private uses. Govt C §65302(a). It must also identify and annually review those areas covered by the general plan that are subject to flooding. Govt C §65302(a). In addition to other criteria, the land use element must meet the standards described in §§10.19-10.24.

© The Regents of the University of California

§10.19 a. Correlation With Rest of Plan

It is the general plan policies that must be internally consistent (see §10.17), not the objectives within the various elements, or the maps, data, or statistics in the general plan. *Cadiz Land Co. v Rail Cycle, L.P.* (2000) 83 CA4th 74, 115, 99 CR2d 378. See also Govt C §65300.5.

© The Regents of the University of California

§10.20 b. Consistency Requirement Applied to Prezoned Territory

The consistency requirement applies to the prezoning of territory outside city limits but within the city's sphere of influence, which may be annexed in the future. *Merritt v City of Pleasanton* (2001) 89 CA4th 1032, 1036, 107 CR2d 675; *City of Irvine v Irvine Citizens Against Overdevelopment* (1994) 25 CA4th 868, 877, 30 CR2d 797.

© The Regents of the University of California

§10.21 c. Population Density and Building Intensity Standards

The land use element must include standards of population density (measured as numbers of people in a given area) and building intensity (using measures such as site coverage, floor-to-area ratio, building type and size, and dwelling units per acre). Govt C §65302; *Twain Harte Homeowners Ass'n v County of Tuolumne* (1982) 138 CA3d 664, 696, 188 CR 233; *Camp v Board of Supervisors* (1981) 123 CA3d 334, 349, 176 CR 620.

© The Regents of the University of California

§10.22 d. Flooding/Timber Production

The land use element must also identify areas subject to flooding and parcels designated for timberland production. Govt C §65302(a)(1). See also Govt C §§65007, 65860.1 (regarding the Sacramento-San Joaquin Valley area).

© The Regents of the University of California

§10.23 e. Military Facilities

In addition, the land use element must consider the impact of new growth on military readiness activities carried out on military bases, installations, and operating and training areas. Govt C §65302(a)(2).

© The Regents of the University of California

§10.24 f. Urban Form and Design

The text and diagrams in the land use element may also express community intentions regarding urban form and design. Govt C §65302.4.

© The Regents of the University of California

§10.25 2. Circulation Element

The circulation element must identify the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, military airports and ports, and other public utilities and facilities. It serves as an infrastructure plan and must be correlated with the land use element. Govt C §65302(b)(1). See also *Concerned Citizens of Calaveras County v Board of Supervisors* (1985) 166 CA3d 90, 99, 212 CR 273. Starting January 1, 2011, if the circulation element is substantively revised, it must plan for a balanced, multimodal transportation network that meets the needs of all users of streets, roads, and highways for safe and convenient travel in a manner that is suitable to the rural, suburban, or urban context. Govt C §65302(b)(2).

© The Regents of the University of California

§10.26 3. Housing Element

The housing element must identify and analyze existing and projected housing needs and establish goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing. Govt C §§65583-65583.2; *Black Prop. Owners Ass'n v City of Berkeley* (1994) 22 CA4th 974, 981, 28 CR2d 305.

For further discussion of housing, see §§5.400-5.432, 10.161-10.199, 10.204-10.207.

© The Regents of the University of California

§10.27 a. Mandated Goals

The housing element is a highly detailed element of the general plan and must reflect the city's responsibility in contributing to the attainment of state housing goals. Govt C §65581(a); *Committee for Responsible Planning v City of Indian Wells* (1989) 209 CA3d 1005, 1013, 257 CR 635.

© The Regents of the University of California

§10.28 b. Other Factors

The housing element must consider economic, environmental, and fiscal factors as well as community goals in establishing a housing program. Govt C §65580(e); *Committee for Responsible Planning v City of Indian Wells* (1989) 209 CA3d 1005, 1013, 257 CR 635.

© The Regents of the University of California

§10.29 c. Assessment

The first component of the housing element is an assessment of regional housing needs, the city's fair share thereof, available resources, and potential constraints on the maintenance, improvement, or development of housing for all income levels and persons with disabilities. Govt C §65583(a). See *Hernandez v City of Encinitas* (1994) 28 CA4th 1048, 33 CR2d 875.

© The Regents of the University of California

§10.30 (1) Land Inventory

The housing element must contain an inventory of specific sites suitable for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites. Govt C §65583(a)(3). If the inventory is insufficient to accommodate the jurisdiction's regional housing needs allocation, the element must designate sites at which high density housing is permitted by right. Govt C §§65583(c)(1), 65583.2(h). See also *Fonseca v City of Gilroy* (2007) 148 CA4th 1174, 56 CR3d 374.

© The Regents of the University of California

§10.31 (2) Examination of Alternative Regulations

Determination of the availability of suitable housing sites must consider the potential for increased residential development under both existing and alternative zoning ordinances and land use restrictions. Govt C §§65583-65584.

© The Regents of the University of California

§10.32 (3) Emergency Shelters

The assessment must identify emergency shelter zones. Govt C §65583(a)(4).

© The Regents of the University of California

§10.33 (4) Special Housing Needs

The assessment must include an analysis of any special housing needs, such as those of the elderly, persons with disabilities, large families, farmworkers, families with female heads of households, and families and persons in need of emergency shelter. Govt C §65583(a)(7).

© The Regents of the University of California

§10.34 (5) Energy Conservation

The element must contain an analysis of opportunities for energy conservation with respect to residential development. Govt C §65583(a)(8).

© The Regents of the University of California

§10.35 (6) Decreases in Low-Income Housing

Cities must address the potential for a decrease in the availability of low-income housing during the next 10 years due to termination of subsidy contracts, mortgage prepayment, or expiration of restrictions on use. Govt C §65583(a)(9).

© The Regents of the University of California

§10.36 d. Objectives

The second component of the housing element is a statement of quantified goals, objectives, and policies for the maintenance, preservation, improvement, and development of the community's housing. Govt C §65583(b). When the total housing needs exceed available resources, quantified objectives "need not be identical to the total housing needs" but should "establish the maximum number of housing units … that can be constructed, rehabilitated, and conserved over a five-year period." Govt C §65583(b).

However, this allowance for reduced quantified objectives is largely illusory. If the city's inventory of sites is insufficient to accommodate the regional housing needs allocation for each income level, the city will have to identify specific sites that can be developed for housing within the planning period and that allow high-density multifamily low-income housing by right (without a conditional use permit). There are detailed requirements related to the procedure for designating such sites. See Govt C §§65583(c)(1)(A), 65583.2(h).

© The Regents of the University of California

§10.37 e. Action Program

The third component of the housing element is a program setting forth a schedule of actions during the planning period, each with a timeline for implementation. See Govt C §65583(c). The requirements of the program are described in §§10.38-10.43.

© The Regents of the University of California

§10.38 (1) Identifying Adequate Sites

The program must identify specific sites for development of housing types for all income levels, including low- and moderate-income households sufficient to meet the city's share of housing needs. If the inventory of available sites does not identify adequate sites to accommodate the need for all income levels, the jurisdiction must determine for each site in the inventory how many additional units could be placed on each site through rezoning, increases in density, placing residential uses on non-residential lots, and redevelopment. There are numerous other detailed requirements associated with this analysis. If the city or county is still unable to reach its designated regional housing needs allocation, it must designate specific sites that will allow for multifamily housing by right at high densities. Govt C §§65583(c)(1), 65583.2.

© The Regents of the University of California

§10.39 (2) Addressing Conservation of Existing Housing

The program must address the conservation and improvement of the condition of existing housing stock, including assisted housing developments at risk for changing from low-income uses. Govt C §65583(c)(4). A housing element is inadequate when it fails to contain a program to conserve the stock of affordable housing. *Buena Vista Gardens Apartments Ass'n v City of San Diego Planning* Dep't (1985) 175 CA3d 289, 303, 220 CR 732.

© The Regents of the University of California

§10.40 (3) Removing Governmental Constraints

The program must address and, when appropriate and legally possible, remove governmental constraints to maintenance, improvement, and development of housing for all income levels, including housing for persons with disabilities. Govt C §65583(c)(3).

© The Regents of the University of California

§10.41 (4) Ensuring Consistency

The program must identify the means to achieve consistency with other general plan elements. Govt C §65583(c)(7).

© The Regents of the University of California

§10.42 (5) Promoting Opportunities Without Discrimination

The program must promote housing opportunities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, color, familial status, or disability. Govt C §65583(c)(5).

© The Regents of the University of California

§10.43 (6) Providing for Numerous Forms of Housing

The program must provide for a variety of housing types, including multifamily rental housing, factory-built housing, mobilehomes, housing for agricultural employees, supportive housing, single-room occupancy units, emergency shelters, and transitional housing. Govt C §65583(c)(1). A court of appeal held that a housing element was inadequate when it failed to identify a sufficient number of sites to accommodate its quantified homeless transitional housing objectives and its other identified programs failed to compensate for a blanket conditional use permit requirement and other zoning restrictions. *Hoffmaster v City of San Diego* (1997) 55 CA4th 1098, 64 CR2d 684.

© The Regents of the University of California

f. Housing Share

§10.44 (1) Regional Housing Needs Determination

At least 2 years before a scheduled housing element update, the Department of Housing and Community Development (HCD) will assign each region of the state that region's share (the regional housing needs allocation, or RHNA), based on consultation with regional councils of governments (COGs). Govt C §§65584(b), 65584.01. The HCD and the COGs must hold meetings to determine the methodology to determine regional housing needs, and the HCD must submit a draft of the regional allocation to the COGs for review. Govt C §§65584.04-65584.05. In the event that a COG disagrees with its allocation, there is a procedure for appealing the allocation, based on improper population projections or improper application of the allocation methodology. Govt C §65584.01. This procedure is not subject to appellate review. *City of Irvine v Southern Cal. Ass'n of Gov'ts* (2009) 175 CA4th 506, 96 CR3d 78.

© The Regents of the University of California

§10.45 (2) Subregional Entities

At least 28 months before a scheduled housing element update, any two or more cities and a county or counties may form a "subregional entity" for the purpose of allocation of the subregion's housing needs allocation. The subregional entity, rather than the regional council of governments (COG), will then determine the ultimate allocation of housing units for its member agencies. Govt C §65584.03. For special provisions applicable to the Southern California Association of Governments, see Govt C §65584.08.

© The Regents of the University of California

§10.46 (3) Local Methodologies

At least 2 years before a scheduled housing element update, each regional council of governments (COG) or subregional entity must develop a methodology for distributing the regional housing need to cities and counties within the region or subregion. Factors that may be included in the methodology include the existing and projected jobs-housing relationship, constraints and opportunities to the development of affordable housing, regional transportation plans, market demand for housing, high housing cost burdens, and numerous other factors. However, a growth control ordinance may not be considered when allocating the housing units. Members of the public must be afforded an opportunity to participate in the development of the methodology. Govt C §65584.04.

© The Regents of the University of California

§10.47 (4) Local Allocations

At least 18 months before a scheduled housing element update, each regional council of governments (COG) or subregional entity must distribute a draft regional housing needs allocation (RHNA) to each local government in the region or subregion and must explain the methodology on which the allocation is based. Within 60 days, a local government may request a reallocation based on specific factors, and the COG/subregional entity must respond to that request within 60 days. If the request for a reallocation is denied, local entities have an appeal process. In the event that a reallocation occurs, the COG/subregional entity may not reduce the total housing allocation for the region or subregion, and it must redistribute the RHNA according to a specific process; affected local governments may also agree to alternate distributions of appealed local housing allocations. Govt C §65584.05. In the event that a jurisdiction is not served by a COG or subregional entity, the Department of Housing and Community Development (HCD) makes the allocation for that jurisdiction, and there are opportunities for such jurisdictions to participate in the drafting process and to appeal the allocation. Govt C §65584.06.

© The Regents of the University of California

§10.48 g. Department of Housing and Community Development Findings

The Department of Housing and Community Development (HCD) may adopt Housing Element Guidelines pursuant to Health & S C §50459. Such guidelines are advisory to local governments in their preparation of the housing element. Govt C §65585(a); *Buena Vista Gardens Apartments Ass'n v City of San Diego Planning Dep't* (1985) 175 CA3d 289, 295, 220 CR 732. The HCD does not currently have any such Guidelines. See 25 Cal Code Regs div 1, chap 1, subchap 5. However, some guidance is provided by the HCD publication, Housing Element Questions and Answers: A Guide to the Preparation of Housing Elements. In addition, the Governor's Office of Planning and Research publishes a document called State of California General Plan Guidelines (2003), which contains a chapter on drafting housing elements. It is available online at www.opr.ca.gov.

© The Regents of the University of California

§10.49 (1) Department of Housing and Community Development Review

Planning agencies must submit drafts of proposed housing elements and amendments to the Department of Housing and Community Development (HCD) for review. The HCD then has 90 days (for adoptions) or 60 days (for amendments) to provide written comments to the city, which the city must consider before final adoption. Govt C §65585. If the HCD finds that a draft housing element does not substantially comply with statutory requirements, the city must either revise the element in accordance with the HCD's recommendations or "self-certify" the element by adopting findings explaining why the city believes there is substantial compliance notwithstanding the HCD's comments. Govt C §65585(f). Once the city adopts the new or amended housing element, the city must again submit the element to the HCD for review. Govt C §65585(h). If the HCD believes that the element is in compliance with state law at that time, the HCD will certify the housing element.

© The Regents of the University of California

§10.50 (2) Rebuttable Presumption of Validity

If the Department of Housing and Community Development (HCD) has found that the housing element substantially complies with the law, there is a rebuttable presumption of the housing element's validity in any court action. Govt C §65589.3. There is no corresponding presumption of "invalidity" if a city has self-certified the element in accordance with Govt C §65585(f), but the presumption of validity will not apply to a self-certified housing element.

© The Regents of the University of California

§10.51 h. Required City Review and Revision

The city must review and revise the housing element "as frequently as appropriate," but not less than every 5 years unless a longer time period is provided by law. Different dates are provided for cities in different areas of the state. Govt C §65588, 65588(e).

© The Regents of the University of California

§10.52 i. Impact of Defective Housing Element

A defective housing element may prevent approval of tentative subdivision maps or other land use approvals because case law has established that a finding of consistency with a general plan is not valid when a general plan is incomplete or inadequate. See, *e.g., Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 806, 184 CR 371; *Camp v Board of Supervisors* (1981) 123 CA3d 334, 358, 176 CR 620. Accordingly, a city without a valid housing element would not be able to approve most development projects.

© The Regents of the University of California

§10.53 j. Coastal Provisions

Special provisions apply to housing elements covering the state's coastal zone. See Govt C §§65588(d), 65590-65590.1. For further discussion of land use issues in the coastal zone, see §§10.93, 10.277-10.333.

© The Regents of the University of California

§10.54 4. Conservation Element

The conservation element of the general plan must address the identification, conservation, development, and use of natural resources. "Natural resources" includes water, forests, soils, waterways, wildlife, and mineral deposits. Govt C §65302(d). The next time cities revise housing elements after January 1, 2009, the conservation elements must identify rivers, flood corridors, riparian habitat, and land that can accommodate floodwater. Govt C §65302(d).

© The Regents of the University of California

§10.55 a. Optional Considerations

The element may also consider issues such as flood control, water pollution, erosion, conversion of farmland, and endangered species. Govt C §65302(d).

© The Regents of the University of California

§10.56 b. Water Agency Involvement

The portions of the conservation element addressing water issues must be developed in coordination with all local agencies that deal with water in the community. Govt C §65302(d). Any applicable urban water management plan must be used as a source document. Govt C §65302.2.

© The Regents of the University of California

§10.57 5. Open Space Element

The open space element details comprehensive and long-range plans and measures for preserving open space for natural resources, for managing the production of resources, for outdoor recreation, and for public health and safety. Govt C §§65302(e), 65560-65570.

© The Regents of the University of California

§10.58 a. Mandated Programs

State law requires an ambitious planning effort for open space that must include certain specific programs. Govt C §§65563-65564.

© The Regents of the University of California

§10.59 b. Action Program

The element's action program must include the adoption of an open space zoning ordinance. Its purposes include the designation of exclusive agricultural zones, large lot zones, and special overlay requirements for hazard areas. Govt C §65910; *Gisler v County of Madera* (1974) 38 CA3d 303, 306, 112 CR 919.

© The Regents of the University of California

§10.60 c. Goals and Inventory

The open space element must also include goals and policies for preserving and managing open space and an inventory of all open space property, whether privately or publicly owned. Govt C §§65560, 65563-65564. See also *Save El Toro Ass'n v Days* (1977) 74 CA3d 64, 73, 141 CR 282.

© The Regents of the University of California

§10.61 6. Noise Element

The noise element considers potential noise problems in the community. Current and projected noise levels are calculated and mapped for roadways, railroads, airports, industrial plants, military installations, and other major noise sources. Govt C §65302(f). See also Govt C §65302.3.

For further discussion of regulating noise, see §§9.107-9.112.

© The Regents of the University of California

§10.62 a. Implementation

The noise element must include implementation measures and solutions to noise problems. See *Camp v Board of Supervisors* (1981) 123 CA3d 334, 351, 176 CR 620.

© The Regents of the University of California

§10.63 b. Guidelines

Pursuant to statute, Noise Element Guidelines issued by the State Department of Health Services, Office of Noise Control (ONC), as well as the state noise insulation standards, must be considered and applied during preparation of the noise element. Govt C §65302(f). The ONC issued a set of guidelines in 1976, Guidelines for the Preparation and Content of Noise Elements of the General Plan (1976), but the ONC no longer exists. More recently, the Governor's Office of Planning and Research assumed responsibility for updating these guidelines, and these updated provisions are commonly followed. Governor's Office of Planning and Research, State of California General Plan Guidelines (1998).

© The Regents of the University of California

§10.64 7. Safety Element

The safety element addresses risk associated with seismic, geologic, flood, and wild fire hazards. Known seismic and other geologic hazards must be mapped, and emergency evacuation routes, firefighting water supply, and similar emergency issues must be addressed. Govt C §65302(g). Safety element revisions occurring on or after January 1, 2009, must also identify certain flood hazard information and establish goals, policies, and objectives based on that information to protect applicable communities from unreasonable flooding risks. Govt C §65302(g)(2).

© The Regents of the University of California

§10.65 a. Importance of Element

The safety element should be considered before making land use decisions, as it is the major tool for identifying hazards within the area.

© The Regents of the University of California

§10.66 b. Required Consultation With State Agencies

Before adoption or amendment of the safety element, each city or county must submit a draft to the following state agencies:

- The California Geological Survey, Department of Conservation, at least 45 days before adoption or amendment, for a determination of whether the element incorporates known seismic and other geologic hazard information. If the Division's findings are available within 30 days of receipt of the draft, the city must consider those findings before adopting the element. Govt C §65302.5.
- State Board of Forestry and Fire Protection, and to every local agency providing fire protection to the jurisdiction, at least 90 days before adoption or amendment, for recommendations on policies that will protect life, property, and natural resources from unreasonable fire risks, and methods and strategies for wildfire risk reduction and prevention. If the Board's and/or local agency's findings are available within 60 days of receipt of the draft, the city or county must consider those recommendations, and if the city or county decides not to accept the recommendations, it must communicate its reasons for not doing so to the Board or local agency. (Note that this requirement applies only to cities within very high fire hazard severity zones, and within counties containing state responsibility areas.) Govt C §65302.5.

© The Regents of the University of California

C. Administration

§10.67 1. Annual Report

After the general plan has been adopted, the city planning agency must (Govt C §65400):

- investigate and make recommendations to the city council regarding means for implementing the general plan; and
- provide an annual report, by April 1 of each year, to the legislative body, the Office of Planning and Research (OPR), and the Department of Housing and Community Development (HCD) on the status of the plan and progress in its implementation, including the city's progress in meeting its share of regional housing needs and the progress of local efforts to remove governmental constraints to the maintenance, improvement, and development of housing.

The report should also address the degree to which the general plan complies with OPR Guidelines. The statute also states that the housing portion of the annual report must be prepared through the use of forms and definitions adopted by the HCD. Govt C §65400(a). If a court, on motion, finds that a planning agency did not submit a substantially compliant housing element portion of that report within 60 days of the April 1 deadline, it may compel compliance within 60 days, and retain jurisdiction and issue further orders to ensure that applicable report requirements are met. This authority applies to proceedings initiated after October 1 following the HCD's adoption of forms and definitions per Govt C §65400(a)(2). Govt C §65400(b).

© The Regents of the University of California

§10.68 2. Consistency Requirements for Land Use Decisions

The mere adoption or amendment of a general plan, without any other project approval, does not require findings. As a legislative act, general plans are presumed valid without supporting findings. *Federation of Hillside & Canyon Ass'ns v City of Los Angeles* (2004) 126 CA4th 1180, 24 CR3d 543. But many land use decisions require a finding that the action is consistent with the general plan, such as the following:

- subdivision map approvals (Govt C §§66473.5, 66474);
- specific plan or other development plan and amendments thereto (Govt C §§65359, 65454);
- development agreements (Govt C §65867.5);
- public works projects, acquisition or disposition of public property, and construction of public buildings (Govt C §§65401-65402);
- capital improvement programs by joint powers agencies (Govt C §65403);
- redevelopment projects (Health & S C §§33331, 33367); and
- housing authority projects (Health & S C §34326).

See also *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 998, 165 CR 514 (observing that city must make general plan consistency finding for "approval of a proposed subdivision, construction of public improvements, and private sale of subdivided lots").

A project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. Perfect conformity is not required, but the project must be compatible with the general plan's objectives and policies. A project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear. Although the courts have articulated various standards of review of a local agency's determination that a project is consistent with the general plan, those standards all have in common the affording of great deference to the lead agency's determination. Nevertheless, the lead agency's consistency finding still must be supported by evidence. *Endangered Habitats League, Inc. v County of Orange* (2005) 131 CA4th 777, 32 CR3d 177.

© The Regents of the University of California

§10.69 3. Requirements Imposed on Other Agencies

Special districts, school districts, and joint powers agencies that construct or maintain public facilities must submit any capital improvement programs to the city planning agency for review as to conformity with the general plan. Govt C §65403. The planning agency then has 40 days to submit comments regarding general plan consistency, or the program will be deemed consistent. Govt C §65403.

© The Regents of the University of California

§10.70 D. Adoption Procedures and Hearing Requirements

State law prescribes the procedure by which a city's general plan is adopted. Govt C §§65350-65362. The legislative body of a newly incorporated city must adopt a general plan within 30 months following incorporation. Govt C §65360.

Before the city adopts the general plan, the proposal must be referred to the public agencies specified in Govt C §65352. These include school districts, which have the right to request a meeting with the planning agency within 15 days following notification to discuss plans for new schools. Govt C §65352.2. In addition, cities and counties must consult with certain California Native American Tribes. Govt C §§65352(a)(9), 65352.3. The city must also consult with water supply agencies, which have 45 days to provide comments on a draft general plan to the planning agency, and which must furnish the city with a series of information about the water supply. Govt C §§65352(a)(6), 65352.5. Proposed actions within the Sacramento and San Joaquin Drainage District must be referred to the Central Valley Flood Protection Board. Govt C §65352(a)(10); Wat C §8501.

The requirements of the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) must also be addressed before the general plan is adopted. 14 Cal Code Regs §15378(a)(1); *City of Santa Ana v City of Garden Grove* (1979) 100 CA3d 521, 160 CR 907.

© The Regents of the University of California

§10.71 1. Additional Requirements for Certain Changes to Land Use Element

Additional requirements apply to environmental impact reports for the amendment or revision of a land use element for certain specified development projects resulting in an increased water demand. See Wat C §§10910-10915.

© The Regents of the University of California

§10.72 2. Additional Requirements for Housing Element

Additional requirements apply to the adoption or amendment of the general plan's housing element. See Govt C §65585. See also §§10.26-10.53.

© The Regents of the University of California

§10.73 E. Initiative/Referendum

The adoption or amendment of a general plan is a legislative act and subject to referendum (*Yost v Thomas* (1984) 36 C3d 561, 570, 205 CR 801) and initiative (*DeVita v County of Napa* (1995) 9 C4th 763, 38 CR2d 699). A court will overturn the electorate's approval of a referendum only if it finds the voters' decision arbitrary or capricious. *Chandis Sec. Co. v City of Dana Point* (1996) 52 CA4th 475, 482, 60 CR2d 481.

© The Regents of the University of California

§10.74 F. Extensions

Any city may apply to the director of the Office of Planning and Research (OPR) for an extension of time to adopt a new general plan, or to adopt a part of a general plan to replace an element that may have been legally inadequate. Govt C §65361.

© The Regents of the University of California

§10.75 1. Relief From General Plan Requirements

During the extension period, the city is not required to have a complete and adequate general plan or make decisions consistent with the portions of general plan for which an extension is sought. An extension allows a city to approve development projects while inadequacies in the general plan are being corrected, subject to the conditions imposed by the Office of Planning and Research (OPR) and consistent with any element or elements that have been adopted and for which an extension has not been sought. Govt C §65361(e).

© The Regents of the University of California

§10.76 2. Attack Under Previous General Plan

An extension does not retroactively immunize a project from attacks based on the general plan in effect at the time of project approval. See *Resource Defense Fund v County of Santa Cruz* (1982) 133 CA3d 800, 812, 184 CR 371.

© The Regents of the University of California

§10.77 3. Consistency With Housing Element

Projects approved during the extension period must be consistent with the housing element and may be challenged if the housing element is inadequate. Except for new cities, extensions may not be granted for the housing element. Govt C §§65361(b), 65587(a).

© The Regents of the University of California

§10.78 4. Conditions

The extension can prevent a court-ordered city-wide moratorium on project approvals resulting from a legal challenge to some individual approval. However, the state may attach conditions to the extension that might restrict the city's ability to approve development during the extension period. Govt C §65361(d).

© The Regents of the University of California

§10.79 5. Consistency With Draft General Plan

As a condition of the extension, the Office of Planning and Research (OPR) may require that new development applications be evaluated under a draft general plan. *Harroman Co. v Town of Tiburon* (1991) 235 CA3d 388, 396, 1 CR2d 72.

© The Regents of the University of California

§10.80 G. Amendments and Updates

The procedure for amending a general plan is the same as that for its initial adoption. Govt C §65350.

No mandatory element of a general plan may be amended more frequently than four times during any calendar year. Govt C §65358(b). This limit does not apply to charter cities. Govt C §65700(a). This limitation also does not apply to amendments to allow an affordable housing project when at least 25 percent of the project is for low-or moderate-income housing, to comply with a court order, to ensure consistency with airport land use plans, or to assure consistency with local coastal programs. Govt C §65358(c)-(d).

Through its initiative power, the electorate may impose additional limitations on future amendments of a general plan. *DeVita v County of Napa* (1995) 9 C4th 763, 38 CR2d 699 (upholding initiative amendment to county general plan that made redesignation of existing agricultural land or open space essentially conditioned on voter approval for following 30 years). However, a legislative body may not contract away or otherwise divest itself of its authority to amend its general plan. 108 *Holdings, Ltd. v City of Rohnert Park* (2006) 136 CA4th 186, 194, 38 CR3d 589; *Alameda County Land Use Ass'n v City of Hayward* (1995) 38 CA4th 1716, 1724, 45 CR2d 752.

© The Regents of the University of California

§10.81 H. Limitations Period for General Plan Challenges

The adequacy of a provision in a general plan may be challenged only within 90 days of that provision's adoption. Govt C §65009(c). The internal consistency of a general plan may be challenged only if the alleged inconsistency is the result of an amendment or adoption within this 90-day "window of opportunity." *Garat v City of Riverside* (1991) 2 CA4th 259, 287, 3 CR2d 504, disapproved on other grounds in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804.

A plaintiff may not use a challenge to a particular land use permit as a vehicle for making an untimely collateral attack on the adequacy of the general plan itself. *A Local & Reg'l Monitor v City of Los Angeles* (1993) 16 CA4th 630, 648, 20 CR2d 228. But see *Kings County Farm Bureau v City of Hanford* (1990) 221 CA3d 692, 741, 270 CR 650 (reaching contrary holding, but with no supporting analysis).

This limitations period only applies to general plan provisions enacted after the January 1, 1984, effective date of Govt C §65009. Govt C §65009(h). Cases involving challenges to general plan provisions adopted before this effective date generally upheld such challenges at any time. See, *e.g., Neighborhood Action Group v County of Calaveras* (1984) 156 CA3d 1176, 1184, 203 CR 401.

© The Regents of the University of California

§10.82 I. Avoiding a Taking Challenge

Some general plans contain a provision to the effect that the general plan does not apply to the extent that the constitution would be violated. The inclusion of such language may actually help avoid a facial taking challenge. *San Mateo County Coastal Landowners' Ass'n v County of San Mateo* (1995) 38 CA4th 523, 547, 45 CR2d 117. A similar approach is to allow property owners to apply for a "variance" from the general plan. See *Napa Citizens for Honest Gov't v Napa County Bd. of Supervisors* (2001) 91 CA4th 342, 110 CR2d 579. For a more detailed discussion of unconstitutional takings, see §10.210.

© The Regents of the University of California

§10.83 J. Specific Plans

After adopting a general plan, a city may also adopt one or more specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan. Govt C §65450. A specific plan must contain certain specified detail relating to land uses, major infrastructure, development and conservation standards, and an implementation program. Govt C §65451. A specific plan is prepared, adopted, and amended in the same manner as a general plan. Govt C §65453.

A specific plan must be consistent with the applicable general plan. Govt C §65454. See *Mitchell v County of Orange* (1985) 165 CA3d 1185, 1191, 211 CR 563. To be consistent with the general plan, a specific plan need not comply with all general plan goals and policies, provided that it furthers them and does not obstruct their attainment. *Endangered Habitats League, Inc. v County of Orange* (2005) 131 CA4th 777, 32 CR3d 177. Projects, too, must be consistent with the specific plan. A project is consistent with the specific plan if, in all its aspects, it will further the objectives of the plan and not obstruct its attainment. *Sierra Club v Napa County (Beringer Wine Estates)* (2004) 121 CA4th 1490, 19 CR3d 1.

Special requirements regarding analysis of water supplies apply to specific plans for certain specified development projects. See Wat C §§10910-10915. Challenges to specific plans are subject to a 90-day limitations period. Govt C §65009(c)(1). As with general plans, specific plans are subject to referendum. *Chandis Sec. Co. v City of Dana Point* (1996) 52 CA4th 475, 481, 60 CR2d 481.

© The Regents of the University of California

§10.84 III. ZONING

"Zoning is a separation of the municipality into districts, and the regulation of buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land." *O'Loane v O'Rourke* (1965) 231 CA2d 774, 780, 42 CR 283. See also *Miller v Board of Pub. Works* (1925) 195 C 477, 234 P 381.

For extensive discussion of zoning, see Longtin's California Land Use (2d ed 1987) (distributed by Local Government Publications, P.O. Box 2596, Walnut Creek, California 94595); 3 Manaster & Selmi, California Environmental Law and Land Use Practice §20 (Matthew Bender, rev ed 1992); Curtin &. Talbert, Curtin's California Land Use and Planning Law (published annually by Solano Press, P.O Box 773, Point Arena, California 95468); California Land Use Practice (Cal CEB 2006).

© The Regents of the University of California

§10.85 A. Authority

Comprehensive zoning regulations lie within the police power of local governments. See *Village of Euclid v Ambler Realty Co.* (1926) 272 US 365, 388, 71 L Ed 303, 47 S Ct 114. Cities do not have the authority to approve projects that are prohibited by their own zoning ordinance. *Ailanto Props., Inc. v City of Half Moon Bay* (2006) 142 CA4th 572, 48 CR3d 340.

© The Regents of the University of California

§10.86 B. Statutory Restrictions

There are certain statutory restrictions against the exercise of local zoning powers in a discriminatory manner. See generally Govt C §65008; *St. Vincent's Sch. for Boys v City of San Rafael* (2008) 161 CA4th 989, 1001, 75 CR3d 213. For further discussion, see §10.443.

© The Regents of the University of California

C. Zoning Ordinances

1. General Plan Consistency

§10.87 a. General Law Cities

The zoning ordinance of a general law city must be consistent with its general plan. Govt C §65860; *Hawkins v County of Marin* (1976) 54 CA3d 586, 593, 126 CR 754. See also Govt C §65860(a) (defining consistency).

© The Regents of the University of California

§10.88 b. Charter Cities With Populations Greater Than Two Million

All ordinances enacted by a charter city having a population of at least two million must be consistent with its general plan. Govt C §65860(d); *City of Los Angeles v State* (1982) 138 CA3d 526, 532, 187 CR 893. See *Garat v City of Riverside* (1991) 2 CA4th 259, 281, 3 CR2d 504, disapproved on other grounds in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804.

© The Regents of the University of California

§10.89 c. Other Charter Cities

However, even in the case of a charter city not subject to the consistency doctrine, a zoning ordinance's inconsistency with the adopted general plan gives rise to a presumption that the zoning ordinance does not reasonably relate to the community's general welfare and therefore constitutes an abuse of the city's police power. *City of Del Mar v City of San Diego* (1982) 133 CA3d 401, 414, 183 CR 898. See also *Mira Dev. Corp. v City of San Diego* (1988) 205 CA3d 1201, 252 CR 825. Further, a city, by its own charter, general plan, ordinances, or other regulations, may require consistency. *City of Irvine v Irvine Citizens Against Overdevelopment* (1994) 25 CA4th 868, 30 CR2d 797.

© The Regents of the University of California

§10.90 d. Judicial Review

A city council finding that a project is consistent with the city's general plan will be reversed by a court only if, based on the evidence in the record before the city council, no reasonable person could have reached the same conclusion. *No Oil, Inc. v City of Los Angeles* (1987) 196 CA3d 223, 242 CR 37; *Save Our Peninsula Comm. v Monterey County Bd. of Supervisors (September Ranch Partners)* (2001) 87 CA4th 99, 104 CR2d 326.

© The Regents of the University of California

2. Procedures for Adoption and Amendment

§10.91 a. Legislative Acts

The adoption and amendment of zoning ordinances are legislative acts, rather than administrative or quasi-judicial acts. *Arnel Dev. Co. v City of Costa Mesa* (1980) 28 C3d 511, 169 CR 904.

© The Regents of the University of California

§10.92 b. Urgency Measures

State law permits a city to adopt an interim ordinance that prohibits otherwise permitted uses when those uses conflict with a land use proposal (*e.g.,* general plan, specific plan, or zoning amendments) that the city is considering, studying, or intending to study within a reasonable time. Govt C §65858. Such a measure

- requires a four-fifths vote of the city council;
- must contain a finding that there is a current and immediate threat to the public health, safety, or welfare; and
- may be adopted without following the notice and adoption procedures required for other ordinances.

The measure has an initial duration of 45 days and may be extended as specified in the statute. The provisions of Govt C §65858 regulate land use and do not allow cities to adopt an interim ordinance that takes the extra step of prohibiting the processing of land use applications. *Building Indus. Legal Defense Found. v Superior Court* (1999) 72 CA4th 1410, 85 CR2d 828.

© The Regents of the University of California

§10.93 c. Urgency Measures in Coastal Zone

An ordinance enacted under the authority of Govt C §65858 that affects property within the coastal zone need not be certified by the Coastal Commission if it does not change the permitted use of the property. *Conway v City of Imperial Beach* (1997) 52 CA4th 78, 60 CR2d 402.

© The Regents of the University of California

§10.94 3. Notice and Hearing Requirements

Generally, the constitutional due process requirements of "notice and hearing" do not apply to legislation. However, state law requires notice and hearing for zoning enactments by counties and general law cities. See Govt C §§65854, 65856. All zoning authorities, including charter cities, are subject to minimum due process standards in conducting zoning hearings. See Govt C §65804.

© The Regents of the University of California

4. Legislative Acts

§10.95 a. Findings Not Generally Required

Findings are not required for legislative acts unless a statute requires them. *Mountain Defense League v Board of Supervisors* (1977) 65 CA3d 723, 135 CR 588. For example, findings are not required on rezoning ordinances because they are legislative in character. *Ensign Bickford Realty Corp. v City Council* (1977) 68 CA3d 467, 137 CR 304. Similarly, findings are not required in connection with the approval or denial of a development agreement, which is considered to be a legislative act. *Santa Margarita Area Residents Together v San Luis Obispo County Bd. of Supervisors (2000) 84 CA4th 221, 100 CR2d 740.*

© *The Regents of the University of California*

§10.96 b. When Findings Required

State law mandates findings for legislative acts under the following circumstances:

- When a general plan limits the number of newly constructed housing units (see Govt C §65302.8);
- When a local ordinance limits the number of newly constructed housing units (see Govt C §65863.6); and
- When a very low, low- and/or moderate-income housing project is disapproved, including through the use of design review standards (see Govt C §65589.5).

© The Regents of the University of California

§10.97 5. Typical Provisions

Zoning ordinances typically do the following:

- Divide a city into various land use designations;
- List permitted uses within those designations;
- Provide for conditional and accessory uses;
- Establish development standards such as building height, setbacks, lot coverage, parking, signage, and landscaping; and
- Provide for administrative procedures for variances, conditional use permits, design review, and zone changes or text amendments.

© The Regents of the University of California

§10.98 6. Limitations of Challenges

The adoption or amendment of a zoning ordinance may only be challenged in court within 90 days of the adoption or amendment. Govt C §65009(c)(1).

© The Regents of the University of California

§10.99 D. Use Permits

Typically, following a list of uses permitted in each zoning district, a local zoning ordinance will provide for other uses that are not permitted as a matter of right, but for which a conditional use permit must be obtained. These permits are a necessary and appropriate zoning flexibility device. *Groch v City of Berkeley* (1981) 118 CA3d 518, 173 CR 534; *Upton v Gray* (1969) 269 CA2d 352, 74 CR 783.

© The Regents of the University of California

1. Procedures for Issuance

§10.100 a. Quasi-Judicial Action

The consideration of a conditional use permit (CUP) is an administrative, quasi-judicial matter, not a legislative matter. *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 517, 113 CR 836. For that reason, the granting or denial of a conditional use permit is not a proper subject for a ballot measure. *Save Our Sunol, Inc. v Mission Valley Rock Co.* (2004) 124 CA4th 276, 21 CR3d 171.

© The Regents of the University of California

§10.101 b. Decision-Maker

Applications for conditional use or other permits are usually heard by either a board of zoning adjustment or zoning administrator. If the city has not established a board of zoning adjustment or office of zoning administrator, the planning commission will exercise all of the duties and functions of such a board or administrator. Govt C §§65900-65902.

© The Regents of the University of California

§10.102 c. Appeals

Cities are also authorized to create and establish a board of appeals to hear and determine appeals from the decisions of the board of zoning adjustment or the zoning administrator. Govt C §§65900, 65903. Typically such appeals are heard by a city's planning commission. Govt C §65904.

© The Regents of the University of California

2. Due Process Requirements

§10.103 a. Notice and Hearing

Due process requires notice and opportunity to be heard for administrative proceedings, including those dealing with conditional use permits (CUPs). Govt C §65905(a). See *Fuchs v County of Los Angeles Civil Serv. Comm'n* (1973) 34 CA3d 709, 110 CR 311.

© The Regents of the University of California

§10.104 b. Findings and Decision

The local administrative agency must issue written findings in support of its decision on the conditional use permit (CUP). These findings must enable the parties to determine whether and on what basis they should seek review of the agency's decision; findings also apprise a reviewing court of the basis for the agency's action. The record must contain substantial evidence to support the findings and the findings must in turn support the decision. *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 514, 113 CR 836. A use permit may be denied, however, if substantial evidence supports any reason to deny the permit. *Saad v City of Berkeley* (1994) 24 CA4th 1206, 30 CR2d 95.

© The Regents of the University of California

3. Standards for Issuance and Denial

§10.105 a. Criteria Required

The zoning ordinance must establish criteria or standards for conditional use permits. Govt C §65901.

© The Regents of the University of California

§10.106 b. General Welfare

The "general welfare" standard for granting or denying a CUP is sufficient. *Hawkins v County of Marin* (1976) 54 CA3d 586, 126 CR 754.

© The Regents of the University of California

§10.107 c. Nuisance Standard

The general welfare standard is sometimes imposed in the negative form, *i.e.,* the permit will not be issued if the proposed use would create noise, dust, odors, or other undesirable characteristics. See *Harris v City of Costa Mesa* (1994) 25 CA4th 963, 31 CR2d 1; *Snow v City of Garden Grove* (1961) 188 CA2d 496, 498, 10 CR 480.

© The Regents of the University of California

§10.108 d. Different Standards for Renewals

Denial of an application to renew an already-issued use permit receives a higher standard of judicial review than a denial of an application for a new use permit. *Goat Hill Tavern v City of Costa Mesa* (1992) 6 CA4th 1519, 8 CR2d 385. Similarly, a higher standard of judicial review applies to an application for a new use permit if the use itself is already in existence, as opposed to a use not yet in existence. *Cadiz Land Co. v Rail Cycle, L.P.* (2000) 83 CA4th 74, 99 CR2d 378.

© The Regents of the University of California

4. Rights Granted

§10.109 a. Nature of Conditions

The conditional use permit is subject to such conditions as are imposed by the city. However, the city may not condition the issuance of the permit on either (Govt C §65909):

- The dedication of land for any purpose not reasonably related to the use of the property for which the use permit is requested; or
- The posting of a bond to guarantee the installation of public improvements not reasonably related to the use of the property for which the use permit is requested.

For further discussion of limitations on requiring dedication of land and monetary exactions, see §§10.217-10.229.

© The Regents of the University of California

§10.110 b. Runs With Land

Use permits run with the land, and the city cannot condition a use permit on its non-transferability. *County of Imperial v McDougal* (1977) 19 C3d 505, 138 CR 472; *Anza Parking Corp. v City of Burlingame* (1987) 195 CA3d 855, 241 CR 175. The conditions, however, need not strictly relate to the use of land. In *Vo v City of Garden Grove* (2004) 115 CA4th 425, 9 CR3d 257, the court upheld use permit conditions that required that a certain number of adult employees and security guards be present on the business premises during certain hours.

© The Regents of the University of California

§10.111 5. Revocations/Terminations

A conditional use permit (CUP) cannot be revoked or terminated without notice and a hearing, notwithstanding a condition that purports to allow automatic termination of the permit. *Community Dev. Comm'n v City of Fort Bragg* (1988) 204 CA3d 1124, 251 CR 709. See also *Goat Hill Tavern v City of Costa Mesa* (1992) 6 CA4th 1519, 8 CR2d 385 (refusal to renew CUP subjected to independent judgment test). Additional or modified conditions may be placed on a CUP if the grounds justifying the new or modified conditions would justify revocation. *Garvatti v Fairfax Planning Comm'n* (1971) 22 CA3d 145, 99 CR 260. The finding that the continued use of an activity under a CUP constitutes a nuisance is required to revoke the permit. See *O'Hagen v Board of Zoning Adjustment* (1971) 19 CA3d 151, 96 CR 484. But see *Board of Police Comm'rs v Superior Court* (1985) 168 CA3d 420, 214 CR 493 (suggesting that revocation of use permit involving First Amendment activity would be subject to strict scrutiny standard). The denial, revocation, or suspension of a permit that involves expressive conduct is subject to an expedited judicial review. CCP §1094.8.

© The Regents of the University of California

§10.112 6. Other Remedies for Noncompliance

Multiple violations of conditional use permit (CUP) conditions may subject the violator to liability for "unfair business practices" under Bus & P C §17200. See *Hewlett v Squaw Valley Ski Corp.* (1997) 54 CA4th 499, 63 CR2d 118. But see *United Farm Workers v Dutra Farms* (2000) 83 CA4th 1146, 100 CR2d 251 (explaining that unfair business practice does not need to encompass more than single act under amended Bus & P C §17200).

© The Regents of the University of California

E. Variances

§10.113 1. Purpose

A variance is issued to allow a property owner to deviate from development standards otherwise applicable to the property. A variance is issued when the owner would otherwise suffer unique hardship under the general zoning regulations because its particular parcel is different from other parcels to which the regulations apply. However, the difference from the parcels need not be a physical difference. *Craik v County of Santa Cruz (Odenweller)* (2000) 81 CA4th 880, 96 CR2d 538. Use variances (variances to permit uses not otherwise permitted in a zone) are prohibited. Govt C §65906.

© The Regents of the University of California

2. Procedures

§10.114 a. Standards

Variances may be granted only when the strict application of the zoning ordinance would deprive a property owner of privileges enjoyed by other property owners in the vicinity under the same zoning classification because of special circumstances applicable to the property including size, shape, topography, location, or surroundings. Govt C §65906.

© The Regents of the University of California

§10.115 b. Local Ordinances

Except for charter cities, the criteria in Govt C §65906 prevail over any inconsistent local provisions. A variance can be sustained only if all applicable requirements are met. *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 113 CR 836.

© The Regents of the University of California

§10.116 c. Parking Variances

Under statutorily prescribed circumstances, the parking requirements of a local zoning ordinance may be relaxed by variance to allow some parking spaces to be located off-site or to allow payment of in lieu fees or facilities. Govt C §65906.5.

© The Regents of the University of California

§10.117 d. Findings

A decision to grant or deny a variance is a quasi-judicial act. Accordingly, such decisions must be accompanied by findings (supported by substantial evidence in the record) that are sufficiently detailed to "bridge the analytical gap" between raw evidence and the ultimate decision. *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 113 CR 836; *Craik v County of Santa Cruz (Odenweller)* (2000) 81 CA4th 880, 96 CR2d 538.

© The Regents of the University of California

§10.118 3. Notice and Hearing Requirements

Generally, a noticed public hearing must be held on any application for a variance from the requirements of a local zoning ordinance. Govt C §65905. State law prescribes the acceptable methods of providing notice for a hearing on a variance application. Govt C §§65091, 65905(b).

© The Regents of the University of California

4. Rights Granted

§10.119 a. Runs With Land

A variance from the zoning ordinance, like a conditional use permit (CUP), runs with the land. *County of Imperial v McDougal* (1977) 19 C3d 505, 138 CR 472.

© The Regents of the University of California

§10.120 b. No Special Privileges

A variance cannot constitute a grant of special privileges inconsistent with the limitations on other properties in the vicinity and zone. Govt C §65906; *Orinda Ass'n v Board of Supervisors* (1986) 182 CA3d 1145, 227 CR 688.

© The Regents of the University of California

§10.121 F. Nonconforming Uses and Structures

Generally, a zoning ordinance may not constitutionally operate to compel immediate discontinuance of an otherwise lawfully established use or business, unless that use or business constitutes a public nuisance. *City of Bakersfield v Miller* (1966) 64 C2d 93, 48 CR 889, cert denied (1966) 384 US 988; *Livingston Rock & Gravel Co. v County of Los Angeles* (1954) 43 C2d 121, 272 P2d 4. A legal nonconforming use is one that was valid when brought into existence, but became nonconforming by subsequent regulation. *City of Los Angeles v Gage* (1954) 127 CA2d 442, 453, 274 P2d 34.

© The Regents of the University of California

§10.122 1. Elimination

A city may provide for a period of time to eliminate nonconforming uses, provided the owner is given a reasonable opportunity to recoup his or her investment. *National Adver. Co. v County of Monterey* (1970) 1 C3d 875, 880, 83 CR 577, cert denied (1970) 398 US 946.

© The Regents of the University of California

§10.123 2. Expansion

The expansion or enlargement of a nonconforming use is generally prohibited. *County of San Diego v McClurken* (1951) 37 C2d 683, 686, 234 P2d 972; *Manhattan Sepulveda, Ltd. v City of Manhattan Beach* (1994) 22 CA4th 865, 27 CR2d 565 (defining "value" for purposes of rebuilding nonconforming building).

© The Regents of the University of California

§10.124 G. Vested Rights

As a general rule, a developer must comply with the law in effect at the time a building permit is issued. *Hazon-Iny Dev., Inc. v City of Santa Monica* (1982) 128 CA3d 1, 179 CR 860. However, under certain circumstances, a property owner can obtain a vested right to use or develop the property in accordance with the regulations applicable at the time the right vests despite subsequent changes in the zoning or other regulations. Nonetheless, even vested rights may be impaired if the new regulations imposed are sufficiently necessary to the public welfare to justify the impairment. *Davidson v County of San Diego* (1996) 49 CA4th 639, 56 CR2d 617.

© The Regents of the University of California

§10.125 1. Common Law

A property owner who has obtained a building permit, completed substantial work, and incurred substantial liabilities in reliance on that permit obtains a vested right to finish the project within the scope of the permit notwithstanding changes in the applicable land use regulations. *Avco Community Developers, Inc. v South Coast Reg'l Comm'n* (1976) 17 C3d 785, 793, 132 CR 386, cert denied (1977) 429 US 1083. Soft costs incurred by a developer do not constitute "detrimental reliance" for purposes of determining whether a right to develop has vested. *Hermosa Beach Stop Oil Coalition v City of Hermosa Beach (Windward Assocs.)* (2001) 86 CA4th 534, 103 CR2d 447.

© The Regents of the University of California

§10.126 2. Vesting Tentative Maps

If the property owner obtains the approval of a vesting tentative map, the owner can proceed with development in substantial compliance with the ordinances, policies, and standards in place at the time the application for the map was complete. Govt C §66498.1(b); *Kaufman & Broad Cent. Valley, Inc. v City of Modesto* (1994) 25 CA4th 1577, 30 CR2d 904.

© The Regents of the University of California

§10.127 3. Development Agreements

The property owner may also enter into a development agreement with the local government, in which the property owner and local government agree to "freeze" applicable rules, regulations, and policies (including zoning) that are in place at the time of the execution of the agreement. Govt C §65866; *Santa Margarita Area Residents Together v San Luis Obispo County Bd. of Supervisors* (2000) 84 CA4th 221, 100 CR2d 740 (upholding development agreement generally as valid exercise of police power). Development agreements cannot be used to establish land uses not authorized by the zoning ordinance applicable to the property. *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 68 CR3d 882. The conditions of a vesting tentative map may state that in the event of a conflict, a development agreement will control. *Building Indus. Ass'n of Central Cal. v City of Patterson* (2009) 171 CA4th 886, 90 CR3d 63, cert denied (2009) ___ US ___, 175 L Ed 2d 480, 130 S Ct 660. See *Stephens v City of Vista* (9th Cir 1993) 994 F2d 650 (finding no problem in enforcing settlement agreement in which city agreed to certain land use density). See also *Native Sun/Lyon Communities v City of Escondido* (1993) 15 CA4th 892, 19 CR2d 344 (because development agreement is legislative act, no findings are required to deny).

The adoption or amendment of a development agreement may only be challenged in court within 90 days of the adoption or amendment. Govt C §65009(c)(1)(D). A developer does not acquire a vested right merely by entering into a lease with a city to develop city property. *Hermosa Beach Stop Oil Coalition v City of Hermosa Beach (Windward Assocs.)* (2001) 86 CA4th 534, 103 CR2d 447.

© The Regents of the University of California

§10.128 H. Conditional Zoning

A city or county can condition a zoning action by requiring a landowner to first enter into a contract agreeing to perform conditions not imposed on other landowners. This is sometimes known as "contract zoning." However, the city cannot provide that the land will automatically revert to its former zoning should the landowner fail to perform the condition. A change in zoning can only occur by formal act of the legislative body in accordance with statutory procedures, and may not be triggered by action (or inaction) of a private party. See *Scrutton v County of Sacramento* (1969) 275 CA2d 412, 79 CR 872. Similarly, a settlement agreement may not prohibit a city from amending the zoning ordinance in the future without a public hearing. *Trancas Prop. Owners Ass'n v City of Malibu* (2006) 138 CA4th 172, 41 CR3d 200.

© The Regents of the University of California

I. Special Issues

§10.129 1. Historic Preservation

Cities have the power to protect property of historical and aesthetic interest. *Penn Cent. Transp. Co. v City of New York* (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646. These regulations may include appropriate and reasonable control of the appearance of neighboring private property within public view. Govt C §§25373, 37361. See also *Bohannan v City of San Diego* (1973) 30 CA3d 416, 106 CR 333.

© The Regents of the University of California

§10.130 2. View Protection

Without an easement, property owners have no inherent right to prevent other property owners from obstructing their view. *Mira Mar Mobile Community v City of Oceanside* (2004) 119 CA4th 477, 14 CR3d 308. View protection ordinances, however, are legitimate exercises of the local government police power. *Guinnane v San Francisco City Planning Comm'n* (1989) 209 CA3d 732, 257 CR 742, cert denied (1989) 493 US 936; *Ross v City of Rolling Hills Estates* (1987) 192 CA3d 370, 238 CR 561. View protection ordinances may accomplish their means by prohibiting residents from maintaining trees above a certain height. *Echevarrieta v City of Rancho Palos Verdes* (2001) 86 CA4th 472, 103 CR2d 165, cert denied (2001) 534 US 950.

© The Regents of the University of California

3. Adult Entertainment

§10.131 a. Method of Regulating

The primary method of zoning control of adult entertainment businesses is by controlling their location, either by spacing regulations or by confining them to a specific limited area. *Young v American Mini Theatres, Inc.* (1976) 427 US 50, 49 L Ed 2d 310, 96 S Ct 2440; *City of Nat'l City v Wiener* (1992) 3 C4th 832, 12 CR2d 701, cert denied (1993) 510 US 824. See also *City of Los Angeles v Alameda Books, Inc.* (2002) 535 US 425, 152 L Ed 2d 670, 122 S Ct 1728 (upholding ordinance prohibiting concentration of more than one adult business in single structure). Although cities may apply more restrictive variance standards to the secondary (such as nuisance) effects of adult businesses than non-adult businesses (*Isbell v City of San Diego* (9th Cir 2001) 258 F3d 1108), any such zoning regulation may not have the effect of totally banning adult-oriented businesses within the jurisdiction (*Topanga Press, Inc. v City of Los Angeles* (9th Cir 1993) 989 F2d 1524, cert denied (1994) 511 US 1030).

For further discussion of regulating adult businesses, see §§9.6-9.16. On First Amendment limitations on municipal authority, see §§1.58-1.64.

© The Regents of the University of California

§10.132 b. Regular and Substantial Course of Conduct

A single showing of an X-rated movie does not justify prosecution under an adult theater zoning ordinance. The zoning authority may limit the location of theaters that show, on a regular basis, films characterized by an emphasis on "specified sexual activities" or "specified anatomical areas." This is known as the "regular and substantial course of conduct" standard. *People v Superior Court (Lucero)* (1989) 49 C3d 14, 259 CR 740.

© The Regents of the University of California

4. Exercise of Religion

§10.133 a. Churches, Temples, and Other Houses of Worship

The First Amendment protects the free exercise of religion. US Const amend I. However, a city may exclude churches from residential districts, particularly when alternative sites are provided. *Minney v City of Azusa* (1958) 164 CA2d 12, 39, 330 P2d 255; *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v City of Porterville* (1949) 90 CA2d 656, 661, 203 P2d 823. A city may also enforce an ordinance governing historic preservation on churches and other houses of worship. *City of Boerne v Flores* (1997) 521 US 507, 138 L Ed 2d 624, 117 S Ct 2157. But see *East Bay Asian Local Dev. Corp. v State* (2000) 24 C4th 693, 102 CR2d 280, cert denied (2001) 532 US 1008 (religious organizations may exempt themselves from historic landmark preservation laws relating to noncommercial property).

On First Amendment limitations of municipal authority relating to religion, see §§1.60-1.64.

© The Regents of the University of California

§10.134 b. RLUIPA

In response to *City of Boerne v Flores* (1997) 521 US 507, 138 L Ed 2d 624, 117 S Ct 2157, which overturned the Religious Freedom Restoration Act of 1993 (42 USC §2000bb), Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) (42 USC §§2000cc—2000cc-5). RLUIPA prohibits land use regulations that impose a substantial burden on an exercise of religion unless the government shows that it used the least restrictive means of furthering a compelling government interest. A land use regulation imposes a substantial burden if it is burdensome or oppressive to a significantly great extent.

Under RLUIPA, government agencies may not impose a land use regulation in a manner that imposes a significant restriction or burden on any exercise of religion unless the government can demonstrate that the burden is (*San Jose Christian College v Morgan Hill* (9th Cir 2004) 360 F3d 1024)

- in furtherance of a compelling government interest, and
- the least restrictive means of furthering that compelling government interest.

In *Guru Nanak Sikh Soc'y v Sutter County* (9th Cir 2006) 456 F3d 978, the Ninth Circuit held that a county violated RLUIPA because it denied two successive applications for a conditional use permit (CUP) for a temple, when:

- The county's broad reasons for its two denials (noise and traffic) could easily apply to all future applications by the temple; and
- The temple agreed to the mitigation measures imposed by the county's planning department, but the county found this insufficient without explanation.

© The Regents of the University of California

§10.135 5. Hazardous Materials and Waste Management

Although toxic waste disposal and treatment are governed to a certain extent by state law, local regulation is not preempted as long as it does not altogether prohibit or unreasonably regulate toxic waste facilities. *Casmalia Resources, Ltd. v County of Santa Barbara* (1987) 195 CA3d 827, 240 CR 903.

For further discussion of hazardous waste, see §§11.237-11.255.

© The Regents of the University of California

§10.136 6. Schools and Community Colleges

California community colleges must comply with all applicable city and county zoning, building, and health regulations. Ed C §81951. School districts may exempt themselves from city or county zoning ordinances provided that certain criteria are met. See Govt C §53094; *City of Santa Cruz v Santa Cruz City Sch. Bd. of Educ.*(1989) 210 CA3d 1, 258 CR 101.

© The Regents of the University of California

§10.137 7. Flood Plains

As a proper exercise of their police power, cities may protect people and property from flooding by flood plain zoning restrictions. *Helix Land Co. v City of San Diego* (1978) 82 CA3d 932, 945, 147 CR 683; *Zisk v City of Roseville* (1976) 56 CA3d 41, 49, 127 CR 896; *Turner v County of Del Norte* (1972) 24 CA3d 311, 315, 101 CR 93.

The establishment of flood plain regulations within floodways is governed by the Cobey-Alquist Flood Plain Management Act (Wat C §§8400-8415).

© The Regents of the University of California

§10.138 8. Alcohol Sales

The Department of Alcoholic Beverage Control may not issue an alcoholic beverage retail license for any business located in a zone where the exercise of the rights conferred by that license would be contrary to a valid local zoning ordinance. Bus & P C §23790; *City of Oakland v Superior Court* (1996) 45 CA4th 740, 53 CR2d 120. A business predating the enactment of a zoning ordinance may continue in operation provided that certain conditions are met. *Boccato v City of Hermosa Beach* (1994) 29 CA4th 1797, 35 CR2d 282.

A city is not preempted from adopting an ordinance directed at the abatement of potential nuisance activity around businesses that sell alcoholic beverages, even though such regulations may prohibit the sale of alcohol at particular locations. *Korean Am. Legal Advocacy Found. v City of Los Angeles* (1994) 23 CA4th 376, 28 CR2d 530. The right to control and abate nuisance and criminal activities by ordinance applies to all alcoholic beverage establishments, including those in operation before an ordinance's effective date. *City of Oakland v Superior Court, supra*.

© The Regents of the University of California

§10.139 9. Telecommunications Act of 1996

The Telecommunications Act of 1996 (47 USC §§151-615b) changes the delivery of telecommunication services by allowing for competition among once exclusive providers of telephone, cable, broadcast, and print services. Providers now have a statutory duty to develop competition within their markets by installing network facilities for interconnection among other providers. 47 USC §§251, 259. The Act also includes provisions concerning cable programming service reforms, and regulations concerning direct satellite services. 47 USC §§303(y), 543.

Cities are preempted from enacting barriers to the development of interstate and intrastate telecommunications services. 47 USC §§253(a), 257. A provider must show "actual or effective prohibition, rather than the mere possibility of prohibition" to prevail on a claim under 47 USC §253(a). See *Sprint Telephony PCS, L.P. v County of San Diego* (9th Cir 2008) 543 F3d 571, 577, cert denied (2009) ___ US ___, 174 L Ed 2d 576, 129 S Ct 2860.

Despite this limitation, cities and local agencies retain control over right-of-way management. 47 USC §253(c). "Right-of-way management" is narrowly construed, and means control over the right-of-way itself, not control over companies with facilities in the right-of-way. *City of Auburn v Qwest Corp.* (9th Cir 2001) 260 F3d 1160, cert denied (2002) 534 US 1079, overruled on other grounds in *Sprint Telephony PCS, L.P. v County of San Diego* (9th Cir 2008) 543 F3d 571. In addition, cities and local agencies retain authority to regulate the placement, construction, and modification of wireless telecommunications facilities, subject to specified limitations. 47 USC §332(c)(7). In *Sprint PCS Assets, L.L.C. v City of Palos Verdes Estates* (9th Cir 2009) 583 F3d 716, the court held that a city can deny a cell tower permit for "adverse aesthetic impacts" under the Telecommunications Act as long as the city (1) makes this finding on the basis of "substantial evidence" in the administrative record, and (2) establishes that the denial will not constitute a prohibition on the provision of wireless services.

PRACTICE TIP: On November 18, 2009, the Federal Communications Commission (FCC) issued its decision entitled "In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance" (FCC 09-99, WT Docket No. 08-165) 24 FCC Rcd 13994, 2009 FCC Lexis 5977. The FCC held that a "reasonable period of time" for a state or local government to act on a personal wireless service facility siting application is presumptively 90 days for collocation applications and presumptively 150 days for siting applications other than collocations, and that the lack of a decision within these timeframes constitutes a "failure to act" based on which a service provider may commence an action in court under 47 USC §332(c)(7)(B)(v). The FCC also found that when a state or local government denies a personal wireless service facility siting application solely because that service is available from another provider, such a denial violates §332(c)(7)(B)(i)(II).

However, on January 14, 2010, a Petition for Review was filed on behalf of the City of Arlington, Texas, delaying the implementation of this declaratory ruling. See FCC order denying stay request (Release-Number: DA 10-212, 2010 FCC Lexis 619).

Although no court has determined whether the relevant provisions in 47 USC §253 or 47 USC §332 are ambiguous, the FCC generally has rulemaking authority to interpret ambiguous provisions of the Telecommunications Act. 47 USC §201(b); *Alliance for Community Media v FCC* (6th Cir 2008) 529 F3d 763, cert denied (2009) ___ US ___, 174 L Ed 2d 290, 129 S Ct 2821 (approving of FCC interpretation of ambiguous cable franchising provisions in Telecommunications Act).

For further discussion of telecommunications, see §§6.89-6.91.

© The Regents of the University of California

10. Agricultural Preservation (Williamson Act)

§10.140 a. Agricultural Preserves

Under the Williamson Act (Govt C §§51200-51297.4), any city or county may by resolution establish one or more agricultural preserves. Agricultural preserves must be at least 100 acres in area unless the city or county finds that smaller preserves are necessary due to unique characteristics of agricultural enterprises within the jurisdiction. Govt C §51230; *Kelsey v Cowell* (1973) 30 CA3d 590, 106 CR 420.

Agricultural preserves continue in effect after annexation, detachment, incorporation, or disincorporation. Govt C §51235.

The city or county must establish rules governing the administration of agricultural preserves, and may enumerate those land uses that are compatible and permitted on contracted lands and those that are compatible and permitted on noncontracted lands. Govt C §51231.

PRACTICE TIP: Williamson Act subvention payments to local governments were suspended for fiscal year 2009-2010 due to the ongoing state budget crisis. This means that counties administering Williamson Act contracts are no longer receiving money from the state to make up for the loss in revenue caused by land being subjected to Williamson Act contracts. Although subvention payments have been customary for many years, they have never been guaranteed. The Williamson Act contracts between landowners and local governments remain in force, however, regardless of the availability of subvention payments. See www.conservation.ca.gov/dlrp/lca/Pages/Index.aspx.

© The Regents of the University of California

§10.141 b. Contracts

Cities and counties may by contract limit the use of agricultural lands within agricultural preserves (in exchange for a reduction in property tax assessments) to those uses enumerated under the rules adopted pursuant to Govt C §51231. Govt C §§51240, 51242.

Williamson Act contracts are binding on all successors in interest including annexing jurisdictions. However, for land that was within one mile of a city boundary at the time of a contract's execution before January 1, 1991, the local agency formation commission (LAFCO) determines whether the city may exercise its option to not succeed to the rights, duties, and powers of the county under the contract. Govt C §51243.5.

Contracts must have an initial term of 10 years and be renewed automatically for an additional year on each annual anniversary date of the contract, unless notice of nonrenewal is given. Govt C §51244.

© The Regents of the University of California

§10.142 c. Nonrenewal

Either the landowner or the city or county may serve a written notice of nonrenewal of the contract on the other party. Such notice must be served by the landowner at least 90 days before the anniversary date of the contract and by the city or county at least 60 days before the anniversary date of the contract. Govt C §51245. On a notice of nonrenewal, the contract remains in effect for the remainder of its term. Govt C §51246.

© The Regents of the University of California

§10.143 d. Cancellation

A landowner may request cancellation of a Williamson Act contract. Govt C §51281. A city or county may grant cancellation if it makes a number of findings specified in the Williamson Act. See Govt C §51282. However, it is not necessary to make the findings that (*Friends of E. Willits Valley v County of Mendocino* (2002) 101 CA4th 191, 123 CR2d 708):

- An emergency existed;
- The property was contiguous to existing development;
- The property would not result in the removal of adjacent properties from agricultural use; or
- The cancellation is consistent with the general plan.

Cancellation findings must be based on substantial evidence within the whole record. Cancellation based on the "public interest" finding must demonstrate that the open space objectives protected by the act are substantially outweighed by other public concerns. *Sierra Club v City of Hayward* (1981) 28 C3d 840, 857, 171 CR 619.

The city or county assesses a fee for the cancellation (unless the council or board determines that it is in the public interest to defer or waive all or part of the fee) equal to 12.5 percent of the cancellation value of the land. Govt C §51283.

Cancellations must be made pursuant to public notice and hearing. Govt C §51284.

© The Regents of the University of California

§10.144 e. Public Improvements

Public improvements other than those listed in Govt C §51293 may not be located within an agricultural preserve unless the following findings are made (Govt C §§51292-51293):

- The location of the improvement is not based primarily on a consideration of the lower cost of acquiring land within an agricultural preserve; and
- If the land is subject to a Williamson Act contract, there is no other land within or outside the preserve on which it is feasible to locate the public improvement.

© The Regents of the University of California

§10.145 11. Signs

Local sign regulations must be consistent with the constitutionally protected First Amendment right to free speech. Although cities have more leeway to regulate commercial speech than noncommercial speech, commercial speech may not be favored over noncommercial speech. *Desert Outdoor Adver., Inc. v City of Moreno Valley* (9th Cir 1996) 103 F3d 814, cert denied (1997) 522 US 912. Consideration must also be given to the type of public forum at issue when analyzing sign regulations.

For further discussion of First Amendment limitations on municipal authority, see §§1.58-1.64.

© The Regents of the University of California

§10.146 12. "Big Box" Stores

Regulation of economic competition is not an improper limitation on competition even when the regulation can reasonably be viewed as a direct and intended effect of zoning ordinance or action, as long as (*Hernandez v City of Hanford* (2007) 41 C4th 279, 296, 59 CR3d 442):

- The primary purpose of the ordinance or action is not an impermissible private anticompetitive goal of protecting or disadvantaging a particular favored or disfavored business or individual; and
- The regulation is an advancement of a legitimate public purpose, reasonably relates to the general welfare of the municipality, and constitutes a legitimate exercise of the municipality's police power.

Hernandez disapproves *Wal-Mart Stores, Inc. v City of Turlock* (2006) 138 CA4th 273, 41 CR3d 420, which upheld a "big box" ordinance, to the extent that any language in *Wal-Mart* may be interpreted as inconsistent with *Hernandez*. *Hernandez,* 41 C4th at 297.

© The Regents of the University of California

§10.147 J. Site/Design Review

A city may impose a review process to determine whether the site and/or design plan is consistent with applicable general and specific plans. See *Selby Realty Co. v City of San Buenaventura* (1973) 10 C3d 110, 109 CR 799; *Novi v City of Pacifica* (1985) 169 CA3d 678, 215 CR 439; *Wesley Inv. Co. v County of Alameda* (1984) 151 CA3d 672, 198 CR 872. Depending on the language of the design review ordinance, cities might not have the authority to approve leases to particular retail tenants under the guise of design review, nor does the act of a property owner of entering into a lease trigger CEQA review under a design review ordinance. *Friends of Davis v City of Davis* (2000) 83 CA4th 1004, 100 CR2d 413.

© The Regents of the University of California

IV. SUBDIVISIONS

A. Basic Requirements

§10.148 1. Map Approval

A subdivision is any division of land for the purpose of sale, lease, or financing. Subdivisions are governed by the Subdivision Map Act (Govt C §§66410-66499.37). Generally, a subdivision requires a tentative map approved by the city and a final map (based on the qualified survey of the land) filed with the county recorder. The city regulates and controls the design and improvement of the subdivision. Govt C §66411.

On the Subdivision Map Act, see Longtin's California Land Use (2d ed 1987) (distributed by Local Government Publications, P.O. Box 2596, Walnut Creek, California 94595); Curtin, Subdivision Map Act Manual (published annually by Solano Press, P.O Box 773, Point Arena, California 95468); California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001).

© The Regents of the University of California

§10.149 2. Tentative, Final, and Parcel Maps

The Subdivision Map Act distinguishes between a subdivision consisting of five or more parcels, which requires a tentative and final map, and a subdivision consisting of only four or fewer parcels, which merely requires a parcel map. See Govt C §66426.

© The Regents of the University of California

§10.150 3. Vesting Tentative Maps

The tentative map may be a vesting tentative map, which if granted will confer a vested right to proceed with the development in accordance with the ordinances, policies, and standards in effect at the time the application for approval of the vesting tentative map is complete. Govt C §66498.1. See *Kaufman & Broad Cent. Valley, Inc. v City of Modesto* (1994) 25 CA4th 1577, 30 CR2d 904. But see *Building Indus. Ass'n of Central Cal. v City of Patterson* (2009) 171 CA4th 886, 90 CR3d 63, cert denied (2009) ___ US ___, 175 L Ed 2d 480, 130 S Ct 660 (conditions of vesting tentative map may state that in event of conflict between vesting tentative map and development agreement, development agreement will control); *Charles A. Pratt Constr. Co. v California Coastal Comm'n* (2008) 162 CA4th 1068, 1072, 76 CR3d 466, cert denied (2009) ___ US ___, 173 L Ed 2d 585, 129 S Ct 1317 (when Commission applies state law and policies to determine permit compliance with local coastal plan (LCP), vesting provisions of Govt C §66498.1 do not apply).

© The Regents of the University of California

§10.151 4. Lot Line Adjustments

The Subdivision Map Act requirements do not apply to lot line adjustments. A lot line adjustment is the adjustment of a lot line between four or fewer adjoining parcels and approval of a lot line adjustment is contingent on conformity with the local general plan, any applicable coastal plan, and building and zoning ordinances. Govt C §66412(d). The local agency must approve or disapprove a lot line adjustment under the Permit Streamlining Act (PSA) (Govt C §§65920-65964). Govt C §66412(d). In addition to the owners, all persons with interests in the parcels subject to the lot line adjustments must be notified of the proceedings. *Horn v County of Ventura* (1979) 24 C3d 605, 156 CR 718.

© The Regents of the University of California

B. Local Ordinances

§10.152 1. Local Flexibility

The Subdivision Map Act (Govt C §§66410-66499.37) allows a city flexibility in enacting local subdivision ordinances. But see *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 29 CR2d 804 (merger provisions of local zoning ordinance impliedly preempted by Subdivision Map Act).

© The Regents of the University of California

§10.153 2. Map Approval

Subdivision maps may be approved by a planning commission, departmental officer, committee of city officials, or the city council. The city determines who will be the advisory agency for purposes of the Subdivision Map Act. Govt C §66415.

© The Regents of the University of California

§10.154 3. Findings for Map Denial

Inasmuch as cities are required to ministerially approve a final map that is in substantial compliance with the tentative map, once a tentative map is approved, no further findings are required at the final map approval phase. *Anthony v Snyder (Barratt Am.)* (2004) 116 CA4th 643, 10 CR3d 505. But the disapproval of a final map must be accompanied by a specific finding. Govt C §66473; *Hill v City of Clovis* (2000) 80 CA4th 438, 94 CR2d 901. An advisory body must deny tentative map approval if it makes any of the following findings:

- The map is not consistent with applicable general and specific plans as specified in Govt C §65451 (Govt C §66474(a));
- The design or improvement of the proposed subdivision is not consistent with applicable general and specific plans (Govt C §66474(b));
- The site is not physically suitable for the proposed type of development (Govt C §66474(c));
- The site is not physically suitable for the proposed density of development (Govt C §66474(d));
- The design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat (Govt C §66474(e));
- The design of the subdivision or type of improvement is likely to cause serious public health problems (Govt C §66474(f));
- The design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of property within the proposed subdivision (Govt C §66474(g));
- The design of the subdivision does not provide for, to the extent feasible, future passive or natural heating and cooling opportunities (Govt C §66473.1); or
- The subdivision is within the Sacramento-San Joaquin Valley and is located within a flood hazard zone, under specified circumstances (Govt C §66474.5).

© The Regents of the University of California

§10.155 4. Automatic Approval

In instances in which the city fails to take action on a tentative map within the time limits specified in the Subdivision Map Act, the map is deemed to be approved, insofar as it complies with other Subdivision Map Act requirements and local ordinance. Govt C §66452.4. The Permit Streamlining Act (PSA) (Govt C §§65920-65964) has a similar "automatic approval" provision. Govt C §65956. See §§10.10-10.15. However, there can be no automatic approval of a map under the Subdivision Map Act until the city has noticed and conducted a public hearing. *Horn v County of Ventura* (1979) 24 C3d 605, 156 CR 718; Govt C §65956. If the notice is not timely given, the applicant may seek a writ to compel the notice or give the notice himself or herself. Govt C §65956.

© The Regents of the University of California

§10.156 5. Map Approval Conditions

The police power of a city permits the imposition of reasonable conditions on map approval. These proposed conditions must reflect the burden imposed by the proposed development. See Cal Const art XI, §7; *California Bldg. Indus. Ass'n v Governing Bd.* (1988) 206 CA3d 212, 253 CR 497. In addition, for proposed residential subdivisions of more than 500 units, a city must impose a condition requiring that a sufficient water supply be available to serve the proposed subdivision. Govt C §66473.7.

A city generally loses the authority to impose conditions on a subdivision after the tentative map is approved. Govt C §§66473, 66474.2; *Anthony v Snyder (Barratt Am.)* (2004) 116 CA4th 643, 10 CR3d 505; *Van't Rood v Santa Clara County* (2003) 113 CA4th 549, 6 CR3d 746.

© The Regents of the University of California

§10.157 6. Imposition of Fees and Dedications

Certain requirements may be imposed on subdivisions by local ordinance, such as:

- Parkland dedication or fees (Govt C §66477);
- School fees and dedications (Govt C §§66478, 53080, 65995);
- Reservations for public purposes (Govt C §§66479-66482); and
- Street dedications (Govt C §66475).

Further, a local ordinance may require fees and/or dedications for a wide variety of other conditions including, for example, bicycle paths, bridges, and groundwater recharge. See generally Govt C §§66475-66489. If a tentative map condition requires a developer to build off-site improvements, the developer's obligation to build the improvements is waived if the city refused to approve the developer's final map for the reason that the developer was unable to complete the improvements due to the city's failure to timely acquire the off-site property. Govt C §66462.5; *Hill v City of Clovis* (2000) 80 CA4th 438, 94 CR2d 901.

For related discussion, see §§10.211-10.230.

© The Regents of the University of California

§10.158 7. Limit on Conditions to Map Approval

A developer may not be required to fulfill more stringent standards and criteria for public improvement pursuant to the Subdivision Map Act than those standards and criteria being applied by the city at that time to its publicly financed improvements located in similarly zoned districts. Govt C §65913.2. Approval of a final map is a ministerial action. *Youngblood v Board of Supervisors* (1978) 22 C3d 644, 150 CR 242.

© The Regents of the University of California

§10.159 8. Time Extensions for Tentative Maps

Generally, a tentative map approval expires after 24 months or after any additional time as prescribed by ordinance (not to exceed an additional 12 months). Govt C §66452.6(a). However, other time periods may apply if the city requires certain improvements. See Govt C §66452.6(a). The period of time may be tolled under certain circumstances. Govt C §66452.6(b)-(c). The developer may apply for an extension of up to 6 years. Govt C §66463.5(c). The 6-year maximum life of a tentative map does not include the period during which a moratorium is in existence. This rule limits only the duration of the tolling period, not the moratorium itself. *Ailanto Props., Inc. v City of Half Moon Bay* (2006) 142 CA4th 572, 48 CR3d 340.

Other sections of the Government Code provide for additional extensions of time. See, *e.g.,* Govt C §66452.22 (if a map has not expired as of July 15, 2009, but will expire before January 1, 2012, the law extends the life of the map by 24 months, in addition to extensions authorized by Govt C §§66452.11, 66452.13, 66452.21, and 66463.5). See also *McPherson v City of Manhattan Beach* (2000) 78 CA4th 1252, 93 CR2d 725 (time for filing final map may be extended based on delay or inaction of local agency).

PRACTICE TIP: The legislature has frequently provided for tentative map extensions, so care should be taken to review pending and recently enacted legislation concerning map extensions.

PRACTICE TIP: When taken together, the tolling and extension provisions can substantially increase the life of a tentative map beyond the initial expiration period. See *California Country Club Homes Ass'n v City of Los Angeles* (1993) 18 CA4th 1425, 22 CR2d 917 (at time of the decision, the Subdivision Map Act authorized a maximum of 13 years based on mandatory extensions for phased final maps and up to 3 years of discretionary extensions). Note that development agreements may authorize additional extensions of time. Govt C §66452.6(a).

© The Regents of the University of California

§10.160 9. Antiquated Subdivisions

A few "grandfather" clauses create exceptions to the Subdivision Map Act for parcels that predate the Act. See Govt C §§66412.6-66412.7, 66451.10, 66499.30(d); CC §1093. Some property owners have asserted that legal parcels were created under these grandfather exceptions. See *Gardner v County of Sonoma* (2003) 29 C4th 990, 129 CR2d 869 (approving county's refusal to extend Govt C §66499.30(d) to cover subdivision map recorded in 1865); *Witt Home Ranch, Inc. v County of Sonoma* (2008) 165 CA4th 543, 81 CR3d 123 (holding that Subdivision Map Act's grandfather provisions do not validate subdivision maps approved under statute in effect through 1915).

© The Regents of the University of California

V. HOUSING

§10.161 A. Non-Discrimination

A city may not prohibit or discriminate against a residential development or emergency shelter for any of the following reasons (Govt C §65008):

- Because of the development's proposed method of financing; or
- Because of the race, sex, color, religion, national origin, ancestry, lawful occupation, marital status, sexual orientation, familial status, disability, source of income, or age of the intended occupants; or
- Because the intended occupants are low-, moderate- or middle-income.

See also *Gibson by Gibson v County of Riverside* (9th Cir 1997) 132 F3d 1311, 1313; 42 USC §§3601-3631.

In addition, if a proposed multifamily residential housing development is consistent with the zoning ordinance and general plan on the date the application is deemed complete, the city may not deny the application based on the fact that the project is a multifamily housing development. Govt C §65008(b)(1)(D). However, an application for senior citizen housing may be approved. Govt C §65008(a)(1)(B). Cities may also give preferential treatment to emergency shelters, publicly assisted housing, farmworker housing, and housing intended for low-, moderate-, and middle-income households. Govt C §65008(e)(2).

On housing, see also §§10.26-10.53, 10.204-10.207.

© The Regents of the University of California

§10.162 B. Affordable Housing

State law mandates provision of housing affordable to all economic segments, particularly households of low- and moderate-income. See Stats 1979, ch 1207, §§1-6; Govt C §§65008, 65580, 65913, 65915. See also *Committee for Responsible Planning v City of Indian Wells* (1989) 209 CA3d 1005, 1013, 257 CR 635. In addition, the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) provides a statutory exemption for affordable housing projects. See Pub Res C §§21159.22-21159.24 and CEQA Guidelines at 14 Cal Code Regs §§15191-15196.

© The Regents of the University of California

§10.163 1. Findings Required to Reject Projects

A city has limited discretion to reject affordable housing projects, including emergency shelters, transitional and supportive housing, and mixed-use developments consisting of both residential and neighborhood commercial uses. Before rejecting an affordable housing development application, or imposing conditions that render a development infeasible, the city must make one or more of the following specific findings in writing based on substantial evidence (Govt C §65589.5):

- The city has adopted a housing element in substantial compliance with state law and the proposed project is not needed to meet the city's share of the regional housing need for very low, low-, or moderate-income housing, or for emergency shelters.
- The proposed project would have a specific, adverse impact on the public health or safety and there is no feasible method to satisfactorily mitigate or avoid the adverse impact without rendering the project unaffordable to low-and moderate-income households.
- The denial of the proposed project or the imposition of conditions is required to comply with specific state or federal law and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households.
- The project is being proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or the proposed site does not have adequate water or wastewater facilities to service the project.
- The project is inconsistent with both the zoning ordinance and general plan land use designation as of the date the application was deemed complete, and the jurisdiction has adopted a housing element in substantial compliance with state law that contains adequate sites for lower income housing and emergency shelters. If, however, the proposed development is to be located on a site designated for low- or moderate-income housing in the housing element, and is consistent with the density in the housing element, then the city cannot rely on the project's inconsistency with the zoning ordinance or general plan as grounds for denial of the project. See Health & S C §§50079.5 (definition of "lower income" household), 50093 (definition of "moderate income" household); Govt C §65582 (definitions of emergency shelter, supportive housing, transitional housing).

© The Regents of the University of California

§10.164 2. Election Required for Certain Housing

Certain low-income housing projects require voter approval. See Cal Const art XXXIV. This article has been implemented by statute. See Health & S C §§37000-37002; *California Hous. Fin. Agency v Patitucci* (1978) 22 C3d 171, 148 CR 875. The statute includes certain exemptions to the voter-approval requirement. See Health & S C §§37001, 37001.5. The voter approval required by Cal Const art XXXIV may be general in nature and need not identify a specific housing project or locale. *Davis v City of Berkeley* (1990) 51 C3d 227, 272 CR 139.

© The Regents of the University of California

§10.165 3. Restrictions on "Downzoning" of Residential Property

A city may not reduce the allowable general plan or zoning density of any residentially designated parcel or approve a project with a density below the density that was utilized by the Department of Housing and Community Development (HCD) when determining whether the city's housing element complied with state law unless the city makes both of the following findings, supported by substantial evidence (Govt C §65863(b)):

- The proposed reduction in density is consistent with the general plan, including the housing element; and
- The remaining sites identified in the housing element are adequate to accommodate the jurisdiction's share of the regional housing need.

It is immaterial under the statute whether the reduction is initiated by the city or by a project applicant. Govt C §65863(b). However, if the remaining sites are inadequate, the city may identify other sites with equal or greater density so that there is no net loss in capacity. Govt C §65863(c). The city is solely responsible for identifying alternative sites unless the applicant proposes a density that results in the remaining sites not being adequate, in which case the city may require the applicant to comply. Govt C §65863(f).

© The Regents of the University of California

§10.166 4. Second Units

Cities must approve applications for second dwelling units ministerially, without discretionary review or a public hearing, if they meet certain minimum standards, notwithstanding any provisions in local ordinances to the contrary. Govt C §65852.2.

© The Regents of the University of California

§10.167 a. Remaining Discretion

Cities may still enact ordinances that (Govt C §65852.2(a)(1)):

- Designate areas within the jurisdiction where second units may be permitted, based on criteria including, but not limited to, the adequacy of water and sewer services and the impact of second units on traffic flow;
- Impose standards on second units that include, but are not limited to, parking, height, setback, lot coverage, architectural review, maximum size of a unit, and standards that prevent adverse impacts on any real property that is listed in the California Register of Historic Places; and
- Provide that second units do not exceed the allowable density for the lot on which the second unit is located, and that second units are a residential use that is consistent with the existing general plan and zoning designation for the lot.

Cities may also totally preclude second units from residentially zoned areas by making certain findings. Govt C §65852.2(c).

© The Regents of the University of California

§10.168 b. Unit Size Standards

A city may establish minimum and maximum unit size requirements for both attached and detached second units, but must permit at least an efficiency unit of 150 square feet in size to be constructed. Govt C §65852.2(d).

© The Regents of the University of California

§10.169 c. Parking Requirements

Parking requirements for second units must not exceed one parking space per unit or per bedroom, unless the city makes a finding that the additional parking requirements are directly related to the use of the second unit and are consistent with existing neighborhood standards applicable to existing dwellings. In addition, off-street parking must be permitted in setback areas in locations determined by the local agency or through tandem parking, unless specific findings are made that parking in setback areas or tandem parking is not feasible based on specific site or regional topographical or fire and life safety conditions, or that it is not permitted anywhere else in the city. Govt C §65852.2(e).

© The Regents of the University of California

§10.170 d. Less Restrictive Requirements Allowed

Cities are authorized to adopt less restrictive requirements for the creation of second units. Govt C §65852.2(g).

© The Regents of the University of California

§10.171 e. No Local Ordinance

If the city does not adopt an ordinance, second units must be approved ministerially if they conform with standards contained in state law. Govt C §65852.2(b).

© The Regents of the University of California

§10.172 5. Density Bonuses

The state density bonus statutes require a city to grant a density bonus and incentives or concessions to a developer who requests a density bonus and agrees to construct or donate land for affordable or senior housing. Govt C §65915. A city must adopt an ordinance that specifies the method of providing such developer incentives. Govt C §65915(a). See also *Building Indus. Ass'n v City of Oceanside* (1994) 27 CA4th 744, 769, 33 CR2d 137. The city must adopt a local ordinance to grant a density bonus above the state law requirement. Govt C §65915(n).

© The Regents of the University of California

§10.173 a. When Applicable

A city must grant a requested density bonus in any of the circumstances described in §§10.174-10.177. See Govt C §65915.

© The Regents of the University of California

§10.174 (1) Percentage of Units Reserved for Low-Income Housing

A city must provide a density bonus when a housing developer agrees to construct (Govt C §65915(b)):

- At least 10 percent of the total units for occupancy by "lower income" households (as defined by Health & S C §50079.5); or
- At least 5 percent of the total units for occupancy by "very low income" households (as defined by Health & S C §50105); or
- At least 10 percent of the total units in a common interest development (as defined by CC §1351) for occupancy by "moderate income" households (as defined by Health & S C §50093), provided that all of the units in the development are offered to the public for purchase.

© The Regents of the University of California

§10.175 (2) Land Donated for Low-Income Housing

A city must provide a density bonus when a housing developer agrees to donate land of at least one acre in size or sufficient to develop at least 40 dwelling units if (Govt C §65915(g)):

- The affordable units will constitute at least 10 percent of the number of units in the proposed development;
- The land is subject to a deed restriction guaranteeing continued affordability; and
- The land is within the boundary of the proposed development (or within one- quarter mile, if the city agrees).

The land donated must also meet certain minimum infrastructure and zoning requirements. Govt C §65915(g).

© The Regents of the University of California

§10.176 (3) Senior Housing

A city must provide a density bonus when a developer proposes a senior citizen housing development (as defined in CC §§51.3 and 51.12). Govt C §65915(b).

© The Regents of the University of California

§10.177 (4) Child Care Facility Included in Development Proposal

When an applicant proposes to construct a housing development that includes a child care facility that will be located on the project site or adjacent to it, and the percentage of attending children from lower income households will at least equal the percentage of lower income households in the development, a city must provide a density bonus that is an amount of square feet equal to or greater than the space in the child care facility, or an additional concession or incentive that significantly contributes to the feasibility of the construction of the child care facility. Govt C §65915(h).

© The Regents of the University of California

§10.178 b. Percentage Increase

The city must grant an increase over the maximum allowable residential density on the site. Govt C §§65915(f), (o)(2). The size of the density bonus that the city must grant is as described in §§10.179-10.181.

© The Regents of the University of California

§10.179 (1) Basic Density Bonus

The percentage bonus depends on the type of development (Govt C §65915(f)- (g)):

- A housing development containing senior citizen housing, or a housing development with the requisite percentage of units affordable to very-low and lower-income households, is entitled to a density increase of at least 20 percent over the maximum allowable density under the applicable zoning ordinance.
- A common interest development that offers all units for sale to the public and that reserves at least 10 percent of the total units for persons of moderate income is entitled to a density increase of at least 5 percent over the maximum allowable density.
- A housing development that includes a donation of land for low-income housing of the requisite size is entitled to a density increase of at least 15 percent over the maximum allowable density.

© The Regents of the University of California

§10.180 (2) Incremental Increases

A housing development that reserves a percentage of units in excess of the percentages described in §10.179 is entitled to a larger density bonus, as follows (Govt C §65915(f)-(g)):

- For each 1-percent increase above 10 percent in the percentage of units affordable to lower-income households, the density bonus must be increased by 1.5 percent, up to a maximum of 35 percent.
- For each 1-percent increase above 5 percent in the percentage of units affordable to very-low-income households, the density bonus must be increased by 2.5 percent, up to a maximum of 35 percent.
- For each 1-percent increase above 10 percent in the percentage of units in a common interest development affordable to moderate-income households, the density bonus must be increased by 1 percent, up to a maximum of 35 percent.
- For each 1-percent increase above 10 percent in the percentage of affordable dwelling units sited on donated land, the density bonus must be increased by 1 percent, up to a maximum of 35 percent.

© The Regents of the University of California

§10.181 (3) Additional Local Density Bonus

Cities may grant a density bonus in excess of that required if they have adopted a local density bonus ordinance. Govt C §65915(n).

© The Regents of the University of California

§10.182 c. Types of Incentives and Concessions

An applicant for a density bonus may also request the following development concessions or incentives (Govt C §65915(k)):

- A reduction in site development standards or a modification of zoning code requirements (including a reduction in setbacks, square footage requirements, required parking, or architectural design requirements) that results in identifiable, financially sufficient, and actual cost reductions;
- Approval of mixed-use zoning in conjunction with the housing project if the inclusion of commercial, office, or industrial uses will reduce the cost of the housing project and such non-residential uses are compatible with the housing project and existing and planned development in the area;
- Other regulatory incentives or concessions proposed by the local agency or the developer that result in identifiable, financially sufficient, and actual cost reductions.

© The Regents of the University of California

§10.183 d. Number of Incentives

An applicant for a density bonus is entitled to (Govt C §65915(d)(2)):

- One incentive or concession for senior citizen housing developments, and for projects that include at least 10 percent of the total units for lower-income households, at least 5 percent for very-low-income households, or at least 10 percent for persons and families of moderate income in a condominium or planned development.
- Two incentives or concessions for projects that include at least 20 percent of the total units for lower-income households, at least 10 percent for very-low-income households, or at least 20 percent for persons and families of moderate income in a condominium or planned development.
- Three incentives or concessions for projects that include at least 30 percent of the total units for lower-income households, at least 15 percent for very-low-income households, or at least 30 percent for persons and families of moderate income in a condominium or planned development.

© The Regents of the University of California

§10.184 e. Grounds for Denial of Incentives or Concessions

Cities may deny requests for incentives or concessions only by making one of the following written findings supported by substantial evidence (Govt C §65915(d)(1)):

- The concession or incentive is not required to provide for affordable housing costs, as defined in Health & S C §50052.5; or
- The concession or incentive would have a specific adverse impact, as defined in Govt C §65589.5, on public health or safety or the physical environment or on any property listed in the California Register of Historical Resources, and there is no feasible method to satisfactorily mitigate or avoid the impact without rendering the development unaffordable to low- and moderate-income households.

© The Regents of the University of California

§10.185 f. Waiver of Development Standards

Under the density bonus statute, the city is also required to waive or modify development and zoning standards that would physically preclude the utilization of the density bonus, incentives, and concessions on a particular site. Govt C §65915(e). This requirement is separate and apart from the density bonus and development concession/incentive discussed in §§10.183-10.184. A waiver or modification may be denied if it would have a specific adverse impact on public health or safety or the physical environment, and there is no feasible method to satisfactorily mitigate or avoid the impact; or if it would have an adverse impact on property listed in the California Register of Historical Resources. Govt C §65915(e).

© The Regents of the University of California

§10.186 g. Limitation on Required Parking

A city may not require more than a set number of parking spaces per unit for housing developments providing the requisite percentage of affordable or senior units. Govt C §65915(p).

© The Regents of the University of California

§10.187 h. Conformance With General Plan and Zoning Ordinance

The granting of a density bonus, concession, or incentive does not, in and of itself, require a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval. Govt C §65915(f)(5), (j).

© The Regents of the University of California

i. Durational Requirements

§10.188 (1) Continued Affordability of Very-Low and Lower-Income Units

A developer who receives a density bonus and/or other concessions or incentives must agree to the continued affordability of the low- or very-low-income units for at least 30 years, or longer if required by other public funds. Govt C §65915(c)(1).

© The Regents of the University of California

§10.189 (2) Moderate-Income For-Sale Units

The city must ensure that the initial occupants of the moderate-income units in a common interest development are persons of moderate income. On resale, the seller of the unit retains the value of any improvements, the down payment, and the seller's proportionate share of appreciation. The city captures its proportionate share of appreciation, which is the percentage of the resale price by which the initial sale price was less than fair market value. The city must use the recaptured funds within 3 years to promote home ownership, pursuant to Health & S C §33334.2(e). The city may also adopt a local ordinance requiring a longer term of affordability, or a longer term of affordability may be required by another funding source. Govt C §65915(c)(2).

© The Regents of the University of California

§10.190 (3) Operation of Child Care Facility

A developer who receives a density bonus or other incentive for including a child care facility in a housing project must agree to keep the facility in operation for at least as long as the period of time that the density bonus units are required to remain affordable. Govt C §65915(i).

© The Regents of the University of California

§10.191 6. Limitation on Authority to Require Conditional Use Permits

State law establishes affordable multifamily residential housing as a permitted use in multifamily housing zones, without a conditional use permit (CUP) ("use by right"), in certain circumstances. This obligation applies whenever any one of three specific exemptions to the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) applies to a proposed development, or when the development meets a number of affordability requirements. See §§10.192-10.197.

© The Regents of the University of California

§10.192 a. Attached Housing Developments

A public entity may not require a use permit for an attached housing development proposal consisting of not more than 100 dwelling units with an affordable component, if the local law does not require a use permit or the project (Govt C §65589.4(a)(2))

- has a minimum density of 12 dwelling units per acre;
- is consistent with the zoning ordinance when the application is completed;
- has had a negative declaration or mitigated negative declaration approved for it; and
- is located in an area addressed by a general plan, specific plan, or other community plan that has been amended in the last 5 years.

"Attached housing development" means a newly constructed or substantially rehabilitated structure containing two or more dwelling units and consisting only of residential units, but which does not include a second unit as defined by Govt C §65852.2(h)(4), or the conversion of an existing structure to condominiums. Govt C §65589.4(h). However, there are numerous conditions that must be met before a housing development will be subject to this law. See §§10.193-10.196.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/10 Land Use/§10.193 (1) 'Affordable'

§10.193 (1) "Affordable"

First, Govt C §65589.4(a) applies only to affordable housing developments. "Affordable" in this context means that the developer will guarantee continued availability of affordable units for at least 30 years in any of the following proportions (Govt C §65589.4(b)):

- At least 10 percent of the units for very low-income households;
- At least 20 percent of the units for low-income households; or
- At least 50 percent of the units for moderate-income households.

© The Regents of the University of California

§10.194 (2) "Infill"

Next, Govt C §65589.4(a)(2) applies only to attached housing developments on infill sites. An "infill" site is defined as a site in an urbanized area that (Govt C §65589.4(a)(2)(F); Pub Res C §21061.3; 14 Cal Code Regs §15191(e)):

- Has been previously developed for qualified urban uses;
- Has not been previously developed for qualified urban uses but (1) all immediately adjacent parcels are developed with existing qualified urban uses, and (2) no parcel within the site has been created within the past 10 years (unless the parcel was created as a result of the plan of a redevelopment agency); or
- Has not been previously developed for qualified urban uses but (1) is surrounded by at least 75 percent qualified urban uses (provided that the remaining 25 percent of the surrounding area has been previously developed for qualified urban uses), and (2) no parcel within the site has been created within the past 10 years (unless the parcel was created as a result of the plan of a redevelopment agency).

A qualified urban use, in turn, is any residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses. Pub Res C §21072.

© The Regents of the University of California

§10.195 (3) Population Requirements: Developments of Maximum 100 Units

Finally, Govt C §65589.4(a)(2) does not apply to smaller cities. Attached housing developments of no more than 100 units must be permitted by right if any of the following are true (Govt C §65589.4(a)(2)(E); Pub Res C §21071; 14 Cal Code Regs §15191(m)):

- The project is located in a city of at least 100,000 persons;
- The project is located in a city that, when combined with two cities that are contiguous with the city, has at least 100,000 persons;
- The project is located in an unincorporated area completely surrounded by incorporated cities, the sum of the populations is at least 100,000 persons, and the population density of the unincorporated area is no less than the density of the surrounding cities;
- The project is located within an "urban growth boundary," which is an area designated in a general plan for which urban uses are allowed on one side and not on the other, and the area has at least 5000 persons per square mile; or
- The project is located within a census-defined place with a population density of at least 5000 persons per square mile.

© The Regents of the University of California

§10.196 (4) Population Requirements: Attached Housing Developments of Maximum 50 Units

For smaller projects, Govt C §65589.4(a) applies to cities with fewer people. Developments of 50 or fewer units must be permitted by right if both of the following are true (Govt C §65589.4(a)(2)(E)):

- The project is located in a city of at least 25,000 persons; and
- The population density of the city is at least 2500 persons per square mile.

© The Regents of the University of California

§10.197 b. Attached Housing Developments Permitted When Certain CEQA Exemptions Apply

An attached housing development is permitted by right when any of three statutory California Environmental Quality Act (CEQA) exemptions apply, provided that a proposed attached housing development site is zoned for multifamily housing and the attached housing development will satisfy the affordability requirements described above for 30 years. Govt C §65589.4(a)(1), (b). The three CEQA exemptions are:

(1) Urbanized infill projects on five acres or less (Pub Res C §21159.23);

(2) High density infill projects of four acres or less (Pub Res C §21159.24); and

(3) Housing for agricultural employees (Pub Res C §21159.22).

The proposed development must also be consistent with any applicable general plan, specific plan, and local coastal program. Govt C §§65589.4(a)(2)(B), (c), (e). In addition, "community level environmental review" must have been conducted, which is defined as a certified environmental impact report or negative declaration for a general plan or an applicable specific or community plan. Pub Res C §§21159.20(b), 21159.21(a)-(b).

© The Regents of the University of California

§10.198 7. Special Requirements for Coastal Communities

State law imposes special affordable housing requirements on coastal communities and the California Coastal Commission. The Coastal Commission must satisfy the broad mandate of "encourag[ing] housing opportunities for persons of low and moderate income" in the coastal zone. More specifically, neither coastal cities nor the Commission may require that a developer of low- and moderate-income housing comply with a density that is below the permitted density established by local zoning, plus any applicable density bonus. Pub Res C §30604(f).

The only exception the statute provides is that the public entity or commission may require a lower density if it can make a finding, based on substantial evidence, that the density sought by the applicant cannot feasibly be accommodated on the site in a manner that is in conformity with the objectives of the local coastal program or the California Coastal Act of 1976 (Pub Res C §§30000-30900), specifically Pub Res C §§30200-30265.5. Those objectives include public access to the coast, recreational use of the coast, and preservation and restoration of the marine environment. Pub Res C §30604(f).

In addition, no conversion or demolition of existing residences occupied by low- or moderate-income households may be authorized unless provisions are made for replacement affordable housing. Govt C §65590(b). New housing developments within the coastal zone must include low- or moderate-income housing to the extent possible. Govt C §65590(c).

© The Regents of the University of California

§10.199 C. Privacy

The right to privacy guaranteed by Cal Const art I, §1 prohibits the city from adopting zoning ordinances favoring familial groups over unrelated "families." *City of Santa Barbara v Adamson* (1980) 27 C3d 123, 131, 164 CR 539; *City of Chula Vista v Pagard* (1981) 115 CA3d 785, 796, 171 CR 738. Cities also may not control the characteristics of residents, such as by limiting occupants of second units to the property owner, dependents, and caregivers. *Coalition Advocating Legal Hous. Options v City of Santa Monica* (2001) 88 CA4th 451, 458, 105 CR2d 802.

© The Regents of the University of California

§10.200 VI. GROWTH MANAGEMENT

Growth control measures may be adopted to address lack of adequate infrastructure or for other social reasons, such as a desire to protect a particular "quality of life," preserve agricultural land or open space, or protect property values.

For related discussion, see §§10.26-10.53, 10.161-10.199; Durkee, Jacobson, Wood & Zischke, Land Use Initiatives and Referenda in California (Solano Press, P.O. Box 773, Point Arena, California 95468).

© The Regents of the University of California

§10.201 A. Public Facilities Planning

Some cities have developed policies to ensure that public facilities keep pace with growth. This approach has been upheld both in California and elsewhere. See, *e.g., Associated Home Builders, Inc. v City of Livermore* (1976) 18 C3d 582, 607, 135 CR 41; *Golden v Planning Bd. of Town of Ramapo* (1972) 30 NY2d 359, 385, 285 NE2d 291.

© The Regents of the University of California

§10.202 1. Limiting Expansion

Regulations limiting the expansion of public facilities have also been used to control urban sprawl. See *Dateline Builders, Inc. v City of Santa Rosa* (1983) 146 CA3d 520, 194 CR 258; *Hollister Park Inv. Co. v Goleta County Water Dist.* (1978) 82 CA3d 290, 294, 147 CR 91; *Swanson v Marin Mun. Water Dist.* (1976) 56 CA3d 512, 128 CR 485.

© The Regents of the University of California

§10.203 2. Other Controls

Another technique for control is based on the number, location, and mix of new residential units. See *Construction Indus. Ass'n v City of Petaluma* (9th Cir 1975) 522 F2d 897, cert denied (1976) 424 US 934 (city plan that fixed housing development growth rate at 500 dwelling units per year and directed that building permits be divided evenly between west and east sections of city and between single-family dwellings and multiple residential units was reasonable exercise by city of its police power and did not violate due process clause).

© The Regents of the University of California

§10.204 B. Housing Obligation Conflicts

A city must provide its fair share of its region's housing needs. Govt C §65584. A court may subject a general plan provision or zoning ordinance to a rigorous evidentiary review to ensure that it does not operate to violate a general plan's housing element or California statutes that require cities to provide a fair share of regional housing needs and that prohibit discrimination against low-income housing. See *Building Indus. Ass'n of San Diego v City of Oceanside* (1994) 27 CA4th 744, 33 CR2d 137 (invalidating growth control initiative amendment to general plan based on evidence it operated to limit housing below city's "fair share" and to discriminate against low-income housing, even though initiative specifically exempted units dedicated for low-income persons). See also *Hoffmaster v City of San Diego* (1997) 55 CA4th 1098, 64 CR2d 684 (provisions regarding transitional housing in city's housing element in conflict with city's conditional use permit (CUP) requirements and geographic limitations for residential care facilities).

© The Regents of the University of California

1. Findings Required for Housing Limits

§10.205 a. General Requirement

Any general plan provision or zoning ordinance that limits the number of housing units that may be constructed on an annual basis must contain findings as to the public health, safety, and welfare of the city to be promoted by the adoption of the ordinance that justify reducing the housing opportunities of the region. Govt C §§65302.8 (general plan), 65863.6 (zoning ordinance).

© The Regents of the University of California

§10.206 b. No Findings for Initiatives

The findings requirement does not apply to growth control zoning ordinances that impose numerical restrictions by initiative. *Building Indus. Ass'n v City of Camarillo* (1986) 41 C3d 810, 226 CR 81.

© The Regents of the University of California

§10.207 2. Burden of Proof

When such a housing limitation is imposed, the city has the burden of proof of showing that the ordinance or regulation is reasonably related to the protection of public health, safety, and welfare of the affected population. Evid C §669.5(b); *Building Indus. Ass'n of San Diego v Superior Court (City of Oceanside)* (1989) 211 CA3d 277, 259 CR 325; *Lee v City of Monterey Park* (1985) 173 CA3d 798, 219 CR 309. But see *Hernandez v City of Encinitas* (1994) 28 CA4th 1048, 33 CR2d 875. This burden of proof applies even in the case of limitations imposed by initiative (*Building Indus. Ass'n v City of Camarillo* (1986) 41 C3d 810, 226 CR 81) and even if the limitation was enacted before the date Evid C §669.5 was enacted (*Murphy v City of Alameda* (1992) 11 CA4th 906, 14 CR2d 329).

© The Regents of the University of California

VII. MORATORIA

A. Authority

§10.208 1. Police Power

Moratoria that impose more stringent temporary land use controls and other growth measures based on documented health, safety, and general welfare concerns are enactments made pursuant to the police power. However, there are constitutional challenges that can be made to such enactments. See *First English Evangelical Lutheran Church v County of Los Angeles* (1989) 210 CA3d 1353, 258 CR 893, cert denied (1990) 493 US 1056. See also *Lockary v Kayfetz* (9th Cir 1990) 908 F2d 543, amended (9th Cir 1990) 917 F2d 1150 (triable issues of fact exist as to whether moratorium on new water hook-ups constituted taking, denial of equal protection, and denial of substantive due process).

For related discussion, see §§10.362-10.445 (challenges to land use decisions), 13.114-13.152 (municipal liability for civil rights/42 USC §1983 claims).

© The Regents of the University of California

§10.209 2. Statutory Provisions

The provisions of Govt C §65858 provide statutory authority and time limits for interim ordinances prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the city plans to study within a reasonable time. Certain time limits apply. See *Martin v Superior Court (Sierra Madre)* (1991) 234 CA3d 1765, 286 CR 513 (city could not circumvent 2-year moratorium limitation in Govt C §65858 merely by rezoning or awaiting expiration of earlier ordinance).

© The Regents of the University of California

§10.210 B. Takings

The Supreme Court recognizes temporary development moratoria as a legitimate planning tool. A temporary moratorium on development does not effect a categorical taking; consequently, the question of whether a temporary moratorium effects a taking in a particular case requires a careful factual inquiry into the factors articulated in *Penn Cent. Transp. Co. v City of New York* (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646. *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency* (2002) 535 US 302, 152 L Ed 2d 517, 122 S Ct 1465. These factors include the plaintiff's investment-backed expectations, the impact of the regulation, the public interest served by the regulation, and the reasons for imposing the moratorium.

A temporary moratorium of more than 1 year may be viewed by the courts with a more jaundiced eye, but is by no means necessarily unconstitutional if it can be justified under the *Penn Central* test. *Tahoe-Sierra Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency, supra*. Normal delays in the land use permitting process are not a taking. *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 120 L Ed 2d 798, 112 S Ct 2886; *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378. But see *Lockary v Kayfetz* (9th Cir 1990) 908 F2d 543, amended (9th Cir 1990) 917 F2d 1150.

© The Regents of the University of California

VIII. EXACTIONS: FEES AND DEDICATIONS

A. Definitions

§10.211 1. Fee

A "fee" is a charge for services rendered or to alleviate impacts that will result from a development. *Mills v County of Trinity* (1980) 108 CA3d 656, 166 CR 674. The term is defined to include exactions both "established for a broad class of projects by legislation of general applicability" and "imposed on a specific project on an ad hoc basis." Govt C §66000(b).

On development fees, see §5.163. On imposition of fees and dedications with respect to subdivisions, see §10.157. On challenges to land use decisions, see §§10.362-10.445. On 42 USC §1983, see §§13.114-13.152.

© The Regents of the University of California

§10.212 2. Dedication

A "dedication" is a requirement imposed in connection with the development of real property whereby a developer must transfer to a city ownership (either in fee, as an easement, or otherwise) of an interest in real property. A dedication is a condition that constitutes a physical invasion of real property. *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 120 L Ed 2d 798, 112 S Ct 2886.

© The Regents of the University of California

B. Authority

§10.213 1. Police Power

The basic authority for cities to exact fees and dedications for voluntary development flows from the police power. Cal Const art XI, §7; *Trent Meredith, Inc. v City of Oxnard* (1981) 114 CA3d 317, 170 CR 685. As long as the local enactments are not in conflict with general laws, the power to impose valid regulatory fees is not dependent on any legislatively authorized taxing power, but exists pursuant to the direct grant of police power. *California Bldg. Indus. Ass'n v Governing Bd.* (1988) 206 CA3d 212, 234, 253 CR 497.

© The Regents of the University of California

§10.214 2. Public Works Power

This constitutional grant of authority allows a city to establish, purchase, and operate public works to furnish its citizens with light, water, power, heat, transportation, or means of communication. Cal Const art XI, §9.

© The Regents of the University of California

§10.215 3. Statutory Provisions

A number of state statutes provide authority for local agencies to make exactions. See, *e.g.,* Govt C §37112 (all acts permitted that are necessary or proper to carry out governmental duties); Govt C §65104 (fees to support work of planning agency); Govt C §65456 (fees to administer specific plans); Govt C §66483 (fees for drainage and sewerage facilities). See also 66 Ops Cal Atty Gen 120 (1983) (this is not sole method to impose such fees); Govt C §66484 (fees for waterways, bridges, railways, freeways, and major thoroughfares; imposed through assessment district procedure); Govt C §§65970-65981, 65995 (school fees both for interim and permanent facilities).

© The Regents of the University of California

§10.216 4. Case Law

A number of cases also recognize local agencies' authority to impose exactions. See, *e.g., Candid Enters., Inc. v Grossmont Union High Sch. Dist.* (1985) 39 C3d 878, 218 CR 303; *Associated Homebuilders of the Greater East Bay, Inc. v City of Livermore* (1961) 56 C2d 847, 17 CR 5; *County of Plumas v Wheeler* (1906) 149 C 758, 87 P 909; *Trent Meredith, Inc. v City of Oxnard* (1981) 114 CA3d 317, 170 CR 685; *Mills v County of Trinity* (1980) 108 CA3d 656, 166 CR 674. Courts originally suggested that cities may go beyond the authority granted by school impact fee statutes when making legislative decisions. *Murrieta Valley Unified Sch. Dist. v County of Riverside* (1991) 228 CA3d 1212, 279 CR 421; *William S. Hart Union High Sch. Dist. v Regional Planning Comm'n* (1991) 226 CA3d 1612, 277 CR 645; *Mira Dev. Corp. v City of San Diego* (1988) 205 CA3d 1201, 252 CR 825. But see Govt C §§65995-65996 (amended by the voters in 1998 to apply to both legislative and adjudicatory actions, thereby implicitly overturning *Mira, Hart,* and *Murrietta*); *Grupe Dev. Co. v Superior Court (Chino Unified Sch. Dist.)* (1993) 4 C4th 911, 16 CR2d 226 (special tax falls within preemption of Govt C §65995).

© The Regents of the University of California

C. Limitations

§10.217 1. Constitutional

Both fees and dedications must not be so restrictive as to cause a "taking" of the property without just compensation. *Nollan v California Coastal Comm'n* (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141 (dedication of easement); *Commercial Builders of N. Cal. v City of Sacramento* (9th Cir 1991) 941 F2d 872, cert denied (1992) 504 US 931. In addition, a dedication must be "roughly proportional" to the impacts of the development for which the dedication is required. *Dolan v City of Tigard* (1994) 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309. No taking occurs if the exaction is the result of an agreement that includes adequate consideration. *Leroy Land Dev. v Tahoe Reg'l Planning Agency* (1991) 939 F2d 696. A reasonable delay in processing a permit is not a taking. *Loewenstein v City of Lafayette* (2002) 103 CA4th 718, 127 CR2d 79.

© The Regents of the University of California

a. Standards Applied to Takings Issue

§10.218 (1) General Rule

As a general rule, the courts will uniformly uphold the constitutionality of a city's ordinances, regulations, or imposition of conditions requiring dedication or payment of a fee as a condition of land use approval when the following conditions are met (*Agins v City of Tiburon* (1980) 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138; *Nollan v California Coastal Comm'n* (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141):

- The city is acting within a police power;
- The condition substantially furthers a legitimate governmental interest; and
- The owner is not denied economically viable use of its land.

For discussion of the partial overruling of *Agins* by *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, see §10.388.

In federal court, a plaintiff bringing a suit under 42 USC §1983 making an "as-applied" challenge to an exaction as a taking may be entitled to a jury trial on liability under the Seventh Amendment to the United States Constitution. See *City of Monterey v Del Monte Dunes at Monterey, Ltd.* (1999) 526 US 687, 720, 143 L Ed 2d 882, 912, 119 S Ct 1624. A fee need not apply to every parcel in a city to be considered a generally applicable, legislatively imposed fee that is not subject to *Nollan*/*Dolan* scrutiny. *San Remo Hotel v City & County of San Francisco* (2002) 27 C4th 643, 117 CR2d 269.

© The Regents of the University of California

§10.219 (2) Dedications

For a dedication to pass constitutional muster, the requirement must be "directly responsible" for or have an "essential nexus" to the problem being corrected. *Nollan v California Coastal Comm'n* (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141. A specific study showing a "solid connection" is required. *Surfside Colony Ltd. v California Coastal Comm'n* (1991) 226 CA3d 1260, 277 CR 371; *Rohn v City of Visalia* (1989) 214 CA3d 1463, 263 CR 319. Once the essential nexus is found to exist, there must also be a reasonable relationship ("rough proportionality") between the degree of the exaction and the impact caused by the project. At least in the adjudicatory area, a city is required to make some sort of individualized determination that the required dedication is related in nature and extent to the impact of the development. *Dolan v City of Tigard* (1994) 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309.

© The Regents of the University of California

§10.220 (3) Fees

The constitutional standards of legislatively enacted development fees of general applicability are less stringent than are the standards for fees imposed on specific developments on an individual and discretionary basis. *Ehrlich v City of Culver City* (1996) 12 C4th 854, 50 CR2d 242. When a development fee is imposed generally on a broad class of property owners, it need only bear a reasonable relationship to the impacts of the development project. 12 C4th at 875. In adopting the fee, the city must make the "nexus" findings in Govt C §66001. However, discretionary, site-specific fees imposed on individual developers are subject to the stricter "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan*. *City of Monterey v Del Monte Dunes at Monterey, Ltd.* (1999) 526 US 687, 143 L Ed 2d 882, 119 S Ct 1624; *Ehrlich v City of Culver City* (1996) 12 C4th 854, 876, 50 CR2d 242.

© The Regents of the University of California

§10.221 b. Special Tax

If a fee exceeds the cost of the service and does not relate sufficiently to the impact of the development, the fee may be a tax. If the fee is a tax and is to be used for a specific purpose it will be considered a special tax subject to two-thirds voter approval. Cal Const art XIIIA; Govt C §§50076, 53720-53730; *Bixel Associates v City of Los Angeles* (1989) 216 CA3d 1208, 265 CR 347 (fee charged to pay for existing inadequate facilities); *Russ Bldg. Partnership v City & County of San Francisco* (1987) 199 CA3d 1496, 246 CR 21. However, the voter-approval requirements and other limitations that Cal Const arts XIIIC-XIIID (Proposition 218) impose on fees and assessments do not, by their terms, affect existing laws relating to "the imposition of fees or charges as a condition of property development." Cal Const art XIIID, §1(b).

© The Regents of the University of California

§10.222 2. Statutory Procedure

Substantive and procedural due process as well as state constitutional requirements have been codified in the developer fees statutes. These statutes apply when a fee is established, increased, or imposed as a condition of approval for a development project. See Govt C §§66000-66008.

© The Regents of the University of California

§10.223 a. Nexus

The purpose of the fee and the use to which it will be put must be identified. The city must make a determination as to how there is a reasonable relationship between the fee and the development on which it is imposed and between the need for the public facility and the type of development project against which the fee is imposed. Govt C §66001.

© The Regents of the University of California

§10.224 b. Findings

Findings are required for any fees that are not expended within 5 or more years after deposit and must be made every 5 years thereafter. Govt C §66001(d). Refunds may be required. Govt C §66001(e)-(f). Capacity charges and connection fees are not subject to the refund remedy in Govt C §66001. *Capistrano Beach Water Dist. v Taj Dev. Corp.* (1999) 72 CA4th 524, 85 CR2d 382 (sewer connection fee paid by developer to connect its hotel to sanitation district's sewer system was not development fee subject to refund within meaning of the Mitigation Fee Act).

© The Regents of the University of California

§10.225 c. Relationship to Cost

Fees must not exceed the estimated reasonable cost of providing the service for which the fees were collected. Govt C §66005(a); *Collier v City & County of San Francisco* (2007) 151 CA4th 1326, 60 CR3d 698 (city may spend regulatory fee revenues for purpose of legitimate regulation as long as revenues do not exceed reasonably necessary expense of regulatory effort); *County of Orange v Barratt Am., Inc.* (2007) 150 CA4th 420, 58 CR3d 542 (citing Govt C §66016(a) and holding that if service fees or charges exceed cost of providing service, local agency is required to reduce fee or service charge creating surplus).

© The Regents of the University of California

§10.226 d. Notice and Hearing

Specific notice, public hearing, and protest procedures apply. Govt C §§66016-66018.5, 66020-66024. At the time of approving the project or of the imposition of the exaction, the local agency must give the project applicant a written notice of the amount of the fees or a description of the dedications, reservations, or other exactions, and notification that the 90-day period in which the applicant may protest has begun. Govt C §66020(d)(1).

© The Regents of the University of California

§10.227 e. Waiting Period

Unless certain urgency findings are made, a 60-day waiting period applies before a new or increased fee can go into effect. Govt C §66017.

© The Regents of the University of California

§10.228 f. Exclusions

The developer fees statutes do not apply to development agreements or redevelopment agency redevelopment agreements. Govt C §66000(b). See *Building Indus. Ass'n of Central Cal. v City of Patterson* (2009) 171 CA4th 886, 90 CR3d 63, cert denied (2009) ___ US ___, 175 L Ed 2d 480, 130 S Ct 660 (interpreting validity of affordable housing fee established in development agreement).

© The Regents of the University of California

§10.229 g. Statute of Limitations

The project applicant has 180 days from the day the public agency delivers notice of the exactions to the applicant to file an action challenging the exaction. Govt C §66020(d)(2). Lawsuits challenging a local agency's legislative decision to promulgate or change a water or sewer capacity charge are subject to Govt C §66022 and a 120-day statute of limitations, but lawsuits challenging a local agency's adjudicatory decision imposing such a charge on a specific development are subject to the 180-day statute of limitations in Govt C §66020. *N.T. Hill, Inc. v City of Fresno* (1999) 72 CA4th 977, 85 CR2d 562. The calculation of the commencement of the cause of action and the conduct of the parties regarding waiver of the right to challenge are critical in determining if actions are time-barred. *Serra Canyon Co. v California Coastal Comm'n* (2004) 120 CA4th 663, 16 CR3d 110; *Travis v County of Santa Cruz* (2004) 33 C4th 757, 16 CR3d 404. Reenactment of a previous fee, even when there is no increase or decrease in the fee, starts the running of a new statute of limitations to challenge the fee. *Barratt Am., Inc. v City of Rancho Cucamonga* (2005) 37 C4th 685, 37 CR3d 149.

© The Regents of the University of California

§10.230 3. Fees and Dedications: Practice Tips

PRACTICE TIP 1: The administrative record must affirmatively support, with substantial evidence, imposition of the fee or dedication. In the case of a development impact fee of general applicability, the record should be made as part of the "AB 1600 Report" pursuant to Govt C §66001 (AB 1600 (1987)) when the fee is adopted or revised. In most cases, additional analysis should not be necessary for each development on which the fee is imposed. See *Commercial Builders of N. Cal. v City of Sacramento* (9th Cir 1991) 941 F2d 872, cert denied (1992) 504 US 931. In the case of dedications or project-specific fees, a record should be prepared at the time the exaction is imposed demonstrating the "essential nexus" and "rough proportionality" between the exaction and the project's impacts. See *Ehrlich v City of Culver City* (1996) 12 C4th 854, 876, 50 CR2d 242. Consider making this record in the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) documentation, where the fee or dedication might be characterized as a mitigation measure. An AB 1600 report will also be required for project-specific fees at the time they are imposed.

PRACTICE TIP 2: Provide for an administrative appeal process in the city's fee ordinance and the ability of the city council to waive the exaction on a showing of a lack of nexus.

PRACTICE TIP 3: Tailor the fees to solve part of the problem. Do not try to solve the entire problem with one fee.

PRACTICE TIP 4: Involve the fee-paying stakeholders in the process that establishes the fee.

PRACTICE TIP 5: Establish community standards for services and facilities in the city's general plan.

PRACTICE TIP 6: Ask the following questions:

(1) What is the problem?

(2) Who or what created the problem?

(3) What is the solution to the problem?

(4) Is there a different way to solve the problem?

(5) Is it a fee or is it a non-monetary exaction?

(6) Is the solution fair?

PRACTICE TIP 7: When a project is approved, it is extremely important that the city serve formal notice of the imposition of the fee or dedication and a notice of protest rights on the project applicant pursuant to Govt C §66020(d)(1), because such service triggers the limitations period for challenging the fee.

© The Regents of the University of California

§10.231 IX. BUILDING PERMITS

A building permit may be a discretionary or a ministerial act. At one time, the issuance of a building permit was viewed as a ministerial act as long as the applicant had complied with the building codes and zoning regulations. However, in recent years, courts have upheld local regulations that treat the issuance of building permits as discretionary and place requirements, in the nature of exactions, on their issuance. See *Friends of Westwood, Inc. v City of Los Angeles* (1987) 191 CA3d 259, 235 CR 788 (building permit for major construction project could be discretionary permit subject to CEQA (California Environmental Quality Act (Pub Res C §§21000-21177))).

© The Regents of the University of California

A. Building, Grading, and Other Regulations

§10.232 1. Authority

Cities have the constitutional power to make and enforce all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. This power extends to regulation of the construction and occupancy of buildings. Cal Const art XI, §7; *Candid Enters., Inc. v Grossmont Union High Sch. Dist.* (1985) 39 C3d 878, 218 CR 303; *Matter of Stoltenberg* (1913) 165 C 789, 791, 134 P 971.

© The Regents of the University of California

§10.233 2. Reasonable Relationship

To pass constitutional muster, the expenses necessarily incurred in complying with the city's construction regulations must be reasonable in relation to the public health or safety interests being protected. *City of Bakersfield v Miller* (1966) 64 C2d 93, 102, 48 CR 889, cert denied (1966) 384 US 988.

© The Regents of the University of California

§10.234 B. Basic Requirements

Typically, an application for a building permit must be accompanied by building plans conforming to applicable building and fire regulations, lawful setback requirements, and similar regulations. Issuance of a building permit may be conditioned on the performance of certain other related acts.

© The Regents of the University of California

§10.235 1. Application

The application for a building permit must include the project's identification, licensed contractor's declaration, owner/builder declaration, workers' compensation exemption or declaration, and construction lending agency information. Health & S C §§19825-19826. See Lab C §3800; *Morris v County of Marin* (1977) 18 C3d 901, 136 CR 251 (failure to comply with Lab C §3800 mandatory duty made county liable for worker's injuries).

© The Regents of the University of California

§10.236 2. Dedication of Land, Construction of Improvements, and Payment of Fees

A building permit may be conditioned on dedication of land or the installation of improvements when such dedication or installation is reasonably related to the proposed use of the property. Govt C §65909. See also *Russ Bldg. Partnership v City & County of San Francisco* (1987) 199 CA3d 1496, 246 CR 21; *Southern Pac. Co. v City of Los Angeles* (1966) 242 CA2d 38, 51 CR 197. But see Govt C §65961. For certain housing projects, no new conditions may be imposed on the issuance of a building permit for 5 years after the approval of a final map, if such conditions could have been imposed at the time the tentative or parcel map was approved. Govt C §65961. However, for purposes of a tentative subdivision map or parcel map that is extended under Govt C §66452.22, the 5-year period must be only 3 years. Govt C 65961(e).

© The Regents of the University of California

C. Uniform Codes

§10.237 1. State Standards

The state Department of Housing and Community Development (HCD) must adopt and enforce rules and regulations for the protection of the public governing the construction, alteration, demolition, occupancy, or other use of buildings used for human habitation. Health & S C §17921. The HCD's regulations are substantially the same as those contained in the most recent editions of the Uniform Building Code, Uniform Housing Code, Uniform Plumbing Code, Uniform Mechanical Code, and National Electric Code, and are distinguished by being referenced as the California version of the respective code. Health & S C §17922.

For the rules relating to adopting a code by reference, see §1.240.

© The Regents of the University of California

§10.238 2. Modifications

Cities must choose between adopting ordinances and regulations imposing the uniform code requirements, or submitting to the regulations adopted by the state Department of Housing and Community Development (HCD). Health & S C §17958; *Briseno v City of Santa Ana* (1992) 6 CA4th 1378, 8 CR2d 486. A city may modify the uniform code requirements if it makes an express finding that such modification is reasonably necessary because of local climatic, geological, or topographical conditions. Health & S C §17958.7; *Building Indus. Ass'n. v City of Livermore* (1996) 45 CA4th 719, 52 CR2d 902 (modification requiring fire sprinkler systems in residential housing); *ABS Institute v City of Lancaster* (1994) 24 CA4th 285, 29 CR2d 224. No modification becomes effective or operative until both the modification and the necessary findings have been filed with the California Building Standards Commission. Health & S C §17958.7.

© The Regents of the University of California

D. Effect of Permit Issuance

§10.239 1. Vested Rights

After a property owner has obtained all permits necessary for the proposed structure and performed substantial work and incurred substantial liabilities in good faith reliance on those approvals, the property owner acquires a vested right to complete construction in accordance with the terms of the permit. *Avco Community Developers, Inc. v South Coast Reg'l Comm'n* (1976) 17 C3d 785, 791, 132 CR 386, cert denied (1977) 429 US 1083; *Consaul v City of San Diego* (1992) 6 CA4th 1781, 8 CR2d 762; *Billings v California Coastal Comm'n* (1980) 103 CA3d 729, 735, 163 CR 288. But see *City of West Hollywood v Beverly Towers, Inc.* (1991) 52 C3d 1184, 278 CR 375 (although no vested rights were held by developer, city was not allowed to impose new restrictions after all discretionary approvals for condominium conversion had been granted).

© The Regents of the University of California

§10.240 2. No Vested Right for Invalid Permit

A permittee does not acquire a vested right under an invalid building permit, even if substantial expenditures have been made in good faith. *Pettitt v City of Fresno* (1973) 34 CA3d 813, 820, 110 CR 262. In a federal court action, however, a contrary holding resulted. *Congregation Etz Chaim v City of Los Angeles* (2004) 371 F3d 1122.

© The Regents of the University of California

§10.241 3. Limit on Vested Right

The rights that vest through reliance on the building or other permit cannot be greater than those specifically granted by the permit itself. *Russ Bldg. Partnership v City & County of San Francisco* (1988) 44 C3d 839, 846, 853, 244 CR 682; *Avco Community Developers, Inc. v South Coast Reg'l Comm'n* (1976) 17 C3d 785, 791, 132 CR 386, cert denied (1977) 429 US 1083. For example, perfection of a vested right for one phase of a multi-phase project does not create a vested right to build subsequent phases.

© The Regents of the University of California

E. Building Permit Duration/Revocation

§10.242 1. Time Frames to Begin and Complete Work

There are no statutory or case-law-based time frames in which building projects must be completed. A building permit becomes "null and void" if the building or work is not commenced within 180 days from the issuance date of the permit or if the building or work authorized by the permit is suspended or abandoned for a period of 180 days. 24 Cal Code Regs §106.4.4. Alternate time frames may apply to newly annexed territory. Health & S C §19829.

© The Regents of the University of California

§10.243 2. Extension

The holder of an unexpired permit who has not begun work may apply for a discretionary extension. The request must be based on "good and satisfactory reasons" that show "that circumstances beyond the control of the permittee have prevented action from being taken." The building official may extend the permit one time only, for a period not to exceed 180 days. Although the code is silent as to extending work that has begun but was suspended or abandoned, it is common practice to allow such extension on the same terms as for a project not yet started. 24 Cal Code Regs §106.4.4. Alternate time frames may apply to newly annexed territory. Health & S C §19829.

© The Regents of the University of California

§10.244 3. Suspension

The building official may, in writing, suspend a permit issued in error, issued on the basis of incorrect information, or issued in violation of any ordinance, regulation, or code. 24 Cal Code Regs §106.4.5. The jurisdiction board of appeals empowered to hear and decide permittees' appeals of building officials' orders, decisions, or determinations regarding the application and interpretation of the building code does not include decisions regarding the administrative provisions of the code. 24 Cal Code Regs §105.2.

© The Regents of the University of California

§10.245 4. Revocation

The building official may, in writing, revoke a permit issued in error, issued on the basis of incorrect information, or issued in violation of any ordinance, regulation, or code. 24 Cal Code Regs §106.4.5. The jurisdiction of the board of appeals empowered to hear and decide permittees' appeals of building officials' orders, decisions, or determinations regarding the application and interpretation of the building code does not include decisions regarding the administrative provisions of the code. 24 Cal Code Regs §105.2. A city may not impose the revocation of a building permit by a refusal to issue a ministerial certificate of occupancy. See *Thompson v City of Lake Elsinore* (1993) 18 CA4th 49, 22 CR2d 344. The doctrine of equitable estoppel may, in a federal court action, prevent the revocation of an improperly issued permit. *Congregation Etz Chaim v City of Los Angeles* (2004) 371 F3d 1122.

© The Regents of the University of California

5. Incomplete Work

§10.246 a. Civil Nuisance Action

An incomplete construction project can be abated by a police power-based civil nuisance action. For discussion of nuisance actions, see §§9.113-9.117.

© The Regents of the University of California

§10.247 b. Criminal Prosecution

The circumstances must be carefully reviewed to determine if criminal enforcement is an available remedy.

© The Regents of the University of California

§10.248 c. Contract Remedies

If a city has provided funds pursuant to a housing program, then the city may utilize the specific remedies in the program's documentation, as well as all generally applicable contract remedies.

© The Regents of the University of California

§10.249 d. State Housing Law Remedies

On the failure of the owner to act, a receiver may be appointed by the court to carry out the abatement remedies necessary to bring the property into compliance with the applicable construction and land use codes. The public agency can obtain a lien for the costs of abatement and thereafter bring an action to recover its enforcement expense. Health & S C §§17980-17992.

© The Regents of the University of California

X. REGIONAL PLANNING ISSUES

§10.250 A. Office of Planning and Research

The state Office of Planning and Research (OPR) is the principal coordinator of state, regional, and local planning. The OPR is supposed to develop long-range planning policies and otherwise assist state and local public agencies in their planning efforts. See Govt C §§65040-65040.6.

© The Regents of the University of California

B. Transportation Planning

§10.251 1. Transportation Planning Agency

Regional transportation planning agencies must prepare a proposed regional transportation plan. The transportation planning agency must consider the transportation plans of cities, counties, districts, private organizations, and state and federal agencies. Govt C §65080(a).

© The Regents of the University of California

§10.252 2. Preparation of Regional Transportation Plan

For provisions relative to the preparation and content of regional transportation plans, see Govt C §§65080-65086.5.

© The Regents of the University of California

§10.253 3. Congestion Management Program

The congestion management agency is required to prepare a congestion management program (CMP) that requires cities and counties to maintain specified levels of service on identified roadways of regional significance. Govt C §§65088-65089.10. If a local government fails to comply with the CMP, the State Controller is obligated to withhold that jurisdiction's apportionment of the increased gas tax revenues generated by Proposition 111 (Cal Const art XIIIB). Govt C §65089.5. A CMP must be developed, adopted, and biennially updated for every county that includes an urbanized area and must include every city in the county. Govt C §65089.

© The Regents of the University of California

C. Airport Planning

§10.254 1. Airport Land Use Plan (ALUP)

Each county that has an airport must establish an airport land use commission (ALUC) charged with planning for the orderly growth of public airports. The ALUC must adopt an airport land use compatibility plan (ALUCP) for the airport and the surrounding area within the ALUC's jurisdiction. Pub Util C §§21670-21679.5. See also *City of Coachella v Riverside County Airport Land Use Comm'n* (1989) 210 CA3d 1277, 258 CR 795. Note, however, that under specific circumstances, in which a county and affected cities themselves adopt certain processes for the preparation, adoption, and amendment of a ALUCP, the formation of an ALUC is no longer required. Pub Util C §21670.1.

For further discussion of airports, see §§6.139-6.155.

© The Regents of the University of California

§10.255 2. Before ALUCP Approval

Until the airport land use compatibility plan (ALUCP) is adopted, the city must submit all regulations and permits within the vicinity of the airport to the airport land use commission (ALUC) for review and approval. See Pub Util C §21675.1.

© The Regents of the University of California

3. After ALUCP Approval

§10.256 a. Airport Land Use Commission (ALUC) Approval

Before the city's amendment of a general plan or a specific plan, or the adoption or approval of a zoning ordinance or building regulation within the area covered by the airport land use compatibility plan (ALUCP), the city must submit the proposed land use action to the airport land use commission (ALUC). See Pub Util C §21676. The Attorney General has opined that an ALUC may not exempt specific plans from compliance with the ALUCP. 87 Ops Cal Atty Gen 102 (2004).

© The Regents of the University of California

§10.257 b. Resubmission of Plan

If the airport land use commission (ALUC) determines that an action, regulation, or permit is inconsistent with the airport land use compatibility plan (ALUCP), the city must reconsider its ALUCP. See Pub Util C §21676.5.

© The Regents of the University of California

§10.258 c. Mandamus

If the airport land use commission (ALUC) fails to act to approve or disapprove any action, regulation, or permit submitted to an ALUC by the city before the ALUC approval of an airport land use compatibility plan (ALUCP), an applicant may use administrative mandamus to compel action. See Pub Util C §§21675.2, 21679.5. If the ALUC fails to adopt an ALUCP, any interested party may initiate judicial proceedings to enjoin the effective date of a zoning change, a zoning variance, the issuance of a permit, or the adoption of a regulation near the airport until the ALUC adopts an ALUCP. Pub Util C §21679. See 71 Ops Cal Atty Gen 213 (1988). See §§13.2-13.27.

© The Regents of the University of California

§10.259 4. City Override

A two-thirds vote of the city council is necessary to override an adverse determination of an airport land use commission (ALUC) concerning the city's proposed amendment of its general plan or specific plan, or the city's proposed adoption or approval of a zoning ordinance or building regulation within the area covered by the airport land use compatibility plan (ALUCP). Pub Util C §21676; 75 Ops Cal Atty Gen 47 (1992). When a city overrides such determination, the operators of the airport are not liable for damages that result from the city's action to override. Pub Util C §21678. To override an ALUC determination regarding consistency of a proposed action with an ALUCP, the local agency must make specific findings that the proposed action is consistent with the purposes of the ALUC. Pub Util C §21676; *California Aviation Council v City of Ceres* (1992) 9 CA4th 1384, 12 CR2d 163.

© The Regents of the University of California

§10.260 5. Local Regulation

Local governments may regulate uses and heights of structures and trees adjacent to an airport. See Govt C §§50485-50485.14.

© The Regents of the University of California

§10.261 D. Waste Management

Under the California Integrated Waste Management Act of 1989 (IWMA) (Pub Res C §§40000-49620), each county and city must prepare and submit to the Integrated Waste Management Board a county-wide integrated waste management plan (IWMP). Pub Res C §41750.

For discussion of municipal solid waste and recycling, see §§6.103-6.119. For discussion of hazardous waste, see §§11.237-11.255.

© The Regents of the University of California

1. Elements of Integrated Waste Management Plan (IWMP)

§10.262 a. Source Reduction and Recycling

The first component of the integrated waste management plan (IWMP) is the source reduction and recycling element from each city. Pub Res C §41750. Each source reduction element must include a program for the management of solid waste generated within the city. Pub Res C §41001. Each source reduction element must evaluate all feasible programs for recycling, composting, and reducing solid waste, as well as the necessary landfill capacity. Pub Res C §§41002-41003.

© The Regents of the University of California

§10.263 b. Household Hazardous Waste

The second component of the integrated waste management plan (IWMP) is the household hazardous waste element. Pub Res C §41750(c). The element must contain a program for the safe collection, recycling, treatment, and disposal of household hazardous wastes that should be separated from the solid waste stream. Pub Res C §§41500, 41510.

© The Regents of the University of California

§10.264 c. Siting

The third component of the integrated waste management plan (IWMP) is a county-wide siting element. Pub Res C §41750(e).

© The Regents of the University of California

§10.265 (1) Consistency With General Plans

All facilities identified must be consistent with the applicable city general plan. Pub Res C §41702.

© The Regents of the University of California

§10.266 (2) Reserved Sites

The county may tentatively reserve a site for new or expanded facilities even though it is inconsistent with the applicable general plan; the site will remain a tentative site until consistency is achieved. Pub Res C §41710.

© The Regents of the University of California

§10.267 (3) Revision

If consistency is not attained, the site must be deleted when the siting element is next revised. Pub Res C §41711.

© The Regents of the University of California

§10.268 2. Waste Management Problems

Each integrated waste management plan (IWMP) must include a summary of significant waste management problems facing the county or city and an overview of the steps that will be taken by local agencies to achieve the purposes of the IWMA. Pub Res C §41751.

© The Regents of the University of California

3. Approval of IWMP

§10.269 a. Submittal

The complete plan is submitted to the state board after approval by the county and by a majority of the cities within the county that contain a majority of the incorporated population. Pub Res C §§41760, 41790.

© The Regents of the University of California

§10.270 b. Public Hearing

Each city or county must hold at least one hearing before approving the plan. Pub Res C §41793.

© The Regents of the University of California

§10.271 c. Failure to Act

If a city fails to act within 90 days of receipt, the plan is deemed approved as submitted. Pub Res C §41760.

© The Regents of the University of California

4. Periodic Review of Integrated Waste Management Plan (IWMP)

§10.272 a. Every 5 Years

The plan must be reviewed, revised if necessary, and submitted to the state board every 5 years. Pub Res C §41770.

© The Regents of the University of California

§10.273 b. Progress Reports

The city, county, and regional agency must submit a report to the state board each year after the board's approval of the plan, summarizing the agency's progress. Pub Res C §41821.

© The Regents of the University of California

§10.274 c. Penalties

If the board finds the plan deficient, it may impose administrative civil penalties. Pub Res C §41813.

© The Regents of the University of California

§10.275 E. Housing Obligations

Local governments are responsible for balancing regional housing needs with economic, environmental, and fiscal factors and community goals established in the general plan. Govt C §65580(d)-(e); Pub Res C §§21000(g), 21001(d).

For further discussion of housing, see §§10.26-10.53, 10.161-10.199.

© The Regents of the University of California

§10.276 F. Joint Powers Authorities

The governance structure of a joint powers authority can result in that entity exercising powers adverse to the interests or desires of a member or nonmember municipality. *Zack v Marin Emergency Radio Auth.* (2004) 118 CA4th 617, 13 CR3d 323.

© The Regents of the University of California

XI. CALIFORNIA COASTAL ACT

A. Basic Regulatory Scheme

§10.277 1. Purpose of Act

The California Coastal Act of 1976 (Coastal Act) (Pub Res C §§30000-30900) was enacted by the legislature as a comprehensive scheme to govern land use planning in the coastal zone. Under the Coastal Act, development of the state's coastal resources is controlled through:

- A permit requirement;
- Local coastal programs that implement the policies of the Coastal Act at the local level; and
- Various enforcement provisions.

Although the Coastal Act generally does not apply to cities outside the coastal zone, the Coastal Act requires that all public entities carrying out or supporting activities that could directly impact coastal resources consider the effect of such activities on these resources. See Pub Res C §30200(a).

On the California Coastal Commission, see §§1.101, 10.278-10.279. On tidelands, beaches, and streams, see §§10.334-10.361.

© The Regents of the University of California

2. California Coastal Commission

§10.278 a. Membership

The Coastal Act establishes the California Coastal Commission, which has the primary responsibility for the implementation of the Coastal Act. Pub Res C §30330. The Coastal Commission consists of 15 members, not all of whom are voting members. Pub Res C §§30301, 30301.5. See also Pub Res C §30304 (alternate members).

© The Regents of the University of California

§10.279 b. Action

With limited exception, any action by the Coastal Commission requires a majority vote of the members present at a meeting. Pub Res C §30315.

© The Regents of the University of California

§10.280 3. Geographic Extent of Coastal Zone

The coastal zone generally extends seaward to the state's outer limit of jurisdiction and inland 1000 yards from the mean high tide line of the sea. However, in significant coastal estuarine habitat and recreation areas, it extends to the lesser of either the first major ridgeline paralleling the sea or five miles from the mean high tide line. The coastal zone is specifically defined by the maps identified and included in the bill enacting the Coastal Act. Pub Res C §30103(a). In determining a coastal zone boundary jurisdiction issue, specific maps prevail over text of the statute. *Rossco Holdings Inc. v State* (1989) 212 CA3d 642, 652, 260 CR 736, cert denied (1990) 494 US 1080.

The Coastal Act contains numerous statutory revisions to the general coastal zone boundary and notably does not include the area of jurisdiction of the San Francisco Bay Conservation and Development Commission. Pub Res C §§30103(a), 30150-30174.

© The Regents of the University of California

§10.281 4. Coastal Policies

The adequacy of local coastal programs and permissibility of development are evaluated against the Coastal Act's coastal resource planning and management policies. See Pub Res C §§30200-30265.5. These include specific policies on the following:

- Public access to the sea and shoreline (Pub Res C §§30210-30214);
- Recreational use (Pub Res C §§30220-30224);
- Protection of the marine environment (Pub Res C §§30230-30237);
- Protection of land resources:
- Environmentally sensitive habitats (Pub Res C §30240);
- Agricultural land (Pub Res C §§30241-30242);
- Timberlands (Pub Res C §30243);
- Archeological resources (Pub Res C §30244);
- Development (Pub Res C §§30250-30255); and
- Industrial development (Pub Res C §§30260-30265.5).

The Coastal Act recognizes that conflicts may occur between these policies, but declares that they must be resolved in a manner that on balance is most "protective" of significant coastal resources. Pub Res C §30007.5.

© The Regents of the University of California

§10.282 5. Interpretive Guidelines

The interpretative guidelines of the Coastal Commission are exempt from the regulation promulgation requirements of the Administrative Procedure Act (Govt C §§11340-11529). See *California Coastal Comm'n v Office of Admin. Law* (1989) 210 CA3d 758, 258 CR 560.

© The Regents of the University of California

§10.283 B. Local Coastal Programs

The Coastal Act requires each local government lying in whole or in part within the coastal zone to prepare and submit to the Coastal Commission a local coastal program (LCP). Pub Res C §30500(a). The LCP consists of a local government's (Pub Res C §30108.6)

- land use plans,
- zoning ordinances,
- zoning district maps, and
- within sensitive coastal resources areas, other implementing actions.

The precise content of each LCP is determined by the local government in full consultation with the Coastal Commission and with full public participation. Pub Res C §§30500(c), 30501. The LCP must meet the requirements of, and implement the provisions and policies of, the Coastal Act at the local level. Pub Res C §30108.6.

© The Regents of the University of California

1. Local Discretion

§10.284 a. Content

The Coastal Act establishes general policies governing coastal development, leaving to the city, in full consultation with the Coastal Commission, the precise content of the local coastal program (LCP). Pub Res C §30500(c).

© The Regents of the University of California

§10.285 b. Local General Plans and Zoning Ordinances

Changes to a city's general plan, zoning ordinance, or other legislative determinations in conformance with a certified local coastal program (LCP) are subject to referendum or initiative. *Yost v Thomas* (1984) 36 C3d 561, 205 CR 801.

© The Regents of the University of California

§10.286 c. Submittal for Coastal Commission Review

The local coastal program (LCP) may be submitted to the Coastal Commission all at once or in two phases: (1) a land use plan (LUP), and (2) zoning ordinances, zoning district maps, and, if required, other implementing actions. Pub Res C §30511. In addition, a local government may submit an LCP for separate geographic units consisting of less than its entire coastal jurisdiction if the Coastal Commission finds that the areas proposed for separate review can be analyzed for potential cumulative impacts on coastal resources and public access independently of the remainder of the affected jurisdiction. Pub Res C §30511(c).

© The Regents of the University of California

§10.287 d. Delay in Submittal

In September, 2000, at the Coastal Commission's urging, the legislature amended the Coastal Act to add §30166.5 to the Public Resources Code, which directed the Coastal Commission to prepare a local coastal program (LCP) for the City of Malibu. This special legislation was the result of Malibu's inability to obtain an approved LCP for over 9 years after its incorporation. The resulting LCP withstood legal challenge by the city, and was held to have been withdrawn by the legislature from the initiative or referendum power. *City of Malibu v California Coastal Comm'n* (2004) 121 CA4th 989, 18 CR3d 40.

© The Regents of the University of California

§10.288 e. Limited Application of CEQA

The California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) does not apply to activities and approvals under the Coastal Act by (Pub Res C §21080.9; 14 Cal Code Regs §§15251(f), 15265; *Strother v California Coastal Comm'n* (2009) 173 CA4th 873, 92 CR3d 831):

- Any local government (as defined in Pub Res C §30109) necessary for the preparation and adoption of a local coastal program (LCP); or
- Any state university or college (as defined in Pub Res C §30119) as necessary for the preparation of and adoption of a long-range land use development plan.

However, CEQA applies to the certification of an LCP or a long-range land use development plan by the Coastal Commission as such actions constitute a plan for use in the Coastal Commission's regulatory program. Pub Res C §21080.9; 14 Cal Code Regs §§15251(f), 15265(b); *Strother v California Coastal Comm'n, supra*.

© The Regents of the University of California

2. Land Use Plan (LUP) Certification

§10.289 a. Standard

The Coastal Commission may require conformance with the policies and requirements of the Coastal Act only to the extent necessary to achieve the basic goals of the Coastal Act. Pub Res C §§30001.5, 30512.2.

© The Regents of the University of California

§10.290 b. Commission Hearing

No later than 60 days after a land use plan (LUP) or portion of an LUP is submitted, the Coastal Commission must conduct a public hearing and determine, by a majority vote of its members present, whether the submittal raises "no substantial issue" as to its conformity with the policies of the Coastal Act. If the Coastal Commission determines that no substantial issue is raised, the LUP or portion thereof is deemed certified as submitted. Pub Res C §30512(a)(1).

© The Regents of the University of California

§10.291 c. Public Hearing

If the Coastal Commission finds that a substantial issue is raised, it must conduct a public hearing no later than 90 days after submission of the land use plan (LUP) or portion thereof and determine, by a majority vote of its appointed membership, whether to certify the plan in whole or in part based on whether the plan meets the policies contained in chapter 3 of the Coastal Act. Pub Res C §30512(a)(3), (c). If the Coastal Commission fails to act within that time period, the LUP or portion thereof is deemed certified. Pub Res C §30512(a)(2).

© The Regents of the University of California

3. Effect of Local Coastal Program (LCP) Certification

§10.292 a. Full Certification

Cities with a certified local coastal program (LCP) are given authority to issue most coastal development permits. Pub Res C §30519.

© The Regents of the University of California

§10.293 b. Partial Certification

On certification of the land use portion of the local coastal program (LCP), a city may issue certain coastal development permits. Pub Res C §30600.5. See also *Maya Del Mar v California Coastal Comm'n* (1984) 152 CA3d 49, 199 CR 225. Before certification of an LCP, the Coastal Commission must approve the following (Pub Res C §30601):

- Projects proposed between the sea and the nearest public road or 300 feet inland of a beach or the line of mean high tide;
- All development on submerged or tidal or public trust lands and near wetlands and coastal bluffs; and
- All major public works or energy facilities.

© The Regents of the University of California

4. Denial of Certification

§10.294 a. Findings

If the Coastal Commission determines not to certify a land use plan (LUP), in whole or in part, it must provide written findings. It may suggest modifications that, if adopted by the local government, would cause the LUP to be deemed certified on confirmation by the Coastal Commission's executive director. Pub Res C §30512(b). A certification with suggested modifications expires 6 months after action by the Coastal Commission. 14 Cal Code Regs §13537(b).

© The Regents of the University of California

§10.295 b. Modifications

The local government may request that the Coastal Commission not recommend or suggest modifications. In such case, the Commission must refuse certification with the required written findings. The local government may also elect to meet the Coastal Commission's decision to refuse certification in a manner other than by the modifications suggested by the Coastal Commission and may then submit a revised land use plan (LUP) to the Coastal Commission. Pub Res C §30512(b).

© The Regents of the University of California

5. Approval of Zoning and Other Implementing Actions

§10.296 a. Standard

The Coastal Commission may reject zoning ordinances and other implementing actions submitted to it only on the grounds they do not conform with, or are inadequate to carry out, the provisions of the certified land use plan (LUP). Pub Res C §30513. If the Coastal Commission has not rejected the zoning ordinances, zoning district maps, and other implementing actions within 60 days, and after a public hearing, these actions are deemed approved. Pub Res C §30513.

© The Regents of the University of California

§10.297 b. Commission Actions

Like the action required on an land use plan (LUP), a decision on the zoning ordinances and other implementing actions requires a majority vote of the commissioners present. 14 Cal Code Regs §13542(b). If the Commission rejects the zoning ordinances and other implementing actions, it may suggest modifications, which, if adopted by the local government, will be deemed approved on confirmation by the executive director. Pub Res C §30513. A certification with suggested modification expires 6 months after action by the Coastal Commission. 14 Cal Code Regs §13542(b).

© The Regents of the University of California

§10.298 c. Modifications

The local government may request that the Coastal Commission not recommend or suggest modifications. In such case, the Commission must refuse certification with the required written findings. The local government may also elect to meet the Coastal Commission's decision to refuse certification in a manner other than by the modifications suggested by the Commission, and may then submit revised zoning ordinances, zoning district maps, and other implementing actions. Pub Res C §30513.

© The Regents of the University of California

§10.299 6. Amendments to Certified Local Coastal Program

A certified local coastal program (LCP) and all local implementing ordinances may be amended by a local government, but any such amendment takes effect only on certification by the Coastal Commission. Pub Res C §30514(a). For purposes of the Coastal Act, an "amendment of a certified local coastal program" includes, but is not limited to, any action by the local government that authorizes a use of a parcel of land other than that designated in the LCP as a permitted use. Pub Res C §30514(e). This includes an amendment of the LCP by initiative or referendum. *Yost v Thomas* (1984) 36 C3d 561, 205 CR 801; 70 Ops Cal Atty Gen 220 (1987).

Amendments are submitted to and processed by the Coastal Commission in the same manner as LCPs, except that the Coastal Commission makes no determination as to whether a proposed amendment raises a substantial issue as to conformity with the policies of chapter 3 of the Coastal Act. Pub Res C §30514(b). Only three submittals of proposed amendments are permitted in any calendar year, but there are no limitations on the number of amendments included in each submittal. Pub Res C §30514(b). The Coastal Commission has established separate procedures for review of minor and de minimis amendments. Pub Res C §30514(c)-(d).

© The Regents of the University of California

§10.300 7. Periodic Review of Local Coastal Programs

The Coastal Commission must review each certified local coastal program (LCP) at least once every 5 years to evaluate its effectiveness in implementing Coastal Act policies. If the Commission finds that a certified LCP is not being carried out in conformity with the Coastal Act, it must recommend corrective actions to the local government, which may include recommended amendments to the certified LCP. Pub Res C §30519.5; *Security Nat'l Guar., Inc. v California Coastal Comm'n* (2008) 159 CA4th 402, 421, 71 CR3d 522. However, the Commission has no power either to make the amendments itself or to compel the local government to make them. 159 CA4th at 421.

© The Regents of the University of California

C. Coastal Development Permits

§10.301 1. Basic Requirement

Any person desiring to perform or undertake any development in the coastal zone must first obtain a coastal development permit, in addition to obtaining any other permit required by other state or local agencies. Pub Res C §30600(a). See *Healing v California Coastal Comm'n* (1994) 22 CA4th 1158, 27 CR2d 758. The term "person" includes the state, any local government or special district, and, to the extent permitted by federal law, the federal government. Pub Res C §§21066, 30600(a).

An exception to this permit requirement is provided for the following emergency work (Pub Res C §30600(e)):

- Emergency work necessary to protect life or property;
- Emergency work necessary to repair public service facilities damaged as a result of a disaster when a state emergency has been declared by the governor; and
- Emergency projects to maintain, repair, or restore a highway damaged as a result of fire, flood, storm, or earthquake.

In such instances, the Coastal Commission must be notified within 14 days from the date of commencement of the project. Pub Res C §30600(e).

© The Regents of the University of California

2. Issuing Agency

§10.302 a. Pre-LCP Certification

Before local coastal program (LCP) certification, the Coastal Commission has authority for issuing all coastal development permits.

© The Regents of the University of California

§10.303 b. Post-LCP Certification

After local coastal program (LCP) certification, coastal permit authority is delegated to local government. The Coastal Commission's role in the permit process is then limited essentially to (Pub Res C §§30519(b), 30603, 30625):

- Retained permit jurisdiction over state tidelands, submerged lands, public trust lands and uncertified geographic areas (areas of deferred certification); and
- Hearing appeals from local actions on appealable developments.

After certification of a city's LCP, a county or the state must obtain a coastal development permit from the city to develop public property within the city's coastal zone jurisdiction. 65 Ops Cal Atty Gen 88 (1982). A city taking an action on a coastal development permit must send notification of its final action to the commission by certified mail within 7 calendar days from the date of taking the action. Pub Res C §30603(d).

© The Regents of the University of California

3. Development

§10.304 a. Statutory Standard

Development subject to the permit requirement is broadly defined and includes, among other things, the following (Pub Res C §30106):

- Placement or erection of any solid material or structure;
- Discharge or disposal of any dredged materials or of any gaseous, liquid, solid, or thermal waste;
- Grading, removing, dredging, mining, or extraction of any material;
- Change of the density or intensity of use of land, including subdivision under the Subdivision Map Act (Govt C §§66410-66499.37) (and any other division of land, including lot splits);
- Change in the intensity of use of water or of access thereto;
- Construction, reconstruction, or alteration of the size of any structure; and
- Removal or harvesting of major vegetation other than for agricultural purposes.

© The Regents of the University of California

§10.305 b. Interpretations

Development includes, among other things, lot line adjustments (see *La Fe, Inc. v Los Angeles County* (1999) 73 CA4th 231, 86 CR2d 217), the conversion of apartment to a stock cooperative (see *California Coastal Comm'n v Quanta Inv. Corp.* (1980) 113 CA3d 579, 609, 170 CR 263), and the conversion of storage area to a restaurant use (see *Stanson v San Diego Coast Reg'l Comm'n* (1980) 101 CA3d 38, 47, 161 CR 392). A permit is required for the development of public land by local governments and state agencies. Pub Res C §§30111, 30519; 65 Ops Cal Atty Gen 88 (1982). A coastal development permit can be required for projects on federal land within the coastal zone. Pub Res C §§30111, 30519. See *California Coastal Comm'n v Granite Rock Co.* (1987) 480 US 572, 94 L Ed 2d 577, 107 S Ct 1419.

© The Regents of the University of California

4. Standards

§10.306 a. Wetlands

Wetlands are "lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens." Pub Res C §30121. Although the Commission relies on the cited definition to identify "wetlands," it has expanded the definition, "given the highly variable environmental conditions along the California coast rendering some wetlands not readily identifiable by simple means." See *Kirkorowicz v California Coastal Comm'n* (2000) 83 CA4th 980, 987, 100 CR2d 124. In addition to obtaining other wetlands approvals, a permit applicant must demonstrate that the development minimizes the adverse impacts to wetlands. Pub Res C §30233(a). See *Bolsa Chica Land Trust v Superior Court of San Diego County* (1999) 71 CA4th 493, 83 CR2d 850. See also *Solid Waste Agency v United States Army Corps of Eng'rs* (2001) 531 US 159, 148 L Ed 2d 576, 121 S Ct 675. Residential development is not allowed in wetlands, even if the development is used to finance the restoration of other degraded wetlands. Pub Res C §30233(a); *Bolsa Chica Land Trust v Superior Court of San Diego County* (1999) 71 CA4th 493, 83 CR2d 850. Wetlands of any quality are entitled to protection. *Dunn v Santa Barbara County* (2006) 135 CA4th 1281, 38 CR3d 316. For other wetlands considerations, see §§10.334-10.361.

© The Regents of the University of California

§10.307 b. Public Access

Permits for new development as defined in Pub Res C §30106 must provide for public access to the shoreline and along the coast. Pub Res C §§30210-30212. Public access exactions must consider factors including the following (Pub Res C §30214):

- The topography and character of the site;
- The impact of public access on the other users of the land; and
- The owners of adjacent land.

The public access requirement constitutes a valid exercise of a regulatory power, and, as such, is not an unconstitutional taking as long as the project contributes, albeit indirectly, to the need for public access. *Grupe v California Coastal Comm'n* (1985) 166 CA3d 148, 212 CR 578. But see *Nollan v California Coastal Comm'n* (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141 (permit condition requiring dedication of easement invalid when condition does not further purpose advanced for imposition of the condition (protection of views)).

© The Regents of the University of California

§10.308 c. Housing

Cities must maintain a feasible level of affordable housing within the coastal zone. Pub Res C §30607.2; Govt C §65590. Before the certification of a local coastal program, single-family residences may be built on certain lots without a coastal development permit. Pub Res C §§30610.1-30610.2.

© The Regents of the University of California

§10.309 5. Statutory Exemptions

The Coastal Act expressly exempts from the coastal development permit requirement certain types of developments and areas. See Pub Res C §30610; 14 Cal Code Regs §§13250-13253. It also exempts, before local coastal program (LCP) certification, construction of a single-family residence on certain vacant lots located in a specified area designated by the Coastal Commission, provided that these lots meet certain criteria. Pub Res C §30610.1(c); Pub Res C §§30610.1-30610.2. The Coastal Act does not limit the power of a local government to declare, prohibit, or abate nuisances. Pub Res C §30005(b).

© The Regents of the University of California

§10.310 6. Coastal Commission Permit Procedures

The Coastal Commission's rules for processing permit applications are found in 14 Cal Code Regs §§13052-15170. The Coastal Commission's executive director may waive the permit requirement for de minimis projects. 14 Cal Code Regs §§13238-13238.2. The executive director may also, administratively, issue permits for emergency projects and certain small developments. Pub Res C §30624; 14 Cal Code Regs §§13136-13153. All other permits are processed as regular permits, except that the Commission may take up as a single matter on the consent calendar certain matters considered as de minimis with respect to Coastal Act purposes and objectives. 14 Cal Code Regs §§13100-13103.

© The Regents of the University of California

§10.311 a. Other Agency Permits

The Coastal Commission will not accept an application for a permit unless all other state or local governmental agencies have granted at a minimum preliminary approval for the development proposed. Required preliminary approvals include (14 Cal Code Regs §13052):

- Tentative map approval;
- Conditional use, variance, or zone change approval;
- A final environmental impact report (EIR) or negative declaration; and
- An approval in concept (*i.e.,* approval of general uses and intensity of use proposed as permitted by the applicable local general plan, zoning requirement, height, setback, or other land use ordinances).

Local agencies may require applicants to agree to defend, indemnify, and hold harmless the agency with respect to litigation challenging the coastal permit. 85 Ops Cal Atty Gen 21 (2002). In certain instances, preliminary approvals may be waived. 14 Cal Code Regs §13053.

© The Regents of the University of California

§10.312 b. Hearings

The Coastal Commission must set a de novo hearing on an application for coastal development permits and any appeals no later than 49 days after the date on which the application is filed with the Commission. Pub Res C §30621. After an application is filed, the Coastal Commission receives written comments from the public and affected public agencies and a written report and recommendation from its staff. 14 Cal Code Regs §§13057-13061, 13073-13087. A public hearing is conducted at the conclusion of which the Coastal Commission may vote to approve, deny, or conditionally approve the application. Pub Res C §30607; 14 Cal Code Regs §§13062-13072, 13090-13095.

© The Regents of the University of California

§10.313 c. Pre-LCP Permits

If the matter is heard before local coastal program (LCP) certification, the Coastal Commission may approve the application if it finds that the proposed development conforms with the policies contained in chapter 3 of the Coastal Act and will not prejudice the local government's ability to prepare an LCP meeting those policies. Pub Res C §30604(a). Written findings that address the requirements of both the Coastal Act and the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) are required. Pub Res C §§21002, 30604; 14 Cal Code Regs §13096. Because its regulatory program has been certified by the Secretary of Resources, the Coastal Commission is exempt from the requirement of preparing an environmental impact report for projects it approves. Pub Res C §21080.5; 14 Cal Code Regs §15251.

© The Regents of the University of California

§10.314 d. Revocation

The Coastal Commission's regulations provide for revocation of permits previously issued, reapplication following the denial of a permit, and reconsideration of the terms and conditions of a permit granted or of a permit denial. Pub Res C §30627; 14 Cal Code Regs §§13104-13109.

© The Regents of the University of California

§10.315 7. Post-Certification Local Government Permit

A local government that has a fully certified local coastal program (LCP) may adopt its own coastal development permit system or it may incorporate coastal development permits into its existing land use permit procedures. 14 Cal Code Regs §§13302-13303.

© The Regents of the University of California

D. Post-Certification Appeals From Local Government Permit Decisions

1. Appeal Jurisdiction

§10.316 a. Beachfront Development

In the case of a certified local coastal program (LCP), the Coastal Commission has appeal jurisdiction over developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or the mean high tide line where there is no beach, whichever is the greater distance. Pub Res C §30603(a)(1).

© The Regents of the University of California

§10.317 b. Other Appellate Jurisdiction

The Coastal Commission also has appeal jurisdiction over developments approved by the local government located ((Pub Res C §30603(a)(2)):

- On tidelands, submerged lands, public trust lands;
- Within 300 feet of the top of the seaward face of any coastal bluff; or
- Within 100 feet of certain wetlands, estuaries, or streams.

Specific types of development are also appealable to the commission without regard to geographic location within the coastal zone. An example is the approval of a development that is not designated as the "principal permitted use" under the approved zoning ordinance or zoning district map. Pub Res C §30603(a)(4).

© The Regents of the University of California

§10.318 2. Grounds for Appeal and Scope of Review

For appealable developments, the grounds for appeal are limited to an allegation that the development does not conform to the certified local coastal program (LCP) or the public access policies. Pub Res C §30603(b). Thus, the Coastal Commission may not consider whether a proposed development impacts views of the coast from offshore vantage points, when neither the Coastal Act nor the local agency's certified LCP refers to the protection of offshore views. See *Schneider v California Coastal Comm'n* (2006) 140 CA4th 1339, 44 CR3d 867. Likewise, the Commission has no jurisdiction, during an appeal of a coastal development permit, to designate a new environmentally sensitive habitat area (ESHA) that contradicts the terms of a certified LCP. *Security Nat'l Guar., Inc. v California Coastal Comm'n* (2008) 159 CA4th 402, 71 CR3d 522. On the other hand, the Coastal Commission may not approve a coastal development permit for a residential project in an ESHA, when the certified LCP limits development in such areas to resource dependent uses, unless the Commission makes detailed findings, with supporting evidence, that to so limit development would deprive the property owner of substantially all economically viable uses of his or her property, and thus constitute a taking. *McAllister v California Coastal Comm'n* (2008) 169 CA4th 912, 87 CR3d 365.

© The Regents of the University of California

§10.319 3. Who May Appeal

Only the applicant, an aggrieved person, or any two members of the Coastal Commission are eligible to appeal an action on a coastal development permit or claim of any exemption for any development by the local government. Pub Res C §30625. An aggrieved person is one who expresses concerns about an application or local action, by either appearing at the local public hearing or otherwise communicating his or her concerns to the local government, or one who for good cause could do neither. Pub Res C §30801.

© The Regents of the University of California

§10.320 4. Timing of Appeal

With limited exceptions, the Coastal Commission's regulations require the exhaustion of local appeals. 14 Cal Code Regs §13573(a)-(b). An action by local government on an appealable development becomes final at the close of business on the 10th working day, unless an appeal to the Coastal Commission is filed with the Commission. Pub Res C §30603.

© The Regents of the University of California

§10.321 5. Commission Appeal Procedures

Coastal Commission review of an appeal is a three-step process:

(1) An appeal of a local government's action requires the executive director of the Coastal Commission to determine, within 5 days, whether the appeal is patently frivolous. An appeal determined to be patently frivolous must be accompanied by a $300 filing fee. Pub Res C §30620.

(2) The Coastal Commission determines whether the local action raises a substantial issue with respect only to the specific grounds permitted on which the appeal is filed. Pub Res C §30625(b)(2).

(3) If it finds that no substantial issue is raised, the appeal is dismissed and the local government decision stands. Pub Res C §30625(a). If the Coastal Commission does find a substantial issue, it then acts on the appeal through a de novo review following its regular permit procedures; the commission's action supersedes the local government's final action. Pub Res C §30625(c).

Both the substantial issue and action steps may occur after the same or separate public hearings. The Coastal Commission, as a party to the writ proceedings, does not have appellate jurisdiction to modify a coastal development permit when such permit was issued by the city pursuant to an order of the trial court. As a party to the writ proceedings, the commission was bound by this ruling, whether or not it was "final." See *City of Half Moon Bay v Superior Court* (2003) 106 CA4th 795, 131 CR2d 213.

© The Regents of the University of California

E. Judicial Review

§10.322 1. Mandate

Any aggrieved person may seek judicial review of a decision or action of the Coastal Commission by filing a petition for writ of mandate under CCP §1094.5 within 60 days after such decision or action has become final. Pub Res C §30801. A decision or action of local government which is not appealable to the Coastal Commission may also be reviewed under CCP §1094.5 if filed within 60 days after such decision or action has become final. Pub Res C §30802. On mandate actions, see §§13.2-13.27.

© The Regents of the University of California

§10.323 2. Bonds

No litigation bond is required for actions against any government or agency to restrain violations of the Coastal Act or to enforce affirmative duties. Pub Res C §§30803-30804; *Venice Canals Resident Homeowners Ass'n v Superior Court* (1977) 72 CA3d 675, 140 CR 361.

© The Regents of the University of California

§10.324 3. Collateral Attack

If no action is filed within the 60-day period, the decision becomes immune from collateral attack. *California Coastal Comm'n v Superior Court* (1989) 210 CA3d 1488, 1493, 258 CR 567; *Walter H. Leimert Co. v California Coastal Comm'n* (1983) 149 CA3d 222, 232, 196 CR 739.

© The Regents of the University of California

§10.325 4. Ripeness

A challenge to a local coastal plan (LCP) (or amendment thereto) is not ripe until the Coastal Commission has approved or denied it. *Santa Barbara County Flower & Nursery Growers Ass'n, Inc. v Santa Barbara County* (2004) 121 CA4th 864, 17 CR3d 489.

© The Regents of the University of California

F. Enforcement

§10.326 1. Basic Provisions

Any person is entitled to maintain an action for declaratory and equitable relief and for the recovery of civil penalties to enforce the provisions of the Coastal Act or a local coastal program (LCP). Pub Res C §§30803, 30805. The Coastal Act provides that if a prima facie showing of a violation is made, preliminary equitable relief must issue to restrain any further violation of the Coastal Act. Pub Res C §30803; *California Coastal Comm'n v Quanta Inv. Corp.* (1980) 113 CA3d 579, 611, 170 CR 263.

© The Regents of the University of California

2. Cease and Desist Authority

§10.327 a. Permit Violations

The executive director of the Coastal Commission may issue cease and desist orders when a person or governmental agency has undertaken or threatens to undertake any activity that (1) requires a permit for which no permit has been obtained, or (2) may be inconsistent with a previously issued permit. Pub Res C §30809(a).

© The Regents of the University of California

§10.328 b. Certified LCPs and Port Master Plans

Such cease and desist orders may also be issued to enforce certified local coastal program (LCPs) or port master plans when (Pub Res C §30809(a)):

- The local government or a port governing body requests the Coastal Commission to act;
- The local government or a port governing body is a party to the violation; or
- The Coastal Commission requests and the local government or a port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation that could cause significant damage to coastal resources.

© The Regents of the University of California

§10.329 c. Terms and Conditions

Cease and desist orders issued by the executive director may be subject to terms and conditions and are null and void after 90 days. Pub Res C §30809(e). The executive director may issue such cease and desist orders only after giving notice to the landowner or person performing the activity that requires a permit or is inconsistent with an issued permit. The Coastal Commission, on its own or at the request of local government, may itself issue cease and desist orders after conducting a public hearing. Pub Res C §30810(a). All affected persons and agencies must be given notice of the public hearing on a proposed cease and desist order. Pub Res C §30810(c). An order so issued may be subject to terms and conditions, including a requirement of immediate removal of development or a schedule that includes steps to be taken to obtain a permit. Pub Res C §30810(b).

© The Regents of the University of California

§10.330 d. Penalties

A civil penalty not to exceed $6000 for each day in which the violation persists may be imposed for negligent or intentional violation of a cease and desist order by any person or governmental agency. Pub Res C §30821.6.

© The Regents of the University of California

3. Civil Penalties

§10.331 a. Amounts

Any person who violates any provision of the Coastal Act is subject to a civil fine not to exceed $30,000. Pub Res C §30820. If the violation is intentional and knowing, an additional civil fine of between $1000 and $15,000 dollars may be imposed for each day in which such violation occurs. Pub Res C §30820. In the case of intentional and knowing violations, the Coastal Commission may also seek exemplary damages in an amount left to the discretion of the court. Pub Res C §30822.

© The Regents of the University of California

§10.332 b. Use of Funds

Monetary penalties assessed under the Coastal Act must be remitted to the Violation Remediation Account of the state Coastal Conservancy Fund to be used for carrying out the provisions of the Coastal Act, when appropriated by the legislature. Pub Res C §30823.

© The Regents of the University of California

§10.333 4. Restoration

The Coastal Commission, a local government implementing a certified local coastal program (LCP), or a port governing body implementing a certified port master plan may, after a public hearing, order restoration of a site if it finds that development has occurred without a coastal development permit and the development is causing continuing coastal resource damage inconsistent with the Coastal Act. Pub Res C §30811.

© The Regents of the University of California

XII. TIDELANDS, BEACHES, AND STREAMS

§10.334 A. Public Trust Doctrine

The public trust doctrine developed in the common law to protect the public's right to use navigable waters and the lands underlying them for the purposes of navigation, commerce, and fisheries. See Cal Const art X, §§3-4. There can be no vested right to interfere with the public uses protected by the public trust. See generally Longtin's California Land Use §5.62 (2d ed 1987). The California Supreme Court has interpreted the protections of the public trust doctrine broadly.

On harbors, see §§6.156-6.179. On water quality, see §§11.111-11.183. On the California Coastal Act, see §§10.277-10.333.

See also Federal Interagency Committee for Wetland Delineation, Federal Manual for Identifying and Delineating Jurisdictional Waters (USFWS, Soil Conservation Service, Environmental Protection Agency, and Army Corps of Engineers); Tiner, Wetlands of the United States: Current Status and Recent Trends; and Littleworth & Garner, California Water (1995) (published by Solano Press Books, P.O. Box 773, Point Arena, California 95468).

© The Regents of the University of California

§10.335 1. Protection of Traditional Uses

Traditional uses protected at common law included navigation, commerce, and fisheries. These uses have been interpreted to include fishing, hunting, bathing, swimming, boating, anchoring, and general recreational uses. *Bohn v Albertson* (1951) 107 CA2d 738, 238 P2d 128.

© The Regents of the University of California

§10.336 2. Flexibility

The public trust doctrine is flexible to meet changing public needs. *Marks v Whitney* (1971) 6 C3d 251, 259, 98 CR 790.

© The Regents of the University of California

§10.337 3. Effect on Water Rights

Water rights are limited by the public trust doctrine. *National Audubon Soc'y v Superior Court* (1983) 33 C3d 419, 189 CR 346, cert denied (1983) 464 US 977 (no vested right to divert water in a manner harmful to the public trust). The doctrine also requires the state to exercise continuing supervision and control over navigable waters while considering its duty under the public trust. *National Audubon Soc'y v Superior Court, supra*.

© The Regents of the University of California

§10.338 4. Enforcement

Any member of the public has standing to raise a claim of harm to the public trust. However, the proper means of enforcement is by way of a petition for writ of mandate against the appropriate state or local agency charged with protecting the affected trust resources. See generally *Center for Biological Diversity, Inc. v FPL Group, Inc.* (2008) 166 CA4th 1349, 83 CR3d 588.

© The Regents of the University of California

B. Areas Protected

§10.339 1. Navigable Waters, Tidelands, and Submerged Lands

The public trust doctrine protects navigable waters, navigable tidelands, and submerged lands. See *Marks v Whitney* (1971) 6 C3d 251, 257, 98 CR 790; *City of Los Angeles v Duncan* (1933) 130 CA 11, 19 P2d 289. Further, the public trust doctrine continues to apply to tidelands even if the lands are no longer submerged due to the placement of fill. *Zack's, Inc. v City of Sausalito* (2008) 165 CA4th 1163, 1177, 81 CR3d 797.

© The Regents of the University of California

§10.340 2. Nontidal Lakes and Streams

The public trust doctrine applies to nontidal lakes and streams. See *State v Superior Court (Lyon)* (1981) 29 C3d 210, 172 CR 696; *State v Superior Court (Fogerty)* (1981) 29 C3d 240, 172 CR 713, cert denied (1981) 454 US 865. It does not extend to non-navigable waterways in the absence of some impact on navigable waters, nor to artificial reservoirs created to utilize appropriative water rights. *Golden Feather Community Ass'n v Thermalito Irrig. Dist.* (1989) 209 CA3d 1276, 1284, 257 CR 836.

© The Regents of the University of California

§10.341 3. Access to and Use of Waterways

The California Constitution requires owners of frontage or tidal lands to allow access to navigable waters. Cal Const art X, §4. See also Longtin's California Land Use §5.64 (2d ed 1987). The legislature has enacted a number of statutes implementing this constitutional mandate. See §§10.342-10.346.

© The Regents of the University of California

§10.342 a. Subdivisions

New subdivisions must allow public access to an adjacent public waterway, river, stream, fully or partially publicly owned lake or reservoir, bay, shoreline, or ocean coastline. Govt C §§66478.1-66478.13.

© The Regents of the University of California

§10.343 b. Coastal Development Projects

Public access to the coastline must be provided in new development projects along the coastline. Pub Res C §§30210-30212. See also *Grupe v California Coastal Comm'n* (1985) 166 CA3d 148, 212 CR 578.

© The Regents of the University of California

§10.344 c. Public Streets and Highways

Public access to navigable waters must be maintained from public streets and highways within a city. Govt C §39933. See also *Lane v City of Redondo Beach* (1975) 49 CA3d 251, 122 CR 189.

© The Regents of the University of California

§10.345 d. Access in Sale of Public Lands

A public right of access for fishing must be reserved in all lands sold by the state. Cal Const art I, §25. The state must reserve convenient access to navigable waters in the sale of shoreline property. Pub Res C §6210.4.

© The Regents of the University of California

§10.346 e. Reservoirs

Access must be provided to publicly owned water supply reservoirs. Health & S C §§115825-115830. Access must be allowed to waters impounded by a dam on a stream naturally frequented by fish, although exceptions may be granted to waters located wholly on privately owned agricultural or residential property where the free passage of fish is not impeded. Fish & G C §5943.

© The Regents of the University of California

C. Regulatory Authority

§10.347 1. California Coastal Commission

For discussion of the California Coastal Commission, see §§10.278-10.333. See also §1.101.

© The Regents of the University of California

§10.348 2. State Department of Fish and Game

The Fish and Game Commission (FGC) is the state agency charged with the responsibility of regulating the taking of fish and game. Fish & G C §200. In this capacity, the FGC reviews and comments on California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) documentation to determine if a project will impact birds, mammals, fish, reptiles, and amphibia. Fish & G C §711.4; 14 Cal Code Regs §778.

© The Regents of the University of California

§10.349 a. Fees

The Department of Fish and Game (DFG) collects fees for the review of environmental impact statements (EIRs) ($2,500), negative declarations ($1,800), and projects subject to a certified regulatory program ($850). Fish & G C §711.4; Pub Res C §21089.

© The Regents of the University of California

§10.350 b. Streambed Alteration Permit

The Department of Fish and Game (DFG) must be notified of and must approve any work that substantially diverts, alters, or obstructs the natural flow or substantially changes the bed, channel, or banks of any river, stream, or lake. Fish & G C §1603. See Fish & G C §§1601 and 1603(f) for exceptions related to emergency situations.

© The Regents of the University of California

§10.351 c. Navigation Dredging Permit

A permit is required before using a vacuum or suction dredge in any river, stream, or lake of the state. Fish & G C §5653.

© The Regents of the University of California

§10.352 3. Army Corps of Engineers

The United States Army Corps of Engineers (Corps) is the lead federal agency responsible for regulating wetlands.

© The Regents of the University of California

§10.353 a. Statutory Authority

Several federal statutes grant the United States Army Corps of Engineers (Corps) authority to regulate activities in waters of the United States. Two are of primary importance: §404 of the Clean Water Act (CWA) (33 USC §§1251-1387) (see §10.354) and the Rivers and Harbors Act of 1899 (see §10.355).

© The Regents of the University of California

§10.354 (1) Section 404 of Clean Water Act (33 USC §1344)

Section 404 of the Clean Water Act (CWA) (33 USC §§1251-1387), 33 USC §1344, gives the United States Army Corps of Engineers (Corps) authority over the discharge of dredged or fill material into wetlands and other waters of the United States. 33 CFR §329.1. The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC §1251(a). To meet this goal, §301 of the CWA prohibits the discharge of any pollutant without a permit. 33 USC §1311. Fill material is considered a pollutant. 33 USC §1362(6). Section 404 of the CWA permits the Corps to issue permits for the discharge of dredged or fill materials into waters of the United States. 33 USC §1344.

© The Regents of the University of California

§10.355 (2) Rivers and Harbors Act of 1899

The Rivers and Harbors Act of 1899 (RHA) (33 USC §§401-467n) gives the United States Army Corps of Engineers (Corps) authority to regulate activities in navigable waters of the United States. 33 USC §§401-403. Section 10 of the RHA prohibits the unauthorized obstruction or alteration of any "navigable waters" of the United States. 33 USC §403. Section 9 of the RHA also prohibits the unauthorized construction of any structure over or in navigable waters, excavating from or deposition of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters. 33 USC §401. Under the RHA, the Corps may issue permits for such activities in navigable waters. See 33 CFR §§330.1-330.6.

© The Regents of the University of California

§10.356 b. Corps' Definition of Wetlands

The United States Army Corps of Engineers (Corps) defines wetlands as "those areas that are inundated or saturated by surface ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 CFR §328.3(b). See also *Solid Waste Agency v United States Army Corps of Eng'rs* (2001) 531 US 159, 148 L Ed 2d 576, 121 S Ct 675. See §10.306 to compare wetlands definition applicable to project subject to Coastal Commission's jurisdiction.

© The Regents of the University of California

§10.357 c. Waters of the United States

Wetlands are only one type of waters of the United States. The term "waters" includes, *e.g.,* territorial seas, prairie potholes, mudflats, all waters used in interstate and foreign commerce, and natural ponds. See 33 CFR §328.3(a).

© The Regents of the University of California

§10.358 d. Nationwide Permits

Nationwide permits are intended to allow dredging or filling to occur with little, if any, delay or paperwork. 33 CFR §330.1. This type of permit has been issued for 26 different activities involving discharges. 33 CFR §330.5; 33 CFR part 330, App A (Nationwide Permits and Conditions). All activities under nationwide permits must comply with a series of special conditions and management practices. 33 CFR §§330.5-330.6.

© The Regents of the University of California

§10.359 e. Individual Permits

Individual permits are for specific activities following review of an individual application. See 33 CFR §§325.1-325.2.

© The Regents of the University of California

§10.360 4. State Lands Commission

The State Lands Commission is the state agency empowered to classify and regulate the use of state-owned lands, including ungranted tidelands and submerged lands. Pub Res C §§6101-6111. The Commission also establishes boundaries among and between publicly and privately owned lands. Pub Res C §6204. The Commission regulates, through leaseholds and other mechanisms, the use of state-owned tidelands. Pub Res C §§6216, 6301.

© The Regents of the University of California

§10.361 5. Department of Boating and Waterways

The Department of Boating and Waterways is the state agency charged with regulating small craft harbors, boating facilities, and beach erosion control. Harb & N C §§50-77.1. The department also regulates all aspects of watercraft and vessels and their use on waterways. Harb & N C §§650-774.4.

© The Regents of the University of California

§10.362 XIII. CHALLENGES TO LAND USE DECISIONS

Damages to property as a result of a land use action can give rise to a variety of constitutional issues including the following:

- A taking under the Fifth Amendment to the United States Constitution or Cal Const art I, §19;
- A violation of civil rights; or
- A denial of due process and equal protection under the Fourteenth Amendment to the United States Constitution or Cal Const art I, §7.

CEQA (California Environmental Quality Act)-based challenges are also quite common in the land use approval process. See §§11.59-11.76.

For complete discussion of environmental regulations, including CEQA, see chap 11. On mandate/judicial review, see §§13.2-13.27. On challenges to land use regulations, see also *Current Issues in Housing and Land Use* (League of California Cities, City Attorneys Continuing Education Seminar, February 2005); Institute for Local Government, An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions (2006) (www.ca-ilg.org/ounce).

© The Regents of the University of California

A. Regulatory and Physical Takings

1. Overview

§10.363 a. Source of Law

The "takings" clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and comparable provisions of Cal Const art I, §19 require payment of just compensation when a governmental entity inversely condemns and therefore "takes" private property for a public use, whether the taking be regulatory or physical (possessory). *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 314, 96 L Ed 2d 250, 107 S Ct 2378 (regulatory); *Nollan v California Coastal Comm'n* (1987) 483 US 825, 831, 97 L Ed 2d 677, 107 S Ct 3141 (regulatory). See *Locklin v City of Lafayette* (1994) 7 C4th 327, 362, 27 CR2d 613 (physical taking—public entity's alteration of upstream property may render entity liable in inverse condemnation for damage to downstream property).

© The Regents of the University of California

§10.364 b. What Constitutes "Property"

"Property" has been characterized as a "bundle of rights," including but not limited to the right to exclude others. *Loretto v Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 433, 73 L Ed 2d 868, 102 S Ct 3164 (quoting *Kaiser Aetna v U.S.* (1979) 444 US 164, 176, 62 L Ed 2d 332, 100 S Ct 383).

© The Regents of the University of California

§10.365 c. "Regulatory Taking" Versus "Physical Taking"

Courts distinguish between "physical taking" and "regulatory taking" of property. See *Brown v Legal Found. of Washington* (2003) 538 US 216, 233, 155 L Ed 2d 376, 123 S Ct 1406; *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency* (2002) 535 US 302, 321, 152 L Ed 2d 517, 122 S Ct 1465. When the government physically occupies, takes possession of, or destroys property, a physical taking has taken place. See *U.S. v Pewee Coal Co.* (1951) 341 US 114, 115, 95 L Ed 809, 71 S Ct 670 (executive order directing Secretary of the Interior to take possession of coal mines constituted physical taking). See also *Casitas Mun. Water Dist. v U.S.* (Fed Cir 2008) 543 F3d 1276, 1296 (holding that flow obligations imposed on water project under Endangered Species Act are a physical taking).

A regulatory taking is an uncompensated taking of private property that occurs through governmental regulation. Takings cases often include claims based on both theories. As discussed in §§10.385 and 10.403, temporary physical takings are generally analyzed as regulatory takings. See generally *Loretto v Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164.

© The Regents of the University of California

§10.366 d. Availability of Damages

Damages for a taking caused by governmental regulation were formerly unavailable in California. *Agins v City of Tiburon* (1979) 24 C3d 266, 157 CR 372, aff'd (1980) 447 US 255. In 1987, the United States Supreme Court issued decisions indicating inter alia that compensation must be made available if the court determines that governmental regulation amounts to a taking. See *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 318, 96 L Ed 2d 250, 107 S Ct 2378; *Nollan v California Coastal Comm'n* (1987) 483 US 825, 841, 97 L Ed 2d 677, 107 S Ct 3141. See also *Keystone Bituminous Coal Ass'n v DeBenedictis* (1987) 480 US 470, 473, 94 L Ed 2d 472, 107 S Ct 1232. Thus, pre-1987 California takings cases have been overruled to the extent that they hold that the only remedy for a regulatory taking is mandamus or declaratory relief. *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 320, 96 L Ed 2d 250, 107 S Ct 2378.

© The Regents of the University of California

§10.367 e. Caveat

The law of regulatory taking is complex and evolving. Analysis of any taking issue will always require thorough and careful legal research.

© The Regents of the University of California

2. Initial Characterization Essential to Analysis

§10.368 a. Suggested Approach

A regulatory taking case requires two levels of analysis (*Penn Cent. Transp. Co. v City of New York* (1978) 438 US 104, 124, 57 L Ed 2d 631, 98 S Ct 2646d):

(1) Is the case ripe for adjudication?

(2) If the case is ripe, liability is analyzed based on the character of the government action, the economic impact of the regulatory action, and the extent to which the action interferes with the owner's reasonable investment-backed expectations.

© The Regents of the University of California

§10.369 b. Is the Case Ripe?

There are two ripeness standards. One standard applies if the owner makes a facial attack on a land use regulation. The other applies if the owner attacks the regulation as it applies to the owner's property. See *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 312 n6, 96 L Ed 2d 250, 107 S Ct 2378; *Williamson County Reg'l Planning Comm'n v Hamilton Bank* (1985) 473 US 172, 192, 87 L Ed 2d 126, 105 S Ct 3108.

© The Regents of the University of California

§10.370 c. Physical Taking or Regulatory Taking?

If the case is ripe for adjudication, whether the case is a physical taking or a regulatory taking determines the appropriate legal standard. A temporary physical taking should be analyzed as a regulatory taking. See generally *Loretto v Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164; *Contra Blue Jeans Equities West v City & County of San Francisco* (1992) 3 CA4th 164, 168, 4 CR2d 114 (challenge to an office building impact fee).

© The Regents of the University of California

3. Ripeness Requirements and Other Limitations on Challenges

§10.371 a. Ripeness Is Jurisdictional

A court has no jurisdiction over a premature claim. *Hensler v City of Glendale* (1994) 8 C4th 1, 10, 32 CR2d 244, cert denied (1995) 513 US 1184; *Long Beach Equities, Inc. v County of Ventura* (1991) 231 CA3d 1016, 1032, 282 CR 877, cert denied (1992) 505 US 1219. A number of decisions dismissing cases on ripeness grounds in the Ninth Circuit are cited in *Kaiser Dev. Co. v City & County of Honolulu* (9th Cir 1990) 898 F2d 112, 113.

© The Regents of the University of California

§10.372 b. Facial Attacks

A facial taking claim alleges that the enactment of the regulation results in a taking; this type of taking claim is thus ripe when the regulation is adopted. Examples of facial taking cases are the *First English* cases. See *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378; *First English Evangelical Lutheran Church v County of Los Angeles* (1989) 210 CA3d 1353, 258 CR 893, cert denied (1990) 493 US 1056 (after remand from United States Supreme Court, Los Angeles County ordinance prohibiting construction on interim basis in area prone to flooding was held not a taking because it did not leave owner without any valuable use and substantially advanced safety interest in preventing injury and death due to flooding). See also *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency* (2002) 535 US 302, 337, 152 L Ed 2d 517, 122 S Ct 1465; *Keystone Bituminous Coal Ass'n v DeBenedictis* (1987) 480 US 470, 495, 94 L Ed 2d 472, 107 S Ct 1232; *Hodel v Virginia Surface Mining & Reclamation Ass'n, Inc.* (1981) 452 US 264, 295, 69 L Ed 2d 1, 101 S Ct 2352; *Sinclair Oil Corp. v County of Santa Barbara* (9th Cir 1996) 96 F3d 401, 405 (federal court abstention under *Pullman* doctrine appropriate in case in which facial claim ripe but as-applied claim not ripe); *Lake Nacimiento Ranch Co. v San Luis Obispo County* (9th Cir 1987) 841 F2d 872, 877.

© The Regents of the University of California

§10.373 c. As-Applied Claims

Ripeness requirements for an as-applied taking claim are more stringent. Such claims challenge the application of a land use regulation to a specific property, *e.g.,* denial of a development permit or imposition of a fee or other condition on development. Compare *Terminals Equip. Co. v City & County of San Francisco* (1990) 221 CA3d 234, 243, 270 CR 329 (denial of permit to demolish existing structure not a taking because owner could continue use of existing building), with *Nollan v California Coastal Comm'n* (1987) 483 US 825, 839, 97 L Ed 2d 677, 107 S Ct 3141 (imposition of public beach access easement as condition of development).

© The Regents of the University of California

§10.374 (1) "Final Determination" Requirement

This requires a property owner to have obtained "a final, definitive position regarding how [the city] will apply the regulations at issue to the particular land in question." *Williamson County Reg'l Planning Comm'n v Hamilton Bank* (1985) 473 US 172, 191, 87 L Ed 2d 126, 105 S Ct 3108. The lead cases are *Williamson County Reg'l Planning Comm'n v Hamilton Bank, supra*, *MacDonald, Sommer & Frates v Yolo County* (1986) 477 US 340, 348, 91 L Ed 2d 285, 106 S Ct 2561, and *Palazzolo v Rhode Island* (2001) 533 US 606, 620, 150 L Ed 2d 592, 121 S Ct 2448. *Long Beach Equities, Inc. v County of Ventura* (1991) 231 CA3d 1016, 1032, 282 CR 877, cert denied (1992) 505 US 1219 (applicant must submit at least one "meaningful application" for a development project that has been "thoroughly rejected"). Compare *Guinnane v City & County of San Francisco* (1987) 197 CA3d 862, 868, 241 CR 787, cert denied (1988) 488 US 823 (case unripe because no final action had been taken on building permit application), with *Guinnane v San Francisco City Planning Comm'n* (1989) 209 CA3d 732, 257 CR 742, cert denied (1989) 493 US 936 (denial of building permit did not violate equal protection or substantive due process clauses).

The "final determination" requirement is met when the agency has no further discretionary authority over the use of a property owner's land, or the permissible uses of the property are known to a reasonable degree of certainty. *Williamson County Reg'l Planning Comm'n v Hamilton Bank* (1985) 473 US 172, 191, 87 L Ed 2d 126, 105 S Ct 3108; *Palazzolo v Rhode Island* (2001) 533 US 606, 620, 150 L Ed 2d 592, 121 S Ct 2448; *Suitum v Tahoe Reg'l Planning Agency* (1997) 520 US 725, 738, 137 L Ed 2d 980, 117 S Ct 1659 (*Williamson County*'s final decision requirement "responds to the high degree of discretion characteristically possessed by land use boards in softening the strictures of the general regulations they administer").

© The Regents of the University of California

§10.375 (2) Multiple Applications

Denial of one or more further applications may be necessary if an initial development application is overly ambitious, because rejection of a grandiose plan does not mean that a more modest proposal would also be rejected. *Palazzolo v Rhode Island* (2001) 533 US 606, 620, 150 L Ed 2d 592, 121 S Ct 2448; *MacDonald, Sommer & Frates v Yolo County* (1986) 477 US 340, 348, 91 L Ed 2d 285, 106 S Ct 2561. See also *Kaiser Dev. Co. v City & County of Honolulu* (D Ha 1986) 649 F Supp 926, 942, aff'd (9th Cir 1990) 898 F2d 112 (finding case unripe because developer made no attempt to submit revised proposal after rejection of beach-front hotel complex concept); *Milagra Ridge Partners, Ltd. v City of Pacifica* (1998) 62 CA4th 108, 72 CR2d 394 (taking claim fails under ripeness doctrine when one project rejected, second reversed by referendum, but no third application was filed to enable city to determine what development could be approved under revised zoning designations); *Calprop Corp. v City of San Diego* (2000) 77 CA4th 582, 592, 91 CR2d 792 (city's rejection of plaintiff's landfill use proposal did not create ripe takings claim due to intense and unique proposed use). But see *City of Monterey v Del Monte Dunes at Monterey, Ltd.* (1999) 526 US 687, 143 L Ed 2d 882, 119 S Ct 1624 (lawsuit filed after serial denial of five development applications); *Hoehne v County of San Benito* (9th Cir 1989) 870 F2d 529, 532 (owner not required to apply for variance, rezoning, conditional use permit when not available or futile).

© The Regents of the University of California

§10.376 (3) Repeal or Waiver

The property owner must also request a repeal or waiver of any allegedly onerous regulation. *Williamson County Reg'l Planning Comm'n v Hamilton Bank* (1985) 473 US 172, 187, 87 L Ed 2d 126, 105 S Ct 3108.

© The Regents of the University of California

§10.377 (4) Exhaustion of Administrative and Judicial Remedies

A closely related concept sometimes treated as part of the "final determination" requirement is the California law requiring a property owner to exhaust all available administrative remedies (*e.g.,* administrative appeals, variance request) before bringing suit. See *Metcalf v County of Los Angeles* (1944) 24 C2d 267, 269, 148 P2d 645; *Igna v City of Baldwin Park* (1970) 9 CA3d 909, 914, 88 CR 581. Exhaustion of administrative remedies is also jurisdictional. *Anthony v Snyder (Barratt Am.)* (2004) 116 CA4th 643, 10 CR3d 505. Judicial remedies must also be exhausted by writ of administrative mandamus or (for facial challenge) declaratory relief. *Hensler v City of Glendale* (1994) 8 C4th 1, 13, 32 CR2d 244, cert denied (1995) 513 US 1184. Issues that are addressed in state administrative and judicial proceedings preclude relief in a parallel federal takings claim. *Dodd v Hood River County* (9th Cir 1998) 136 F3d 1219, 1225, cert denied (1998) 525 US 923. For the doctrine to apply, exhaustion of administrative remedies must be required by statute. *Campbell v Regents of Univ. of Cal.* (2005) 35 C4th 311, 25 CR3d 320.

© The Regents of the University of California

§10.378 (5) Futility

The "final determination" requirement is not applicable if the owner can demonstrate futility. The futility exception is narrowly construed. See, *e.g., Hacienda Valley Mobile Estates v City of Morgan Hill* (9th Cir 2003) 353 F3d 651, 661; *American Savings & Loan Ass'n v County of Marin* (9th Cir 1981) 653 F2d 364, 371. See also *Kinzli v City of Santa Cruz* (9th Cir 1987) 818 F2d 1449, 1454, modified (9th Cir 1987) 830 F2d 968, cert denied (1988) 484 US 1043 (denial of at least one meaningful application may be necessary before futility can be asserted). The mere fact that state procedures are untested or uncertain is insufficient to establish futility. *Carson Harbor Village, Ltd. v City of Carson* (9th Cir 2004) 353 F3d 824, 830.

© The Regents of the University of California

§10.379 (6) State Remedies

A property owner must also "seek compensation through the procedures the state has provided" before a federal taking claim is ripe. *Williamson County Reg'l Planning Comm'n v Hamilton Bank* (1985) 473 US 172, 194, 87 L Ed 2d 126, 105 S Ct 3108. Reserving the federal takings claim in state court suffices to preserve the claim in federal court. *San Remo Hotel, L.P. v City & County of San Francisco* (9th Cir 2004) 364 F3d 1088, 1094. However, when the takings issue is litigated and decided in state court, issue preclusion may apply. 364 F3d at 1096. In *San Remo Hotel, L.P. v City & County of San Francisco* (2005) 545 US 323, 337, 162 L Ed 2d 315, 125 S Ct 2491, the U.S. Supreme Court held that the Full Faith and Credit statute precluded federal courts from reconsidering takings claims already heard by a state court. A property owner may file first in federal court only if there was no adequate state remedy available at the time of the alleged taking. See, *e.g., City of Monterey v Del Monte Dunes at Monterey, Ltd.* (1999) 526 US 687, 721, 143 L Ed 2d 882, 119 S Ct 1624; *Carson Harbor Village, Ltd. v City of Carson* (9th Cir 2004) 353 F3d 824, 830 (holding that California's legal scheme for redressing excess rent control is at least facially adequate); *LeVald, Inc. v City of Palm Desert* (9th Cir 1993) 998 F2d 680, 686; *Sinaloa Lake Owners Ass'n v City of Simi Valley* (9th Cir 1989) 882 F2d 1398, 1402, cert denied (1990) 494 US 1016, overruled on other grounds in *Armendariz v Penman* (9th Cir 1996) 75 F3d 1311. A plaintiff may not circumvent ripeness requirements by alleging that it does not seek just compensation, but only an adjudication of the constitutionality of the regulation. *Ventura Mobilehome Communities Owners Ass'n v City of San Buenaventura* (9th Cir 2004) 371 F3d 1046, 1052.

© The Regents of the University of California

§10.380 (7) Limitations on Actions

Takings claims against local legislative and administrative acts are subject to the state statutes of limitations applicable to such acts. For example, a challenge to the facial validity of a zoning ordinance is subject to the 90-day period of limitations under Govt C §65009, but an inverse condemnation claim for damages for the application of a subdivision ordinance to a particular parcel of property is subject to the 90-day limitations period under Govt C §66499.37 for challenging acts pursuant to the Subdivision Map Act (Govt C §§66410-66499.37). *Travis v County of Santa Cruz* (2004) 33 C4th 757, 775, 16 CR3d 404; *Hensler v City of Glendale* (1994) 8 C4th 1, 22, 32 CR2d 244, cert denied (1995) 513 US 1184. See also *Freeman v City of Beverly Hills* (1994) 27 CA4th 892, 896, 32 CR2d 731.

The 5-year limitations period of CCP §319 does not apply to regulatory takings. *Travis v County of Santa Cruz* (2004) 33 C4th 757, 775 n11, 16 CR3d 404. For statute of limitations purposes, a claim that a government action requiring offers of dedication of a beach access easement arises, and the limitation period begins to run, when the offers are made, not when the offers are accepted. *Daniel v County of Santa Barbara* (9th Cir 2002) 288 F3d 375, 383, cert denied (2002) 537 US 973.

© The Regents of the University of California

§10.381 d. "Public Use" Limitation

At issue in *Kelo v City of New London* (2005) 545 US 469, 162 L Ed 2d 439, 125 S Ct 2655, was the Fifth Amendment's prohibition on "taking" private property "for public use, without just compensation." In *Kelo,* the city used condemnation to acquire private property to be resold to a developer who planned to build a business park. 545 US at 472. The Court upheld the city's actions, equating "public use" with "public purpose" and leaving it to the legislative determinations of the state and local governments authorizing and carrying out the eminent domain purpose to determine public purpose. 545 US at 484.

© The Regents of the University of California

§10.382 4. Facial Regulatory Takings Disfavored

Facial challenges to regulations based on a takings claim are generally disfavored and liability is difficult to establish. See *Pennell v City of San Jose* (1988) 485 US 1, 9, 99 L Ed 2d 1, 108 S Ct 849 (rent control ordinance allowing hearing officer to consider tenant's financial difficulties did not constitute facial taking); *Long Beach Equities, Inc. v County of Ventura* (1991) 231 CA3d 1016, 1029, 282 CR 877, cert denied (1992) 505 US 1219 (growth control ordinance limiting number of building permits that may be annually issued did not constitute facial taking). The claimant must show that the regulation will always result in a taking for properties subject to it. Such inquiries are evaluated under the ad hoc factual analysis that the courts have traditionally employed. See *Cwynar v City & County of San Francisco* (2001) 90 CA4th 637, 651, 109 CR2d 233.

© The Regents of the University of California

5. Regulatory Taking Liability Analysis

§10.383 a. Same Analysis for Permanent and Temporary Takings

The standard for determining whether the government must provide just compensation for a regulatory taking is the same for temporary and permanent taking claims. However, the length of time of the taking is a relevant factor. *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency* (2002) 535 US 302, 152 L Ed 2d 517, 122 S Ct 1465 (temporary moratoria on development); *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378 (interim ordinance prohibiting construction).

© The Regents of the University of California

§10.384 b. Extraordinary Delay

An extraordinary delay in acting on a development permit application may give rise to a temporary taking claim. However, normal or reasonable delays in processing of development applications or zone change requests do not constitute a taking. *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency* (2002) 535 US 302, 332, 152 L Ed 2d 517, 122 S Ct 1465; *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 321, 96 L Ed 2d 250, 107 S Ct 2378. A delay resulting from an agency's mistaken assertion of jurisdiction is not a temporary taking requiring compensation. *Landgate, Inc. v California Coastal Comm'n* (1998) 17 C4th 1006, 1018, 73 CR2d 841, cert denied (1998) 525 US 876. But see *Chandis Sec. Co. v City of Dana Point* (1996) 52 CA4th 475, 484, 60 CR2d 481 (stating in dicta that at some point prolonged and unnecessary delays will amount to a taking). To constitute a taking, the delay must be so unreasonable that the court can only conclude that the delay was intended to thwart the owner's use of the land. *Loewenstein v City of Lafayette* (2002) 103 CA4th 718, 127 CR2d 79; *Ali v City of Los Angeles* (1999) 77 CA4th 246, 253, 91 CR2d 458.

© The Regents of the University of California

§10.385 c. Temporary Physical Taking

A regulation that results in a temporary physical taking claim is often analyzed as a regulatory taking. *Loretto v Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 432 n9, 73 L Ed 2d 868, 102 S Ct 3164. But when the government physically occupies property or acquires a cognizable property interest such as an easement, however temporarily, just compensation must be paid. *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency* (2002) 535 US 302, 322, 152 L Ed 2d 517, 122 S Ct 1465 (citing *U.S. v General Motors Corp.* (1945) 323 US 373, 89 L Ed 311, 65 S Ct 357).

© The Regents of the University of California

§10.386 d. *Penn Central* Ad Hoc Test

In *Penn Cent. Transp. Co. v City of New York* (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, the Supreme Court prescribed an ad hoc, case-by-case approach to determining whether there is a taking. The relevant factors include the economic impact of the regulation on the claimant (particularly the extent to which the regulation interfered with distinct investment-backed expectations) and the character of the governmental action. Further, a taking may more readily be found if the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. According to *Palazzolo v Rhode Island* (2001) 533 US 606, 150 L Ed 2d 592, 121 S Ct 2448, and *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency* (2002) 535 US 302, 152 L Ed 2d 517, 122 S Ct 1465, *Penn Central* provides the leading test for determining whether there is a taking. See *McClung v City of Sumner* (9th Cir 2008) 548 F3d 1219 (holding that legislative, generally applicable development conditions that do not require an owner to relinquish rights to real property should be analyzed under *Penn Central*).

© The Regents of the University of California

§10.387 e. Two-Prong *Agins* Standard

In *Agins v City of Tiburon* (1980) 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138*,* the United States Supreme Court held that the application of a land use regulation to a specific property is a taking if it "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." 447 US at 260 (citations omitted). Later, in *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 120 L Ed 2d 798, 112 S Ct 2886*,* the Court clarified that, under this standard, the regulation must deny an owner *all* economically viable use of his or her property. *Lucas v South Carolina Coastal Council, supra*. See also *Palazzolo v Rhode Island* (2001) 533 US 606, 617, 150 L Ed 2d 592, 121 S Ct 2448; *NJD, Ltd. v City of San Dimas* (2003) 110 CA4th 1428, 1437, 2 CR3d 818.

The tests under *Agins* and *Penn Cent. Transp. Co. v City of New York* (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, are similar: both may be applied to a single takings claim, although the more nuanced *Penn Central* test appears to be gaining favor in the courts. *Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency* (2002) 535 US 302, 152 L Ed 2d 517, 122 S Ct 1465. It appears as if the trend of the law is that if a regulation does not result in a physical invasion or deprive property of all economic use, *Agins* ceases to apply and the *Penn Central* test governs. See *Allegretti & Co. v County of Imperial* (2006) 138 CA4th 1261, 42 CR3d 122.

© The Regents of the University of California

§10.388 (1) *Agins* Partly Overturned

In the most significant takings decision in decades, the Supreme Court in *Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074, partly overturned *Agins* by holding that a regulation may not be challenged as a taking on the grounds that the regulation fails to substantially advance a legitimate state interest. A trial court's application of the "substantially advances a legitimate state interest" prong of the *Agins* test is reversible error. *Los Altos El Granada Investors v City of Capitola* (2006) 139 CA4th 629, 43 CR3d 434. A regulation or condition requiring an exaction of property, however, may still be challenged on the grounds that there is no nexus because the regulation fails to substantially advance a legitimate state interest.

© The Regents of the University of California

§10.389 (2) Categorical Taking/Deprivation of All Economic Use

In *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 120 L Ed 2d 798, 112 S Ct 2886, the Supreme Court reaffirmed the proposition that a regulation that denies all economically beneficial or productive use of land is a taking per se. However, even if no use is allowed, there is no taking if the government can show that its regulation is necessary to prevent or eliminate a nuisance or "noxious use." *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 1020, 120 L Ed 2d 798, 112 S Ct 2886. Stated differently, a regulation that deprives land of all economically beneficial use does not effect a compensable taking if "the proscribed use interests were not part of [the property owner's] title to begin with." 505 US at 1027. In *Palazzolo v Rhode Island* (2001) 533 US 606, 629, 150 L Ed 2d 592, 121 S Ct 2448, the Supreme Court ruled that when the claimant acquired land after the enactment of the regulation, the three-prong analysis described in *Penn Central* was the appropriate standard. The *Palazzolo* court also said that when the law allows at least one single-family dwelling there is not a total taking.

© The Regents of the University of California

§10.390 (3) Some Economic Use Remains

A court will not find a categorical taking if a regulation deprives a property of something less than 100-percent economic viability. *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 1015, 120 L Ed 2d 798, 112 S Ct 2886. Supreme Court Justice Antonin Scalia's *Lucas* opinion also indicates that deprivation of all economic use rule is imprecise because it does not make clear the "property interest" against which the loss of use is to be analyzed. Justice Scalia also states, for example, that it is not clear whether a regulation requiring a developer to leave 90 percent of a rural tract in its natural state should be analyzed as a deprivation of all economically beneficial use or a mere diminution in value of the tract as the whole. 505 US at 1017, 1019. See also *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 774, 66 CR2d 672, cert denied (1998) 522 US 1077.

© The Regents of the University of California

§10.391 f. Exactions: *Nollan*/*Dolan* "Nexus" Test

The *Nollan*/*Dolan* nexus test is used to determine whether an exaction or condition on property constitutes a taking. Such an exaction is a taking unless the government can demonstrate a direct nexus and rough proportionality between the exaction and the burden placed by the property on public resources. *Nollan v California Coastal Comm'n* (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141; *Dolan v City of Tigard* (1994) 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309. This analysis requires balancing of interests. See §§10.392-10.397.

For further discussion of the constitutional limits that specifically apply to fees and dedication requirements on development projects, see §§5.163, 5.185.

© The Regents of the University of California

§10.392 (1) Direct Nexus

In the exactions context, *Nollan* amplifies the "substantially advance a legitimate state interest" aspect of the *Agins* standard by requiring a direct and substantial nexus between the burdens created by the proposed property development and the governmental interest addressed by a challenged development exaction. *Nollan v California Coastal Comm'n* (1987) 483 US 825, 834, 97 L Ed 2d 677, 107 S Ct 3141. The property development need not be the sole cause of the impact that an exaction addresses. Rather, the development need only exacerbate a preexisting need (*e.g.,* commercial development's impact on housing). *Dolan v City of Tigard* (1994) 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309. Thus, it is clear that as a result of the *Nollan* nexus test, something more than the deferential rational-basis test is required.

© The Regents of the University of California

§10.393 (2) Rough Proportionality

Once a "direct" or "essential nexus" (*Nollan v California Coastal Comm'n* (1987) 483 US 825, 834, 97 L Ed 2d 677, 107 S Ct 3141) is found between a legitimate state interest and an exaction imposed as a condition of a discretionary permit, a court must decide whether the extent of the exaction bears the required relationship to the project impact. When the exaction involves the dedication of land or an ad hoc fee, the public agency has the burden of showing that there is a "rough proportionality" between the exaction and the impact. Conditions that require the actual dedication of property, rather than merely limiting the landowner's use of the property, are subject to this stricter scrutiny. *Dolan v City of Tigard* (1994) 512 US 374, 391, 129 L Ed 2d 304, 114 S Ct 2309. See also *Keystone Bituminous Coal Ass'n v DeBenedictis* (1987) 480 US 470, 492, 94 L Ed 2d 472, 107 S Ct 1232 (court will balance police power interests served by regulation and property uses permitted by regulatory action against burdens created by regulation to determine whether a taking has occurred).

California law requires local governments to make specific findings and observe a number of procedural requirements before adopting development fees. See generally Govt C §§66000-66008.

© The Regents of the University of California

§10.394 (3) Fees for Public Improvements

Fees used to fund public improvements, imposed as conditions of discretionary permits, are also subject to the "direct nexus" and "rough proportionality" standards. However, fees of general applicability are subject to a more lenient standard of review and will be upheld as long as they are reasonable. *Ehrlich v City of Culver City* (1996) 12 C4th 854, 866, 50 CR2d 242.

© The Regents of the University of California

§10.395 (4) Fees to Mitigate Loss of Housing Units

A fee to mitigate the loss of rental housing units caused by, for example, conversion of rental units to hotel use, will not be subject to *Nollan*/*Dolan* heightened scrutiny if this requirement is based on a legislatively approved formula, and if the government has no discretion as to the amount of the fee. The fee need not be applicable to all property in the city if it is applicable to all similarly situated properties. *San Remo Hotel L.P. v City & County of San Francisco* (2002) 27 C4th 643, 672, 117 CR2d 269.

© The Regents of the University of California

§10.396 (5) Development Denials

The courts have not extended *Nollan*/*Dolan* beyond exactions in the land use context. Development denials are not subject to the rough proportionality test. *City of Monterey v Del Monte Dunes at Monterey, Ltd.* (1999) 526 US 687, 702, 143 L Ed 2d 882, 119 S Ct 1624. See also *Landgate, Inc. v California Coastal Comm'n* (1998) 17 C4th 1006, 1023, 73 CR2d 841, cert denied (1998) 525 US 876.

© The Regents of the University of California

§10.397 (6) Ad Hoc Factual Inquiry

There is no "set formula" for analyzing whether the *Nollan*/*Dolan* nexus requirements have been met. The court conducts an ad hoc factual inquiry into the nexus between the subject property interests served by the exaction and the extent to which the amount of the exaction is proportional to the burden imposed by the proposed use. *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 1015, 120 L Ed 2d 798, 112 S Ct 2886. See *Penn Cent. Transp. Co. v City of New York* (1978) 438 US 104, 124, 57 L Ed 2d 631, 98 S Ct 2646.

As a rule, the greater the burdens created or exacerbated by the property, the more likely that an exaction's validity will be sustained as long as the exaction ameliorates the burdens. At the other end of the spectrum, the nexus test is not met if a development condition bears no relationship to the benefit conferred on the applicant or burden imposed by the property. See *Kavanau v Santa Monica Rent Control Bd.* (1997) 16 C4th 761, 775, 66 CR2d 672, cert denied (1998) 522 US 1077 (listing 13 factors that may be considered when making such a factual inquiry).

A jury trial may be appropriate to determine disputed factual issues in a regulatory taking challenge filed in a federal court. *City of Monterey v Del Monte Dunes at Monterey, Ltd.* (1999) 526 US 687, 143 L Ed 2d 882, 119 S Ct 1624.

© The Regents of the University of California

§10.398 g. Diminution of Value Cases

In the exaction and dedication context, the *Nollan* (*Nollan v California Coastal Comm'n* (1987) 483 US 825, 834, 97 L Ed 2d 677, 107 S Ct 3141) nexus test must be applied to a regulatory taking claim when a property retains some economically beneficial use. *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 1015, 120 L Ed 2d 798, 112 S Ct 2886. Thus, for instance, even a landowner who suffers a 90-percent loss in property value may not be entitled to any damages if a *Nollan* nexus is found. See *Lucas,* 505 US at 1017.

© The Regents of the University of California

§10.399 h. Exceptions: When *Nollan/Dolan* Nexus Test Inapplicable

The *Nollan/Dolan* nexus test is not applicable outside of the context of exactions. However, the *Penn Central* and *Agins* tests apply to all regulatory takings claims, regardless of whether there was an exaction. When there was a physical taking or a regulation with a completely confiscatory economic impact on property uses or value (*i.e.,* denial of all economic use), a court may find that there was a categorical taking that mandates the payment of just compensation. *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 1015, 120 L Ed 2d 798, 112 S Ct 2886.

© The Regents of the University of California

6. Regulations Authorizing Physical Occupation

§10.400 a. Analysis

The analysis of a "physical" regulatory taking claim is limited to determining whether the government has required a property owner to submit to the physical occupation of some or all of the owner's property. *Brown v Legal Found. of Washington* (2003) 538 US 216, 233, 155 L Ed 2d 376, 123 S Ct 1406; *Loretto v Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 435, 73 L Ed 2d 868, 102 S Ct 3164 (statute requiring property owner to allow installation of cable television lines was a physical taking); *U.S. v Pewee Coal Co.* (1951) 341 US 114, 115, 95 L Ed 809, 71 S Ct 670. But see *Yee v City of Escondido* (1992) 503 US 519, 526, 527, 118 L Ed 2d 153, 112 S Ct 1522 (rejecting a physical taking challenge to mobile home rent control ordinance).

© The Regents of the University of California

§10.401 b. Permanent Physical Occupation

A permanent physical occupation of property compelled by governmental action is a taking *per se*. Physical takings usually involve a possessory property interest, such as fee ownership or an easement. *Brown v Legal Found. of Washington* (2003) 538 US 216, 233, 155 L Ed 2d 376, 123 S Ct 1406; *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 120 L Ed 2d 798, 112 S Ct 2886; *U.S. v Pewee Coal Co.* (1951) 341 US 114, 115, 95 L Ed 809, 71 S Ct 670. See also *Loretto v Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 427, 73 L Ed 2d 868, 102 S Ct 3164.

© The Regents of the University of California

§10.402 c. *Penn Central-Agins-Nollan* Nexus Standard Inapplicable to Permanent Physical Taking

If the court agrees with the characterization of a governmental action as resulting in a physical occupation, liability may be more likely to be found, because the analysis of a physical taking does not involve the balancing of interests approach used in regulatory taking cases. *Loretto v Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 432, 73 L Ed 2d 868, 102 S Ct 3164. But see *Blue Jeans Equities W. v City & County of San Francisco* (1992) 3 CA4th 164, 166, 4 CR2d 114. For this reason, a property owner may attempt to characterize the nature of governmental action as a physical taking rather than a regulatory action. However, physical taking challenges are generally disfavored and therefore difficult to establish. See generally *Keystone Bituminous Coal Ass'n v DeBenedictis* (1987) 480 US 470, 495, 94 L Ed 2d 472, 107 S Ct 1232.

© The Regents of the University of California

§10.403 d. Temporary Physical Occupation

A physical taking may be based on a claim that property has been temporarily taken. However, when the government has not physically occupied the property or acquired a property interest, a temporary physical taking claim should be analyzed as a regulatory taking, applying the *Penn Central-Agins* tests. *Palazzolo v Rhode Island* (2001) 533 US 606, 629, 150 L Ed 2d 592, 121 S Ct 2448; *Loretto v Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 432 n9, 73 L Ed 2d 868, 102 S Ct 3164.

© The Regents of the University of California

7. Remedy

§10.404 a. Invalidation

A property owner who seeks damages for an alleged regulatory taking must file an action in state court to invalidate the allegedly onerous regulation, *e.g.,* a permanent injunction, or, in the case of a permit denial or development condition imposed after a city's quasi-adjudicatory hearing, seek mandamus relief. These actions must be filed before or concurrently with the taking claim. *Williamson County Reg'l Planning Comm'n v Hamilton Bank* (1985) 473 US 172, 194, 87 L Ed 2d 126, 105 S Ct 3108; *Agins v City of Tiburon* (1979) 24 C3d 266, 273, 157 CR 372, aff'd (1980) 447 US 255; *Patrick Media Group, Inc. v California Coastal Comm'n* (1992) 9 CA4th 592, 607, 11 CR2d 824. See also *Hensler v City of Glendale* (1994) 8 C4th 1, 32 CR2d 244, cert denied (1995) 513 US 1184; *California Coastal Comm'n v Superior Court* (1989) 210 CA3d 1488, 1496, 258 CR 567, cited with approval in *Rossco Holdings Inc. v State* (1989) 212 CA3d 642, 657, 260 CR 736, cert denied (1990) 494 US 1080 (administrative mandamus must be pursued to invalidate allegedly improper development conditions). However, when the agency completely lacked jurisdiction, a writ of mandamus action is not required. *Buckley v California Coastal Comm'n* (1998) 68 CA4th 178, 190, 80 CR2d 562.

© The Regents of the University of California

§10.405 b. Accrual of Damages

Successful takings claimants may be awarded damages. *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 311, 96 L Ed 2d 250, 107 S Ct 2378. Damages begin to accrue on the date the challenged regulation is imposed rather than the date on which the city refuses to pay. 482 US at 320. Damages are measured by "the property owner's loss, rather than the government's gain." *Brown v Legal Found. of Washington* (2003) 538 US 216, 235, 155 L Ed 2d 376, 123 S Ct 1406. However, damages may not be awarded until the challenged regulation is determined to be a taking. *Agins v City of Tiburon* (1979) 24 C3d 266, 157 CR 372, aff'd (1980) 447 US 255. See *Freeman v City of Beverly Hills* (1994) 27 CA4th 892, 32 CR2d 731 (barring money damages claim when action not filed within statute of limitations in Govt C §65009(c)(2)).

© The Regents of the University of California

§10.406 c. Damages Not Necessarily Required

In regulatory takings jurisprudence, compensation is required only if the regulation denies all economically beneficial or productive use of land. Supreme Court Justice Antonin Scalia indicates in *Lucas v South Carolina Coastal Council* (1992) 505 US 1003, 1019 n8, 120 L Ed 2d 798, 112 S Ct 2886, that

> [i]t is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these 'all-or-nothing' situations.

Payment is not required even if a regulation deprives land of all economically beneficial use "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of (the owner's) title to begin with." *Lucas,* 505 US at 1027.

No payment is required if the city proves that the property is a noxious use or nuisance. *Lucas,* 505 US at 1020.

© The Regents of the University of California

B. Procedural Due Process

§10.407 1. Constitutional Provisions

A city must afford procedural due process before depriving a person of a significant property or liberty interest. US Const amends V, XIV; Cal Const art I, §7. Procedural due process generally means notice and opportunity to be heard. See, *e.g., Dusenbery v U.S.* (2002) 534 US 161, 170, 151 L Ed 2d 597, 122 S Ct 694; *Harris v County of Riverside* (9th Cir 1990) 904 F2d 497, 502 (property owner is entitled to notice of legislative proposal to change allowable property uses); *Horn v County of Ventura* (1979) 24 C3d 605, 612, 156 CR 718 (adjacent property owners had constitutional right to notice and hearing on subdivision proposal even though Subdivision Map Act [Govt C §§66410-66499.37] did not then require such notice). However, see *Clark v City of Hermosa Beach* (1996) 48 CA4th 1152, 1179, 56 CR2d 223, cert denied (1997) 520 US 1167, holding that an applicant for a conditional use permit and subdivision had no legitimate expectation or claim of entitlement to permits and therefore no property interest, even though members of the city council discussed issues outside the public hearing and were determined to be biased against the applicant. Thus, someone is entitled to damages for a denial of procedural due process only if the person is deprived of a cognizable "property right" or "liberty interest." See also *BreakZone Billiards v City of Torrance* (2000) 81 CA4th 1205, 1224, 97 CR2d 467 (reiterating that applicants do not have a constitutionally recognized "property right" in a conditional use permit).

See California Land Use Practice, chap 19 (Cal CEB 2006).

© The Regents of the University of California

§10.408 2. Statutory Requirements

Specific notice and hearing requirements are imposed by a number of statutes. These requirements include those discussed in §§10.409-10.413.

© The Regents of the University of California

§10.409 a. Ralph M. Brown Act

The Ralph M. Brown Act (Govt C §§54950-54963) imposes notice, open meeting, and related requirements before a "legislative body" of a local agency may take action. The district attorney or any interested person may file suit to prevent or stop violations. Govt C §§54960-54960.1. The court may award court costs and attorney fees to the prevailing party. Govt C §54960.5.

© The Regents of the University of California

§10.410 b. Planning and Zoning Law

The Planning and Zoning Law contains a number of procedural requirements, as follows:

- **Zoning hearings.** Cities must develop and implement minimum procedural rules for zoning hearings; these must include provisions for notice to interested parties and opportunity to be heard. See Govt C §65804.
- **Notice requirements.** State law imposes notice requirements for any public hearing required by the Planning and Zoning Law. See Govt C §§65090-65096. A person's failure to receive notice required by the law does not constitute grounds for invalidation if the notice was actually given. Govt C §65093.
- **Adoption and amendment of general plan and specific plans.** See Govt C §§65350-65358, 65453.
- **Curative statute.** An error or omission with respect to notice or other procedures will not invalidate any proceeding subject to the Planning and Zoning Law unless a court finds that the error was prejudicial, that it substantial injury to the complaining party, and that a different result would have been probable if the error had not occurred. Govt C §65010. There is "no presumption that error is prejudicial or that injury was done if the error is shown." Govt C §65010.

© The Regents of the University of California

§10.411 c. Subdivision Map Act

The Subdivision Map Act (Govt C §§66410-66499.37) requires local agencies to provide notice and a hearing before making most decisions affecting the subdivision of property. See generally Govt C §§66451-66472.1.

© The Regents of the University of California

§10.412 d. California Environmental Quality Act (CEQA)

The California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) also imposes public notice and review requirements. See, *e.g.,* Pub Res C §§21092-21092.6 (negative declarations and environmental impact reports). Failure to comply with a CEQA requirement that "precludes relevant information from being presented to the public agency … may constitute a prejudicial abuse of discretion." Pub Res C §§21005, 21168, 21168.5. Several cases indicate that the "harmless error" standard does not apply when an agency has not proceeded in accordance with CEQA requirements. See *Friends of the Eel River v Sonoma County Water Agency* (2003) 108 CA4th 859, 882, 134 CR2d 322; *Resource Defense Fund v Local Agency Formation Comm'n* (1987) 191 CA3d 886, 897, 236 CR 794; *Rural Landowners Ass'n v City Council* (1983) 143 CA3d 1013, 1022, 192 CR 325.

© The Regents of the University of California

§10.413 e. Judicial Review

If there is no explicit standard for judicial review, the effect of failure to comply with any statutory due process requirement will generally be determined by whether the legislature intended to impose a mandatory or directory duty. See, *e.g., Downtown Palo Alto Comm. for Fair Assessment v City Council* (1986) 180 CA3d 384, 394, 225 CR 559. When the statute is mandatory, failure to comply with the requirement invalidates the procedure altogether. When the statute is directory, the court will uphold the procedure if the government body "substantially complied" with the statute. 180 CA3d at 394. Statutory requirements for the purpose of informing or educating the public are mandatory and strict compliance is required. *Smith v Board of Supervisors of City & County of San Francisco* (1989) 216 CA3d 862, 875, 265 CR 466; *Ibarra v City of Carson* (1989) 214 CA3d 90, 99, 262 CR 485.

© The Regents of the University of California

3. Fair Hearing Requirements

§10.414 a. Ex Parte Contacts

In legislative actions, procedural due process does not prohibit city council members or planning commission members from making ex parte contacts on such matters pending before them. *City of Fairfield v Superior Court* (1975) 14 C3d 768, 780, 122 CR 543. In quasi-judicial actions, city council members and planning commissioners who have ex parte contacts on matters pending before them are required to disclose all such contacts and the information received at the public hearing so as to allow the applicant and the public to respond or comment on such information. *Clark v City of Hermosa Beach* (1996) 48 CA4th 1152, 56 CR2d 223, cert denied (1997) 520 US 1167 (evidence of council members' analysis of facts not disclosed at public hearing sufficient to reverse council decision). A majority of the members of the city council or planning commission must not hear, discuss, deliberate, or take action on a matter among themselves except at a meeting that meets the requirements of the Ralph M. Brown Act (Govt C §§54950-54963), whether the members meet together or in seriatim meetings. Govt C §54952.2.

© The Regents of the University of California

§10.415 b. Evidence

Evidence on which a decision-maker intends to rely should be made a part of the quasi-adjudicatory hearing record, although strict adherence to the hearsay rule is not required. *Desert Turf Club v Board of Supervisors* (1956) 141 CA2d 446, 455, 296 P2d 882.

© The Regents of the University of California

c. Bias

§10.416 (1) Campaign Contributions

A city council member who receives a campaign contribution from a developer is not automatically barred from acting on the developer's land use permit application. *Woodland Hills Residents Ass'n v City Council* (1980) 26 C3d 938, 945, 164 CR 255. But see Govt C §84308 and 2 Cal Code Regs §§18438-18438.8 (defining who is disqualified from acting on land use entitlement application after receipt of campaign contribution).

© The Regents of the University of California

§10.417 (2) Actual Bias or Appearance of Bias

In cases involving a direct, personal, or pecuniary interest, the constitutional test is an objective appearance of bias. *Haas v County of San Bernardino* (2002) 27 C4th 1017, 1034, 119 CR2d 341; *BreakZone Billiards v City of Torrance* (2000) 81 CA4th 1205, 97 CR2d 467 (no bias when council members received campaign contributions from donor who might benefit from decision or when council member appealed decision of planning commission); *Clark v City of Hermosa Beach* (1996) 48 CA4th 1152, 56 CR2d 223, cert denied (1997) 520 US 1167 (evidence of council member's personal animosity towards applicants sufficient to reverse council decision). But see *Cohan v City of Thousand Oaks* (1994) 30 CA4th 547, 558, 35 CR2d 782 (when local ordinance called for "person" appealing planning commission decision to city council to show cause why commission's action should be overturned, city council's decision to appeal action to itself was an appearance of conflict of interest and was part of overall violation of developer's substantive and procedural due process rights). See also *Haas v County of San Bernardino* (2002) 27 C4th 1017, 1029, 119 CR2d 341 (standard for bias arising from a hearing officer's personal or political, as opposed to financial, views is the same—the court looks at whether there is an actual appearance of bias); *Andrews v Agricultural Labor Relations Bd.* (1981) 28 C3d 781, 791, 171 CR 590; *Linney v Turpen* (1996) 42 CA4th 763, 770, 49 CR2d 813.

© The Regents of the University of California

§10.418 (3) Advance Knowledge of Facts

Members of an adjudicatory body are not biased merely because they have advance knowledge of the adjudicative facts in dispute. *State Water Resources Control Bd. Cases* (2006) 136 CA4th 674, 39 CR3d 189.

© The Regents of the University of California

C. Substantive Due Process and Equal Protection

§10.419 1. Constitutional Provision

The rights to substantive due process and equal protection are protected by the United States and California constitutions. US Const amend XIV; Cal Const art I, §7. They are complementary limitations on the police power.

© The Regents of the University of California

2. Substantive Due Process

§10.420 a. Overview

The substantive due process doctrine applies to the substance of governmental action, rather than the procedures leading to such action. The doctrine prohibits governmental action that arbitrarily or unreasonably deprives a person of life, liberty, or property. See *Kawaoka v City of Arroyo Grande* (9th Cir 1994) 17 F3d 1227, 1234, cert denied (1994) 513 US 870; *Terminal Plaza Corp. v City & County of San Francisco* (1986) 177 CA3d 892, 908, 223 CR 379. See also 7 Witkin, Summary of California Law, *Constitutional Law* §615- (10th ed 2005).

© The Regents of the University of California

§10.421 b. Deferential Judicial Review

Due process review of land use regulation is highly deferential; a land use regulation is a valid exercise of the police power if it is fairly debatable that it bears a reasonable relation to the general welfare. *Christensen v Yolo County Bd. of Supervisors* (9th Cir 1993) 995 F2d 161; *County Sanitation Dist. No. 2 v County of Kern* (2005) 127 CA4th 1544, 27 CR3d 28. Courts do "not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." *Gerling Global Reinsurance Corp. v Low* (9th Cir 2002) 296 F3d 832, 844, quoting *Wedges/Ledges of Cal., Inc v City of Phoenix* (9th Cir 1994) 24 F3d 56, 66. See also *Carson Harbor Village Ltd. v City of Carson* (9th Cir 1994) 37 F3d 468, 472, overruled on other grounds by *WMX Technols., Inc. v Miller* (1997) 104 F3d 1133, 1136 ("This deferential inquiry does not focus on the ultimate effectiveness of the law, but on whether the enacting body could have rationally believed at the time of the enactment that the law would promote the objective"). The landowner has a heavy burden to show that a land use regulation violates substantive due process. *Herrington v County of Sonoma* (9th Cir 1987) 834 F2d 1488, 1498 n7. In California, ordinary disputes between agencies and developers "simply do not qualify as deprivations of substantive due process." *Stubblefield Constr. Co. v City of San Bernardino* (1995) 32 CA4th 687, 712, 38 CR2d 413, cert denied (1995) 516 US 913.

© The Regents of the University of California

§10.422 c. Companion Claims

As a matter of practice, substantive due process claims are often raised as companion claims to taking and civil rights claims. *Southern Pac. Transp. Co. v City of Los Angeles* (9th Cir 1990) 922 F2d 498, 501, cert denied (1990) 502 US 943. See Larson, The New Substantive Due Process (League of California Cities Continuing Education Seminar, February 1991). However, the courts have held that a substantive due process claim is inappropriate in contexts already addressed by other explicit provisions of the constitution, including the takings clause. *Graham v Connor* (1989) 490 US 386, 395, 104 L Ed 2d 443, 109 S Ct 1865; *Armendariz v Penman* (9th Cir 1996) 75 F3d 1311, 1318. See also *Patel v Penman* (9th Cir 1996) 103 F3d 868, 875. Given that, in general, a regulation may no longer be challenged as a taking on the grounds that the regulation fails to substantially advance a legitimate state interest (*Lingle v Chevron U.S.A., Inc.* (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074), it remains to be seen whether takings plaintiffs will continue to be barred from asserting a substantive due process claim in connection with a takings claim.

© The Regents of the University of California

§10.423 d. Ripeness

Facial validity challenges are ripe when the regulation is adopted. *Pennell v City of San Jose* (1988) 485 US 1, 11, 99 L Ed 2d 1, 108 S Ct 849.

As-applied challenges are subject to the "final determination" ripeness requirement developed for taking cases by *Williamson County Reg'l Planning Comm'n v Hamilton Bank* (1985) 473 US 172, 186, 87 L Ed 2d 126, 105 S Ct 3108. See *Southern Pac. Transp. Co. v City of Los Angeles* (9th Cir 1990) 922 F2d 498, 507, cert denied (1990) 502 US 943; *Sinaloa Lake Owners Ass'n v City of Simi Valley* (9th Cir 1989) 882 F2d 1398, 1407, cert denied (1990) 494 US 1016, overruled on other grounds in *Armendariz v Penman* (9th Cir 1996) 75 F3d 1311.

© The Regents of the University of California

§10.424 e. Rational-Basis Test

The rational-basis test requires a court to uphold local laws that have a conceivable rational basis. The rational-basis test is sometimes alternatively described as proscribing regulations that are "arbitrary, discriminatory, or demonstrably irrelevant" to a legitimate governmental interest. *Pennell v City of San Jose* (1988) 485 US 1, 11, 99 L Ed 2d 1, 108 S Ct 849 (citing *Nebbia v New York* (1934) 291 US 502, 539, 78 L Ed 940, 54 S Ct 505).

© The Regents of the University of California

§10.425 f. Comparison to Rational-Relationship Test

The rational-basis test for analyzing a substantive due process claim is comparable to the rational-relationship test applied in most equal protection challenges. See Longtin, Longtin's California Land Use §1.30 (2d ed 1987). Compare *Village of Euclid v Ambler Realty Co.* (1926) 272 US 365, 71 L Ed 303, 47 S Ct 114, with *Associated Home Builders, Inc. v City of Livermore* (1976) 18 C3d 582, 135 CR 41. See also *Birkenfeld v City of Berkeley* (1976) 17 C3d 129, 159, 130 CR 465. For discussion of cases, see Longtin, Longtin's California Land Use §§1.30-1.35 (2d ed 1987).

© The Regents of the University of California

§10.426 g. Vested Rights

The substantive due process doctrine provides that a vested right may not be eliminated or significantly impaired, as a general rule, by subsequent changes in legislation. See 7 Witkin, Summary of California Law, *Constitutional Law* §§623-626 (10th ed 2005).

© The Regents of the University of California

§10.427 (1) No Right to Develop

Property owners have no inherent vested or constitutional right to develop their property free from governmental regulation. *Penn Cent. Transp. Co. v City of New York* (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646; *HFH, Ltd. v Superior Court* (1975) 15 C3d 508, 516, 125 CR 365. See generally 7 Witkin, Summary of California Law, *Constitutional Law* §626 (10th ed 2005). A property owner has no vested right in the zoning in existence at the time of submission of the application. *Stubblefield Constr. Co. v City of San Bernardino* (1995) 32 CA4th 687, 708, 38 CR2d 413, cert denied (1995) 516 US 913.

© The Regents of the University of California

§10.428 (2) Common Law Vested Rights

The right to develop property ordinarily does not vest until the last permit necessary for construction of a project (usually a building permit) has been issued and substantial expenditures have been incurred in reliance on the permit. *Avco Community Developers, Inc. v South Coast Reg'l Comm'n* (1976) 17 C3d 785, 791, 132 CR 386, cert denied (1977) 429 US 1083. Until that point in time, a proposed development project is vulnerable to a change in the general plan, zoning, or other land regulations, as long as such regulations are not discriminatory. *Consaul v City of San Diego* (1992) 6 CA4th 1781, 1794, 8 CR2d 762 (dwelling unit allocation under growth control ordinance did not confer vested right to develop residential project). But see *Bateson v Geisse* (9th Cir 1988) 857 F2d 1300, 1303 (substantive due process claim exists when city council denied building permit despite property owner's fulfillment of all requirements necessary for issuance of non-discretionary building permit). To acquire a vested right, reliance on a permit must be in good faith. *Stokes v Board of Permit Appeals* (1997) 52 CA4th 1348, 1357, 61 CR2d 181 (no vested right when developer misrepresented facts on permit application).

© The Regents of the University of California

§10.429 (3) Mines, Quarries, Timber, and Other Extractive Industries

In the special cases of mines, quarries, timber, and other extractive industries in which the originally permitted use becomes legally nonconforming, discontinuation of the use on one portion of the property does not constitute an abandonment of vested rights to continue the historically permitted use when the owner has continuously used some portion of the property for its original purpose. *Hansen Bros. Enters., Inc. v Board of Supervisors* (1992) 12 C4th 533, 565, 48 CR2d 778 (applying "diminishing asset" rule to find mining company had vested right to continue mining without obtaining new permit). But see *Hermosa Beach Stop Oil Coalition v City of Hermosa Beach (Windward Assocs.)* (2001) 86 CA4th 534, 552, 103 CR2d 447 (even though defendant had contract with city to drill for oil, defendant had not acquired necessary permits or begun construction, so it had no vested right to do so when initiative prohibiting oil drilling was passed).

© The Regents of the University of California

§10.430 (4) Statutes Affecting Vested Rights Doctrine

The legislature has altered the common law vested rights doctrine in certain instances. The scope of rights vested is determined by the terms of the statute.

With respect to subdivisions, a city must apply the ordinances, policies, and standards in effect at the time a tentative map application is deemed complete. Govt C §66474.2. Rights to proceed with a subdivision vest for certain purposes when a vesting tentative map is approved. See Govt C §§66498.1-66498.9; *Kaufman & Broad Cent. Valley, Inc. v City of Modesto* (1994) 25 CA4th 1577, 1585, 30 CR2d 904.

The term of a development agreement may also protect a project against changes in zoning or the general plan. See generally Govt C §§65864-65869.5; *Santa Margarita Area Residents Together v San Luis Obispo County Bd. of Supervisors* (2000) 84 CA4th 221, 100 CR2d 740 (upholding development agreement generally as valid exercise of police power). Development agreements cannot be used to establish land uses not authorized by the zoning ordinance applicable to the property. *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 68 CR3d 882. The conditions of a vesting tentative map may state that in the event of a conflict between the vesting tentative map and a development agreement, the development agreement will control. *Building Indus. Ass'n of Central Cal. v City of Patterson* (2009) 171 CA4th 886, 90 CR3d 63, cert denied (2009) ___ US ___, 175 L Ed 2d 480, 130 S Ct 660. A city may amend or suspend a development agreement only for health and safety reasons. Govt C §65865.3. When a development agreement establishes the scope of the project and precise parameters for future construction as well as a procedure to process project approvals, a city is bound by its commitments under the agreement even when further agreement and discretionary approvals are necessary for the project. *Santa Margarita Area Residents Together v San Luis Obispo County Bd. of Supervisors* (2000) 84 CA4th 221, 229, 100 CR2d 740.

© The Regents of the University of California

3. Equal Protection

§10.431 a. Overview

A city may not deprive a person of equal protection of the laws. US Const amend XIV; Cal Const art I, §7.

The equal protection doctrine requires a city to treat similarly situated persons in a like manner. However, absolute equality is not required. The equal protection doctrine is particularly significant in reviewing the fairness of regulatory classifications. A classification must be non-arbitrary and based on some difference that has a reasonable relation to a legitimate governmental interest. See 8 Witkin, Summary of California Law, *Constitutional Law* §701 (10th ed 2005).

© The Regents of the University of California

§10.432 b. Application to Land Use Regulations

Cities historically have a wide police power latitude to enact land use classifications that treat classes of properties differently. *Village of Euclid v Ambler Realty Co.* (1926) 272 US 365, 388, 71 L Ed 303, 47 S Ct 114 (upholding general validity of zoning ordinances). See also *Miller v Board of Pub. Works* (1925) 195 C 477, 486, 234 P 381. Equal protection challenges will be reviewed under either the rational-relationship test or the strict-scrutiny test. See 8 Witkin, Summary of California Law, *Constitutional Law* §704 (10th ed 2005).

© The Regents of the University of California

§10.433 c. Rational-Relationship Test

Most equal protection challenges are subject to the rational-relationship test, which is similar to the rational-basis test applied to substantive due process and police power challenges. See *Griffin Dev. Co. v City of Oxnard* (1985) 39 C3d 256, 263, 217 CR 1.

© The Regents of the University of California

§10.434 (1) Nature of Test

The rational-relationship test requires a court to uphold a classification which has some rational relationship to a conceivable legitimate state purpose. See *Weber v City Council* (1973) 9 C3d 950, 958, 109 CR 553; *Candid Enters., Inc. v Grossmont Union High Sch. Dist.* (1985) 39 C3d 878, 890, 218 CR 303. Thus, the classification must be upheld unless it is arbitrary or capricious. Even when property is treated differently from similarly situated properties, if there is any rational basis for differential treatment, it does not violate equal protection. *Stubblefield Constr. Co. v City of San Bernardino* (1995) 32 CA4th 687, 714, 38 CR2d 413, cert denied (1995) 516 US 913.

© The Regents of the University of California

§10.435 (2) When Not Applied

The only classifications not subject to the rational-relationship test are those abridging a fundamental right or applying only to a suspect class.

© The Regents of the University of California

§10.436 (3) Development

"[D]evelopers do not constitute a 'suspect class,' and development is not a 'fundamental interest.' " *Candid Enters., Inc. v Grossmont Union High Sch. Dist.* (1985) 39 C3d 878, 890, 218 CR 303. A citizen challenging a governmental classification bears the burden of showing invalidity. 39 C3d at 890.

© The Regents of the University of California

§10.437 (4) Class of One Property Owner

The Supreme Court has held that one landowner may maintain an equal protection claim if intentionally treated differently from other similarly situated owners without any rational basis. *Village of Willowbrook v Olech* (2000) 528 US 562, 564, 145 L Ed 2d 1060, 120 S Ct 1073. See also *Village of Willowbrook*, 528 US at 566 (Breyer, J., concurring) (single property owner may state equal protection claim only if different treatment motivated by ill will). Although the scope of the "class of one" doctrine remains unclear, circuit courts have begun applying the theory. *Bell v Duperrault* (7th Cir 2004) 367 F3d 703, 707; *Cobb v Pozzi* (2d Cir 2004) 363 F3d 89, 110; *DeMuria v Hawkes* (2nd Cir 2003) 328 F3d 704, 706.

© The Regents of the University of California

§10.438 d. Strict Scrutiny or Compelling State Interest Test

In the rare case when a fundamental right (*e.g.,* freedom of speech, the right to vote, or the right of family members to dwell together) is significantly abridged by a classification or a classification applies only to a suspect class, the strict scrutiny test will apply. See *Moore v City of E. Cleveland* (1977) 431 US 494, 500, 52 L Ed 2d 531, 97 S Ct 1932 (applying strict scrutiny to a regulation that prevented a grandmother from living with her grandson).

© The Regents of the University of California

§10.439 (1) Fundamental Right

A right protected by the United States or California constitutions is a fundamental right. Fundamental rights include freedom of speech and the press and the right to vote, as well as "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and an individual's bodily integrity. *Planned Parenthood v Casey* (1992) 505 US 833, 851, 120 L Ed 2d 674, 112 S Ct 2791.

© The Regents of the University of California

§10.440 (2) Suspect Classifications

Suspect classes triggering strict scrutiny include race, national origin, ethnicity, and gender.

© The Regents of the University of California

§10.441 (3) Nature of Test

If the classification affects a fundamental right or suspect class, the court will conduct an independent review of the classification to determine whether the regulatory classification is necessary to further a compelling state interest. Because land use regulation is usually found to further a "substantial" rather than "compelling" government interest, a land use regulation that discriminates against a suspect class or infringes on a fundamental right is likely unconstitutional. 8 Witkin, Summary of California Law, *Constitutional Law* §704 (10th ed 2005).

© The Regents of the University of California

§10.442 (4) When Not Applied

Not every limitation on a fundamental right is subject to the strict scrutiny standard. Regulations that have only an incidental effect on the exercise of a fundamental right are not subject to strict scrutiny. *Young v American Mini Theatres, Inc.* (1976) 427 US 50, 61, 49 L Ed 2d 310, 96 S Ct 2440 (applying rational-relationship test to adult zoning regulations when freedom of speech was not found to be implicated). But see *Doe v City of Butler* (3d Cir 1989) 892 F2d 315, 319 (facially neutral zoning regulation limiting transitional dwellings to six persons had only incidental impact on constitutional right to associate); *Board of Supervisors v Local Agency Formation Comm'n* (1992) 3 C4th 903, 913, 13 CR2d 245, cert denied (1993) 507 US 988 (applying rational-relationship test to requirement that voters in municipal incorporation reside in area to be incorporated because regulation did not abridge fundamental right to vote); *Elysium Institute, Inc. v County of Los Angeles* (1991) 232 CA3d 408, 427, 283 CR 688, cert denied (1992) 502 US 1098 (operation of nudist camp did not involve fundamental right and zoning ordinance's impact on such uses had only an incidental effect on the right to privacy).

© The Regents of the University of California

§10.443 e. Statutory Provisions

Various state and federal statutes prohibit discriminatory land use actions. See, *e.g.,* Govt C §65008 (declaring "null and void" any local land use action that discriminates based on race, sex, color, religion, ethnicity, national origin, ancestry, familial status, disability, lawful occupation, age, method of financing, or intended occupancy by persons of low to middle income); *City of Edmonds v Oxford House, Inc.* (1995) 514 US 725, 729, 131 L Ed 2d 801, 115 S Ct 1776 (federal law prohibits "single-family" residential restrictions that do not reasonably accommodate persons with disabilities); *Bay Area Addiction Research & Treatment, Inc. v City of Antioch* (9th Cir 1999) 179 F3d 725, 730 (Americans with Disabilities Act applies to local zoning ordinances and prohibits discrimination on the basis of disability); *Broadmoor San Clemente Homeowners Ass'n v Nelson* (1994) 25 CA4th 1, 5, 30 CR2d 316 (private CC&Rs (covenants, conditions, and restrictions) invalid to extent they discriminate against disabled persons).

Courts often do not even look to whether land use actions were taken with a discriminatory intent, and may sometimes find a violation of an anti-discrimination statute based solely on its perceived discriminatory impact. See *Keith v Volpe* (9th Cir 1988) 858 F2d 467, 485, cert denied sub nom *City of Hawthorne v Wright* (1989) 493 US 813 (approval of freeway project without construction of replacement housing found to have discriminatory impact based on race and income); *Building Indus. Ass'n of San Diego v City of Oceanside* (1994) 27 CA4th 744, 770, 33 CR2d 137 (growth control initiative found to have discriminatory impact on low-income housing, even though it specifically exempted units dedicated for low-income persons).

© The Regents of the University of California

§10.444 D. Civil Rights

Federal law provides a possible remedy whenever anyone, acting under color of state law (including the adoptions of land use regulations), deprives a person of federal rights, privileges, or immunities. 42 USC §1983.

For related discussion regarding municipal liability and federal statutory provisions, see §§13.114-13.152.

© The Regents of the University of California

§10.445 E. CEQA Challenges

In most legal challenges to land use decisions, the petitioners will also challenge the city's determination under the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21777). For discussion of legal challenges to actions under CEQA, see §§11.59-11.76. On CEQA generally, see §§11.10-11.79. For a detailed discussion of CEQA, see Practice Under the California Environmental Quality Act (2d ed Cal CEB 2008).

© The Regents of the University of California

11

Protecting the Environment

I. OVERVIEW OF ENVIRONMENTAL PROTECTIONS
- A. The Challenge §11.1
- B. Sources of Law §11.2
- C. Preserving the Public's Interest in Sensitive Lands §11.3
  - 1. Public Trust Doctrine
    - a. Interests Protected §11.4
    - b. State and Local Responsibilities §11.5
    - c. Future of Public Trust Doctrine §11.6
  - 2. Conservancies §11.7
  - 3. Local Efforts at Conservation
    - a. Joint Powers Agreements §11.8
    - b. Williamson Act §11.9

II. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)
- A. Overview §11.10
  - 1. Purpose §11.11
  - 2. CEQA Guidelines §11.12
  - 3. Local Guidelines §11.13
  - 4. Lead Agencies, Responsible Agencies, and Trustee Agencies
    - a. Definitions §11.14
    - b. Identifying Lead Agency §11.15
    - c. Roles of Lead, Responsible, and Trustee Agencies §11.16
  - 5. Timing for CEQA Compliance §11.17
  - 6. Project Approval §11.18
- B. Scope
  - 1. Definition of "Project" §11.19
  - 2. Discretionary Projects §11.20
  - 3. Exemptions
    - a. Statutory Exemptions §11.21
    - b. Categorical Exemptions §11.22
    - c. Common Sense Exemption §11.23
    - d. Procedures §11.24
- C. Initial Study
  - 1. Purpose and Contents §11.25
  - 2. Environmental Checklist Form §11.26
  - 3. Significance Determinations §11.27
  - 4. Timing §11.28
  - 5. Determining Whether Project May Have Significant Environmental Effect §11.29
- D. Negative Declaration
  - 1. When Prepared §11.30
  - 2. Duty to Investigate Impacts §11.31
  - 3. Contents §11.32
  - 4. Public Review §11.33
  - 5. Adoption §11.34
- E. Environmental Impact Report (EIR)
  - 1. When Required §11.35
  - 2. Notice of Preparation §11.36
  - 3. Baseline §11.37
  - 4. Contents §11.38
  - 5. Adequacy §11.39
  - 6. Public Review of Draft EIR §11.40
  - 7. Response to Comments §11.41
  - 8. Recirculation of Draft EIR §11.42
  - 9. Certification of Final EIR §11.43
- F. Additional Types of EIRs and Negative Declarations
  - 1. Master EIRs, Program EIRs, and Tiering §11.44
  - 2. Subsequent EIRs and Negative Declarations §11.45
  - 3. Addendum to EIR or Negative Declaration §11.46
- G. Project Approval
  - 1. Required Findings §11.47
    - a. If Negative Declaration Has Been Adopted §11.48
    - b. If Environmental Impact Report Has Been Certified §11.49
      - (1) Individual Impact Findings §11.50

(2) Findings Concerning Project as a Whole §11.51
(3) Evidentiary Support §11.52
2. Mitigation Monitoring Program §11.53
3. Notice of Determination §11.54
H. Deadlines for Taking Action to Approve or Disapprove Environmental Documents and Projects
1. CEQA
a. Initial Study §11.55
b. Negative Declaration §11.56
c. Environmental Impact Report (EIR) §11.57
2. Permit Streamlining Act §11.58
I. Legal Challenges
1. Statute of Limitations §11.59
a. Challenges to Adequacy of Negative Declaration or EIR §11.60
b. Challenges to Exemption Determinations §11.61
2. Exhaustion of Administrative Remedies §11.62
3. Standing §11.63
a. Beneficial Interest §11.64
b. Zone of Interest §11.65
4. Procedural Requirements §11.66
a. Service of Mandate Petition §11.67
b. Administrative Record
(1) Procedure §11.68
(2) Contents §11.69
(3) Statement of Issues §11.70
c. Settlement Negotiations §11.71
d. Briefing and Hearing §11.72
5. Standard of Review §11.73
a. Deference to Substantive Judgments §11.74
b. Mandamus Proceedings §11.75
6. Remedies §11.76
J. National Environmental Policy Act (NEPA)
1. Persuasive Authority §11.77
2. Joint Documents §11.78
K. References §11.79

III. WATER SUPPLIES AND SUPPLY PLANNING
A. Overview of Water Management §11.80
B. Role of State
1. Department of Water Resources (DWR)
a. California Water Plan §11.81
b. State Water Project §11.82
c. Water Resource Investigations §11.83
d. Depository for Urban Water Management Plans §11.84
e. Watermasters §11.85
f. Additional Mandates §11.86
2. State Water Resources Control Board (SWRCB) §11.87
C. Role of Special Districts §11.88
1. Watermasters §11.89
2. Planning Duties of Special Districts §11.90
3. Private Water Companies §11.91
D. Role of Cities
1. General Plans §11.92
2. Urban Water Management Plans §11.93
a. Requirements §11.94
b. Alternative Water Sources or Water Demand Management Measures §11.95
3. Groundwater Regulation §11.96
4. Groundwater Management Plans §11.97
5. Evaluation of Water Supply for Development Projects
a. EIR Requirement §11.98
b. Water Supply Assessments (WSA)
(1) When Required §11.99
(2) Contents §11.100
(3) Insufficient Water Supply §11.101
(4) Justiciability §11.102
(5) Water Suppliers' "Substantial Discretion" §11.103
(6) Information Resources §11.104
c. Written Verification of Water Supplies for Residential Subdivisions §11.105
(1) Definition of "Sufficient Water Supply" §11.106
(2) Reliance on Supplies Not Currently Available §11.107
(3) Compelling Compliance §11.108
d. Agreements With Developers §11.109

6. Integrated Regional Water Management Planning Act §11.110

IV. WATER QUALITY
A. Overview of Regulation
1. Porter-Cologne Act §11.111
2. Regulatory Agencies §11.112
3. Other Statutes Relating to Water Quality §11.113
B. Water Quality and Cities
1. Cities' Two Roles §11.114
2. City as Regulated Entity
a. General Requirement §11.115
b. Cities as Dischargers §11.116
3. City as Regulator
a. Authority to Impose More Restrictive Controls §11.117
b. Nuisance Abatement §11.118
c. EPA Enforcement §11.119
d. Local Regulation of Groundwater Quality
(1) Wells §11.120
(2) State-Recommended Standards §11.121
(3) Groundwater Management Plans §11.122
(4) Subdivision Map Act §11.123
C. Basic Regulatory Scheme
1. State Water Resources Control Board Plans and Policies
a. Development §11.124
b. Applicability §11.125
c. Maintaining High Quality of State Waters Policy §11.126
d. Nonpoint Source Management Plan §11.127
2. Water Quality Plans
a. Regional Boards §11.128
b. Requirements for Basin Plans §11.129
3. Implementation §11.130
a. State Waste Discharge Requirements
(1) When Required §11.131
(2) Report of Waste Discharge Is Permit Application §11.132
(3) Waste Discharge Requirement Is Permit §11.133
(4) Permit Issuance Is Quasi-Judicial Act §11.134
(5) Standard for Issuance §11.135
(6) Periodic Review §11.136
b. Federal National Pollutant Discharge Elimination System (NPDES) Permits
(1) When Required §11.137
(2) Issuance by State §11.138
(3) State Permit Application Is Also Federal Permit Application §11.139
(4) Storm Water Permits §11.140
(a) Municipal Program §11.141
(b) Construction Storm Water Program §11.142
(c) Industrial Storm Water Program §11.143
(5) Total Maximum Daily Loads §11.144
(a) Overview of TMDLs in California §11.145
(b) TMDL Adoption §11.146
(c) EPA Approval of TMDLs §11.147
(d) Overview of TMDL Enforcement §11.148
(e) Citizen Suits Against the Government §11.149
(f) Conflicts With Development §11.150
(g) Removing an Impaired Water Body from the §303(d) List §11.151
c. Review of State or Regional Board Action
(1) Administrative Review §11.152
(2) Judicial Review §11.153
4. Enforcement §11.154
a. Civil Prosecution §11.155
b. Administrative Fines and Civil Liability Orders §11.156
c. Cease and Desist Orders §11.157
d. Cleanup and Abatement Orders §11.158
e. Injunctive Relief or Criminal Penalties §11.159
f. Technical Reports §11.160
g. Citizen Suits §11.161
D. Sewage Disposal Regulations
1. Authority to Own and Operate Sewer System §11.162
2. Pretreatment Program and Sewage Disposal
a. Standards §11.163
b. Purpose of Pretreatment Program §11.164
c. Local Limits on Pollutants §11.165

3. Use and Disposal of Sewage Sludge §11.166
4. On-Site Sewage Treatment Systems §11.167
5. Collection System Regulation §11.168
E. Groundwater Regulation
1. State Law
a. Discharges to Groundwater §11.169
b. Regional Board Responsibility §11.170
2. Discharges to Groundwater Subject to State Waste Discharge Requirements §11.171
3. Injection Wells §11.172
a. Federal Law §11.173
b. State Law §11.174
F. Wetlands
1. Definition of Wetland §11.175
2. Dual Jurisdiction §11.176
a. Waste Discharges §11.177
b. Fill §11.178
3. Jurisdictional Determinations §11.179
G. Recycled Water Regulation
1. Definition of "Recycled Water"
a. Not "Waste" §11.180
b. "Recycled Water" §11.181
2. Recycled Water Permitting Options
a. Water Reclamation Requirements §11.182
b. Master Reclamation Permits §11.183

V. AIR QUALITY
A. Basic Regulatory Scheme
1. Overview
a. Federal Law §11.184
b. State Law
(1) Air Resources Board and Local Air Pollution Control Agencies §11.185
(2) Responsibilities §11.186
2. Regional Air Quality Management
a. Regional Basins §11.187
b. Duties of APCDs and AQMDs §11.188
c. Air Quality Attainment Plans §11.189
(1) Five-Percent Annual Reduction in Pollutants §11.190
(2) Implementation §11.191
d. Limit on APCD and AQMD Powers
(1) Preservation of Local Land Use Authority §11.192
(2) Permitting Requirements §11.193
(3) Limit on Trip Reduction Programs §11.194
(4) Limit on New Control Measures §11.195
(5) Preemption §11.196
e. Procedural Requirements for Plan Adoption §11.197
f. Procedural Requirements for Rule Adoption
(1) Authority §11.198
(2) Notice and Hearing §11.199
(3) Changes to Proposed Rules §11.200
(4) Findings and Rulemaking Record §11.201
3. City Authority §11.202
a. Local Government Implementation Measures §11.203
b. Permit Checks §11.204
c. Proximity of Certain Facilities to Schools §11.205
4. State Authority
a. State Air Standards §11.206
b. State Regulatory Programs §11.207
c. Composition of ARB §11.208
5. Federal Laws
a. Environmental Protection Agency (EPA) §11.209
b. EPA Regions §11.210
c. National Standards §11.211
d. State Implementation Plans §11.212
e. Emission Standards §11.213
f. Minimum Standards for State Permit Programs §11.214
B. Enforcement
1. State Enforcement
a. Civil Penalties §11.215
b. Variances
(1) Hearing Boards §11.216
(2) Hearing Procedures §11.217

(3) Hearing Board Decisions §11.218
(4) Judicial Review §11.219
c. Orders for Abatement
(1) Issuance §11.220
(2) Effect §11.221
(3) Violations §11.222
2. Federal Enforcement §11.223
3. Citizen Enforcement §11.224
C. Permits
1. District Action on Emissions Permits
a. Non-Vehicular Sources
(1) Permit Requirement §11.225
(2) "Air Contaminants" §11.226
b. NSR Programs; Offsets §11.227
c. Duration of Permits §11.228
d. Market-Based Incentives §11.229
e. Applicability of Other Laws §11.230
f. Fees §11.231
2. Permit Appeals
a. Permit Denials §11.232
b. Permit Issuances §11.233
c. Exhaustion Requirement §11.234
D. Global Warming §11.235
E. References §11.236

VI. HAZARDOUS WASTE
A. Basic Regulatory Scheme
1. Federal Law §11.237
a. RCRA §11.238
b. CERCLA §11.239
2. State Law: Hazardous Waste Control Act §11.240
B. Household Hazardous Waste Planning Requirements
1. City Household Hazardous Waste Plans §11.241
2. Regional Hazardous Waste Plans §11.242
C. Hazardous Waste Facilities Planning and Approval Requirements §11.243
1. City Planning Requirement §11.244
2. Application to Build Hazardous Waste Facility
a. Notice of Intent; City Advisory Committee §11.245
b. Time Limits for Processing Applications §11.246
c. Appeals §11.247
D. Relationship to Water and Air Quality Issues
1. Compliance With Water Quality Requirements §11.248
2. Compliance With Air Quality Requirements §11.249
E. Obligations of Property Owners
1. CERCLA Liability §11.250
2. RCRA Liability §11.251
3. Notice to Buyers §11.252
4. Developer Obligations §11.253
F. Brownfields Cleanup §11.254
G. References §11.255

VII. ENDANGERED SPECIES
A. Overview of Endangered Species Protection
1. Importance §11.256
2. Scope of Discussion §11.257
B. Federal Endangered Species Act of 1973
1. Purpose of ESA §11.258
2. Implementation §11.259
3. Species Protected Under ESA
a. Threatened and Endangered Species §11.260
b. Candidate Species §11.261
c. Modifications to Lists §11.262
d. Critical Habitat §11.263
4. Take Prohibition Under ESA
a. Prohibition Against "Takings" §11.264
b. "Harm" §11.265
c. Examples of Projects Affected §11.266
5. Consultation for Federal and "Federal-Nexus" Projects
a. Requirement §11.267
b. Biological Assessment and Incidental Take Authorization §11.268
c. Examples of ESA §7 Consultations §11.269

6. Habitat Conservation Plans and §10(a) "Incidental Take" Permits
a. ESA §10(a) §11.270
b. Habitat Conservation Plan §11.271
(1) Project-Specific vs. Regional HCPs §11.272
(2) Multi-Species §10(a) Permits §11.273
(3) "No Surprises" and the Permit Revocation Rule §11.274
(4) Transferability of Permits §11.275
7. Enforcement
a. Federal Enforcement §11.276
(1) Jurisdiction and Venue §11.277
(2) Limits on Federal Power §11.278
(3) Standing §11.279
(4) Burden of Proof
(a) Review of Agency Actions §11.280
(b) Civil "Takings" Cases §11.281
(c) Criminal Cases §11.282
(d) Injunctive Relief §11.283
(5) Standard of Review of Agency Actions §11.284
(6) Notice Requirements §11.285
(7) Related Litigation §11.286
b. State Court Litigation §11.287
C. California Endangered Species Act (CESA)
1. Overview §11.288
2. Species Protected Under the CESA
a. Threatened and Endangered Species §11.289
b. Candidate Species §11.290
c. Listing §11.291
(1) Listed Plants §11.292
(2) Listed Animals §11.293
d. "Take" Prohibition Under CESA
(1) Definition of "Take" §11.294
(2) Incidental Take Permit §11.295
(3) Enforcement §11.296
D. References §11.297

© The Regents of the University of California

I. OVERVIEW OF ENVIRONMENTAL PROTECTIONS

§11.1 A. The Challenge

Environmental law is a fast-growing area of legal concern for the public sector, particularly municipalities. Public agencies must address the practical problems and competing interests involved in preserving the environment. Not only are local entities becoming increasingly responsible for enforcing a plethora of environmental rules and regulations; they also often find themselves subject to regulations, some of which carry hefty penalties for a failure to comply.

For further discussion of topics covered by this chapter, see generally Practice Under the California Environmental Quality Act (2d ed Cal CEB 2008); California Land Use Practice (Cal CEB 2006); California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001).

© The Regents of the University of California

§11.2 B. Sources of Law

Federal and state statutory schemes control nearly every aspect of our environment and the hazards to our environment. Many of the federal and state statutes overlap, although the requirements under state laws most often are as stringent or more stringent than requirements under federal law. Despite the presence of countless federal and state environmental rules and regulations, cities may continue to exercise authority over certain aspects of the environment as long as the authority they exercise falls within their traditional police powers.

© The Regents of the University of California

§11.3 C. Preserving the Public's Interest in Sensitive Lands

There are several different mechanisms available for the conservation of sensitive lands including:

- The public trust doctrine;
- Special state legislation;
- Agreements between public agencies and creation of joint powers agencies; and
- Agreements between public agencies and private parties.

© The Regents of the University of California

1. Public Trust Doctrine

§11.4 a. Interests Protected

The state owns all of its navigable waterways and the land beneath them as trustees of a public trust for the benefit of the people. *National Audubon Soc'y v Superior Court* (1983) 33 C3d 419, 434, 189 CR 346, cert denied (1983) 464 US 977. The public trust doctrine traditionally has been regarded as a way to protect the waterways for navigation, commerce, and fishing. However, the doctrine is increasingly viewed as a mechanism by which to preserve the lands in their natural state, so they may serve as ecological units for scientific study, open space, and environments that provide food and habitat for birds and marine life, and that favorably affect the scenery and climate of the area. 33 C3d at 434.

For discussion of tidelands, beaches, and streams, see §§10.334-10.361. For discussion of harbors, see §§6.156-6.179.

© The Regents of the University of California

§11.5 b. State and Local Responsibilities

Under the public trust doctrine, the state is the administrator of a public trust and has the power and the duty to exercise continued supervision over the trust. This duty is administered by the California State Water Resources Control Board (State Board). In considering the public trust, courts have concurrent jurisdiction with the State Board in water rights controversies to reconsider water allocations. *National Audubon Soc'y v Superior Court* (1983) 33 C3d 419, 426, 189 CR 346, cert denied (1983) 464 US 977.

Public trust uses do not have a priority over other water uses and all competing interests must be balanced. 33 C3d at 445. The State Board has the duty to adopt objectives to protect fish and wildlife uses and to implement a program for achieving those objectives. In doing so, the State Board also has a duty to consider and protect all of the other beneficial uses of water, including municipal, industrial, and agricultural uses. It is up to the State Board to balance all of these competing interests in adopting water quality objectives and formulating a program to achieve those objectives. *State Water Resources Control Bd. Cases* (2006) 136 CA4th 674, 777, 39 CR3d 189.

Parties acquiring rights in trust property (including cities holding such properties as the result of state grants) generally hold those properties subject to the trust and can assert no vested rights to use those properties in a manner harmful to the trust. *National Audubon Soc'y,* 33 C3d at 434.

© The Regents of the University of California

§11.6 c. Future of Public Trust Doctrine

Although the public trust doctrine has been expanded far beyond the traditional trust uses of navigation, commerce, and fishing to include recreational uses and preservation, it is unclear how far the doctrine will reach. There have been multiple cases and commentary that suggest that the public trust doctrine will continue to expand to include government's holding of sensitive lands in trust. *Marks v Whitney* (1971) 6 C3d 251, 259, 98 CR 790. Conversely, courts have chosen not to extend the public trust doctrine to non-navigable waterways or artificial bodies of water. See *Golden Feather Community Ass'n v Thermalito Irrig. Dist.* (1989) 209 CA3d 1276, 257 CR 836.

© The Regents of the University of California

§11.7 2. Conservancies

The California State Legislature has been willing on some occasions to set up a trust or conservancy for the protection of sensitive lands. For example, the legislature set up the Santa Monica Mountains Conservancy to protect the Santa Monica Mountains Zone in 1979. See Pub Res C §§33000-33215. The Coachella Valley Mountains Conservancy performs a similar function in that area of the state. The Coachella conservancy was created in 1990 to hold, in perpetual open space, mountainous lands surrounding the Coachella Valley. Pub Res C §§33500-33806.

© The Regents of the University of California

3. Local Efforts at Conservation

§11.8 a. Joint Powers Agreements

Cities and other local entities may also establish such conservancies, or their functional equivalent, either through private contracts or by creation of a specialized government agency through joint powers agreements. Two or more public agencies by agreement may jointly exercise any power common to the contracting parties. The procedures and powers of such joint powers agencies are described in Govt C §§6500-6536. Such joint powers agencies can perform other environmental functions, as well. For example, two or more public agencies that have the authority to identify, plan for, monitor, control, regulate, dispose of, or abate liquid, toxic, or hazardous wastes or hazardous materials may, by agreement, jointly exercise any of these common powers. See Govt C §6502.7.

On intergovernmental relations, see §§1.85-1.106. On the authority for intergovernmental agreements, see §§7.179-7.189.

© The Regents of the University of California

§11.9 b. Williamson Act

The California Land Conservation Act of 1965 (Williamson Act) (Govt C §§51200-51297.4) generally provides a vehicle for cities and other local agencies to preserve agricultural lands. See §§10.140-10.144. However, land devoted to recreational use, land within a scenic highway corridor, a wildlife habitat area, a salt pond, a managed wetland area, or a submerged area may also be protected under the Williamson Act. Govt C §51205.

© The Regents of the University of California

II. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

§11.10 A. Overview

Sections 11.11-11.78 provide a brief summary of key principles of the California Environmental Quality Act (referred to hereinafter as CEQA (Pub Res C §§21000-21177). For a more comprehensive treatment of this complex subject, see the references listed in §11.79.

© The Regents of the University of California

§11.11 1. Purpose

The provisions of Pub Res C §§21000-21001 contain broad statements of legislative intent regarding the environmental protection goals of CEQA. See also 14 Cal Code Regs §15003. However, the legislature has cautioned the courts not to interpret CEQA to impose procedural or substantive requirements beyond those explicitly stated in CEQA or the state CEQA Guidelines (14 Cal Code Regs §§15000-15387). Pub Res C §21083.1.

© The Regents of the University of California

§11.12 2. CEQA Guidelines

The Secretary of the California Resources Agency has adopted comprehensive regulations governing the requirements of CEQA (referred to as the CEQA Guidelines) (14 Cal Code Regs §§15000-15387). When interpreting CEQA, courts must accord "great weight" to the state CEQA Guidelines unless clearly unauthorized or erroneous. *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 391 n2, 253 CR 426. See *Communities for a Better Env't v California Resources Agency* (2002) 103 CA4th 98, 126 CR2d 441 (CEQA Guidelines are subject to invalidation if inconsistent with the existing CEQA statute).

PRACTICE TIP: The state CEQA Guidelines are updated infrequently and may be inconsistent with new statutory provisions or recent case law. The CEQA statute and related case law should be cross-referenced to ensure that the CEQA Guidelines reflect current legal requirements. The latest version of the CEQA statute and Guidelines can be found at http://ceres.ca.gov/ceqa.

© The Regents of the University of California

§11.13 3. Local Guidelines

Every local public agency, including each city and redevelopment agency, must adopt local procedures that will be used to evaluate proposed projects and administer the city's responsibilities under CEQA. 14 Cal Code Regs §15022. These are commonly referred to as "local guidelines." The local guidelines must be consistent with CEQA and the state CEQA Guidelines. See Pub Res C §21082; 14 Cal Code Regs §15022. If the state CEQA Guidelines are amended, a city's local guidelines should be amended within 120 days. 14 Cal Code Regs §15022(c).

PRACTICE TIP: To avoid the need for frequent revisions to local guidelines, some cities simply incorporate the state CEQA Guidelines by reference and use their local guidelines to address issues of particularly local concern, such as identifying the appropriate city decision-making body for particular types of projects, describing local procedures for public hearings and administrative appeals, describing which projects are regarded as involving ministerial or discretionary approvals, establishing thresholds of significance for particular environmental impacts, and establishing detailed requirements for mitigation monitoring programs.

© The Regents of the University of California

4. Lead Agencies, Responsible Agencies, and Trustee Agencies

§11.14 a. Definitions

"Lead agency" means the public agency that has the principal responsibility for carrying out or approving a proposed project. Pub Res C §21067; 14 Cal Code Regs §15367. "Responsible agency" means an agency that has discretionary approval authority over a project, but does not have principal responsibility for carrying out or approving the project. Pub Res C §21069; 14 Cal Code Regs §15381. "Trustee agency" means a state agency with "jurisdiction by law" over natural resources affected by a project that are "held in trust for the people of the State of California," though the agency need not have any approval authority over the project. Examples of trustee agencies include the California Department of Fish and Game and the State Lands Commission. 14 Cal Code Regs §15386.

© The Regents of the University of California

§11.15 b. Identifying Lead Agency

Although in some instances two or more agencies will act to implement and/or approve a project, normally only one agency can function as the lead agency. 14 Cal Code Regs §15050(a). The state CEQA Guidelines establish criteria for determining which agency will be the lead agency. 14 Cal Code Regs §15051. A city normally serves as the lead agency for private development projects within its boundaries and for pre-zoning land to be annexed into the city. 14 Cal Code Regs §15051(b). School districts, however, are lead agencies for their own projects, even when these are located within city boundaries. When two or more agencies cannot agree as to which will act as lead agency, any of the agencies or a private project applicant may request the State Office of Planning and Research (OPR) to resolve the dispute. 14 Cal Code Regs §15053.

© The Regents of the University of California

§11.16 c. Roles of Lead, Responsible, and Trustee Agencies

A lead agency is responsible for preparing the environmental documents for a project, including any negative declaration or environmental impact report (referred to hereinafter as EIR). See, *e.g.,* 14 Cal Code Regs §§15081.5, 15082. A responsible agency does not prepare an EIR or negative declaration; the environmental documentation is prepared by the lead agency. 14 Cal Code Regs §15367. A lead agency must consult with responsible agencies as part of the lead agency's efforts to prepare the environmental document. 14 Cal Code Regs §§15072(a), (e), 15086(a). A responsible agency must respond to requests for consultation issued by the lead agency regarding the EIR or negative declaration, and must consider that document before approving the project. 14 Cal Code Regs §15096(b). A responsible agency is bound by the lead agency's determination regarding the adequacy of an EIR or negative declaration, unless the responsible agency (14 Cal Code Regs §§15050(c), 15052, 15096(e)):

- Files a timely legal challenge;
- Determines that a subsequent EIR or negative declaration is needed; or
- Meets certain criteria for assuming the role of lead agency.

In addition to consulting with responsible agencies, lead agencies must also solicit consultation and comments from trustee agencies. See, *e.g.,* 14 Cal Code Regs §15063(g).

© The Regents of the University of California

§11.17 5. Timing for CEQA Compliance

Choosing the precise time for CEQA compliance involves balancing a number of factors. Environmental review must be undertaken as early as reasonably possible in the planning process to allow for environmental considerations to influence the design of a project, yet late enough that meaningful information is available for environmental assessment. 14 Cal Code Regs §15004(b). Environmental review would be premature if completed too early in the planning process to allow for meaningful analysis of potential environmental impacts. *Save Tara v City of West Hollywood* (2008) 45 C4th 116, 139, 84 CR3d 614; *Friends of the Sierra R.R. v Tuolumne Park & Recreation Dist.* (2007) 147 CA4th 643, 54 CR3d 500; *Concerned McCloud Citizens v McCloud Community Servs. Dist.* (2007) 147 CA4th 181, 54 CR3d 1. However, if environmental review is performed too late in the process, it leaves the agency open to the charge that the environmental analysis is merely a post-hoc rationalization of a decision that the agency has already made. *Save Tara*, 45 C4th at 140 (city's actions committed agency to definite course of action concerning proposed housing development, such that city should have completed CEQA process before taking those actions); *Friends of Mammoth v Board of Supervisors* (1972) 8 C3d 247, 104 CR 761 (county planning board improperly issued building permit and conditional use permit for specific project before performing CEQA review).

© The Regents of the University of California

§11.18 6. Project Approval

CEQA review must be completed before a project is approved. 14 Cal Code Regs §15352(a). Any decision by a public agency that "commits the agency to a definite course of action in regard to a project" entails approval, including the execution of a contract, the provision of financial assistance, or the issuance of a permit or license. 14 Cal Code Regs §15352(b).

Although execution of a discretionary contract will generally be equivalent to project approval under this definition, if the agreement is conditional, confers no vested rights, does not restrict the agency from considering alternatives or mitigation measures, and does not legally commit the agency to a definite course of action, it may not constitute an "approval" under CEQA. *Concerned McCloud Citizens v McCloud Community Servs. Dist.* (2007) 147 CA4th 181, 54 CR3d 1. But see *Citizens for Responsible Gov't v City of Albany* (1997) 56 CA4th 1199, 66 CR2d 102 (city's execution of development agreement for horse racing track before completing CEQA review constituted project approval even though agreement was contingent on electorate vote because agreement "committed [the city] to a definite course of action that was contingent only on the outcome of the election").

Before completing CEQA review, an agency "must not take any action that significantly furthers a project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of the CEQA review of that public project." *Save Tara v City of West Hollywood* (2008) 45 C4th 116, 138, 84 CR3d 614. This issue presents a question of law for the courts. The court will look to the specific terms of the agency's action and the surrounding circumstances to determine "whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered," including the alternative of disapproving the proposal. 45 C4th at 139.

PRACTICE TIP: As recognized in *Sava Tara*, cities and other lead agencies often engage in preliminary activities designed to facilitate or otherwise encourage a project but that, in the agency's view, stop short of a binding commitment or "approval." 45 C4th at 136. *Sava Tara* does not disallow such activities before completion of the CEQA process. At the same time, the court held that this issue presents a purely legal question, to be determined based on the facts and circumstances of the challenged action; the court expressly declined to adopt a "bright-line" test. 45 C4th at 138. The decision presents a challenge because it may be difficult to determine whether specific agency action constitutes "approval" for CEQA purposes. To address the Court's concern, a city engaging in preliminary activities that stop short of "approval" should make clear that, in taking such preliminary action, the city has not foreclosed any mitigation measures or alternatives, including the alternative of ultimately disapproving the proposal.

© The Regents of the University of California

B. Scope

§11.19 1. Definition of "Project"

"Project" means any activity that has the potential to cause a direct or reasonably foreseeable indirect physical change in the environment, and that (Pub Res C §21065; 14 Cal Code Regs §15378(a)):

- Is directly undertaken by a public agency;
- Receives financial assistance from a public agency; or
- Involves the issuance of a lease, permit, license, or other entitlement for use by a public agency.

The term "project" encompasses regulatory approvals such as general plan amendments, zone changes, and annexations that may ultimately lead to physical environmental changes. 14 Cal Code Regs §15378(a)(1); *Bozung v Local Agency Formation Comm'n* (1975) 13 C3d 263, 277 n16, 118 CR 249. "Project" includes a legislative body's submitting an initiative measure to the voters that may lead to voter approval of the project. However, a citizen-sponsored initiative, or a city-sponsored initiative that will not lead to voter approval, is not a "project." 14 Cal Code Regs §15378(b)(3); *Friends of Sierra Madre v City of Sierra Madre* (2001) 25 C4th 165, 105 CR2d 214. See also *San Bernardino Assoc. Gov'ts v Superior Court* (2006) 135 CA4th 1106, 38 CR3d 293 (when one agency directed another to perform ministerial duty of placing item on ballot for vote, that action was not CEQA "project"). Further, a "project" does not include the creation of a government funding mechanism for unspecified or uncertain future projects. *Kaufman & Broad-South Bay, Inc. v Morgan Hill Unified Sch. Dist.* (1992) 9 CA4th 464, 11 CR2d 792.

© The Regents of the University of California

§11.20 2. Discretionary Projects

Unless exempted, all "discretionary projects" proposed to be carried out or approved by a city must receive environmental review pursuant to CEQA. Pub Res C §21080(a). Discretionary projects are those that require the exercise of judgment or deliberation, as opposed to merely determining whether there has been compliance with applicable laws and regulations. 14 Cal Code Regs §15357. See also 14 Cal Code Regs §15369 (defining "ministerial projects"). "Ministerial projects" involve a governmental decision requiring little or no personal judgment by the public official and are exempt from CEQA. Pub Res C §21080(b)(1); 14 Cal Code Regs §15369; *Health First v March Joint Powers Auth.* (2009) 174 CA4th 1135, 1143, 96 CR3d 290; *Madrigal v City of Huntington Beach* (2007) 147 CA4th 1375, 55 CR3d 209. Even approvals that ordinarily are ministerial, such as building permits, can become subject to CEQA if the city in effect exercises discretionary control over the project. *Friends of Westwood, Inc. v City of Los Angeles* (1987) 191 CA3d 259, 235 CR 788.

© The Regents of the University of California

3. Exemptions

§11.21 a. Statutory Exemptions

The legislature has exempted certain types of projects from CEQA. Some statutory exemptions offer complete exemptions from CEQA, regardless of whether the project will involve significant environmental impacts; *e.g.,* Pub Res C §21080.13 ("[t]his division shall not apply to any railroad grade separation project which eliminates an existing grade crossing or which reconstructs an existing grade separation"). Other statutory exemptions provide that the project is exempt from only some of CEQA's requirements, or encompass only projects meeting a variety of criteria, including whether the project will have significant environmental impacts. See, *e.g.,* Pub Res C §21083.3 (limiting CEQA requirements for projects consistent with general plan and zoning) and §21159.21 (statutory exemption for certain housing projects). These statutory exemptions generally are found in Pub Res C §§21080(b), 21080.01-21080.33, and 21159.21-21159.23, which provide exemptions for certain housing projects, including low-income and agricultural worker housing. Other exemptions, however, are scattered throughout the California codes.

Many of the statutory exemptions are further described in 14 Cal Code Regs §§15260-15285. See also Govt C §12012.45(b)(1)(C) (exempting execution of intergovernmental agreement between tribe and county or city negotiated pursuant to tribal-state gaming compact). Of particular significance is the exemption for projects that are disapproved. Pub Res C §21080(b)(5); 14 Cal Code Regs §15270. See also *Main San Gabriel Basin Watermaster v State Water Resources Control Bd.* (1993) 12 CA4th 1371, 16 CR2d 288. This exemption allows a city to disapprove a project on the merits without regard to the initiation or completion of CEQA procedures. 14 Cal Code Regs §15270(b).

© The Regents of the University of California

§11.22 b. Categorical Exemptions

The California Secretary of the Resources Agency has authority to adopt by regulation a list of classes of projects that under normal circumstances will have no significant effect on the environment and would thus be exempt from CEQA. Pub Res C §21084. These categorical exemptions are listed in 14 Cal Code Regs §§15300-15333.

Some exemptions are relied on more often than others. The more commonly used categorical exemptions include Class 1 (Existing Facilities), Class 2 (Replacement or Reconstruction), Class 3 (New Construction or Conversion of Small Structures), Class 4 (Minor Alterations to Land), Class 5 (Minor Alterations in Land Use Limitations), and Class 32 (Infill Development Projects). 14 Cal Code Regs §§15301-15305, 15332.

The provisions of 14 Cal Code Regs §15300.2 contain certain exceptions that preclude application of the categorical exemptions. The categorical exemptions do not apply to the following:

- Projects located in a sensitive environment;
- Projects involving significant cumulative impacts;
- Projects that may have a significant environmental impact due to unusual circumstances;
- Projects that adversely affect scenic highways;
- Projects that cause substantial adverse changes to designated historical resources; and
- Projects that are located on properties included on the State Secretary for Environmental Protection's list of hazardous waste sites.

See also Pub Res C §§21084(b)-(c), (e), 21084.1; *Salmon Protection & Watershed Network v County of Marin* (2004) 125 CA4th 1098, 23 CR3d 321.

© The Regents of the University of California

§11.23 c. Common Sense Exemption

In addition to the listed statutory and categorical exemptions, CEQA does not apply to projects when the lead agency determines "with certainty that there is no possibility that the activity in question may have a significant effect on the environment." 14 Cal Code Regs §15061(b)(3). See *Muzzy Ranch Co. v Solano County Airport Land Use Comm'n* (2007) 41 C4th 372, 386, 60 CR3d 247 (explaining application of exemption); *Martin v City & County of San Francisco* (2005) 135 CA4th 392, 403, 37 CR3d 470 (citing this "common sense" exemption in support of conclusion that alterations to interior of private residence, which have no significant effect on the public environment, are not subject to CEQA).

© The Regents of the University of California

§11.24 d. Procedures

If an agency concludes that a project falls within a statutory or categorical exemption, then the agency generally does not need to follow any particular procedures to provide notice or memorialize that conclusion. 14 Cal Code Regs §§15060-15061. See also *CalBeach Advocates v City of Solana Beach* (2002) 103 CA4th 529, 538, 127 CR2d 1 (city did not have to adopt findings concerning applicability of statutory exemption). But see *Great Oaks Water Co. v Santa Clara Valley Water Dist.* (2009) 170 CA4th 956, 968, 88 CR3d 506 (statutory exemption for certain rate-setting activities required lead agency to adopt specific findings in order to rely on exemption). If the conclusion is reached by a non-elected official or body, then the conclusion may be appealed to the agency's elected decision-making body. 14 Cal Code Regs §15061(e). After approving a project that has been determined to be exempt, the agency may prepare and file a "notice of exemption." 14 Cal Code Regs §§15061(d), 15062. Filing such a notice has the effect of shortening the statute of limitations for challenging the agency's decision from 180 days from the date of the decision to 35 days from the date the notice is posted. Pub Res C §21167(d).

PRACTICE TIP 1: Although CEQA generally does not require a lead agency to follow particular procedures in order to rely on a statutory or categorical exemption, if a lead agency decides that an exemption applies and chooses to forgo a negative declaration, the lead agency should include specific documentation in the record (*e.g.,* a staff report) supporting the decision to apply the exemption. Such documentation will facilitate the court's review of the agency's decision, and may provide the court with a basis for deferring to the city's factual determinations regarding the applicability of the exemption.

PRACTICE TIP 2: If using an exemption, the lead agency should be sure to file a notice of exemption after approval of the project to trigger the applicable 35-day statute of limitations. See §§11.59, 11.61; 14 Cal Code Regs §15062; *San Lorenzo Valley Community Advocates for Responsible Educ. v San Lorenzo Valley Unified Sch. Dist.* (2006) 139 CA4th 1356, 1385, 44 CR3d 128.

PRACTICE TIP 3: If a lead agency chooses, it may complete a negative declaration for a project even if a CEQA exemption applies. If that is done, the lead agency should still make findings supporting the exemption as an alternative ground for approving the project.

© The Regents of the University of California

C. Initial Study

§11.25 1. Purpose and Contents

If a proposed activity is a project and is not exempt from CEQA, then the city ordinarily must prepare an "initial study" to determine whether the project will have a significant effect on the environment. See 14 Cal Code Regs §15063; *Leonoff v Monterey County Bd. of Supervisors* (1990) 222 CA3d 1337, 272 CR 372. If an EIR clearly is required, the city may skip the initial study and proceed directly to EIR preparation. 14 Cal Code Regs §§15060(d), 15063(a). An initial study serves several important purposes, including providing information on whether an EIR is needed and focusing the EIR on the project's significant environmental impacts. 14 Cal Code Regs §15063(c). The initial study may also reveal ways for the project applicant or lead agency to modify the project to mitigate adverse environmental impacts before an EIR is prepared, which in turn may enable the project to qualify for a negative declaration rather than an EIR. 14 Cal Code Regs §15063(c)(2).

© The Regents of the University of California

§11.26 2. Environmental Checklist Form

Appendixes G and H to the state CEQA Guidelines contain an "Environmental Checklist Form" which meets the requirements for an initial study. 14 Cal Code Regs §15063(f). In addition to completing the checklist, the initial study preparer must provide a narrative explanation or data to support the conclusions contained in the initial study. 14 Cal Code Regs §15063(d); *Sundstrom v County of Mendocino* (1988) 202 CA3d 296, 248 CR 352; *Citizens Ass'n for Sensible Dev. v County of Inyo* (1985) 172 CA3d 151, 171, 217 CR 893. But see *Silveira v Las Gallinas Valley Sanitary Dist.* (1997) 54 CA4th 980, 989, 63 CR2d 244 (purchase of property that will result in no changes or alteration to property does not require explanation or data for each conclusion contained in initial study).

© The Regents of the University of California

§11.27 3. Significance Determinations

An agency cannot limit its inquiry to subjects listed on the CEQA Guidelines Appendix G checklist if the public has raised a fair argument supported by substantial evidence that the project may result in other significant environmental impacts. *Protect the Historic Amador Waterways v Amador Water Agency* (2004) 116 CA4th 1099, 1109, 11 CR3d 104 ("in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect"). For example, an agency must analyze urban decay impacts when evidence in the record indicates that a project may have economic impacts, which in turn could indirectly result in such effects. *Bakersfield Citizens for Local Control v City of Bakersfield* (2004) 124 CA4th 1184, 22 CR3d 203.

© The Regents of the University of California

§11.28 4. Timing

The initial study must be completed within 30 days after an application is accepted as complete, unless this deadline is extended for up to 15 days with the applicant and lead agency's consent. 14 Cal Code Regs §15102.

© The Regents of the University of California

§11.29 5. Determining Whether Project May Have Significant Environmental Effect

This critical inquiry focuses on the potential that a project may create a significant effect on the environment. 14 Cal Code Regs §15064. The determination of whether a project may create a significant effect on the environment will affect the type of environmental document that must be prepared. This standard is commonly called the "fair argument" test, which requires the lead agency to prepare an EIR if there is substantial evidence in the record supporting a fair argument that the project may result in a significant environmental effect. *Moss v County of Humboldt* (2008) 162 CA4th 1041, 1049, 76 CR3d 428; *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 1002, 165 CR 514. "Significant effect on the environment" means a substantial or potentially substantial adverse change in the physical conditions within the area affected by a project. 14 Cal Code Regs §15382. For certain types of impacts, a mandatory finding of significance is required. 14 Cal Code Regs §§15064.5, 15065. More commonly, the determination of whether a particular impact is significant requires the exercise of judgment based on substantial evidence in the record. 14 Cal Code Regs §15064(b), (f).

PRACTICE TIP 1: Local planning documents such as general plans, specific plans, and traffic studies, can provide thresholds for significance of particular impacts. Local CEQA guidelines also can create thresholds for significance, providing an objective standard to be applied when conducting initial studies. Such thresholds of significance are "encouraged" by the state CEQA Guidelines, must be developed through a public review process, and must be supported by substantial evidence. 14 Cal Code Regs §15064.7.

PRACTICE TIP 2: The lead agency has some discretion to reject evidence of environmental impacts as not being credible if there are "legitimate, disputed issues of credibility," so long as the agency makes express findings supporting its credibility determinations. *County Sanitation Dist. No. 2 v County of Kern* (2005) 127 CA4th 1544, 1597, 27 CR3d 28. See also *Citizens' Comm. to Save Our Village v City of Clarement* (1995) 37 CA4th 1157, 1168, 44 CR2d 288. Some courts, however, have expressed skepticism regarding the extent of an agency's discretion to reject the substantiality of evidence on the ground that it is not credible. *Pocket Protectors v City of Sacramento* (2004) 124 CA4th 903, 934, 21 CR3d 791.

PRACTICE TIP 3: The "fair argument" standard of review represents a low threshold. The nature of the "fair argument" standard is such that, up until the moment the city approves the project, evidence may be submitted indicating that the proposed project may have a significant impact on the environment. This evidence may be submitted by a commenter, or the evidence may come from the agency's own files. See, *e.g., Citizens for Responsible & Open Gov't v City of Grand Terrace* (2008) 160 CA4th 1323, 73 CR3d 202; *Mejia v City of Los Angeles* (2005) 130 CA4th 322, 29 CR3d 788; *Ocean View Estates Homeowners Ass'n v Montecito Water Dist.* (2004) 116 CA4th 396, 10 CR3d 451. If a project is being considered based on a negative declaration, counsel must remain watchful for the submittal of evidence that may constitute a "fair argument." If a "fair argument" has been made, then the city should not proceed with a negative declaration, but should prepare an EIR instead.

© The Regents of the University of California

D. Negative Declaration

§11.30 1. When Prepared

A "negative declaration" is appropriate in two situations:

(1) A negative declaration is prepared if no substantial evidence before the city shows that the project may have a significant impact on the environment. Pub Res C §21080(c)(1); 14 Cal Code Regs §15070(a).

(2) A negative declaration is prepared if an initial study identifies potentially significant impacts, but revisions made to the project before public review of the negative declaration clearly reduce impacts to a level of insignificance. There must be no substantial evidence in the record that the project, as revised, would have a significant effect on the environment. Pub Res C §21080(c)(2); 14 Cal Code Regs §15070(b).

The latter type of negative declaration is known as a "mitigated negative declaration." See Pub Res C §§21064.5, 21080(c)(2), 21081.6; 14 Cal Code Regs §15070(b). Before project approval, if the lead agency concludes that any of the mitigation measures are infeasible, the city may, after holding a public hearing, substitute equivalent or more effective mitigation measures without recirculating the mitigated negative declaration, provided that the substitute mitigation measures do not in themselves create potentially significant impacts. Pub Res C §21080(f); 14 Cal Code Regs §15074.1.

PRACTICE TIP: If changes are made to a project or conditions imposed by the lead agency to avoid a significant effect on the environment, thus resulting in a mitigated negative declaration, be sure to document that the applicant has agreed to the changes and conditions before the mitigated negative declaration is released for public review. 14 Cal Code Regs §15070(b)(1).

© The Regents of the University of California

§11.31 2. Duty to Investigate Impacts

A city has a duty to investigate the potential environmental impacts of a project. A court may consider an agency's failure to gather relevant data in determining whether there is a "fair argument" that a project's environmental impacts may be significant. See generally *Sundstrom v County of Mendocino* (1988) 202 CA3d 296, 311, 248 CR 352 (holding that absence of evidence in record can itself support "fair argument" of significant impacts). But see *Gentry v City of Murrieta* (1995) 36 CA4th 1359, 1380, 43 CR2d 170 (absence of evidence in support of "fair argument" may itself be evidence that significant impacts will not occur).

© The Regents of the University of California

§11.32 3. Contents

A negative declaration must contain the following (14 Cal Code Regs §15071):

- A description of the project;
- The location of the project;
- A proposed finding that the project will not have a significant environmental impact;
- A copy of the initial study documenting reasons to support the finding; and
- Mitigation measures, if any, incorporated into the project.

© The Regents of the University of California

§11.33 4. Public Review

The CEQA Guidelines provide detailed notice requirements. See Pub Res C §§21091-21092.5; 14 Cal Code Regs §§15072-15073, 15105. A proposed negative declaration must be circulated for public review not less than 20 days before its adoption (or 30 days, if the negative declaration is subject to State Clearinghouse review). Pub Res C §21091(b); 14 Cal Code Regs §15073(a). In some instances, the State Clearinghouse may authorize shorter review periods pursuant to Pub Res C §21091(e); 14 Cal Code Regs §15105(d). For a description of projects subject to State Clearinghouse review, see 14 Cal Code Regs §15205(b). A proposed negative declaration must be recirculated if the document is substantially revised after it has been circulated, but before adoption. See 14 Cal Code Regs §15073.5 (for discussion of whether revision is sufficiently substantial to require recirculation). On the State Clearinghouse, see §1.101.

PRACTICE TIP 1: Notice to state trustee agencies (the state agency with jurisdiction over natural resources affected by a project, *e.g.,* the Department of Fish and Game) is required in many cases. Pub Res C §21080.3. The failure to notify a trustee agency constitutes a per se CEQA violation that may require a court to void project approval, and it also may void any failure to exhaust administrative remedies defense. *Fall River Wild Trout Found. v County of Shasta* (1999) 70 CA4th 482, 82 CR2d 705; *Gentry v City of Murrieta* (1995) 36 CA4th 1359, 43 CR2d 170. Cities therefore should err on the side of providing notice to the Department of Fish and Game and any other potential responsible or trustee agencies.

PRACTICE TIP 2: During the public review period for a negative declaration, the city may receive comment letters from interested public agencies, organizations, and individuals. CEQA does not require that the city respond to comments received on a negative declaration. Should litigation result, however, the city may want information in the record showing that it reviewed and attempted to address the concerns of the public. In particular, the city may want to include in the record information explaining why such comments do not constitute a "fair argument" that the project may have significant impacts. For example, the city may want to include an explanation why the evidence offered in support of a "fair argument" is not credible. Thus, although not strictly required, responding to comments received on a negative declaration is an option that the city should consider as part of its CEQA process.

© The Regents of the University of California

§11.34 5. Adoption

Before making a recommendation on a project, any advisory body to a city decision-making body must consider the proposed negative declaration or mitigated negative declaration. 14 Cal Code Regs §15074(a). The decision-making body must consider the proposed document together with any comments received during the public review process. Adoption must be supported by findings that (14 Cal Code Regs §15074(b)):

- Based on the record as a whole, there is no substantial evidence that the project will have a significant effect on the environment; and
- The document reflects the lead agency's independent judgment and analysis.

If the lead agency concludes that a mitigation measure in a mitigated negative declaration is infeasible or otherwise undesirable, it may adopt a substitute measure of equal or greater efficacy without recirculating the document if the substitution is considered at a public hearing and the agency makes a written finding that the measure is of equal or greater efficacy and will not itself cause any potentially significant effect on the environment. Pub Res C §31090(f); 14 Cal Code Regs §15074.1.

If the decision-making body is not elected (*e.g.,* the planning commission), the adoption of the negative declaration may be appealed to the elected decision-making body *e.g.,* the city council). Pub Res C §21151(c).

© The Regents of the University of California

E. Environmental Impact Report (EIR)

§11.35 1. When Required

An EIR must be prepared if a project is not exempt from CEQA and does not qualify for a negative declaration. As a general rule, an EIR is required whenever it can be fairly argued on the basis of substantial evidence in light of the whole record before the city that the project may have a significant impact on the environment. *No Oil, Inc. v City of Los Angeles* (1974) 13 C3d 68, 75, 118 CR 34; *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 1001, 165 CR 514. See generally Pub Res C §§21080(d), 21082.2(d); 14 Cal Code Regs §15064(f). Substantial evidence of impacts requiring an EIR must consist of factual information or expert opinion rather than speculation, unsubstantiated opinion, or clearly inaccurate information. Pub Res C §§21080(e), 21082.2(c); 14 Cal Code Regs §15064(f)(5).

© The Regents of the University of California

§11.36 2. Notice of Preparation

The lead agency must solicit the views of responsible agencies and certain other public agencies regarding the scope and content of the EIR via a notice of preparation of the EIR. Pub Res C §21080.4; 14 Cal Code Regs §§15082-15083.5. A copy of the notice of preparation also must be mailed to the State Office of Planning and Research and posted in the office of the county clerk in each county in which the project will be located. Pub Res C §§21080.4, 21092.3.

© The Regents of the University of California

§11.37 3. Baseline

An EIR must contain a description of the physical environmental conditions at the project site and in the project vicinity as they exist at the time the notice of preparation is published. If no notice of preparation is published, then the setting should be described as it exists at the time the environmental analysis is commenced. This setting description must include both a local and a regional perspective. This environmental setting will normally constitute the "baseline" physical condition by which the lead agency determines whether an impact is significant. 14 Cal Code Regs §15125(a); *Communities for a Better Env't v South Coast Air Quality Mgmt. Dist.* (2010) 48 C4th 310, __ CR3d __; *Fairview Neighbors v County of Ventura* (1999) 70 CA4th 238, 82 CR2d 436; *Temecula Band of Luiseno Mission Indians v Rancho Cal. Water Dist.* (1996) 43 CA4th 425, 50 CR2d 769. Future buildout of a specific plan or general plan is not the baseline for measuring the impacts of a project that is consistent with that buildout; instead, the baseline generally consists of physical conditions as they exist, rather than hypothetical future conditions under a "build-out" scenario. See *Communities for a Better Env't v South Coast Air Quality Mgmt. Dist., supra*; *Environmental Planning & Info. Council v County of El Dorado* (1982) 131 CA3d 350, 357, 182 CR 317. See also *Woodward Park Homeowners Ass'n, Inc. v City of Fresno* (2007) 150 CA4th 683, 706, 58 CR3d 102.

© The Regents of the University of California

§11.38 4. Contents

CEQA and the state CEQA Guidelines describe in detail the required contents of an EIR. See Pub Res C §21100; 14 Cal Code Regs §§15120-15132. Generally, an EIR must:

- Accurately describe the proposed project;
- Identify and analyze each significant environmental impact expected to result from the proposed project;
- Identify mitigation measures to reduce those impacts to the extent feasible;
- Evaluate a range of reasonable alternatives to the proposed project; and
- Include a statement briefly indicating the reasons for determining that any effects on the environment are not significant and, thus, have not been discussed in detail.

Additionally, an EIR must describe in a separate section any significant effects on the environment that cannot be avoided if the project were implemented and any significant effects on the environment that would be irreversible if the project were implemented. See Pub Res C §21100(b)(2). See also Pub Res C §21100; 14 Cal Code Regs §§15126, 15126.2, 15130. See also §11.32.

PRACTICE TIP 1: CEQA includes a number of rules governing how the analysis should be performed for a particular environmental resource. See, *e.g.,* 14 Cal Code Regs §15064.5 (historical and unique archaeological resources). In other instances, agencies have adopted policies, regulations, or guidance addressing how the agency is to perform an analysis. A city's CEQA analysis should be performed so that it is consistent with such policy, regulations or guidance. See, *e.g., Ebbetts Pass Forest Watch v California Dep't of Forestry & Fire Protection* (2008) 43 C4th 936, 949, 77 CR3d 239 (agency had duty to comply with its own guidance regarding how to determine geographic scope of biological analysis); *Endangered Habitats League, Inc. v County of Orange* (2005) 131 CA4th 777, 32 CR3d 177 (when specific plan contained policy requiring agency to use particular model to analyze traffic impacts, agency erred by using a different model in its EIR). The city has discretion to not comply with policies or guidance adopted by another agency, so long as substantial evidence supports the agency's chosen approach. *California Native Plant Soc'y v City of Rancho Cordova* (2009) 172 CA4th 603, 625, 91 CR3d 571 (upholding mitigation measures adopted by city despite objections by other agencies with jurisdiction over affected resources); *Association of Irritated Residents v County of Madera* (2003) 107 CA4th 1383, 1396, 133 CR2d 718 (agency had substantial evidence to support conclusions regarding biological impacts of proposed projects even though surveys were not performed in accordance with protocols adopted by federal wildlife agency).

PRACTICE TIP 2: AB 32 (2006) contains a policy statement that global warming poses "a serious threat" to the economic and environmental well-being of the state. See Health & S C §§38500-38599 (codification of AB 32). Based on this policy statement, similar policy statements in gubernatorial executive orders, and federal decisions requiring climate change impact analyses under the National Environmental Policy Act of 1969 (NEPA) (42 USC §§4321-4370h), the Attorney General and various citizen groups have filed actions challenging environmental studies that do not analyze climate change impacts. At the time of this writing, no published appellate decisions on the subject are yet available.

Under SB 97 (2007), the Governor's Office of Planning and Research has provided the California Resources Agency with CEQA guidelines addressing global warming in CEQA documents. As required by Pub Res C §21083.05 (codifying SB 97), the Resources Agency has adopted final guidelines, which are available at http://ceres.ca.gov/ceqa/guidelines/. The Office of Planning and Research has issued a Technical Advisory, entitled CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review, that provides some direction on how CEQA documents may address climate change.

Many air districts and other agencies are developing, or have adopted, guidance on how to address climate change and greenhouse gas emissions in CEQA documents. Many cities and other public agencies are also developing "climate action plans" to address these issues; if approved, such plans have the potential to streamline

the CEQA process. For examples, see the Berkeley plan at www.berkeleyclimateaction.org/ and the San Francisco plan at www.sfenvironment.org/downloads/library/climateactionplan.pdf.

Although there is ongoing debate on how to address climate change, most lead agencies are now addressing the issue in their environmental documents. This issue is evolving rapidly. Given widespread attention and interest from environmental advocates and other stakeholders, developments should be monitored carefully.

© The Regents of the University of California

§11.39 5. Adequacy

An EIR must be prepared with a sufficient degree of analysis to allow decision makers to make an informed decision that takes into account the environmental consequences of a project. Courts should look not for perfection, but for adequacy, completeness, and a good faith effort at full disclosure. 14 Cal Code Regs §§15003(i), 15151. See generally *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 390, 253 CR 426 (for a concise summary of CEQA principles applicable to an EIR). Although this standard is often repeated by courts, the judicial inquiry into a particular EIR's determination of adequacy can be exacting. See, *e.g., Kings County Farm Bureau v City of Hanford* (1990) 221 CA3d 692, 270 CR 650. Among other holdings, the *Laurel Heights* decision emphasized that an EIR that draws conclusions without supporting evidence will not be considered adequate. In addition, an agency may not rely solely on compliance with another agency's certified regulatory scheme as a substitute for conducting an independent evaluation of the potential specific impacts of a project for which it has discretionary approval authority. See *Californians for Alternatives to Toxics v Department of Food & Agric.* (2005) 136 CA4th 1, 15, 38 CR3d 638.

© The Regents of the University of California

§11.40 6. Public Review of Draft EIR

An EIR is prepared in two basic steps: (1) a draft EIR is prepared and circulated to the public and affected public agencies for review and comments; and (2) a final EIR, including the comments submitted and responses to those comments, is prepared and then certified by the lead agency as to completeness and adequacy. CEQA requires that the review period for a draft EIR be at least 30 days. This minimum review period is increased to 45 days if the document requires review by the State Clearinghouse. Pub Res C §21091(a); 14 Cal Code Regs §15105. On the State Clearinghouse, see §1.101. For a description of projects requiring State Clearinghouse review, see 14 Cal Code Regs §15205(b).

© The Regents of the University of California

§11.41 7. Response to Comments

Unlike the process for negative declarations, written comments received during the public review period for a draft EIR must be responded to in writing. Pub Res C §21091(d); 14 Cal Code Regs §15088. The response to comments must provide reasoned, good faith analysis regarding all significant environmental issues raised in the EIR comments. *Cleary v County of Stanislaus* (1981) 118 CA3d 348, 358, 173 CR 390; Pub Res C §21091(d)(2)(B); 14 Cal Code Regs §15088. Responses to comments submitted by another public agency must be provided to the commenting agency at least 10 days before EIR certification. Pub Res C §21092.5(a). When such comments from a sister agency disclose new or conflicting data or opinions that raise concern that the agency may not have fully evaluated the project and its alternatives, the lead agency must pay particular care to respond with good faith, reasoned analysis. *Berkeley Keep Jets Over the Bay Comm. v Board of Port Comm'rs* (2001) 91 CA4th 1344, 1367, 111 CR2d 598; *Cleary v County of Stanislaus* (1981) 118 CA3d 348, 357, 173 CR 390. Although an agency must respond to comments received during the public comment period, it may also respond to late comments. 14 Cal Code Regs §15088(a); *Gray v County of Madera* (2008) 167 CA4th 1099, 1111, 85 CR3d 50 (lead agency may but is not required to respond to late comments).

PRACTICE TIP: Agencies should note, however, that potential challengers may exhaust their administrative remedies by providing comments to the agency at any time before the close of the public hearing. *Galante Vineyards v Monterey Peninsula Water Mgmt. Dist.* (1997) 60 CA4th 1109, 1121, 71 CR2d 1. Thus, as a matter of practice, agencies should consider responding to all comments, including those submitted after the close of the public review period. The response to a late comment does not need to be included in the final EIR, but the response should be included in the record (*e.g.,* in a staff report) so that the court has the benefit of the agency's analysis in the event a lawsuit is filed.

© The Regents of the University of California

§11.42 8. Recirculation of Draft EIR

When "significant new information" is added to an EIR after the expiration of the public comment period but before certification, the agency must recirculate the EIR for additional public comment. Pub Res C §21092.1; 14 Cal Code Regs §15088.5. Recirculation is required only when the information added to the EIR changes the EIR in a way that deprives the public of a meaningful opportunity to comment on either a substantial adverse environmental impact of the project or a feasible project alternative or mitigation measure that would clearly reduce the impact and that is not going to be implemented. A decision not to recirculate will be upheld if it is supported by substantial evidence in the administrative record. See 14 Cal Code Regs §15088.5; *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1993) 6 C4th 1112, 26 CR2d 231.

© The Regents of the University of California

§11.43 9. Certification of Final EIR

The final EIR consists of the draft EIR with any revisions made following its circulation for public review, the comments received on the draft EIR, a list of persons and entities commenting on the draft EIR, the lead agency's responses to comments, and any other information added by the lead agency. 14 Cal Code Regs §15132. The lead agency must certify that the final EIR was completed in compliance with CEQA and was reviewed and considered by the decision-making body (*e.g.,* the city council) before project approval. 14 Cal Code Regs §15090. The lead agency must also find that the final EIR reflects the independent judgment of the lead agency. Pub Res C §21082.1(c)(3); 14 Cal Code Regs §15090(a)(3). If the decision-making body is not elected (*e.g.,* the planning commission), the certification of the EIR may be appealed to the elected decision-making body (*e.g.,* the city council). Pub Res C §21151(c); 14 Cal Code Regs §15090(b). An appeal from the certification of an EIR by an unelected planning commission must be decided by the majority vote of the elected governing board. On appeal, the elected governing board itself must consider and approve the EIR and make findings; a tie vote by the governing board does not certify the EIR. Pub Res C §21151(c).

PRACTICE TIP: The distinction between EIR certification and project approval is important. Certification of an EIR constitutes a determination that, in the lead agency's opinion, the EIR meets legal requirements. EIR certification does not trigger the running of the statute of limitations to challenge project approval. Instead, the statute of limitations begins to run at the time of project approval. Pub Res C §21167(a). Additional statute of limitations periods may apply. See Pub Res C §21167. An agency may move immediately from the decision to certify the EIR to the decision whether to approve the project. Practice varies widely. Some agencies consider taking both steps at the same hearing; other agencies hold separate hearings on whether to certify the EIR and to approve the project, with the hearings separated by weeks or months. Either approach is permissible. Cities should be aware, however. that a lengthy delay between certification of the EIR and approval of the project may raise questions regarding the need to perform supplemental review. Pub Res C §21166.

© The Regents of the University of California

F. Additional Types of EIRs and Negative Declarations

§11.44 1. Master EIRs, Program EIRs, and Tiering

CEQA and the CEQA Guidelines include a number of provisions intended to streamline environmental review. These include tiering, program EIRs, master EIRs, and EIRs prepared for community plans, general plans, or zoning. Pub Res C §§21083.3, 21090, 21093-21094, 21156-21159.4; 14 Cal Code Regs §§15152, 15165-15179.5, 15183. Generally, all of these provisions are designed to allow cities and other agencies to consider planning-level environmental concerns in a program or master EIR that may be adopted for a general plan or other planning or policy action. Follow-up EIRs or negative declarations on specific projects should focus more on project-specific impacts.

A local agency's determination that a project is within the scope of a prior master or program EIR will be upheld if it is based on substantial evidence. *Citizens for Responsible Equitable Envt'l Dev. v City of San Diego Redev. Agency* (2005) 134 CA4th 598, 610, 36 CR3d 249. But see *Wal-Mart Stores, Inc. v City of Turlock* (2006) 138 CA4th 273, 287, 41 CR3d 420 (assuming, without deciding, that "fair argument" standard applied to city's determination that ordinance was within scope of general plan EIR and thus additional CEQA review was unnecessary under 14 Cal Code Regs §15183). Note, however, that when an EIR is tiered from a prior EIR that has subsequently been decertified, the newer, tiered EIR that is written as a project EIR must also be decertified. *Friends of the Santa Clara River v Castaic Lake Water Agency* (2002) 95 CA4th 1373, 116 CR2d 54.

A redevelopment plan EIR must analyze the impacts of component projects and may not defer such analysis to subsequent review, to the extent information is known or reasonably could have been known at the time of plan approval. *Friends of Mammoth v Town of Mammoth Lakes Redev. Agency* (2000) 82 CA4th 511, 536, 98 CR2d 334. CEQA also allows redevelopment plan EIRs to be written as program or master EIRs; however, such EIRs must comply with rules applicable to programmatic environmental review. See *Citizens for Responsible Equitable Envt'l Dev. v City of San Diego Redev. Agency* (2005) 134 CA4th 598, 607, 36 CR3d 249.

PRACTICE TIP: The various EIRs available to streamline the environmental review process may be quite useful. At the same time, the rules concerning tiering, program EIRs, and particularly master EIRs are complicated. When considering what type of EIR to prepare for a planning or policy action (such as a general plan update or amendment), cities should carefully evaluate whether a program EIR, master EIR, or project-specific EIR will be preferable.

© The Regents of the University of California

§11.45 2. Subsequent EIRs and Negative Declarations

After certification of an EIR or adoption of a negative declaration, no subsequent environmental document will be required unless one or more of the following three criteria are met (Pub Res C §21166; 14 Cal Code Regs §15162):

(1) Substantial changes are proposed in the project that will require major revisions to the environmental document due to new significant environmental effects or a substantial increase in the severity of previously identified effects;

(2) Substantial changes occur in the circumstances under which the project is to be undertaken that will require major revisions to the environmental document due to new significant environmental effects or a substantial increase in the severity of previously identified effects; or

(3) Specified new information of substantial importance to the project becomes available.

However, the availability of the new information does not necessarily require the reopening and recirculation of a previously approved environmental document. See *Snarled Traffic Obstructs Progress v City & County of San Francisco* (1999) 74 CA4th 793, 88 CR2d 455; *Chaparral Greens v City of Chula Vista* (1996) 50 CA4th 1134, 1150, 58 CR2d 152.

The subsequent EIR or negative declaration must be circulated for public review. Subsequent or supplemental environmental review generally may be triggered only if the public agency is considering a subsequent discretionary approval or other action. See *Cucamongans United for Reasonable Expansion v City of Rancho Cucamonga* (2000) 82 CA4th 473, 479, 98 CR2d 202. Although the deferential standard of review in Pub Res C §21166 applies to changes in projects, it does not apply to entirely new projects. *Save Our Neighborhood v Lishman* (2006) 140 CA4th 1288, 1297, 45 CR3d 306. But see *Mani Bros. Real Estate Group v City of Los Angeles* (2007) 153 CA4th 1385, 1399, 64 CR3d 79 (criticizing *Lishman*).

© The Regents of the University of California

§11.46 3. Addendum to EIR or Negative Declaration

An addendum may be used if a subsequent EIR or negative declaration is not required, or only minor technical changes or additions are necessary. An addendum need not be circulated for public review but must be considered by the decision-making body along with the original negative declaration or EIR before approving the project. 14 Cal Code Regs §15164. The addendum or the project approval findings should include a brief statement explaining the reasons for not preparing a subsequent EIR or negative declaration. 14 Cal Code Regs §15164. Cities should consider whether the addendum procedure is being applied to the original project or a component of the original project and also whether the environmental impacts of the revised project are greater than those previously analyzed. See *Mani Bros. Real Estate Group v City of Los Angeles* (2007) 153 CA4th 1385, 64 CR3d 79. *American Canyon Community United for Responsible Growth v City of American Canyon* (2006) 145 CA4th 1062, 52 CR3d 312.

© The Regents of the University of California

G. Project Approval

§11.47 1. Required Findings

Before approving any project for which an EIR has been certified or a negative declaration adopted, a city must make certain findings (Pub Res C §21081.6(a)(2); 14 Cal Code Regs §§15074(c), 15091(e)):

- The decision-making body must make findings regarding the project's environmental impacts; the nature of these findings will vary based on the type of environmental review; and
- When approving a project for which an EIR has been certified or when adopting a negative declaration, the decision-making body must also specify the location and custodian of the documents constituting the administrative record. See also Pub Res C §21167.6(e) (contents of administrative record).

© The Regents of the University of California

§11.48 a. If Negative Declaration Has Been Adopted

Before approving a project for which a negative declaration has been prepared, the agency must find, on the basis of the initial study, any comments received, and any mitigation measures, that there is no substantial evidence that the project may have a significant effect on the environment. 14 Cal Code Regs §15074(b).

© The Regents of the University of California

§11.49 b. If Environmental Impact Report Has Been Certified

Before approving a project for which an EIR has been certified, the agency must make findings concerning each significant impact identified in the EIR and concerning the impact of the project as a whole.

© The Regents of the University of California

§11.50 (1) Individual Impact Findings

For each significant environmental impact identified in the EIR, the city must make one of three findings (Pub Res C §21081; 14 Cal Code Regs §15091; *City of Marina v Board of Trustees of Cal. State Univ.* (2006) 39 C4th 341, 366, 46 CR3d 355):

- The impact has been mitigated to a level of insignificance;
- Mitigation measures are the exclusive responsibility of another public agency that has adopted or will adopt them; or
- Specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the final EIR.

PRACTICE TIP 1: Under CEQA's "substantive mandate," an agency may not approve a proposed project if feasible alternatives exist that would substantially lessen its significant environmental effects. Pub Res C §21081. The agency's CEQA findings are the means by which the agency demonstrates that it has complied with this substantive mandate. An agency may reject mitigation measures or alternatives if economic, legal, social, technological, or other considerations make the mitigation measures or alternatives infeasible. Pub Res C §21081(a)(3). In recent years, a number of published decisions have focused on the adequacy of the evidence relied on by an agency in rejecting such mitigation measures or alternatives. The cases turn in part on the nature of the agency's finding rejecting a mitigation measure or alternative:

- If the agency rejects a mitigation measure or alternative as legally infeasible, then the adequacy of the agency's finding presents a question of law, and the court reviews the agency's decision de novo, without deferring to the agency's own explanation of legal infeasibility. *City of Marina v Board of Trustees of the Cal. State Univ.* (2006) 39 C4th 341, 355, 46 CR3d 355.
- If the agency rejects a mitigation measure or alternative as economically infeasible, then the court applies the "substantial evidence" test based on all the evidence in the record (not merely the information in the EIR). *Sierra Club v County of Napa* (2004) 121 CA4th 1490, 19 CR3d 1; *Association of Irritated Residents v County of Madera* (2003) 107 CA4th 1383, 133 CR2d 718; *San Franciscans Upholding the Downtown Plan v City & County of San Francisco* (2002) 102 CA4th 656, 125 CR2d 745. Judicial skepticism exists, however, when the agency's finding is based largely on statements or information provided by the applicant regarding the economic infeasibility of an environmentally superior alternative. *Uphold Our Heritage v Town of Woodside* (2007) 147 CA4th 587, 598, 54 CR3d 366; *Save Round Valley Alliance v County of Inyo* (2007) 157 CA4th 1437, 1461, 70 CR3d 59; *Preservation Action Council v City of San Jose*, (2006) 141 CA4th 1336, 1356, 46 CR3d 902. These cases discuss the utility of the agency's independent investigation of the economic infeasibility of an alternative.
- If the agency rejects a mitigation measure or alternative on legitimate policy grounds, then the court applies the "substantial evidence" test and defers to the agency's judgment regarding how to balance competing concerns. *California Native Plant Soc'y v City of Santa Cruz* (2009) 177 CA4th 957, 99 CR3d 572; *Defend the Bay v City of Irvine* (2004) 119 CA4th 1261, 1269, 15 CR3d 176.

PRACTICE TIP 2: These cases suggest that, if a city wishes to reject a mitigation measure or alternative despite its environmental advantages, the city should cite competing policy concerns in support of that decision. If the city wishes to cite economic reasons in support of its finding, the record should reflect that the city has independently investigated the economic feasibility of the environmentally superior alternative. If the city wishes to cite legal reasons in support of its finding, the city should be confident that its legal analysis is correct. Whenever possible and appropriate, the city should cite multiple independent bases for rejecting the mitigation measure or alternative.

© The Regents of the University of California

§11.51 (2) Findings Concerning Project as a Whole

Before approving the project, the decision-making body must find, based on substantial evidence, that: (1) the project will not have a significant effect on the environment; or (2) the significant effects of the project have been eliminated or substantially lessened when feasible and the remaining significant environmental effects are acceptable because the benefits of the project outweigh its unavoidable adverse environmental impacts. This second finding is commonly known as a "statement of overriding considerations." Pub Res C §21081; 14 Cal Code Regs §15093. This finding is necessary when a project will create adverse environmental impacts that cannot be mitigated to a level of insignificance.

PRACTICE TIP: If a city has decided not to adopt an environmentally superior alternative or any individual mitigation measures identified in the EIR, the CEQA findings must reject each alternative or mitigation measure on the ground that it is either less environmentally sensitive or infeasible based on specific economic, legal, social, technological, or other grounds. Pub Res C §21081(a)(3).

© The Regents of the University of California

§11.52 (3) Evidentiary Support

An agency's CEQA findings, including any statement of overriding considerations, must be supported by substantial evidence in the record of administrative proceedings leading to project approval. Pub Res C §21081.5; 14 Cal Code Regs §§15091(b), 15093(b); *Uphold Our Heritage v Town of Woodside* (2007) 147 CA4th 587, 54 CR3d 366; *Village Laguna of Laguna Beach, Inc. v Board of Supervisors* (1982) 134 CA3d 1022, 1034, 185 CR 41.

PRACTICE TIP: CEQA findings must bridge the analytical gap between the evidence in the EIR and the agency's ultimate conclusions regarding the project. When preparing CEQA findings, make sure that the conclusions stated in the findings are consistent with the text and summary section of the EIR. A clear and complete summary section can greatly assist the process of preparing legally adequate findings. It is a good practice to provide citations to supporting evidence found in the EIR or elsewhere in the administrative record. Because an EIR may, but is not required to, contain information on a project's social and economic benefits, the applicant should be requested to provide documentation of a project's benefits and the lead agency should prepare a staff report discussing the social and economic considerations related to a statement of overriding considerations. The findings may cite information in the EIR, or elsewhere in the record. *Citizens of Goleta Valley v Board of Supervisors* (1990) 52 C3d 553, 568, 276 CR 410; *Sierra Club v County of Napa* (2004) 121 CA4th 1490, 1497, 19 CR3d 1.

© The Regents of the University of California

§11.53 2. Mitigation Monitoring Program

If mitigation measures are required or incorporated into a project as part of the CEQA process, whether through an EIR or a mitigated negative declaration, the lead agency must adopt a reporting or monitoring program to ensure compliance with those mitigation measures. The mitigation measures must be enforceable through permit conditions, agreements, or other mechanisms. For public projects, mitigation measures should be incorporated into the plan, policy, regulation, or project that is being approved. The program must be adopted at the time of project approval. Pub Res C §21081.6; 14 Cal Code Regs §15097. The monitoring program does not have to be included in the EIR. *Christward Ministry v County of San Diego* (1993) 13 CA4th 31, 48, 16 CR2d 435.

PRACTICE TIP: Because state law provides little specific guidance on the contents of a mitigation monitoring program, this subject should be addressed in a city's local guidelines or by ordinance. For private development projects, a city should consider requiring the applicant to enter into a mitigation monitoring agreement, which can provide a range of contract remedies to ensure enforcement. Because mitigation measures must be incorporated into a project's approval, cities may use code and permit enforcement procedures to ensure implementation of mitigation measures. See 14 Cal Code Regs §15126.4.

© The Regents of the University of California

§11.54 3. Notice of Determination

After deciding to approve or carry out a project for which a negative declaration or mitigated negative declaration has been approved, the lead agency must file a notice of determination. 14 Cal Code Regs §15075. If an EIR has been certified for a project, the lead agency must file the notice of determination within 5 working days after approval of the project. 14 Cal Code Regs §15094. If the lead agency is a state agency, the notice of determination must be filed with the Office of Planning and Research. 14 Cal Code Regs §15094(c). If the lead agency is a local agency, the notice of determination must be filed with the county clerk of the county or counties in which the project will be located. 14 Cal Code Regs §§15075(d), 15094(d). If a project requires discretionary approval from a state agency, the notice of determination must be filed with both the county clerk and the Governor's Office of Planning and Research. 14 Cal Code Regs §15094(d). A copy of the notice of determination must also be mailed to any persons requesting the notice within 5 days of the agency's action. Pub Res C §21167(f).

PRACTICE TIP: Any fees owing to the State Department of Fish and Game must be paid. Typically, these fees are paid to the county clerk at the time that the notice of determination is filed. Certain findings and project approvals are not valid or final until these filing fees are paid. Pub Res C §21089(b); Fish & G C §711.4.

© The Regents of the University of California

H. Deadlines for Taking Action to Approve or Disapprove Environmental Documents and Projects

1. CEQA

§11.55 a. Initial Study

The initial study must be completed within 30 days after the city accepts an application as complete, unless this deadline is extended for up to 15 days with the applicant's consent. 14 Cal Code Regs §15102.

© The Regents of the University of California

§11.56 b. Negative Declaration

Each city must also adopt an ordinance or resolution establishing time limits for action on negative declarations and EIRs prepared for private projects. This time limit may not exceed 180 days for completion and adoption of a negative declaration, calculated from the date the city accepts an application as complete. Pub Res C §21151.5(a).

© The Regents of the University of California

§11.57 c. Environmental Impact Report (EIR)

Each city must also adopt an ordinance or resolution establishing time limits for action on EIRs prepared for private projects. This time limit must not exceed 1 year for completion and certification of an EIR, calculated from the date the city accepts an application as complete. Pub Res C §21151.5(a). A city's CEQA ordinance or resolution may also provide for a reasonable extension of the applicable time limit based on compelling circumstances and mutual consent of the project applicant and the city. Pub Res C §21151.5(a)(4). If an EIR is to be prepared for a private project by an outside consultant, the contract with the consultant must be executed within 45 days after the lead agency sends a notice of preparation, unless the project applicant and the local agency mutually agree to an extension of such deadline. Pub Res C §21151.5(b).

PRACTICE TIP 1: To avoid problems with meeting the deadline for entering into a contract with an environmental consultant, some cities prefer to establish a standing list of qualified consultants. Staff can be authorized to select a consultant without the need for city council action, if deemed appropriate in a particular city.

PRACTICE TIP 2: Although an EIR will not be deemed certified if a city fails to meet the 1-year deadline for completing and certifying an EIR (*Land Waste Mgmt. v Contra Costa County Bd. of Supervisors* (1990) 222 CA3d 950, 271 CR 909), failure to meet the deadline can expose the city to a claim for money damages under the theory that failure to prepare and certify an adequate EIR is a violation of the federal constitutional right to due process (*Sunset Drive Corp. v City of Redlands* (1999) 73 CA4th 215, 86 CR2d 209).

© The Regents of the University of California

§11.58 2. Permit Streamlining Act

Under the Permit Streamlining Act (PSA) (Govt C §§65920-65964), a city that is acting as a lead agency for a development project must approve or disapprove a project within 180 days after certifying an EIR, except for certain affordable housing projects, which must be approved or disapproved within 90 days after certifying an EIR. See Govt C §65950(a)(1)-(2). A city that is acting as a lead agency must approve or disapprove a project within 60 days after adopting a negative declaration or determining that a project is exempt from CEQA. Govt C §65950(a)(3)-(4). The PSA applies only to development projects that require quasi-judicial approvals such as use permits and tentative subdivision maps, as opposed to legislative actions such as general plan amendments and rezonings. *Landi v County of Monterey* (1983) 139 CA3d 934, 189 CR 55. If an extension of time for the completion and certification of an EIR has been granted under an ordinance or resolution adopted under Pub Res C §21151.5(b), then action must be taken on the project within 90 days after certification of the EIR. Govt C §65950.1.

These time limits can be extended once for a period not to exceed 90 days on consent of the city and the applicant. Govt C §65957. Failure to meet these deadlines does not result in deemed approval of the environmental document. *Land Waste Mgmt. v Contra Costa County Bd. of Supervisors* (1990) 222 CA3d 950, 961, 271 CR 909. There is also authority that the PSA's time limits are directory, not mandatory, with respect to CEQA. *Eller Media Co. v City of Los Angeles* (2001) 87 CA4th 1217, 105 CR2d 262; *Riverwatch v County of San Diego* (1999) 76 CA4th 1428, 91 CR2d 322. For general discussion of the PSA, see §§10.10-10.15.

PRACTICE TIP: To avoid any ambiguity as to the date when an application is accepted as complete, city staff should document acceptance in a letter to the applicant. This action must occur within 30 days after the application was submitted. Govt C §65943. Documenting any staff-level determination that a project is exempt from CEQA is also important. For projects that are likely to be controversial, some cities request that the applicant agree in advance to defend any CEQA litigation that may result from project approval. See 85 Ops Cal Atty Gen 21 (2002). But see Pub Res C §21089(a).

© The Regents of the University of California

I. Legal Challenges

§11.59 1. Statute of Limitations

CEQA provides unusually short limitations periods. For agency actions, when a notice of determination or notice of exemption is filed, legal challenges must be filed within 30 or 35 days, respectively, of posting of the notice. See Pub Res C §21167(b), (d); 14 Cal Code Regs §15112. If a city proceeds with no CEQA compliance or does not file a notice of determination or notice of exemption, the statute of limitations is 180 days. This period runs from the city's formal project approval or, if there was no formal approval, from the date of commencement of the project. Pub Res C §21167(a), (d); 14 Cal Code Regs §15112(c)(5).

If a project as constructed is substantially different from the approved project, the commencement of the statute of limitations may be tolled until the challenger knew or reasonably should have known of the revisions to the project. *Concerned Citizens of Costa Mesa v Thirty-second Dist. Agric. Ass'n* (1986) 42 C3d 929, 231 CR 748. See also *Cumming v City of San Bernardino Redev. Agency* (2002) 101 CA4th 1229, 125 CR2d 42.

PRACTICE TIP: Before relying on the expiration of a statute of limitations, make sure that the required notice of determination or notice of exemption has been filed, posted, and mailed to any parties who have submitted a written request for a copy of the notice. See Pub Res C §§21152, 21167(f); 14 Cal Code Regs §15094; *Lewis v Seventeenth Dist. Agric. Ass'n* (1985) 165 CA3d 823, 834, 211 CR 884. In addition, ensure that fees owed to the State Department of Fish and Game have been paid (Pub Res C §21089(b); Fish & G C §711.4(c)). Because the statute of limitations runs from the posting of notice, and not from the time when the notice is filed with the county, or the state Office of Planning and Research if required, consider instructing city staff to witness that the notice is posted by the county clerk, and to obtain a copy of the notice showing the date of posting.

© The Regents of the University of California

§11.60 a. Challenges to Adequacy of Negative Declaration or EIR

If a plaintiff alleges that the city improperly prepared a negative declaration instead of an EIR or that the city prepared an inadequate EIR, then the statute of limitations expires 30 days after the posting of a notice of determination under Pub Res C §21152. Pub Res C §21167(b)-(c).

© The Regents of the University of California

§11.61 b. Challenges to Exemption Determinations

If the plaintiff alleges the city improperly determined the project was exempt from CEQA, then the statute of limitations is 35 days after the posting of a notice of exemption under Pub Res C §21167(d).

PRACTICE TIP: It is advisable to file a notice of exemption if there is any significant risk of a legal challenge. This provides a record of the city's determination that a project is exempt and invokes the benefit of the 35-day statute of limitations.

© The Regents of the University of California

§11.62 2. Exhaustion of Administrative Remedies

A prerequisite to bringing a legal challenge under CEQA is the requirement to present, either orally or in writing, specific objections to the agency decisions in question, either during the public comment period or before the close of the public hearing on the project. Pub Res C §21177; *California Native Plant Soc'y v City of Rancho Cordova* (2009) 172 CA4th 603, 615, 91 CR3d 571; *Sierra Club v City of Orange* (2008) 163 CA4th 523, 535, 78 CR 3d 1. *Coalition for Student Action v City of Fullerton* (1984) 153 CA3d 1194, 1197, 200 CR 855. Project opponents also must raise written or oral objections to an administrative appeal body with final decision-making authority, if applicable. *Tahoe Vista Concerned Citizens v County of Placer* (2000) 81 CA4th 577, 594, 96 CR2d 880. However, the presentation of specific objections may not be required as part of the administrative review to a project deemed by the agency to be exempt from CEQA. *Banker's Hill, Hillcrest Park, West Comm. Preservation Group v City of San Diego* (2006) 139 CA4th 249, 282, 42 CR3d 537 (exhaustion required for exemption determination and single unelaborated comment did not constitute exhaustion); *Azusa Land Reclamation Co. v Main San Gabriel Basin Watermaster* (1997) 52 CA4th 1165, 1210, 61 CR2d 447 (exhaustion requirement only applies if there is opportunity to present environmental concerns either during official public comment period or during public hearing).

© The Regents of the University of California

§11.63 3. Standing

To maintain an action under CEQA, a person must have objected to the city's approval of the project or the draft environmental document orally or in writing before the close of either the public comment period or the city's hearing on the project, whichever is later. Pub Res C §21177(b). A CEQA challenge is ordinarily brought as a petition for writ of mandate when the general rules of standing for mandate actions apply. *Santiago County Water Dist. v County of Orange* (1981) 118 CA3d 818, 832, 173 CR 602.

© The Regents of the University of California

§11.64 a. Beneficial Interest

The provisions of CCP §1086 require a showing of beneficial interest in that the petitioner will obtain some benefit from issuance of the writ or suffer some detriment from its denial, beyond the interest held in common by the public at large. See *Murrieta Valley Unified Sch. Dist. v County of Riverside* (1991) 228 CA3d 1212, 1224, 279 CR 421; *Braude v City of Los Angeles* (1990) 226 CA3d 83, 87, 276 CR 256; *Citizens Ass'n for Sensible Dev. v County of Inyo* (1985) 172 CA3d 151, 158, 217 CR 893.

© The Regents of the University of California

§11.65 b. Zone of Interest

The petitioner also must show that its interests are within the zone of interests to be protected or regulated by the legal duty asserted. *Waste Mgmt. of Alameda County v County of Alameda* (2000) 79 CA4th 1223, 1233, 94 CR2d 740. An economic or competitive interest alone does not provide standing under CEQA. 79 CA4th at 1235; *Regency Outdoor Adver., Inc. v. City of West Hollywood* (2007) 153 CA4th 825, 829, 63 CR3d 287. But see *Burrtec Waste Indus., Inc. v City of Colton (Taormina Indus.)* (2002) 97 CA4th 1133, 1137, 119 CR2d 410 (commercial competitor had standing to bring CEQA lawsuit challenging adequacy of public notice when challenge was not based solely on commercial interests of petitioner, but rather upheld public's right to notice).

© The Regents of the University of California

§11.66 4. Procedural Requirements

A party challenging a decision under CEQA must meet several procedural requirements. Many of these requirements are designed to ensure that CEQA litigation is resolved promptly.

© The Regents of the University of California

§11.67 a. Service of Mandate Petition

A proof of service by mail, demonstrating that the public agency carrying out or approving the project has received written notice of the commencement of the proceeding, must be filed concurrently with the initial pleading. Pub Res C §21167.5. The petitioner must also serve the Attorney General within 10 days of any initial filing and may not obtain any relief until this has been done. Pub Res C §21167.7. See also *Schwartz v City of Rosemead* (1984) 155 CA3d 547, 202 CR 400 (petitioner cannot collect attorney fees absent appropriate notification to Attorney General). The party must name as a real party in interest any recipient of an approval that is the subject of the action and serve the petition on that real party in interest. Pub Res C §21167.6.5.

Within 10 business days following service of the petition on the public agency, the public agency must provide the petitioner with a list of responsible agencies and any public agency having jurisdiction over a natural resource affected by the project. Pub Res C §21167.6.5(b). The petitioner is then required to notify these agencies of the pending action within 15 days. Pub Res C §21167.6.5(c).

© The Regents of the University of California

b. Administrative Record

§11.68 (1) Procedure

When filing a mandate petition, the petitioner must also file a request that the public agency prepare the administrative record. This request must be served on the agency within 10 business days from the date that the action or proceeding was filed. Pub Res C §21167.6(a). Absent a stipulation or court order granting additional time, the city must complete preparation of the administrative record within 60 days after service of the request. Pub Res C §21167.6(b), (c). Alternatively, the petitioner may elect to prepare the administrative record. Pub Res C §21167.6(b)(2). The petitioner generally bears the cost of preparing the administrative record and must take all necessary steps to obtain the record or have it prepared. *Black Historical Soc'y v City of San Diego* (2005) 134 CA4th 670, 677, 36 CR3d 378.

PRACTICE TIP 1: Proceed cautiously when preparing the record. See *Protect Our Water v County of Merced* (2003) 110 CA4th 362, 365, 1 CR3d 726 (county's failure to provide adequate, organized, and complete administrative record for appellate review required reversal of project approval, even though petitioner exercised its right to prepare record and did sloppy job). Also note that, absent a stipulation from petitioner, the respondent may not delegate the preparation of the administrative record to real parties in interest. *Hayward Area Planning Ass'n v City of Hayward* (2005) 128 CA4th 176, 184, 26 CR3d 783.

PRACTICE TIP 2: An agency's failure to timely prepare and certify the record may subject it to sanctions. Pub Res C §21167.6(d). The required contents of the record are specified in statute. See Pub Res C §21167.6(e).

© The Regents of the University of California

§11.69 (2) Contents

The required contents of the administrative record are specified in statute. Pub Res C §21167.6(e). The contents must include, without limitation, the following (Pub Res C §21167.6(e)):

- All project application materials;
- All staff reports and related documents prepared by the respondent public agency with respect to compliance with CEQA and the action on the project;
- All staff reports and related documents prepared by the respondent public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations;
- Any transcript or minutes of the proceedings involving testimony on or consideration of the project or any environmental document on the project;
- All notices issued by the respondent agency;
- All written comments received;
- All written evidence or correspondence submitted to or transferred from the respondent public agency;
- Any proposed decisions or findings submitted to the decision-making body or the respondent public agency by its staff, or the project proponent, project opponents, or other persons;
- The documentation of the final public agency decision;
- Any other written materials relevant to the respondent public agency's compliance with CEQA or to its decision on the merits of the project; and
- The full written record before any inferior administrative decision-making body whose decision was appealed to the superior administrative decision-making body before the filing of litigation.

The record should include materials for any prior versions of the project previously considered by the agency. *Meija v City of Los Angeles* (2005) 130 CA4th 322, 335, 29 CR3d 788; *County of Orange v Superior Court* (2003) 113 CA4th 1, 8, 6 CR3d 286 ("[Pub Res C §21167.6(e)] contemplates that the administrative record will include pretty much everything that ever came near a proposed development *or* to the agency's compliance with CEQA in responding to that development").

The record of proceedings should be managed and compiled in a way that is thorough and well organized; otherwise a court may reverse the agency's approval of the project. The Fifth District Court of Appeal reversed an approval of a use permit for a gravel mine, based solely on the fact that the lead agency's record of proceedings "read … as if its preparers randomly pulled out documents and threw them into binders, failing to organize them either chronologically or by subject matter." *Protect Our Water v County of Merced* (2003) 110 CA4th 362, 365, 1 CR3d 726.

NOTE: A city's failure to timely prepare and certify the record may subject it to sanctions. Pub Res C §21167.6(d).

Documents that are privileged should not be included in the record of proceedings. The attorney-client and joint-defense privileges may apply even when documents are exchanged with counsel for a private applicant. *California Oak Found. v County of Tehama* (2009) 174 CA4th 1217, 94 CR 3d 902.

PRACTICE TIP 1: Check local court rules for additional requirements pertaining to the format and organization of the administrative record for CEQA litigation matters.

PRACTICE TIP 2: Costs related to record preparation, including out-of-pocket costs and staff time, are generally recoverable by the prevailing party. That includes costs incurred by the city even when the petitioner has elected to prepare the record, if the petitioner's actions impose costs on the agency. *St. Vincent's Sch. for Boys v City of San Rafael* (2008) 161 CA4th 989, 75 CR3d 213. City staff should keep a record of the time devoted to the record preparation effort. Such documentation will facilitate the preparation of a memorandum of costs if the court denies the petition.

© The Regents of the University of California

§11.70 (3) Statement of Issues

Within 30 days after notice of certification of the administrative record, the petitioner must file and serve a statement of the issues that it intends to raise at trial. The respondent and real party in interest then have 10 days to file and serve their own statement of issues. Pub Res C §21167.8(f). A party's failure to identify an issue in its statement of issues may be deemed a waiver of its ability to argue that issue later on. *El Morro Community Ass'n v California Dep't of Parks & Recreation* (2004) 122 CA4th 1341, 1351, 19 CR3d 445.

© The Regents of the University of California

§11.71 c. Settlement Negotiations

CEQA requires the parties to follow certain procedural steps early in the proceeding in an effort to determine whether a settlement can be reached. Pub Res C §21167.8(a)-(c). Failure of any party to participate in the litigation settlement process without good cause may result in the imposition of sanctions by the court. Pub Res C §21167.8(e).

© The Regents of the University of California

§11.72 d. Briefing and Hearing

Within 90 days after filing the mandate petition, the petitioner must serve and file a request to schedule a hearing. On application by any party, the court must set a briefing schedule and hearing date. Unless good cause is shown, briefing must be completed within 90 days after the filing of the request for hearing and the hearing must be held within 30 days, if feasible. Pub Res C §21167.4. If there is failure to file a timely request for hearing, absent relief from default for excusable neglect under CCP §473, dismissal of the CEQA challenge is mandatory. *Nacimiento Reg. Water Mgmt. Advisory Comm. v Monterey County Water Resources Agency* (2004) 122 CA4th 961, 18 CR3d 921.

PRACTICE TIP: Check local court rules for additional requirements pertaining to the briefing and hearing requirements for CEQA litigation matters.

© The Regents of the University of California

§11.73 5. Standard of Review

Two provisions of CEQA govern the "standard of review" applied by the courts in CEQA actions depending on whether the challenge is brought as a traditional mandate case or an administrative mandate case. See Pub Res C §§21168, 21168.5. In CEQA actions, the reviewing court essentially determines: (1) whether the city followed the procedural requirements of CEQA; and (2) whether the city's factual conclusions are supported by substantial evidence. See 14 Cal Code Regs §15384(a).

© The Regents of the University of California

§11.74 a. Deference to Substantive Judgments

Reviewing courts generally will defer to a city's substantive determinations while requiring strict compliance with CEQA procedures. In other words, courts do not pass on the correctness of environmental conclusions, but only on the sufficiency of the EIR or negative declaration as an informative document. See, *e.g., Citizens of Goleta Valley v Board of Supervisors* (1990) 52 C3d 553, 564, 276 CR 410.

PRACTICE TIP: Parties often dispute whether the city's alleged error is procedural or pertains to a factual judgment. These disputes arise because the standard of review, and the corresponding level of judicial deference, turns on how the alleged CEQA violation is characterized. In *Vineyard Area Citizens for Responsible Growth, Inc. v City of Rancho Cordova* (2007) 40 C4th 412, 53 CR3d 821, the supreme court concluded that "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." 40 C4th at 435. An agency's failure to follow required procedures is reviewed without deference, and prejudice is presumed. By contrast, a factual dispute is reviewed under the deferential "substantial evidence" standard. Be mindful of whether the record reflects disputed issues as factual in nature, thereby increasing the chance that a reviewing court will employ a standard of review that is deferential to the city's decision.

© The Regents of the University of California

§11.75 b. Mandamus Proceedings

A legal challenge to an environmental determination made under Pub Res C §21168 is reviewed by administrative mandamus as provided in CCP §1094.5; a determination made under Pub Res C §21168.5 is reviewed by traditional mandamus as provided in CCP §1085. *Friends of the Old Trees v Department of Forestry & Fire Protection* (1997) 52 CA4th 1383, 61 CR2d 297. In either case, evidence will generally be limited to the administrative record. *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 38 CR2d 139.

© The Regents of the University of California

§11.76 6. Remedies

If a trial court finds that a city has violated CEQA, the court must issue a peremptory writ of mandate requiring one or more of the following (Pub Res C §21168.9(a); *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal.* (1988) 47 C3d 376, 422, 253 CR 426):

- That the city's action be voided in whole or in part;
- If the court finds that project activity will prejudice the consideration or implementation of particular mitigation measures or project alternatives, that the city and project proponent suspend all activity under the action that could change or alter the environment until the city has complied with CEQA; or
- That the city take specific actions to comply with CEQA.

If a court finds that an agency has taken an action without complying with CEQA, the court must specifically address each of the alleged grounds for noncompliance. Pub Res C §21005(c). If a court finds the CEQA review inadequate as to only a portion of the project and finds that portion to be "severable" from the remainder of the project, the court may allow the remainder of the project to proceed. Pub Res C §21168.9(b); *Anderson First Coalition v City of Anderson* (2005) 130 CA4th 1173, 1178, 30 CR3d 738. The court must retain jurisdiction over the city's CEQA proceedings until compliance is achieved. Pub Res C §21168.9(b). A CEQA challenge is not moot because the project has been constructed and is operating. An appellate court's decision to affirm the trial court's order requiring an EIR could result in modification of the project to mitigate adverse impacts or require that the project be torn down to restore the property to its original condition. *Woodward Park Homeowners Ass'n, Inc. v Garreks, Inc.* (2000) 77 CA4th 880, 92 CR2d 268.

© The Regents of the University of California

J. National Environmental Policy Act (NEPA)

§11.77 1. Persuasive Authority

CEQA was modeled on the National Environmental Policy Act of 1969 (NEPA) (42 USC §§4321-4370h). California courts view judicial and administrative interpretations of NEPA as persuasive authority for interpreting CEQA. See, *e.g., Citizens of Goleta Valley v Board of Supervisors* (1990) 52 C3d 553, 565 n4, 276 CR 410.

© The Regents of the University of California

§11.78 2. Joint Documents

CEQA requires coordination with the federal government whenever a project requires preparation of environmental documentation under both CEQA and the National Environmental Policy Act of 1969 (NEPA) (42 USC §§4321-4370h). See Pub Res C §§21083.5, 21083.7. The state CEQA Guidelines contain procedures for the coordination of federal and state environmental review. 14 Cal Code Regs §§15220-15229. NEPA uses different terminology to refer to environmental documents. An environmental impact statement (EIS) prepared under NEPA is comparable to an EIR prepared under CEQA. A finding of no significant impact (FONSI) prepared under NEPA is comparable to a negative declaration prepared under CEQA.

PRACTICE TIP: When processing a project that is subject to both CEQA and NEPA, it is important to be aware of certain procedural and substantive differences between these two acts. For example, NEPA requires a greater level of detail in the analysis of alternatives within an EIS than would be required for an EIR's alternatives analysis. 40 CFR §1502.14(b). Joint environmental documents must comply with the requirements of both CEQA and NEPA. 14 Cal Code Regs §15170.

© The Regents of the University of California

§11.79 K. References

The following treatises provide more comprehensive coverage of CEQA, the state CEQA Guidelines, and court decisions interpreting CEQA:

- Bass, Herson & Bogdan, CEQA Deskbook: A Step-by-Step Guide on How to Comply With the California Environmental Quality Act (2d ed 1999, Solano Press);
- Practice Under the California Environmental Quality Act (2d ed Cal CEB 2008);
- Longtin, Longtin's California Land Use (2d ed 1987, Local Government Publications) (updated annually), information available at www.longtinslanduse.com;
- Manaster & Selmi, California Environmental Law and Land Use Practice, chaps 20-23 (Matthew Bender, updated annually); and
- Remy, Thomas, Moose & Manley, Guide to the California Environmental Quality Act (CEQA) (11th ed 2007, Solano Press), information available at www.solano.com.

Additional information is available online:

- CERES (The California Environmental Resources Evaluation System) is an information system developed by the California Resources Agency. CERES has a comprehensive website, which includes links to CEQA statutes, CEQA Guidelines, case law and guidance issued by the Governor's Office of Planning & Research (see www.ceres.ca.gov/ceqa/); and
- Online searchable environmental database of the Governor's Office of Planning & Research, State Clearinghouse is available at www.ceqanet.ca.gov/.

On mandate/judicial review, ordinary mandamus, and administrative mandamus, see §§13.2-13.27.

© The Regents of the University of California

III. WATER SUPPLIES AND SUPPLY PLANNING

§11.80 A. Overview of Water Management

Cities have the obligation to determine, in the context of land use decisions, whether there will be sufficient water to meet demands for new housing, industry, commerce, and other development, as well as for other water-dependent uses, including agriculture, recreation, and environmental uses. Management of California's water supply is largely the responsibility of an array of different federal, state, local, and private entities, including cities. Water suppliers other than cities must base their water supply and facilities planning on the land use decisions of cities. Likewise, cities and counties must base their land use planning decisions on the information provided by water suppliers.

© The Regents of the University of California

B. Role of State

1. Department of Water Resources (DWR)

§11.81 a. California Water Plan

The Department of Water Resources (DWR) published the first California Water Plan as its Bulletin No. 3 in 1957. The DWR is responsible for updating the Plan, now known as Bulletin No. 160, every 5 years to reflect changes in resources and urban, agricultural, and environmental water demands. See Wat C §10004. The plan suggests ways of managing demand and augmenting supply to balance water supply with demand on a statewide basis. See Wat C §§10004.5-10005. The plan was most recently updated in 2005. For information on the California Water Plan, including the most recent version of the Plan, go to www.waterplan.water.ca.gov/index.cfm.

© The Regents of the University of California

§11.82 b. State Water Project

The Department of Water Resources (DWR) operates the State Water Project (SWP), which diverts water from the Feather River in northern California and delivers it to 29 urban and agricultural contractors statewide. As part of its operations, the DWR prepares an assessment of the water supply reliability of the SWP. See California Department of Water Resources, State Water Project Delivery Reliability Report (2007) (available online at http://baydeltaoffice.water.ca.gov/swpreliability/). This assessment must be considered in CEQA documents for projects that rely on SWP water as part of their supplies. See *Santa Clarita Org. for Planning the Env't v County of Los Angeles ("SCOPE II")* (2007) 157 CA4th 149, 68 CR3d 449; *Santa Clarita Org. for Planning the Env't v County of Los Angeles ("SCOPE I")* (2003) 106 CA4th 715, 131 CR2d 186. The report should also be considered in any water supply assessment relying on SWP water, because a water supply assessment is a part of the CEQA document. See discussion of water supply assessments in §§11.99-11.104.

© The Regents of the University of California

§11.83 c. Water Resource Investigations

The Department of Water Resources (DWR) is responsible for surveying and investigating water resource issues throughout the state. See Wat C §§225-238. It has published numerous technical studies related to local water resources as well as statewide inventories of water supplies. See, *e.g.,* California Department of Water Resources, California's Groundwater, Bulletin No. 118-03 (2003) (available online at www.water.ca.gov/groundwater/bulletin118/bulletin118update2003.cfm); California Department of Water Resources, Mathematical Simulation of Salinity in the Sacramento River System, Bulletin No. 156 (1971). For a complete list of DWR publications, see California Department of Water Resources, Publications 1995-1999, Bulletin No. 170-99 (2000) (available online in the Publications and Video Repository at www.water.ca.gov/pubs/planning/department_of_water_resources_publications_1995-99__bulletin_160-99_/b17099.pdf).

© The Regents of the University of California

§11.84 d. Depository for Urban Water Management Plans

The Water Code requires all urban water suppliers within the state to prepare urban water management plans every 5 years. See Wat C §§10610-10656. The plans must be submitted to Department of Water Resources (DWR), to the State Library, and to any city or county in which the system provides water within 30 days of adoption. See Wat C §10644. The DWR must submit to the legislature a report summarizing the status of the plans, including their sufficiency. Wat C §10644. For discussion of the requirements for urban water management plans, see §§11.93-11.95.

© The Regents of the University of California

§11.85 e. Watermasters

The Department of Water Resources (DWR) may establish watermaster service areas for management of groundwater or surface water resources. See Wat C §§4000-4407.

© The Regents of the University of California

§11.86 f. Additional Mandates

The Governor has authority to issue Executive Orders and take other actions related to water and other issues. For example, in 2008, the Governor proclaimed a statewide drought and ordered the Department of Water Resources (DWR) to take actions to facilitate and improve coordination between local water districts and agencies and state and federal agencies and departments to respond to water shortages, identify risks to water supply, improve water conservation efforts, and help farmers suffering losses. See, *e.g.,* Office of the Governor, Executive Order S-06-08 (June 4, 2008) (available online at http://gov.ca.gov/executive-order/9797/).

© The Regents of the University of California

§11.87 2. State Water Resources Control Board (SWRCB)

Related to water supplies, the State Water Resources Control Board (SWRCB) is primarily responsible for the following:

- Administering the appropriative water rights permitting system (see Wat C §§174, 1200-1851);
- Acting as a referee in water rights determinations on reference by a court (see Wat C §§2000-2900);
- Collecting certain statements that must be filed by water users (see Wat C §§1005.1-1005.4, 1010-1011.5, 4999-5108); and
- Acting to prevent the waste or unreasonable use, unreasonable method of use, or unreasonable method of diversion of water within California (see Wat C §§100-101, 275). See also Cal Const art X, §2; *Imperial Irrig. Dist. v State Water Resources Control Bd.* (1990) 225 CA3d 548, 275 CR 250; *U.S. v State Water Resources Control Bd.* (1986) 182 CA3d 82, 227 CR 161.

In April 2006, the SWRCB delegated authority to the Chief of the Division of Water Rights to designate local agencies for the administration of the groundwater recordation program. See Wat C §§4999-5009. A groundwater extractor subject to the program and located within the jurisdictional boundaries of a designated local agency must send the annual Notice of Extraction and Diversion of Water and any applicable fees to the designated local agency rather than to the SWRCB. Wat C §5009.

As part of its regulatory jurisdiction over appropriative water rights, the SWRCB has authority to consider and approve temporary and long-term water transfers (Wat C §§1725-1745.11), and temporary urgency changes in point of diversion, place of use, or purpose of use from those specified in a water rights permit or license (Wat C §§1435-1442).

The SWRCB is also responsible for various duties related to protecting water quality. See §§11.111-11.183.

The traditional separation between water rights and water quality functions was in part countermanded in *State Water Resources Control Bd. Cases* (2006) 136 CA4th 674, 39 CR3d 189. Among other things, the court held that in some circumstances the SWRCB is required to achieve water quality objectives at least in part by allocating responsibility to do so amongst the water right holders.

© The Regents of the University of California

§11.88 C. Role of Special Districts

Although cities may provide water service, they are not obliged to do so. See §§6.2-6.10. In many instances, water service within a city is provided by one or more special districts. There are a great number of types of special districts distributing water on wholesale and retail bases within California. These include, but are not limited to, the following:

- Irrigation districts (see Wat C §§20500-29978);
- County water districts (see Wat C §§30000-33901);
- California water districts (see Wat C §§34000-38501);
- Municipal water districts (see Wat C §§71000-73001); and
- Public utility districts (see Pub Util C §§15501-18055).

In addition, there are numerous special districts that are not primarily responsible for the distribution of water but participate in some aspect of water resource management. These may be organized according to general statutes, such as water replenishment districts (see Wat C §§60000-60622), or they may be creatures of special legislation, such as the Orange County Water District (see Wat C App, ch 40). For information on the characteristics of 157 different types of public water agencies, see California Department of Water Resources, General Comparison of Water District Acts, Bulletin No. 155 (1994).

© The Regents of the University of California

§11.89 1. Watermasters

In addition to the special districts, a number of groundwater basins and stream systems in California are managed by a court-appointed watermaster as the result of adjudication of water rights in those sources. For a list of adjudicated basins under the jurisdiction of a watermaster, see California Department of Water Resources, California's Groundwater, Bulletin No. 118 at 42-43 (2003). In addition, watermaster service areas may be organized by the Department of Water Resources (DWR) for management of groundwater or surface water resources. See Wat C §§4000-4407. See also §11.85.

© The Regents of the University of California

§11.90 2. Planning Duties of Special Districts

The role of each type of special district listed above is somewhat unique. There are, however, several main water supply planning duties that a special water district might possess:

- Balancing of regional water supplies and demand;
- Importation of water to augment natural supplies;
- Groundwater management;
- Groundwater replenishment; or
- Underground water storage.

© The Regents of the University of California

§11.91 3. Private Water Companies

In addition to public agencies with water-related responsibilities, private water companies, including those regulated by the California Public Utilities Commission and mutual water companies, also have limited water supply planning roles. For example, private water companies may be included within the definition of "urban water suppliers" under the Urban Water Management Planning Act (Wat C §§10610-10656) or "public water systems" under SB 610 (2001). See Wat C §§10617, 10912(c). For further discussion of those acts, see §§11.93-11.95.

© The Regents of the University of California

D. Role of Cities

§11.92 1. General Plans

A city's general plan must address water supply as part of the conservation and safety elements. See Govt C §65302. The discussion of water supply must be consistent with the land use and other mandatory elements. See *Garat v City of Riverside* (1991) 2 CA4th 259, 285, 3 CR2d 504, disapproved on other grounds in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 743, n 11, 29 CR2d 804.

That portion of the conservation element related to water supplies must be developed in coordination with any countywide water agency and with all district and city agencies that have developed, served, controlled, or conserved water for any purpose within the county or city for which the plan is prepared. See Govt C §65302. Coordination includes the discussion and evaluation of any water supply and demand information described in Govt C §65352.5, if that information has been submitted by the water agency to the city or county. See Govt C §65302(d).

The safety element of general plans is required to address peakload water supply requirements as they related to identified fire and geologic hazards. See Govt C §65302(g).

Because general plans contain the most basic policy decisions regarding development issues and integrate multiple issues such as water, subsequent water-related projects must analyze environmental impacts based on adopted general plans. See *County of Amador v El Dorado County Water Agency* (1999) 76 CA4th 931, 91 CR2d 66. Environmental review of future water supply projects that fit within and implement an existing general plan may incorporate the growth-inducing impacts discussion of the general plan EIR. *Sierra Club v West Side Irrig. Dist.* (2005) 128 CA4th 690, 27 CR3d 223.

© The Regents of the University of California

§11.93 2. Urban Water Management Plans

All urban water suppliers, including qualifying cities, must prepare urban water management plans (UWMPs). See Wat C §10620. "Urban water suppliers" are public or private water suppliers directly or indirectly providing water for municipal purposes to more than 3000 customers or supplying more than 3000 acre-feet of water per year. See Wat C §10617. UWMPs must be updated once every 5 years, in years that end in 5 or 0. See Wat C §10621. UWMPs must be adopted pursuant to a process that includes a public hearing. See Wat C §10642. The preparation and adoption of a UWMP is statutorily exempt from the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177), but the exemption does not extend to implementation of projects contemplated by the plan, other than certain listed projects. See Wat C §§10632, 10652.

Adopted plans, as well as any changes or amendments thereto, must be submitted to the Department of Water Resources (DWR), the State Library, and any city or county within which the supplier provides water supplies, no later than 30 days after adoption. Wat C §10644. Failure to submit an adopted UWMP to the DWR affects a supplier's eligibility to obtain funding under the Safe, Clean, Reliable Water Supply Act (Wat C §§78500-78702) or the Costa-Machado Water Act of 2000 (Wat C §§79000-79221), or to receive drought assistance from the state. See Wat C §10656. The DWR must consider whether the supplier is implementing, or has scheduled for implementation, the demand management measures contained in a UWMP in evaluating applications for urban water conservation program grants and loans made available under Wat C §79163. See Wat C §10631.5.

PRACTICE TIP: Water suppliers should be aware that updated urban water management plan (UWMPs) will be due before the end of 2010.

© The Regents of the University of California

§11.94 a. Requirements

Generally, an urban water management plan (UWMP) "shall describe and evaluate sources of supply, reasonable and practical efficient uses, reclamation and demand management activities. The components of the plan may vary according to an individual community or area's characteristics and its capabilities to efficiently use and conserve water. The plan must address measures for residential, commercial, governmental, and industrial water demand management." Wat C §10615. Specific requirements for UWMPs are listed in:

- Wat C §10631 (general content requirements, including information regarding groundwater and desalination);
- Wat C §10631.1 (water use projections for lower income residences);
- Wat C §10632 (water shortage contingency analysis);
- Wat C §10633 (recycled water and wastewater analysis);
- Wat C §10634 (water quality and effects of water quality on management strategies and supply reliability); and
- Wat C §10635 (water service reliability for normal, single dry, and multiple dry water years).

Plans must consider population and water uses over a 20-year horizon. See Wat C §§10631(a), 10635(a). An urban water supplier that relies on a wholesale agency for a source of water may rely on water supply information provided by the wholesaler to fulfill plan informational requirements under Wat C §10631(b)-(c). See Wat C §10631(k).

© The Regents of the University of California

§11.95 b. Alternative Water Sources or Water Demand Management Measures

If any water source may not be available at a consistent level due to legal, water quality, environmental, or climatic factors, the urban water management plan (UWMP) must, to the extent possible, describe plans to supplement or replace the water source with alternative sources or water demand management measures. Wat C §10631(c). Failure to adequately address the reliability of a contaminated groundwater supply, including timing issues relating to treatment of contaminated water, may render the UWMP invalid. *Friends of the Santa Clara River v Castaic Lake Water Agency* (2004) 123 CA4th 1, 19 CR3d 625.

© The Regents of the University of California

§11.96 3. Groundwater Regulation

Cities and counties may also regulate groundwater within their jurisdictional territory under the police power. See, *e.g., Allegretti & Co. v County of Imperial* (2006) 138 CA4th 1261, 42 CR3d 122; *Baldwin v County of Tehama* (1994) 31 CA4th 166, 36 CR2d 886. This has been done on a regular basis by counties; currently, at least 27 have enacted some kind of groundwater ordinance. See California Department of Water Resources, California's Groundwater, Bulletin No. 118 at 39 (2003). These ordinances vary in substance, from regulating only certain areas of concern, to establishing groundwater objectives and monitoring requirements, to limiting exports of groundwater outside the county. See California's Groundwater at 39.

© The Regents of the University of California

§11.97 4. Groundwater Management Plans

Special districts that provide water service, as well as cities and counties, may by ordinance or resolution adopt groundwater management plans related to the groundwater basins that underlie their respective service areas. See Wat C §10753. These plans, sometimes called "AB 3030 plans" following the original 1992 authorizing act, may include components related to (see Wat C §§10753.7-10753.8):

- Control of saline water intrusion;
- Wellhead protection areas;
- Regulation of the migration of contaminated groundwater;
- Mitigation of overdraft;
- Monitoring of groundwater levels and storage;
- Replenishment of groundwater; or
- Other listed components.

A local agency may not manage groundwater within the service area of another local agency without that agency's consent, nor may it manage groundwater within the service area of a water corporation regulated by the Public Utilities Commission or a mutual water company without that entity's consent unless the groundwater basin is "critically overdrafted." See Wat C §§10750.7-10750.8. A groundwater management plan may not be adopted for any portion of a basin that is subject to groundwater management by a local agency or a watermaster under other provisions of law or a court order, judgment, or decree, unless the local agency or watermaster agrees (see Wat C §§10750.2(b), 10750.6), but a managed basin may be subsequently adjudicated. Although adoption of AB 3030 (1992) plans by a local agency is voluntary (see Wat C §10750.4), an agency that seeks funds from the DWR under any program for the construction of groundwater supply or quality projects (except under the Local Groundwater Management Assistance Act of 2000 (Wat C §§10795-10795.20)) must prepare and implement an AB 3030 plan that meets the requirements of Wat C §10753.7(a). See Wat C §§10753.7(a), 10795-10795.20.

© The Regents of the University of California

5. Evaluation of Water Supply for Development Projects

§11.98 a. EIR Requirement

An environmental impact report (EIR) for a development project must contain a thorough analysis that reasonably informs the reader of the amount of water available to serve the development. *Vineyard Area Citizens for Responsible Growth, Inc. v City of Rancho Cordova* (2007) 40 C4th 412, 53 CR3d 821; *Santa Clarita Org. for Planning the Env't v County of Los Angeles ("SCOPE II")* (2007) 157 CA4th 149, 68 CR3d 449; *California Oak Found. v City of Santa Clarita* (2005) 133 CA4th 1219, 35 CR3d 434; *Santa Clarita Org. for Planning the Env't v County of Los Angeles ("SCOPE I")* (2003) 106 CA4th 715, 131 CR2d 186. See also *Planning & Conserv. League v Department of Water Resources* (2000) 83 CA4th 892, 100 CR2d 173.

An EIR does not need to identify a guaranteed source of water and need not demonstrate with certainty that future water supplies will be sufficient to meet total demand. However, it must identify an existing, available, and sufficient source of water for the project. *Western Placer Citizens for an Agric. & Rural Env't v County of Placer* (2006) 144 CA4th 890, 50 CR3d 799. Moreover, an EIR must (*Vineyard Area Citizens for Responsible Growth, Inc. v City of Rancho Cordova* (2007) 40 C4th 412, 53 CR3d 821)

- evaluate the likelihood of future water supplies proving available for the project over the short and long term;
- identify alternative water supplies should some uncertainty exist regarding the availability of anticipated supplies;
- analyze the reasonably foreseeable environmental impacts of utilizing such supplies; and
- describe mitigation measures available to minimize adverse impacts.

© The Regents of the University of California

b. Water Supply Assessments (WSA)

§11.99 (1) When Required

Larger development projects, including those that have water use demands equivalent to a 500-dwelling unit project or would increase the number of service connections by 10 percent or more for a water supplier with fewer than 5000 service connections, are subject to a statutory requirement for preparation of a water supply assessment (WSA) as part of CEQA review for any covered project, even when only a negative declaration is required. Pub Res C §21151.9; Wat C §§10910(b), 10912. For any development project subject to CEQA, the city should identify the public water system that will serve the project, and the number of service connections it has, to determine whether the size of the project meets the threshold for requiring a WSA. Although generally a city or county will be able to identify the proper water system and request a WSA from that party, if no public water system can be identified, the city or county must prepare a WSA itself. See Wat C §10910(b).

© The Regents of the University of California

§11.100 (2) Contents

If the water demand for a proposed project is accounted for in the most recently adopted urban water management plan, as described in §§11.93-11.95, the public water system may incorporate information from that plan into the water supply assessment (WSA). See Wat C §10910(c)(2). In general, a WSA must include a discussion of whether the total projected water supplies and demands during normal, single dry, and multiple dry years during a 20-year projection will meet the proposed project's water demand in addition to the public water system's existing and planned future uses. Wat C §10910(c)(3). For groundwater supplies, the WSA must include additional information, including whether the relevant groundwater basins have been adjudicated. If the relevant groundwater basins have not been adjudicated, the WSA must reference the overdraft status of the basins as stated in California Department of Water Resources, California's Groundwater, Bulletin No. 118 (2003). See Wat C §10910(f)(2).

Demonstrating reliable water supplies has become increasingly difficult due to factors such as environmental constraints, drought conditions, and increasing water demands, thus requiring water purveyors and land use agencies to be particularly thorough when preparing water supply analyses. See, *e.g., Vineyard Area Citizens for Responsible Growth, Inc. v City of Rancho Cordova* (2007) 40 C4th 412, 53 CR3d 821; *Friends of the Santa Clara River v Castaic Lake Water Agency* (2004) 123 CA4th 1, 19 CR3d 625; *Santa Clarita Org. for Planning the Env't v County of Los Angeles ("SCOPE I")* (2003) 106 CA4th 715, 131 CR2d 186; *Planning & Conserv. League v Department of Water Resources* (2000) 83 CA4th 892, 100 CR2d 173.

© The Regents of the University of California

§11.101 (3) Insufficient Water Supply

If the public water supplier determines in the water supply assessment (WSA) that there are insufficient supplies available to serve the proposed project, the water supplier must describe plans to acquire or develop additional supplies, including information regarding funding, permit requirements, and timing. See Wat C §10911(a). The local land use planning agency must then determine, based on the entire record including the WSA, whether the projected water supplies will be sufficient to satisfy project demands, in addition to existing and planned future uses. If the agency determines that the supplies will not be sufficient, that determination must be included in the findings related to the project. See Wat C §10911(c).

© The Regents of the University of California

§11.102 (4) Justiciability

One court has held that for a water supply assessment (WSA) challenge to be justiciable, the challenger must participate in and bring such suit as part of the CEQA process. See *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 75 CR3d 393.

© The Regents of the University of California

§11.103 (5) Water Suppliers' "Substantial Discretion"

Water suppliers have "substantial discretion" in determining how to measure groundwater sufficiency in preparing and adopting a water supply assessment (WSA). See *O.W.L. Found. et al v City of Rohnert Park* (2008) 168 CA4th 568, 86 CR3d 1 (city did not abuse discretion when it (1) decided not to analyze groundwater pumping by all parties in the entire basin, and (2) focused the WSA analysis around its own groundwater production activities).

PRACTICE TIP: A city or county that receives a water supply assessment (WSA) must independently assess the information and analysis contained in the WSA to ensure its adequacy. When a city has its own water department or utility that will serve the proposed project, city staff should recognize that the water department's role in preparing and approving the WSA is separate and apart from the final decision-making roles carried out by the planning commission and city council. In particular, the water department's preparation and adoption of a WSA is neither equivalent to nor binding on the CEQA determination on water supply issues and does not constitute a land use approval for the project. Instead, the city council, as the lead agency and land use authority, must determine whether the projected water supplies are sufficient to satisfy the demands of the project and existing and future uses, and whether to approve the project. See Wat C §10911(c).

© The Regents of the University of California

§11.104 (6) Information Resources

The Department of Water Resources (DWR) has prepared the Guidebook for Implementation of Senate Bill 610 and Senate Bill 221 of 2001 (2003) (available online at www.water.ca.gov/pubs/use/sb_610_sb_221_guidebook/guidebook.pdf). In addition, the Association of California Water Agencies has published a user's guide entitled Water Supply and Development (2003). For additional resources, see Garcia, P., Evolving Issues for Water Supply Assessment in a Water Scarce California (League of California Cities Annual Conference, 2008).

© The Regents of the University of California

§11.105 c. Written Verification of Water Supplies for Residential Subdivisions

Every tentative map for residential subdivisions of more than 500 dwelling units (or 10 percent or more of the public water system's current connections if the system has less than 5000 connections) must contain as a condition of approval a requirement that a sufficient water supply will be available. Govt C §66473.7. A development agreement that includes such a residential subdivision must contain a requirement that any tentative map prepared for the subdivision will comply with Govt C §66473.7. Govt C §65867.5(c).

Evidence of the availability of a sufficient water supply is based on a written verification from the public water system that will supply the subdivision, prepared at the request of the applicant or the city or county. Govt C §66473.7(b)(1). The written verification is due within 90 days of the request. An approved written verification is filed with the Department of Real Estate under the Subdivided Lands Act (Bus & P C §§11000-11200). See Bus & P C §11010(b)(6). The requirement for a written verification does not apply to subdivisions within an urbanized area on land that has been previously developed for urban uses or that is surrounded by land that is or has been developed for urban uses, or to housing projects that are exclusively for very-low and low-income households. Govt C §66473.7(i).

© The Regents of the University of California

§11.106 (1) Definition of "Sufficient Water Supply"

The definition of a "sufficient water supply" is consistent with the statutory provisions governing preparation of urban water management plan (UWMPs). See Govt C §66473.7(a)(2); Wat C §§10620-10645. A finding of sufficiency must be based on substantial evidence. Substantial evidence relied on in a written verification may include the water system's most recently adopted UWMP, a water supply assessment (WSA), or other analytical information substantially similar to that in a water service reliability assessment for an UWMP. See Govt C §66473.7(c). If groundwater will be a source of supply for the project, the water system must evaluate, based on substantial evidence, the extent to which the water system or the landowner has the right to extract the additional groundwater needed to supply the proposed subdivision. See Govt C §66473.7(h).

© The Regents of the University of California

§11.107 (2) Reliance on Supplies Not Currently Available

If a written verification relies on water supplies that are not currently available to the public water system to provide a sufficient water supply to the subdivision, it must be based on the following, to the extent that each is applicable (see Govt C §66473.7(d)(1)- (4)):

- Written contracts or other proof of valid rights to the identified water supply;
- Adopted capital outlay programs to finance delivery of a sufficient water supply;
- Securing of applicable federal, state, and local permits for construction of any necessary infrastructure; and
- Any necessary regulatory approvals required to convey a sufficient water supply to the proposed project.

If the public water system verifies that it is unable to provide a sufficient water supply to meet the projected demand of the proposed subdivision, the city or county may nevertheless find that water supplies will be sufficient as a result of additional water supplies not accounted for by the public water system that are or will be available before completion of the subdivision. See Govt C §66473.7(b)(3).

© The Regents of the University of California

§11.108 (3) Compelling Compliance

The local agency or any other interested party can seek a writ of mandamus to compel a water purveyor to comply with Govt C §66473.7. See Govt C §66473.7(b)(2). But see §11.102.

© The Regents of the University of California

§11.109 d. Agreements With Developers

Various public agencies, including water districts (see, *e.g.,* Wat C §§34000-38501), may enter into an agreement with a land developer for the construction of oversized water facilities to support anticipated growth in the area. Such agencies may also enter into agreements with subsequent developers to reimburse the first developer for the construction costs of the oversized facilities. See 88 Ops Cal Atty Gen 172 (2005) (addressing California water districts).

© The Regents of the University of California

§11.110 6. Integrated Regional Water Management Planning Act

Under the Integrated Regional Water Management Planning Act (Wat C §§10530-10550), three or more local agencies, including cities, counties, special districts, corporations, and mutual water companies, may form a regional water management group to prepare and adopt regional plans for the implementation or operation of qualified water projects or programs, or for the preparation of reports or studies relating to regional water quality, water supply planning, flood protection, or environmental mitigation, restoration, or enhancement. See Wat C §§10533-10537, 10540.

At least two members of a group must have statutory authority over water supply. See Wat C §10537. The group may be established by a joint powers agreement, memorandum of understanding, or other written agreement approved by the governing bodies of the participating agencies. Wat C §10537. The plan may address qualified programs, projects, reports, or studies that any participating local public agency has the authority to undertake. See Wat C §10540(b). This includes groundwater management planning, urban water management planning, agricultural water management planning, and the preparation of water supply assessments. Wat C §10540(b), (c). For additional resources, see Hentschke, Show Me the Water (League of California Cities—City Attorney Department Spring Conference, 2003). The Integrated Regional Water Management Planning Act (IRWMPA) (Wat C §§10530-10550) was enacted effective March 1, 2009. The IRWMPA provides a general definition of an IRWM plan (Wat C §10534) as well as guidance to Department of Water Resources regarding content of IRWM Program Guidelines. Under Wat C §10541(f), the guidelines must include standards for identifying a region for the purposes of developing or modifying an IRWM plan. The Region Acceptance Process (RAP) for IRWM Program Guidelines will be used to evaluate and accept an IRWM region into the IRWM grant program. Wat C §10541(f).

© The Regents of the University of California

IV. WATER QUALITY

A. Overview of Regulation

§11.111 1. Porter-Cologne Act

The Porter-Cologne Water Quality Control Act (Porter-Cologne Act) (Wat C §§13000-14958) governs water quality in California. It is a comprehensive regulatory framework governing waste discharges to both surface and groundwater.

© The Regents of the University of California

§11.112 2. Regulatory Agencies

The Porter-Cologne Act is implemented by the State Water Resources Control Board (SWRCB) and nine regional water quality control boards (RWQCBs). The SWRCB and the regional boards adopt policies and plans relating to water quality control in the state that together comprise the uniform water quality guidelines for California. These boards also implement portions of the Federal Water Pollution Control Act, as amended (the Clean Water Act (33 USC §§1251-1387)). See Wat C §§13370-13389. The boards also administer the National Pollutant Discharge Elimination System (NPDES) permit program. See, *e.g.,* Wat C §13370; 33 USC §§1288, 1313 (planning), 1342 (permits).

© The Regents of the University of California

§11.113 3. Other Statutes Relating to Water Quality

In addition to the Porter-Cologne Act and the federal Clean Water Act (see §§11.111-11.112), there are several state statutes that govern hazardous waste and certain site-specific discharges. See Health & S C §§25100-25257.1 (hazardous waste control), 25300-25395.45 (state superfund law), 25280-25299.8 (underground storage of hazardous substances), 25159.10-25159.25 (toxic injection wells), 25208-25208.17 (toxic pits). See also Health & S C §§25189.5, 25192, 25249.5-25249.13 (the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly called Proposition 65). For discussion of these issues and statutes, see §§11.248-11.249.

In addition, it is unlawful to deposit in, or cause to be deposited in, California waters any substance or material deleterious to fish, plants, mammals, or birds, unless the discharge is expressly authorized under a waste discharge requirement or waiver issued by the state or regional boards after a public hearing or a federal permit for which the state or a regional board has, after a public hearing, issued a water quality certificate. Fish & G C §5650.

© The Regents of the University of California

B. Water Quality and Cities

§11.114 1. Cities' Two Roles

Cities are affected by the state and federal regulation of water quality in two regards: (1) when they engage in activities that are regulated by this statutory scheme; and (2) when they are acting in their role as regulators.

© The Regents of the University of California

2. City as Regulated Entity

§11.115 a. General Requirement

The Porter-Cologne Act requires anyone discharging or proposing to discharge waste that could affect the quality of the state's waters (or when there is a material change in such discharge) to file a report of waste discharge (ROWD). Wat C §13260. The State Water Resources Control Board (SWRCB) or a regional board can then prescribe requirements establishing conditions for the discharge, commonly referred to as "waste discharge requirements" (WDRs). Wat C §§13263, 13374. Contaminants and pollutants are defined broadly. See *Lake Madrone Water Dist. v State Water Resources Control Bd.* (1989) 209 CA3d 163, 168, 256 CR 894. WDRs can be state-only permits or jointly issued as a WDR/National Pollutant Discharge Elimination System (NPDES) permit. Wat C §§13263, 13377.

© The Regents of the University of California

§11.116 b. Cities as Dischargers

Cities operating sewage treatment plants must comply with state and federal laws in the operation of the plants and the discharge of the waste into surface waters. On requirements related to sewage disposal, see §§11.162-11.168.

© The Regents of the University of California

3. City as Regulator

§11.117 a. Authority to Impose More Restrictive Controls

Cities are not preempted from imposing more restrictive water quality controls. The Porter-Cologne Act does not preclude a city from adopting and enforcing additional and more restrictive regulations with respect to protecting water quality or from abating nuisances. Wat C §13002; *People ex rel Deukmejian v County of Mendocino* (1984) 36 C3d 476, 204 CR 897; *People v New Penn Mines, Inc.* (1963) 212 CA2d 667, 674, 28 CR 337. See *People v City of Los Angeles* (1958) 160 CA2d 494, 325 P2d 639 (city may prohibit another city from depositing sewage resulting in contamination of land within prohibiting city's boundaries). Although a city may prohibit discharge of waste effluent at a certain site, an ordinance prohibiting all discharges of waste originating outside the city is probably invalid. See 47 Ops Cal Atty Gen 40 (1966). See generally *Oregon Waste Sys., Inc. v Department of Envt'l Quality* (1994) 511 US 93, 128 L Ed 2d 13, 114 S Ct 1345 (invalidating surcharge on disposal of solid waste from other states). For further discussion of local regulation of water service, see chap 6.

© The Regents of the University of California

§11.118 b. Nuisance Abatement

Cities can declare and abate nuisances. The Porter-Cologne Act does not prohibit a city from declaring or abating nuisances. See Wat C §13002(b). On general principles of nuisance law, see §§9.113-9.117.

© The Regents of the University of California

§11.119 c. EPA Enforcement

Local regulations are sometimes enforceable by the federal Environmental Protection Agency (EPA). When a city enacts an ordinance establishing the limitations on the type and quantity of pollutants that can be discharged into a municipal sewer system, the federal EPA construes those standards as the standards required for compliance with the Clean Water Act (33 USC §§1251-1387) (and they are, therefore, enforceable by the EPA). See 40 CFR §403.5(d).

© The Regents of the University of California

d. Local Regulation of Groundwater Quality

§11.120 (1) Wells

All cities, counties, and water agencies must have an ordinance relating to water well, cathodic protection well, and monitoring well drilling, maintenance, and abandonment that contains standards that meet or exceed state minimums or the state's model standards must be enforced by the city or county. Wat C §§13800-13801, 13803, 13805. If a water agency has an acceptable ordinance and has permit authority over well drilling within a city's jurisdiction, the city does not have to adopt such an ordinance. Wat C §13801(c).

© The Regents of the University of California

§11.121 (2) State-Recommended Standards

In addition, if a regional board finds that additional standards for water wells, cathodic protection wells, and monitoring wells are needed in an area to protect water quality, the board must make a report with recommended standards and notify the affected cities and counties within the area. See Wat C §13802. On receipt of the report, the affected city or county has 120 days to consult with all interested parties and to adopt an ordinance establishing standards. Wat C §13803. The standards adopted by ordinance are effective 60 days after their adoption. Wat C §13804. If a city or county fails to adopt standards, the regional board may impose standards. See Wat C §13805.

© The Regents of the University of California

§11.122 (3) Groundwater Management Plans

Local agencies may adopt groundwater management plans that address groundwater issues. Wat C §§10750-10755.4. Local ordinances may regulate pumping practices and use of groundwater. *Baldwin v County of Tehama* (1994) 31 CA4th 166, 36 CR2d 886 (upholding constitutional right of cities and counties to regulate groundwater). Cities and other public entities within the same groundwater basin that have adopted groundwater management plans under Wat C §10755.3 must meet at least annually to coordinate those programs. Wat C §10755.3.

© The Regents of the University of California

§11.123 (4) Subdivision Map Act

The Subdivision Map Act (Govt C §§66410-66499.37) provides authority for cities to fund facilities to preserve and protect groundwater. Under the Subdivision Map Act, a city can adopt groundwater recharge facility plans, construct recharge facilities, and charge a fee for construction of the facilities as a condition of approval of subdivision maps or building permits. Govt C §66484.5.

© The Regents of the University of California

C. Basic Regulatory Scheme

1. State Water Resources Control Board Plans and Policies

§11.124 a. Development

The policies and plan developed under the Porter-Cologne Act became part of the California Water Plan. Wat C §§10004, 13141. The State Water Resources Control Board (SWRCB) is charged with formulating and adopting policy for water quality control. Wat C §13140. In so doing, the SWRCB must consult with and carefully evaluate the recommendations of concerned federal, state, and local agencies (Wat C §13144) and hold a noticed public hearing before adoption of a new policy (Wat C §13147). At least 60 days before the hearing, the SWRCB must notify any affected regional boards, unless notice is waived. Wat C §13147. The SWRCB also adopts policies relating to water quality of the coastal marine environment, such as the California Ocean Plan. Wat C §13142.5.

© The Regents of the University of California

§11.125 b. Applicability

Any policy or plan adopted or approved by the State Water Resources Control Board (SWRCB) is binding on other state agencies unless specifically exempted by statute. Wat C §13146. The Porter-Cologne Act expressly requires that the SWRCB's policies and plans be consistent with the state's housing and sustainable living environment goals. Wat C §13142.

© The Regents of the University of California

§11.126 c. Maintaining High Quality of State Waters Policy

One important policy adopted by the State Water Resources Control Board (SWRCB) is the "anti-degradation" policy. This policy, adopted via SWRCB Resolution No. 68-16, requires water quality control regulations that achieve or maintain "the highest water quality consistent with maximum benefit to the people." (This resolution is available online at www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/1968/rs68_016.pdf). Notwithstanding the broad language of this policy, the SWRCB has held that limited degradation of water quality may be acceptable when the level established: (1) is consistent with the level designated in cleanup orders; (2) is consistent with the public benefit; and (3) does not unreasonably affect beneficial uses. See Monahan et al, California Environmental Law Handbook 79 (9th ed 1995) (citing *In re County of Santa Cruz,* SWRCB Order No. 86-8).

© The Regents of the University of California

§11.127 d. Nonpoint Source Management Plan

Point sources such as municipal wastewater discharges were the primary focus of water quality control in the 1970s and 1980s. Nonpoint sources are now receiving a larger portion of planning and regulatory attention. In many areas, nonpoint sources, such as urban nuisance flows, sediment runoff, and agricultural runoff, are the principal sources of contaminants entering surface and groundwater. Section 319 of the 1987 Amendments to the Clean Water Act (33 USC §1329) requires each state to prepare a nonpoint source management plan and to conduct an assessment of the impact nonpoint sources have on the state's waters. In SWRCB Resolution No. 99-114, the State Water Resources Control Board (SWRCB) adopted a nonpoint source pollution control program and authorized its submittal to the EPA. (The resolution is available online at www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/1999/rs99-114.shtml and the SWRCB's program plan is available online at www.waterboards.ca.gov/water_issues/programs/nps/protecting.html). See also SWRCB Resolution No. 88-123 (establishing nonpoint management framework), available at www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/1988/rs1988_0123.pdf.

© The Regents of the University of California

2. Water Quality Plans

§11.128 a. Regional Boards

The regional boards, in consultation with affected cities, counties, and other local agencies, formulate and adopt water quality control plans for each area within their respective regions. Wat C §13240. The water quality control plans (commonly known as "basin plans") are similar to a city's general plan, providing the blueprint for water quality control policy for each region. Plans must be adopted in accordance with the Administrative Procedure Act (Govt C §§11340-11529). Govt C §11353; *State Water Resources Control Bd. v Office of Admin. Law* (1993) 12 CA4th 697, 703, 16 CR2d 25. Each of the nine regional boards' basin plan is available online at www.waterboards.ca.gov/plans_policies/.

© The Regents of the University of California

§11.129 b. Requirements for Basin Plans

The basin plans are developed to ensure the reasonable protection of beneficial uses and prevention of nuisance. Wat C §§13000, 13241.

The basin plans establish water quality objectives to protect beneficial uses. Waste discharge requirements (WDRs) are then based on the applicable water quality objectives. Wat C §§13241, 13263(a). Regional boards are to consider the following factors in developing water quality objectives, in issuing state-only WDRs, and in issuing requirements in National Pollutant Discharge Elimination System (NPDES) permits more stringent than required by federal law (Wat C §§13241, 13263(a); *City of Burbank v State Water Resources Control Bd.* (2005) 35 C4th 613, 26 CR3d 304):

- All past, present, or potential beneficial uses of water;
- A determination regarding the environmental characteristics of the area and its water quality;
- An assessment of the water quality conditions that reasonably could be achieved through coordinated control of all factors that affect water quality in the area;
- An analysis of relevant economic considerations;
- The need for developing housing within the region; and
- The need to develop and use recycled water.

In addition to state water quality objectives, the EPA has adopted federal water quality criteria for certain priority pollutants in its California Toxics Rule. 65 Fed Reg 31681 (May 18, 2000). These federal criteria are implemented through the state's Policy for the Implementation of Toxic Standards for Inland Surface Waters and Enclosed Bays and Estuaries (referred to as the State Implementation Plan, or SIP), available at www.epa.gov/waterscience/standards/wqslibrary/ca/.

A basin plan or an amendment to a basin plan adopted by a regional board is not effective until approved by the State Water Resources Control Board (SWRCB). Wat C §13245. However, when a basin plan amendment involves a water quality standard adopted by states and authorized tribes on or after May 30, 2000, such standards must be approved by the EPA before they are the basis for actions under the Clean Water Act (*e.g.,* establishment of water quality-based effluent limits under Clean Water Act §301(b)(1)(C) or development of total maximum daily loads (TMDLs)). See 40 CFR §131.21(c)(2).

PRACTICE TIP: Cities should carefully monitor the adoption of basin plans or other generally applicable water quality control plans by the regional boards. It is at this stage that cities may argue that policies proposed by the Regional Water Quality Control Board (RWQCB) will have adverse economic consequences that are not warranted by the environmental benefits to be gained. Later applications for WDRs must be determined to be consistent with the plans, and objections based on the impact to the city may be too late.

© The Regents of the University of California

§11.130 3. Implementation

The regional boards implement both state and federal laws regulating discharges of waste into state waters. The state program is implemented through issuance of waste discharge requirements (WDRs) and the federal program is implemented, subject to federal EPA review and veto, through issuance of National Pollutant Discharge Elimination System (NPDES) permits. Wat C §§13370-13389. The critical elements of the permits are the prohibitions and effluent limitations, which set the acceptable pollutant levels of the permit holder's discharge/wastewater.

© The Regents of the University of California

a. State Waste Discharge Requirements

§11.131 (1) When Required

Unless affirmatively waived by the state or regional boards (see Wat C §13269), all discharges of waste that could impact water quality or beneficial use require waste discharge requirements (WDRs) even if a National Pollutant Discharge Elimination System (NPDES) permit is not required. See, *e.g., Lake Madrone Water Dist. v State Water Resources Control Bd.* (1989) 209 CA3d 163, 168, 256 CR 894.

PRACTICE TIP: The definition of "waste" has become a key issue in this regulatory arena as the regional boards have proposed WDRs for the discharge or beneficial reuse of recycled water and even imported water. See §§11.180-11.183. If the discharge is not a "waste," then no WDRs are required. Wat C §13050(d) (defining "waste").

© The Regents of the University of California

§11.132 (2) Report of Waste Discharge Is Permit Application

The Porter-Cologne Act requires anyone discharging or proposing to discharge waste that could affect the quality of the state's water (or when there is a material change in such discharge) to prepare and file a "Report of Waste Discharge" (ROWD) with the regional board. Wat C §13260.

© The Regents of the University of California

§11.133 (3) Waste Discharge Requirement Is Permit

Waste discharge requirements (WDRs) specify what the applicant can and cannot discharge into state waters. Wat C §13263. A waste discharge requirement can be waived by a regional board, but recent legislative changes to the waiver requirements have made this process much more onerous. Wat C §13269.

© The Regents of the University of California

§11.134 (4) Permit Issuance Is Quasi-Judicial Act

Adoption of the waste discharge requirements (WDRs) is an administrative or "quasi-judicial" act and follows similar procedural patterns for adoption and appeal of such actions. See Wat C §13330(d); CCP §1094.5. Complete applications for WDRs are reviewed by regional board staff, who prepare a draft permit that is sent to the applicant and any interested parties. The matter is placed on a regional board agenda for consideration. The regional board may adopt, modify, or reject the draft permit. See Wat C §13263.

© The Regents of the University of California

§11.135 (5) Standard for Issuance

Waste discharge requirements (WDRs) must implement the water quality control plans and protect beneficial uses of the receiving waters. Wat C §13263(a). The effluent limits imposed need not mirror the water quality objectives being implemented and may take into account available dilution, mixing, and ambient water quality. See *In the Matter of the Petition for Review of the City of Manteca,* SWRCB Order No. WQ 2005-05 at 12-13.

© The Regents of the University of California

§11.136 (6) Periodic Review

Discharge of waste is a privilege, not a vested right. The ability to continue discharging is reviewed periodically by the regional board (frequently every 5 years) and may be discontinued. See Wat C §13263(g).

© The Regents of the University of California

b. Federal National Pollutant Discharge Elimination System (NPDES) Permits

§11.137 (1) When Required

Under the federal Clean Water Act (33 USC §§1251-1387), a National Pollutant Discharge Elimination System (NPDES) permit is required for all point source discharges of pollutants to navigable waters of the United States. 33 USC §§1311(a), 1342. See generally 40 CFR pts 122-125. A "point source" is a discrete conveyance such as a pipe or channel. 33 USC §1362(14).

© The Regents of the University of California

§11.138 (2) Issuance by State

Federal law also provides that states with sufficient statutory authority may implement the permit requirements on delegation of the National Pollutant Discharge Elimination System (NPDES) program by the federal EPA. 33 USC §1342(b). The Porter-Cologne Act gives California adequate authority; thus, NPDES permits are issued by the State Water Resources Control Board (SWRCB) and regional boards. Wat C §§13370-13389. The SWRCB and regional boards have adopted general permits in a number of areas for similar types of discharges. See, *e.g.,* SWRCB Order No. 99-08-DWQ (general permit for construction-related storm water discharges).

© The Regents of the University of California

§11.139 (3) State Permit Application Is Also Federal Permit Application

Under California law, a Report of Waste Discharges is treated as an National Pollutant Discharge Elimination System (NPDES) permit application as long as the federal application (Form 200) is included. 23 Cal Code Regs §2235.1.

© The Regents of the University of California

§11.140 (4) Storm Water Permits

Storm water runoff poses specific water quality problems and as such was initially addressed by the National Pollutant Discharge Elimination System (NPDES) permit program. Because municipal and industrial storm water is generally channeled into surface waters, storm water is a point source subject to an NPDES permit. *Natural Resources Defense Council v Costle* (DC Cir 1977) 568 F2d 1369, 1372, 1377 n5. Storm water regulations also make permit requirements applicable to many sources, although general permits may be issued for some point sources of storm water runoff. See 40 CFR §122.26; §§6.13-6.16. See also the EPA website at http://cfpub.epa.gov/npdes/. To secure coverage under a general permit, municipalities, construction sites, and industrial facilities must submit a NPDES permit application (commonly known as a Notice of Intent, or NOI). At a minimum, an NOI requires the completion of a standard form and payment of a fee, but also may require submission of a site map and other related documents.

© The Regents of the University of California

§11.141 (a) Municipal Program

Since the 1987 amendments to the Clean Water Act, federal law expressly requires an NPDES permit for municipal separate storm sewer systems (MS4s) serving a population of 100,000 or more. See 33 USC §1342(p). An MS4 is a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) owned or operated by a state. See 40 CFR 122.26(b)(8). The MS4 permits require the discharger to develop and implement a Storm Water Management Plan/Program with the goal of reducing the discharge of pollutants to the maximum extent practicable (MEP). 33 USC §1342(p)(3). MEP is the performance standard developed for storm water. The management programs specify what best management practices (BMPs) will be used to address certain program areas. A menu of BMPs and guidance on selecting BMPs can be found in the BMP databases at: www.swrcb.ca.gov/water_issues/programs/stormwater/bmp_database.shtml.

© The Regents of the University of California

§11.142 (b) Construction Storm Water Program

Dischargers whose projects disturb one or more acres of soil, or whose projects disturb less than one acre but are part of a larger common plan of development that in total disturbs one or more acres, are required to obtain coverage under the General Permit for Discharges of Storm Water Associated with Construction Activity (Construction General Permit Order No. 99-08-DWQ available on the Internet at www.waterboards.ca.gov/water_issues/programs/stormwater/gen_const.shtml#const_permit). See 40 CFR §122.26(b)(15)(i). Effective July 1, 2010, **all** dischargers are required to obtain coverage under the Construction General Permit Order 2009-0009-DWQ (available on the internet at www.waterboards.ca.gov/water_issues/programs/stormwater/constpermits.shtml). Construction activity subject to this permit includes clearing, grading, and disturbances to the ground, such as stockpiling or excavation, but does not include regular maintenance activities performed to restore the original line, grade, or capacity of the facility. 40 CFR §122.26(b)(15)(i). The Construction General Permit requires the development and implementation of a Storm Water Pollution Prevention Plan (SWPPP), details about which are available at: www.waterboards.ca.gov/water_issues/programs/stormwater/construction.shtml.

© The Regents of the University of California

§11.143 (c) Industrial Storm Water Program

Dischargers of storm water associated with industrial activity are required to apply for an individual permit or to seek coverage under a promulgated storm water general permit. See 40 CFR §122.26(c). The Industrial Storm Water General Permit Order 97-03-DWQ (General Industrial Permit, available on the Internet at www.waterboards.ca.gov/water_issues/programs/stormwater/gen_indus.shtml#indus) is an NPDES permit that regulates discharges associated with ten broad categories of industrial activities. The General Industrial Permit requires the implementation of management measures that will achieve the performance standard of best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT). The General Industrial Permit also requires the development of a Storm Water Pollution Prevention Plan (SWPPP) and a monitoring plan. Through the SWPPP, sources of pollutants are to be identified and the means to manage the sources to reduce storm water pollution are described.

© The Regents of the University of California

§11.144 (5) Total Maximum Daily Loads

Section 303(d) of the Clean Water Act (33 USC §1313(d)) requires states to identify and list lakes, rivers, and streams for which technology-based effluent limitations are not sufficient to achieve water quality standards. For each of these water quality-limited water bodies, states must set total maximum daily loads (TMDLs), which is the total amount of a pollutant a water body can tolerate, plus a margin of safety, and still meet water quality standards and support uses designated in the applicable basin plan, such as recreation and aquatic life ("fishable/swimmable") uses. 33 USC §1313(d)(1)(c).

Once TMDLs are set, the state must allocate the TMDL among all the sources contributing that pollutant to the watershed, including municipal wastewater dischargers, storm water discharges, industrial sources, and nonpoint sources such as agricultural runoff. More stringent effluent limitations can be set for point sources to meet TMDL wasteload allocations.

© The Regents of the University of California

§11.145 (a) Overview of TMDLs in California

Under the Porter-Cologne Water Quality Control Act (Porter-Cologne Act) (Wat C §§13000-14958), the State Water Resources Control Board (SWRCB) controls the total maximum daily load (TMDL)) development process and maintains California's Clean Water Act §303(d) list. Wat C §13160. The SWRCB has delegated the primary responsibility of certifications to the Regional Water Boards, but has retained ultimate discretion over the §303(d) listing process. See 23 Cal Code Regs §§3830-3869. California state water quality standards are reviewed every 3 years. Clean Water Act §303(c)(1); 33 USC §1313(c)(1).

© The Regents of the University of California

§11.146 (b) TMDL Adoption

The Regional Board may adopt a total maximum daily load (TMDL) by amending the basin plan to incorporate the new TMDL. The Clean Water Act, CEQA, and the Bagley-Keene Open Meeting Act (Govt C §§11120-11132) each has its own requirements that affect the timeline for adoption. Each TMDL requires its own notice and comment period and written response to significant public comments, which is made available to the public before adopting the TMDL. See *Friends of the Old Trees v Department of Forestry & Fire Protection* (1997) 52 CA4th 1383, 1403, 61 CR2d 297; 23 Cal Code Regs §3779. TMDLs need not include an implementation plan under federal law, although California law requires the Regional Board to adopt an implementation plan for the TMDL before the TMDL may become effective. See Govt C §§11349.1, 11353(b)(4). The State Water Resources Control Board (SWRCB) has adopted and the EPA has approved, with amendments, a list of impaired California water bodies, available at www.waterboards.ca.gov/water_issues/programs/tmdl/.

© The Regents of the University of California

§11.147 (c) EPA Approval of TMDLs

The Clean Water Act §303(d) list and total maximum daily loads (TMDLs) must be reviewed and approved by the EPA, as well as evaluated by the state and EPA once every 2 years. See Clean Water Act §303(d)(2); 33 USC §1313(d)(2); 40 CFR §130.7(d) (regarding the 2-year requirement). If the EPA disapproves a state list or TMDL, the EPA must issue a replacement TMDL. 33 USC §1313(d)(2). After the EPA approves its own TMDLs for a body of water, if the state later develops its own TMDLs for the body of water, the state's TMDLs may supersede the EPA's TMDLs after gaining EPA approval. *City of Arcadia v EPA* (9th Cir 2005) 411 F3d 1103.

© The Regents of the University of California

§11.148 (d) Overview of TMDL Enforcement

Even after the passage of the Clean Water Act (33 USC §§1251-1387), the EPA did not enforce total maximum daily loads (TMDLs) for many years. TMDLs are most frequently enforced through citizen suits against the government, usually for failure to enforce TMDLs. See §11.149. TMDLs are not directly enforceable against dischargers of pollutants. 33 USC §1365(f).

© The Regents of the University of California

§11.149 (e) Citizen Suits Against the Government

Citizens may bring suit under §505 of the Clean Water Act (33 USC §1365) to enforce the Act. 40 CFR §135.1; *Alaska Ctr. for Env't v Browner* (9th Cir 1994) 20 F3d 981. Generally, courts require evidence of a state's clear refusal to submit its total maximum daily loads (TMDLs) before a citizen's lawsuit against the state may prevail. See, *e.g., San Francisco Baykeeper v Whitman* (9th Cir 2002) 297 F3d 877 (constructive submission doctrine did not apply when state had submitted some TMDLs and had dedicated "substantial" resources to the program).

© The Regents of the University of California

§11.150 (f) Conflicts With Development

When a project constitutes a new source or a new discharge that leads to increased pollutants in impaired water bodies, no National Pollutant Discharge Elimination System permit may be issued until (1) all existing discharges from point sources in the watershed are identified and made subject to compliance schedules, and (2) the compliance schedules can demonstrate future attainment of all pertinent water quality standards. See *Friends of Pinto Creek v U.S. EPA* (9th Cir 2007) 504 F3d 1007, 1011, cert denied sub nom *Carlota Copper Co. v Friends of Pinto Creek* (2009) ___ US ___, 173 L Ed 2d 106, 129 S Ct 896 (construing 40 CFR §122.4(i)). An exception, however, allows for a new discharge when load allocations are available, provided there is a compliance schedule in place for existing point source discharges in the impaired water quality segment, and the compliance schedule projects attainment of applicable water quality standards over time. 504 F3d at 1012.

© The Regents of the University of California

§11.151 (g) Removing an Impaired Water Body from the §303(d) List

The EPA must approve a state's decision to de-list various bodies of water. See *Sierra Club, Inc. v Leavitt* (ND Fla 2005) 393 F Supp 2d 1263, aff'd in part and rev'd in part on other grounds (11th Cir 2007) 488 F3d 904. When the body of water exceeds water quality standards only a few times or exceeds water quality standards due to natural causes, the EPA has approved a state's decision to remove particular water bodies from its Clean Water Act §303(d) list. 393 F Supp 2d at 1274.

© The Regents of the University of California

c. Review of State or Regional Board Action

§11.152 (1) Administrative Review

Certain regional board actions or failures to act are subject to review by the State Water Resources Control Board (SWRCB). The SWRCB may review decisions of the regional boards on its own motion or on a petition by an aggrieved person. Wat C §13320.

Review must be sought within 30 days of the regional board's decision to act or not to act. When the regional board fails to act, the 30-day period commences on the board's refusal to act or 60 days from when the regional board was requested to act. Wat C §13320(a). An aggrieved person may obtain a stay of the regional board's decision pending the State Water Resources Control Board (SWRCB) appeal. Wat C §13321.

SWRCB review is based on the record before the regional board plus any evidence relevant to implement the policies of the Porter-Cologne Act. See Wat C §13320(b).

© The Regents of the University of California

§11.153 (2) Judicial Review

State Water Resources Control Board (SWRCB) decisions on regional board actions or failures to act are subject to judicial review. After an aggrieved person has exhausted administrative remedies, judicial review of SWRCB decisions is available. *Azusa Land Reclamation Co. v Main San Gabriel Basin Watermaster* (1997) 52 CA4th 1165, 1211, 61 CR2d 447.

Decisions made under Wat C §13320 (review of regional board decisions) are subject to review by writ of mandate under CCP §1094.5 (see §§13.2-13.27). Wat C §13330(d). The petition must be filed not later than 30 days from the date of service of the SWRCB's decision or order, or from the date on which the SWRCB denies review. Wat C §13330(a)-(b). The court uses independent judgment to review these decisions. Wat C §13330(d). The evidence before the reviewing court is generally limited to the administrative record of the proceedings. Wat C §13330(b).

Judicial review of SWRCB decisions other than those made under Wat C §13320 regarding water quality are reviewed by ordinary mandamus under CCP §1085. *Marina County Water Dist. v State Water Resources Control Bd.* (1984) 163 CA3d 132, 137, 209 CR 212. But see Wat C §§1126, 13330(e), 13550-13557 (SWRCB actions relating to water reuse subjected to review by writ of mandate).

© The Regents of the University of California

§11.154 4. Enforcement

The California Water Code establishes the applicable statute of limitations and other relevant procedural matters. The regional boards may enforce waste discharge requirements (WDRs) and National Pollutant Discharge Elimination System (NPDES) permits administratively or through the courts. See, *e.g.,* Wat C §§13300, 13308, 13323-13328, 13331, 13340, 13350, 13385. The federal EPA retains concurrent enforcement authority with regard to NPDES permits. See 33 USC §1342(i).

© The Regents of the University of California

§11.155 a. Civil Prosecution

State law enables the board to refer the matter to the state attorney general. The attorney general generally seeks injunctive relief and monetary remedies. Wat C §§13331, 13350, 13385.

© The Regents of the University of California

§11.156 b. Administrative Fines and Civil Liability Orders

The regional boards may issue an administrative complaint alleging a violation of law and set a proposed penalty amount, which is subject to a hearing at the defendant's election. See Wat C §13323. The water boards are empowered to impose civil fines. Wat C §§13261(b), (d), 13265(b)(1), (d)(1), 13268(b)(1), (d)(1), 13323-13327, 13350(d)(1), (e)(1), (f)(1), 13385(c), (e). The amount of liability is established by the board based on consideration of the factors provided in Wat C §13327 or Wat C §13385(d). There is a 30-day statute of limitations on appeals to the State Water Resources Control Board (SWRCB) for review of administrative civil liability orders and for filing of a superior court action after the SWRCB's decision. Wat C §§13320, 13323(d), 13330. Such fines compensate the state for "unquantifiable damages" and act as a deterrent for illegal discharges. *People ex rel Younger v Superior Court* (1976) 16 C3d 30, 37, 127 CR 122.

© The Regents of the University of California

§11.157 c. Cease and Desist Orders

After notice and a hearing, the water boards may issue cease and desist orders for any actual or threatened violation of a waste discharge requirement, an NPDES permit, or a water quality control plan. See Wat C §§13301-13303. A water board can also seek an injunction from a court to enforce its cease and desist orders. Wat C §13331(a).

© The Regents of the University of California

§11.158 d. Cleanup and Abatement Orders

Cleanup and abatement orders are issued ex parte without any notice or hearing. The orders seek to compel a discharger to take certain remedial action to correct or prevent a violation of a permit or plan. Wat C §13304(a). In some circumstances and after notice, including posting a notice at the subject site, the regional board may abate the problem at the owner's expense. Wat C §13305. A hearing must be held not less than 10 days from the posting of the notice.

© The Regents of the University of California

§11.159 e. Injunctive Relief or Criminal Penalties

The water boards may also seek injunctive relief or criminal penalties for violations of a permit or plan for using recycled water improperly, or for illegal discharge of pollutants. Wat C §§13261(c), 13265(a), 13268(a), 13271(c), 13272(c), 13387, 13522.6, 13525.5, 13526, 13754, 13396.5(e).

© The Regents of the University of California

§11.160 f. Technical Reports

The water boards may also order a suspected discharger to submit technical and monitoring reports. Wat C §§13225, 13267. Failure to submit these reports is subject to imposition of penalties. Wat C §13268.

© The Regents of the University of California

§11.161 g. Citizen Suits

A citizen's suit may be filed against National Pollutant Discharge Elimination System (NPDES) permit holders for violations when the state or EPA has failed to take appropriate enforcement action. 33 USC §1365. A 60-day notice of intent to sue letter is a procedural prerequisite to a citizen enforcement action. See 33 USC §1365(b).

© The Regents of the University of California

D. Sewage Disposal Regulations

§11.162 1. Authority to Own and Operate Sewer System

Cities, counties, and special districts may own and operate sewer systems and treatment plants. A city owning and/or operating a sewage collection or treatment facility is governed by the Porter-Cologne Act (Wat C §§13000-14958) and the Clean Water Act (33 USC §§1251-1387) and is also empowered to exercise its own governmental authority to protect water quality. State law specifically authorizes several types of local agencies to own and operate sewer systems. See the following:

- Cities (see Govt C §§38900-38901);
- County sanitation districts (see Health & S C §§4700-4858);
- Sanitary districts (see Health & S C §§6400-6982);
- County water districts (see Wat C §§30000-33249);
- Sewer maintenance districts (see Health & S C §§4860-4927);
- Municipal utility districts (see Pub Util C §§11501-14403.5);
- Special districts (see Pub Util C §§13451-13691); and
- Improvement districts (see Health & S C §§4600-4650).

Cities expressly authorized to operate collection systems and wastewater sewer treatment plants may require pretreatment of industrial waste and limit the introduction of pollutants into the system. See Govt C §§54725-54740.6. State law also provides express authority to prescribe fees and charges for sewer services. See Health & S C §§5470-5474.10.

© The Regents of the University of California

2. Pretreatment Program and Sewage Disposal

§11.163 a. Standards

Cities may apply pretreatment standards promulgated by the federal EPA to industrial users of publicly owned treatment works (POTW). Wat C §§13370-13389. The standards limit what industrial users can discharge into a municipal sewer system. The state can enforce pretreatment standards directly against the industrial user or through the permit issued to the POTW itself. See 33 USC §1317(b)(1); *County Sanitation Dist. v Inland Container Corp.* (9th Cir 1986) 803 F2d 1074 (limiting federal permit authority to sewer district actually owning sewer into which pollutant is discharged).

© The Regents of the University of California

§11.164 b. Purpose of Pretreatment Program

The purpose of limitations on industrial discharges into municipal sewer systems and pretreatment programs is to protect the integrity of the publicly owned treatment works (POTW), to ensure that sewage sludge is disposable by regulating its toxicity, and to ensure that waste discharge requirements governing discharges to the land (water reclamation) and National Pollutant Discharge Elimination System (NPDES) permit conditions governing direct discharges into surface waters are not subverted by "indirect discharges" through POTWs. See 40 CFR §403.1. In addition to pretreatment programs, many cities also have extensive public education programs, source control, and "Fats, Oils, and Grease" (FOG) programs to control discharges from residential and commercial users.

© The Regents of the University of California

§11.165 c. Local Limits on Pollutants

In addition to state and federal general prohibitions and categorical limits on certain pollutants that may pass through a publicly owned treatment works (POTW) untreated, local limits may be developed by individual POTWs. See, *e.g.,* 33 USC §1317(b)(4). Indeed, it may be necessary to set such local limits, by industry or by pollutant, when pretreatment program approval is required. See 40 CFR §403.5 (EPA's requirements for POTWs to avoid pass-through or interference with disposal).

A city may set local limits by ordinance or conditions of approval. Local limits for a specific POTW may be set by municipal ordinance or as part of a municipal permit or contract. See, *e.g.,* 40 CFR §403.8(f).

Local limits become federally enforceable standards. When local standards are set, they become pretreatment standards for purposes of compliance with the Clean Water Act. See 40 CFR §403.5(d).

© The Regents of the University of California

§11.166 3. Use and Disposal of Sewage Sludge

The Clean Water Act requires a permit be obtained to dispose of sewage sludge or "biosolids" from a publicly owned treatment works (POTW) that would result in any pollutant entering navigable waters. 33 USC §1345(a). The Clean Water Act requires the EPA to develop regulations for the use and disposal of sewage. See 33 USC §1345(d); 40 CFR part 503.

© The Regents of the University of California

§11.167 4. On-Site Sewage Treatment Systems

City and county health departments usually regulate private on-site treatment systems such as septic systems under local ordinances. The State Water Resources Control Board (SWRCB) was required to adopt regulations concerning such treatment systems by 2004. Wat C §§13290-13291.7.

© The Regents of the University of California

§11.168 5. Collection System Regulation

In May of 2006, the State Water Resources Control Board (SWRCB) adopted a new general permit to regulate all sanitary sewer collection systems owned by public entities that are greater than one mile in length. See SWRCB Order No. 2006-0003-DWQ. If not covered expressly by a National Pollutant Discharge Elimination System (NPDES) for the publicly owned treatment works (POTW), cities should have submitted an application or Notice of Intent (NOI) for coverage under the permit to the State Water Board by November 2, 2006.

© The Regents of the University of California

E. Groundwater Regulation

1. State Law

§11.169 a. Discharges to Groundwater

Although the federal Clean Water Act (33 USC §§1251-1387) primarily regulates discharges from point sources into navigable, surface waters of the United States, the state Porter-Cologne Act (Wat C §§13000-14958) also regulates discharges to groundwater from nonpoint sources (for example, agricultural operations, leach fields, septic tank and urban runoff, and sewage sludge deposits). See *Lake Madrone Water Dist. v State Water Resources Control Bd.* (1989) 209 CA3d 163, 168, 256 CR 894. State policies and plans are expressly intended to manage groundwater. Wat C §13142. Thus, for the purposes of the Porter-Cologne Act, "discharge of waste" includes contamination into or through groundwater. See Wat C §§13050(e), 13373.

© The Regents of the University of California

§11.170 b. Regional Board Responsibility

Regional boards have primary responsibility for regulating groundwater quality, although cities also may exercise police power to protect groundwater (see §11.96). The most common situation in which cities and regional boards share jurisdiction involves the cleanup of underground storage tanks (UST). Cities and counties, through the health official or the fire department, have the power to regulate UST cleanups. See Health & S C §§25297.1-25299.81. However, when a UST may have caused groundwater contamination, the regional board generally will supervise the groundwater cleanup. Since 1994, local agency jurisdiction is subject to designation as a Certified Unified Program Agency (CUPA); the State Secretary for Environmental Protection certifies a local agency as a CUPA, which is responsible for implementation of the requirements of Health & S C §25404(c). See Health & S C §§25187, 25404-25404.9; 27 Cal Code Regs §§15100-16150.

© The Regents of the University of California

§11.171 2. Discharges to Groundwater Subject to State Waste Discharge Requirements

All dischargers of waste into or affecting groundwater must apply for and receive waste discharge requirements. See Wat C §§13050(e), 13260, 13263 (discussed in §§11.131-11.136).

© The Regents of the University of California

§11.172 3. Injection Wells

Injection wells may affect the quality of surrounding groundwater. Both state and federal law regulate use of wells into which waste is injected. See, *e.g.,* Wat C §13382.

© The Regents of the University of California

§11.173 a. Federal Law

The federal Safe Drinking Water Act (42 USC §§300f-300j-26) prohibits underground injection of waste liquids that may affect sources of drinking water, unless specifically authorized. 42 USC §300h(b). In addition, federal law requires California to develop and implement an underground injection control program. 42 USC §300h-1. However, because California has not yet developed such a program, except for class II wells, the federal EPA administers the federal underground injection control program and standards for class I, III, IV, and V wells and all wells on Native American lands. See 40 CFR §§147.250-147.251.

© The Regents of the University of California

§11.174 b. State Law

Specific provisions of the Porter-Cologne Act (Wat C §§13000-14958) deal with the construction and abandonment of certain types of wells and these requirements are in addition to waste discharge requirements. Wat C §§13700-13806. Oil and gas wells, and wells for waste water disposal are regulated separately but also must be constructed and abandoned in a manner that does not pollute groundwater. See Pub Res C §§3220, 3228-3229, 3740.

© The Regents of the University of California

F. Wetlands

§11.175 1. Definition of Wetland

A wetland is an area "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 CFR §232.2. While common examples of wetlands include swamps, marshes, and bogs, wetlands may not be easily recognizable in arid regions.

© The Regents of the University of California

§11.176 2. Dual Jurisdiction

Wetlands are regulated under both federal and state law, and present complex groundwater and surface water quality control issues. Waste discharge requirements are triggered when discharges to groundwater recharge areas would ultimately affect groundwater quality; wetlands can be groundwater recharge areas. Wetlands are waters of the state for purposes of the state Porter-Cologne Act (Wat C §13050(e)) and may be waters of the United States for purposes of the federal Clean Water Act (33 USC §§1342, 1344, 1362(7)). See *Solid Waste Agency v United States Army Corps of Eng'rs* (2001) 531 US 159, 167, 148 L Ed 2d 576, 121 S Ct 675; *U.S. v Riverside Bayview Homes* (1985) 474 US 121, 129, 88 L Ed 2d 419, 106 S Ct 455.

The federal Clean Water Act requires states to adopt water quality standards for "navigable waters," which includes "waters of the United States." See 33 USC §1362(7). Because some wetlands are considered "waters of the United States" and are thus "navigable waters," states must regulate those wetlands. The judiciary's interpretation of what constitutes a federally regulable water body has evolved considerably in recent years. For example, in 2006, the United States Supreme Court issued a plurality opinion with no clear direction for future wetlands determinations. See *Rapanos v U.S.* (2006) 547 US 715, 165 L Ed 2d 159, 126 S Ct 2208. Although the decision did not provide clear direction on wetlands determinations, the United States Army Corps of Engineers and the EPA have interpreted Justice Kennedy's concurring decision as controlling. The agencies jointly issued a guidance document to ensure that future agency actions would be consistent with the *Rapanos* decision. The guidance states that the EPA and the Corps will assert Clean Water Act jurisdiction over:

- Traditional navigable waters and wetlands adjacent thereto;
- Non-navigable tributaries that are relatively permanent waters and wetlands with a continuance surface connection with such tributaries; and
- Other non-navigable tributaries and other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters.

A copy of the guidance can be found at www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf.

In 2007, the Ninth Circuit held that a wetland adjacent to a non-navigable tributary was not under the jurisdiction of the Clean Water Act because the wetland was an isolated, non-navigable, intrastate pond and there was no significant nexus between the wetland at issue and the nearest navigable waterway. See *San Francisco Baykeeper v Cargill Salt Div.* (9th Cir 2007) 481 F3d 700.

© The Regents of the University of California

§11.177 a. Waste Discharges

State and federal permits may be required to develop and use wetlands. Discharges to wetlands may be subject to waste discharge requirements. Discharges to wetlands primarily for the purpose of waste disposal may also be subject to a National Pollutant Discharge Elimination System (NPDES) permit requirement (issued by the state). See *Northern Cal. River Watch v City of Healdsburg* (9th Cir 2007) 496 F3d 993, cert denied (2008) 552 US 1180.

© The Regents of the University of California

§11.178 b. Fill

Discharges to wetlands of dredged or fill material are subject to a separate Clean Water Act §404 permit program administered by the Army Corps of Engineers. 33 USC §1344; 33 CFR §323.4(c). The scope of the federal Clean Water Act is limited to "navigable waters." 33 USC §1344(a). The United States Supreme Court has held that this includes wetlands that abut a navigable waterway (*U.S. v Riverside Bayview Homes* (1985) 474 US 121, 133, 88 L Ed 2d 419, 106 S Ct 455) but not a non-navigable, isolated, intrastate pond (*Solid Waste Agency v United States Army Corps of Eng'rs* (2001) 531 US 159, 148 L Ed 2d 576, 121 S Ct 675). In 2006, a plurality of the Court held that the Corps may assert jurisdiction over a wetland with a continuous surface connection to a permanent, standing, or flowing body of water, although a concurring justice concluded that jurisdiction depends on whether the wetland has a "significant nexus" to more traditional navigable waters. *Rapanos v U.S.* (2006) 547 US 715, 165 L Ed 2d 159, 126 S Ct 2208.

The Corps has adopted a program of nationwide permits that addresses many forms of such discharges. See, *e.g.,* 65 Fed Reg 12818 (March 9, 2000). When the filling of wetlands would interfere with groundwater recharge, groundwater quality may be protected through the waste discharge requirements or the Army Corps of Engineers permit. See Sawyer, *State Regulation of Groundwater Pollution Caused by Changes in Groundwater Quantity or Flow,* 19 Pac L J 1267, 1278-81 (1988).

PRACTICE TIP: As reflected in the Guidance Letter issued in response to *Rapanos v U.S.* (2006) 547 US 715, 165 L Ed 2d 159, 126 S Ct 2208, and other developments, it appears that the Army Corps may have narrowed its jurisdiction over waters in some respects (*e.g.,* swales and ditches are generally no longer jurisdictional). However, case-by-case application of Clean Water Act jurisdiction will likely continue in many instances and only time will tell how Corps offices in California apply the new guidance.

© The Regents of the University of California

§11.179 3. Jurisdictional Determinations

For a court to hear a challenge to a wetlands determination by the United States Army Corps of Engineers, the jurisdictional determination at issue must be a final delineation from which legal consequences will flow, rather than a mere preliminary delineation. See *Fairbanks N. Star Borough v U.S. Army Corps of Eng'rs* (9th Cir 2008) 543 F3d 586, cert denied (2009) ___ US ___, 174 L Ed 2d 552, 129 S Ct 2825.

© The Regents of the University of California

G. Recycled Water Regulation

1. Definition of "Recycled Water"

§11.180 a. Not "Waste"

Reclamation activities performed by cities arguably do not constitute disposal or the discharge of "waste" that would require waste discharge requirements (WDRs). "Waste" is defined as "sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal." Wat C §13050(d).

© The Regents of the University of California

§11.181 b. "Recycled Water"

"Recycled water" is "water, which as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource." See Wat C §§13050(n), 13575(a)(3). In this case, disinfected highly treated water is the *result* of the treatment of "waste," and this water is suitable for a direct beneficial use or a controlled use that would not otherwise occur. See 22 Cal Code Regs §§60301.220, 60301.225, 60304-60307. Thus, "recycled water" should not be considered a "waste" under the Water Code, and should not be regulated as such by the regional board under waste discharge requirements (WDRs).

The legislature has expressly recognized the safety and benefit of "recycled water" and that such water is not to be considered "waste." See Wat C §§13510- 13512, 13529(f), 13550-13551.

© The Regents of the University of California

2. Recycled Water Permitting Options

§11.182 a. Water Reclamation Requirements

One permitting option is the issuance of water reclamation requirements (WRRs) under Wat C §13523 for purposes of operating reclamation and recycling activities. Standard enforcement requirements in Wat C §13350 do not apply to WRRs, and instead are controlled by the requirements of division 7, chapter 7 of the Water Code (Wat C §§13500-13557).

© The Regents of the University of California

§11.183 b. Master Reclamation Permits

With consent of the permit holder, the regional board may also combine waste discharge requirements (WDRs) and water recycling requirements (WRRs), but arguably only under a master reclamation permit under the authority of Wat C §§13523.1 and 13263(h). Because recycled water is not a waste, only Wat C §13263(h) could be used by the water boards to justify regulating recycled water under WDRs because no other subsection references "recycled water." Including WDRs in regulation of recycled water subjects cities to additional enforcement and liability under Wat C §13350, which should be weighed before agreement is given to a master reclamation permit.

© The Regents of the University of California

V. AIR QUALITY

A. Basic Regulatory Scheme

1. Overview

§11.184 a. Federal Law

Air quality regulation is accomplished through a complex federal/state/regional/local governmental planning and regulatory process. The federal Clean Air Act (42 USC §§7401-7671q) sets minimum standards called National Ambient Air Quality Standards (NAAQS) that California air quality regulatory programs must meet. The NAAQS specify the maximum permissible concentrations of six "criteria" air pollutants, including ozone, particulate matter, carbon monoxide, nitrogen dioxide, sulfur dioxide, and lead. 40 CFR Part 50. States that fail to adopt and implement acceptable programs are subject to federal "sanctions," including denial of federal highway improvement projects, withholding of federal highway construction funds, and requiring new sources to meet more stringent emission offset requirements. On offsets, see §11.227.

The federal EPA is authorized to, and may be mandated to, promulgate and enforce regulations in lieu of the deficient state regulations. *Coalition for Clean Air v Southern Cal. Edison Co.* (9th Cir 1992) 971 F2d 219, cert denied sub nom *EPA v Coalition for Clean Air* (1993) 507 US 950.

The Clean Air Act directs the EPA to base standards on air quality criteria that accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare. 42 USC §7408(a)(2). Under the Administrative Procedure Act, the EPA's actions and decisions will be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC §706(2)(A).

© The Regents of the University of California

b. State Law

§11.185 (1) Air Resources Board and Local Air Pollution Control Agencies

In California, responsibility for regulating air pollution is divided between a state agency, the California Air Resources Board (ARB), and local and regional air pollution control districts (APCDs) and air quality management districts (AQMDs). The laws establishing California's air quality regulatory program are set forth in division 26 of the California Health and Safety Code. See Health & S C §§39000-44474.

© The Regents of the University of California

§11.186 (2) Responsibilities

The California Air Resources Board (ARB) is responsible for setting emission standards for "vehicular" sources (such as cars, trucks, motorcycles, and buses). Health & S C §§39660, 39667, 43013. The ARB also has overarching responsibility to adopt state air quality standards known as the "California Ambient Air Quality Standards" (CAAQS) (Health & S C §§39003, 39606) and to determine whether air basins have attained those standards (Health & S C §39608). In addition, the ARB is charged with adopting standards for motor vehicle fuel specifications (Health & S C §43013) and emission standards for toxic emissions from non-vehicular sources (Health & S C §39660). The ARB also has limited jurisdiction over certain non-vehicular sources of air pollution with widespread air quality impacts. For example, the ARB regulates non-vehicular portable equipment, including construction and farm equipment, and consumer products containing reactive organic compounds. Health & S C §§41712, 43013. Air pollution control districts (APCDs) and air quality management districts (AQMDs) are responsible for regulating emissions from "non-vehicular" sources (all sources other than vehicular sources). Health & S C §§39002, 40000.

© The Regents of the University of California

2. Regional Air Quality Management

§11.187 a. Regional Basins

The ARB has divided California into 15 geographical air basins. Those air basins generally include more than one county. 17 Cal Code Regs §§60100-60114. Every county in California is included within the jurisdiction of an air pollution control district (APCD) or air quality management district (AQMD). Health & S C §40002. Many California counties have their own APCD.

APCDs and AQMDs are governed by a "governing board." In most counties the APCD jurisdiction is limited to one county, with at least one county board of supervisor and one city council member serving on the governing board. See Health & S C §40100.5. When an APCD or AQMD exercises jurisdiction in more than one county, the governing board consists of county supervisors, city council members, and possibly others appointed as provided in the legislation establishing the particular APCD or AQMD.

© The Regents of the University of California

§11.188 b. Duties of APCDs and AQMDs

The air quality regulatory activities of air pollution control districts (APCDs) and air quality management districts (AQMDs) include the following:

- Air quality planning (see Health & S C §§40910-40930);
- Adoption of rules and regulations establishing emissions limitations and permitting requirements (see Health & S C §§40001, 40702);
- Issuance of permits to non-vehicular sources of emissions (see Health & S C §§42300-42316); and
- Enforcement of air quality rules and regulations (see Health & S C §§40752, 42400-42410).

© The Regents of the University of California

§11.189 c. Air Quality Attainment Plans

Under the California Clean Air Act (Stats 1988, ch 1568), each APCD or AQMD that has non-attainment for any of the CAAQS must prepare a plan for attaining and maintaining compliance with the CAAQS. Health & S C §§40910-40930. Each district plan must set forth general control measures by which the region will attain compliance with the CAAQS. The plans are blueprints for how clean, healthful air as defined by the CAAQS will be attained within each region. The district attainment plans are variously referred to as "air quality management plans" or "air quality maintenance plans" (AQMPs), "attainment plans," or "non-attainment plans." The plans must be reviewed at least once every 3 years to correct deficiencies and incorporate new data or projections. Each triennial plan revision must be submitted to the California Air Resources Board (ARB) after adoption at a public hearing. Health & S C §40925. Within each air basin, the same planning document might serve as the district attainment plan under state law and the federal state implementation plan (SIP) under federal law. See, *e.g.,* Health & S C §40460(d) (the AQMP of the South Coast Air Quality Management District shall also serve as the region's SIP under the Clean Air Act).

© The Regents of the University of California

§11.190 (1) Five-Percent Annual Reduction in Pollutants

Each attainment plan must demonstrate at least a 5-percent annual reduction in pollutants, averaged over a 3-year period. Health & S C §40914. The California Air Resources Board (ARB) may approve an attainment plan that does not meet the 5-percent reduction goal in two situations: (1) the alternate emission reduction strategy is equal to or more effective than district-wide emission reductions in improving air quality; or (2) despite inclusion of every feasible measure, a 5-percent reduction cannot be achieved. Health & S C §§40914(b), 41503.1.

© The Regents of the University of California

§11.191 (2) Implementation

Each air pollution control district (APCD) and air quality management districts (AQMD) is authorized to adopt locally effective regulations to implement its attainment plan. The plan must include certain types of regulations depending on whether the air pollution problem in the area is characterized as moderate, serious, severe, or extreme (Health & S C §§40001, 40918-40920, 40920.5):

- **Indirect Source Regulation.** Attainment plans for areas designated as moderate, serious, severe, or extreme non-attainment areas must make provisions for the regulation of emissions from "indirect sources." Health & S C §§40716(a), 40918-40920.5. The state law does not define what an indirect source is, but the federal law defines it as any facility, building, structure, installation, real property, road, or highway that attracts or may attract mobile sources of pollution. 42 USC §7410(a)(5)(c). The California Air Resources Board (ARB) uses a similar definition.
- **Mobile Source Regulation.** Attainment plans for areas designated as moderate, serious, severe, or extreme non-attainment areas must also provide for the implementation of transportation control measures (TCM) (Health & S C §40717(g)) to reduce the number of vehicle trips taken in the regions and the miles traveled by motor vehicles. As with indirect source regulations, the attainment plan may provide that transportation control measures will be regulated by the APCD or AQMD directly, or by cities and counties through ordinances. Health & S C §40717; 87 Ops Cal Atty Gen 96 (2004). If specified conditions are met, APCDs and AQMDs may by resolution raise the vehicle registration fees within their area for purposes of reducing vehicular pollution. Health & S C §§44223, 44225 (sunsetting January 1, 2015). These funds are available to districts for this purpose. Health & S C §44229 (sunsetting January 1, 2015). The districts may in turn, allocate the funds to cities for specific purposes. See, *e.g.,* Health & S C §§44236 (Congestion Management Program), 44237 (transportation control measures). Moderate, serious, severe, and extreme non-attainment areas must implement "reasonably available" transportation control measures. Health & S C §§40918(a)(3), 40919(a)(1), 40920(a), 40920.5(a).
- **ISTEA and Congestion Management Conformity.** The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (23 USC §§134-135) and the California congestion management statute (Govt C §§65088-65089.10) both include requirements that transportation planning "conform" to the State Implementation Plan (SIP), as required by the federal Clean Air Act. See 42 USC §7506(c).

© The Regents of the University of California

d. Limit on APCD and AQMD Powers

§11.192 (1) Preservation of Local Land Use Authority

There is one significant limit on the otherwise broad authority granted to air pollution control districts (APCDs) and air quality management districts (AQMD) to regulate sources of air pollution. No power granted to APCDs or AQMDs constitutes an infringement on the existing authority of cities and counties to plan and control land use. Health & S C §§40716(b), 41015. Although these sections have not been interpreted by the courts, attorneys for APCDs and AQMDs generally interpret these provisions as prohibiting a district from overriding or dictating land use decisions made by cities and counties, such as general plan amendments, zoning ordinances, and siting of industrial, commercial, and residential development.

© The Regents of the University of California

§11.193 (2) Permitting Requirements

Air pollution control districts (APCDs) and air quality management districts (AQMDs) sometimes interpret Health & S C §§40716(b) and 41015 as not prohibiting a parallel permitting system for indirect sources such as now exists for industrial air pollution sources. Although Health & S C §42300 authorizes the establishment of a permit system for equipment that causes air pollution, there is not a similar specific grant of authority for a permit system covering other types of development projects. The attorney general has opined that the authority of an APCD or AQMD does not extend to requiring permits for indirect sources. 76 Ops Cal Atty Gen 11 (1993).

© The Regents of the University of California

§11.194 (3) Limit on Trip Reduction Programs

Air pollution control districts (APCDs), air quality management districts (AQMDs), cities, and all other public entities are prohibited from requiring "an employer to implement an employee trip reduction program unless the program is expressly required by federal law and the elimination of the program will result in the imposition of federal sanctions, including, but not limited to, the loss of federal funds for transportation purposes." Health & S C §40717.9(a). Similarly, APCDs, AQMDs, and regional and local public entities are generally prohibited from requiring private parties to impose parking charges, restrict parking, or impose measures to reduce retail shopping trips. Health & S C §40717.6.

© The Regents of the University of California

§11.195 (4) Limit on New Control Measures

Air pollution control districts (APCDs) and air quality management districts (AQMDs) are prohibited from adopting new or more stringent control measures with respect to pollutants for which standards have not been violated unless the APCD or AQMD prepares an analysis of the costs and benefits of achieving attainment. Health & S C §40930.

© The Regents of the University of California

§11.196 (5) Preemption

The federal Clean Air Act preempts air quality management districts (AQMDs) and air pollution control districts (APCDs) from adopting or enforcing any state or local standard relating to control of emissions from new motor vehicles or motor vehicle engines. 42 USC §7543(a); *Engine Mfrs. Ass'n v South Coast Air Quality Mgmt. Dist.* (2004) 541 US 246, 158 L Ed 2d 529, 124 S Ct 1756. Thus, an AQMD or APCD may not adopt or enforce a regulation requiring fleet operators to purchase or lease only those vehicles that meet state motor vehicle pollutant standards. *Engine Mfrs. Ass'n v South Coast Air Quality Mgmt. Dist., supra.*

© The Regents of the University of California

§11.197 e. Procedural Requirements for Plan Adoption

The development and adoption of air quality attainment plans is governed by provisions of state and federal law. The air pollution control district (APCD) or air quality management district (AQMD) must consult with affected general purpose local governments and designated organizations of elected officials (*e.g.,* councils of governments and metropolitan planning organizations) before the plan is adopted. 42 USC §§7410(a)(2)(M), 7421, 7504. Additionally, evidence of public involvement and participation in the plan adoption process must be presented. Information regarding attainment plan provisions for any area in California may be obtained from the APCD or AQMD exercising jurisdiction over that area, or the California Air Resources Board (ARB).

© The Regents of the University of California

f. Procedural Requirements for Rule Adoption

§11.198 (1) Authority

Air pollution control districts (APCDs) and air quality management districts (AQMDs) are authorized to adopt rules to implement their attainment plans and to carry out other powers and duties imposed by the California Health and Safety Code. Such rulemaking is governed by Health & S C §§40725-40730.

© The Regents of the University of California

§11.199 (2) Notice and Hearing

Generally, no rule may be adopted, amended, or repealed unless the district governing board holds a public hearing on such action. A public hearing may not be held unless the air pollution control districts (APCD) or air quality management district (AQMD) has given at least 30 days' notice of the time and place of the public hearing. Such notice must be given to the California Air Resources Board (ARB) and by publication within the district. A copy of the rule or regulation proposed to be adopted, amended, or repealed and a summary of the proposed action must be given to the ARB at the time notice is given. The published notice must invite public comment, give the name, address, and telephone number of the person to whom comments should be directed, and the date by which comments must be received. Health & S C §40725(c).

© The Regents of the University of California

§11.200 (3) Changes to Proposed Rules

At the public hearing, the governing board must consider the oral and written testimony presented before taking action to adopt, amend, or repeal a rule or regulation. It may continue or postpone a hearing on a rule or regulation. If, after considering the matters presented, the governing board wishes to make changes in the text originally made available that significantly change the meaning of the proposed rule or regulation, it may not do so at that time, but must continue the matter to its next regular meeting and allow additional arguments and statements concerning the proposed changes. Health & S C §40726.

© The Regents of the University of California

§11.201 (4) Findings and Rulemaking Record

Before adopting, amending, or repealing a rule or regulation, the governing board must make findings regarding "necessity, authority, clarity, consistency, non-duplication and reference" (Health & S C §40727(a)) and prepare an assessment of social and economic impacts if such action will significantly affect air quality or emissions limitations for air pollution control districts (APCDs) or air quality management districts (AQMDs) with populations of 500,000 or more (Health & S C §40728.5). Before the board can make the required findings, the district must prepare a written analysis that identifies all existing federal air pollution control requirements and district regulations that apply to the same equipment or source type that is the subject of the proposed rule. Notice of the public hearing must indicate the analysis is available. Health & S C §40727.2. The APCD or AQMD must also maintain a rulemaking file on each regulation, which is deemed the administrative record for that proceeding. Health & S C §40728.

© The Regents of the University of California

§11.202 3. City Authority

Air pollution control districts (APCDs) and air quality management districts (AQMDs) share air pollution control authority over many sources with local governments. See Health & S C §§39002, 41508. Cities and counties have authority, under the police power, to adopt ordinances to limit emissions of air contaminants. Because of the technical nature of emission controls, most cities and counties have elected not to exercise that concurrent authority, and have left air pollution control to APCDs and AQMDs.

© The Regents of the University of California

§11.203 a. Local Government Implementation Measures

However, the district attainment plans adopted by air pollution control districts (APCDs) and air quality management districts (AQMDs) usually contain measures that can be implemented by local governments. If an attainment plan provides for local government implementation of one of its measures, failure of a city or county to implement a "local government implementation measure" may result in the APCD or AQMD implementing that measure through its rulemaking authority. See Health & S C §39002.

© The Regents of the University of California

§11.204 b. Permit Checks

Cities must require applicants for a development project or building permit to indicate whether a permit is required from the air pollution control district (APCD) or air quality management district (AQMD) for the activities to be conducted at the facility for which the permit is sought. Govt C §65850.2(a)(1). No city may approve an occupancy certificate unless there is verification that conditions of any APCD permit are being met. Govt C §65850.2(c).

© The Regents of the University of California

§11.205 c. Proximity of Certain Facilities to Schools

Cities are prohibited from allowing any facility that must have a risk management and prevention plan (RMPP) or that may emit air contaminants from being constructed within 1000 feet of the outer boundary of a school unless and until an approved RMPP has been submitted and the air pollution control district (APCD) or air quality management district (AQMD) with jurisdiction has met the requirements of Health & S C §42301.6, requiring, among other things, public notice.

© The Regents of the University of California

4. State Authority

§11.206 a. State Air Standards

The California Air Resources Board (ARB) has the authority to establish state ambient air quality standards (Health & S C §39606(a)(2)), which can be stricter than the National Ambient Air Quality Standards (NAAQS) (42 USC §7416). For a discussion of the NAAQS, see §11.184. The ARB has exercised this authority by adopting the California Ambient Air Quality Standards (CAAQS). Like the National Ambient Air Quality Standards (NAAQS), the CAAQS specify maximum permissible concentrations of criteria pollutants in the ambient air. 17 Cal Code Regs §70200. Some of the CAAQS, such as those for particulate matter and ozone, are more protective of public health than their NAAQS counterparts. In addition, the ARB has established CAAQS for some pollutants that do not have a NAAQS counterpart, such as "visibility reducing particles" and sulfates. The California Clean Air Act (Stats 1988, ch 1568) requires the ARB to designate each air basin as attainment or nonattainment with respect to each CAAQS. Health & S C §39608. Authority for setting emission standards for new motor vehicles also rests with the ARB. Health & S C §§43000-44299.91.

© The Regents of the University of California

§11.207 b. State Regulatory Programs

The California Air Resources Board (ARB) is responsible for listing and developing model regulations to control the emissions of toxic air contaminants (see Health & S C §§39650-39675), reviewing air pollution control districts (APCD) and air quality management district (AQMD) air quality plans (see Health & S C §40923), and administering the Air Toxics "Hot Spots" Information and Assessment Act of 1987 (see Health & S C §§44300-44394). This latter program is a statewide effort to inventory and categorize the risk associated with emissions of toxic air contaminants from non-vehicular sources. The California Bureau of Automotive Repair is also responsible for overseeing the motor vehicle inspection and maintenance program (the "Smog Check" program). Health & S C §§44000-44126.

© The Regents of the University of California

§11.208 c. Composition of ARB

The California Air Resources Board (ARB) consists of 11 members appointed by the governor with the consent of the state senate. Health & S C §39510(a)-(b). Five of the members must be air pollution control district (APCD) or air quality management district (AQMD) governing board members (Health & S C §39510(c)):

- one from the Bay Area AQMD,
- one from the South Coast AQMD,
- one from the San Joaquin Valley Unified APCD,
- one from the San Diego APCD, and
- one from one of the other districts.

The ARB is a department of the California Environmental Protection Agency (Cal/EPA). Health & S C §39510.

© The Regents of the University of California

5. Federal Laws

§11.209 a. Environmental Protection Agency (EPA)

Federal air pollution laws and regulations are administered by the federal EPA. The federal EPA is headed by an administrator. The federal EPA administrator is empowered to promulgate regulations under the federal Clean Air Act (42 USC §§7401-7671q).

© The Regents of the University of California

§11.210 b. EPA Regions

The United States and its territories are divided into ten regions for purposes of administering federal environmental programs. California is in Region IX. EPA Region IX is headquartered in San Francisco and is administered by a regional administrator. See 40 CFR §§1.5, 1.7.

© The Regents of the University of California

§11.211 c. National Standards

The federal Clean Air Act establishes the national framework for air pollution regulation. It is fundamentally a "bottom-up" approach to the problem of achieving clean air. The federal EPA sets standards for acceptable levels of air quality ("National Ambient Air Quality Standards," or NAAQS). These standards must accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare. 42 USC §7408(a)(2). The NAAQS specify the maximum permissible concentrations of six "criteria" air pollutants in the atmosphere, including ozone, particulate matter, carbon monoxide, nitrogen dioxide, sulfur dioxide, and lead. 40 CFR Part 50. Under the Clean Air Act, EPA has divided each state into separate "air quality control regions" for planning purposes. 42 USC §7407. EPA designates each region as "attainment" or "nonattainment" for each criteria pollutant based on whether the region meets the NAAQS for that pollutant. 42 USC §7407.

© The Regents of the University of California

§11.212 d. State Implementation Plans

The federal Clean Air Act requires each state to prepare a state implementation plan (SIP) and to submit the SIP to EPA for approval. 42 USC §7410. Each SIP must set forth control measures that will attain, maintain, and enforce the National Ambient Air Quality Standards (NAAQS) within the state. The Act sets forth a number of general requirements for the content of SIPs. 42 USC §7410(a)(2). Within these general parameters, however, states have substantial discretion to determine the specific air pollution control strategies set forth in their SIPs. Each state is free to determine the particular "mix of emissions limitations" set forth in a SIP, as long as the SIP will achieve and maintain compliance with the NAAQS. *Train v Natural Resources Defense Council* (1975) 421 US 60, 79, 43 L Ed 2d 731, 95 S Ct 1470; see also *National Steel Corp. v Gorsuch* (6th Cir 1983) 700 F2d 314, 322 (Clean Air Act gives states "wide discretion" in drafting and revising SIPs).

In areas that have not yet attained the NAAQS for specified pollutants, there are additional requirements and additional time is provided. 42 USC §§7511-7514(a). If a state fails to adopt an adequate SIP, the EPA must adopt and implement a federal implementation plan (FIP) to accomplish the goals of the federal Clean Air Act. *Coalition for Clean Air v Southern Cal. Edison Co.* (9th Cir 1992) 971 F2d 219, cert denied sub nom *EPA v Coalition for Clean Air* (1993) 507 US 950.

© The Regents of the University of California

§11.213 e. Emission Standards

Federal regulations establish minimum requirements for certain new, large, industrial sources (new source performance standards, or NSPS). 42 USC §7411. The Clean Air Act also requires the EPA to establish emission standards for "hazardous air pollutants" (HAP) under a program known as "national emission standards for hazardous air pollutants" (NESHAP). 42 USC §7412.

© The Regents of the University of California

§11.214 f. Minimum Standards for State Permit Programs

The Clean Air Act Amendments of 1990 require the EPA to establish, for the first time, minimum standards for state permit programs. 42 USC §§7661-7661f. The amendments also establish a stratospheric ozone protection program (42 USC §§7671-7671q) and a demonstration program for "clean fuel vehicles" that is consistent with the California Air Resources Board (ARB) program to encourage the production and sale of clean fuel vehicles and "low-emitting vehicles" (42 USC §§7581-7590).

© The Regents of the University of California

B. Enforcement

1. State Enforcement

§11.215 a. Civil Penalties

Rules and regulations adopted by air pollution control districts (APCDs) and air quality management districts (AQMDs) have the force and effect of law and may be enforced against "persons" through the imposition of criminal or civil penalties, injunctive relief, or administrative abatement orders. Health & S C §§41513, 42400-42410, 42450-42454. Civil penalties can be as high as $75,000 per day for each day a violation occurs or continues. Health & S C §42402.3(a). The provisions of Health & S C §39047 define the term "person" to include state and local government entities and their officers and employees, except for the imposition of criminal sanctions.

© The Regents of the University of California

b. Variances

§11.216 (1) Hearing Boards

Within each air pollution control district (APCD) and air quality management district (AQMD) is constituted a hearing board. Health & S C §40800. Any person who is or will be in violation of Health & S C §41701 or any APCD or AQMD rule or regulation may apply to the hearing board for a variance. Health & S C §§42350, 42352. The granting of a variance will insulate the person from enforcement action for violations of the rule(s) from which the variance is granted. Except in the case of an emergency, before granting a variance the hearing board must hold a public hearing. Health & S C §42359. The type of notice required varies depending on the type of proceeding and length of variance sought. See Health & S C §§40823-40826.

© The Regents of the University of California

§11.217 (2) Hearing Procedures

Variance hearings are quasi-judicial and evidence is taken under oath. Health & S C §§40807, 40828-40829. Members of the public must be given an opportunity to testify. Health & S C §40828(a). To grant a variance, a majority of the hearing board must make the findings required by Health & S C §42352:

(1) Petitioner is or will be in violation of Health & S C §41701 or of any rule, regulation, or order of the district;

(2) Due to conditions beyond the reasonable control of petitioner, requiring compliance would result in either an arbitrary or unreasonable taking of property, or the practical closing and elimination of a lawful business;

(3) The closing or taking would be without a corresponding benefit in reducing air contaminants;

(4) Petitioner has given consideration to curtailing operations of the pollution source in lieu of obtaining a variance;

(5) During the period the variance is in effect, petitioner will reduce excess emissions to the maximum extent feasible;

(6) During the period the variance is in effect, petitioner will monitor or otherwise quantify emission levels from the source, if requested to do so by the district and report those emission levels to the district pursuant to a schedule established by the district.

© The Regents of the University of California

§11.218 (3) Hearing Board Decisions

A hearing board may impose conditions on the granting of a variance and is authorized to exercise wide discretion in weighing the equities involved and the advantages to the petitioner and the affected public that might accrue from a grant or denial of a variance. Health & S C §§42353-42354.

© The Regents of the University of California

§11.219 (4) Judicial Review

Judicial review of hearing board decisions, including decisions on variance petitions, may be had by writ of administrative mandate as governed by CCP §1094.5. Health & S C §40864(a). An administrative mandate action must be filed within 30 days after the date the hearing board decision was mailed. Health & S C §40864.

© The Regents of the University of California

c. Orders for Abatement

§11.220 (1) Issuance

The governing board of an air pollution control district (APCD) or air quality management district (AQMD), or a hearing board, may, after notice and a hearing, issue an order for abatement whenever it finds that any person is constructing or operating any equipment that may cause the issuance of air contaminants without a required permit or in violation of Health & S C §41700-41701 or any order, rule, or regulation prohibiting or limiting the discharge of air contaminants into the air. Health & S C §42450.

© The Regents of the University of California

§11.221 (2) Effect

An order for abatement is an administrative order in the nature of an injunction requiring the respondent to refrain from a particular act. It may be conditional. An order for abatement does not have the effect of a variance, however, unless all of the conditions for a variance have been met. Health & S C §42452.

© The Regents of the University of California

§11.222 (3) Violations

Violation of an order for abatement may be punished by the imposition of civil penalties of up to $25,000 per day for each day of violation. Health & S C §42401. Once an order for abatement has been obtained, injunctive relief to prevent continued violation of the order for abatement may be obtained without the need to show lack of an adequate remedy at law or irreparable damage or loss. Health & S C §42454.

© The Regents of the University of California

§11.223 2. Federal Enforcement

The EPA is authorized to bring enforcement action against persons who violate any provision of a state implementation plan. Enforcement may be sought by way of civil or criminal penalties and/or injunctive relief. See 42 USC §7413. Civil penalties may be assessed by the EPA Administrator in amounts up to $25,000 per day of violation. 42 USC §7413. Cities and counties have no immunity from federal enforcement actions. See 42 USC §7413(c)(6) (referring to 42 USC §7602(a), defining "person" to include municipalities). The Eleventh Circuit has held that the administrative compliance provisions of the federal Clean Air Act (42 USC §7413) are unconstitutional to the extent that they allow the EPA to impose civil and criminal penalties for noncompliance with an order without an opportunity for meaningful adjudication or judicial review. *Tennessee Valley Auth. v Whitman* (11th Cir 2003) 336 F3d 1236, cert denied sub nom *Leavitt v Tennessee Valley Auth.* (2004) 541 US 1030. The Ninth Circuit has yet to decide this issue.

© The Regents of the University of California

§11.224 3. Citizen Enforcement

Private parties may judicially enforce specific provisions set forth in a state implementation plan (SIP) if the EPA fails to do so. 42 USC §7604; *Bayview Hunters Point Community Advocates v Metropolitan Transp. Comm'n* (9th Cir 2004) 366 F3d 692, 695.

© The Regents of the University of California

C. Permits

1. District Action on Emissions Permits

a. Non-Vehicular Sources

§11.225 (1) Permit Requirement

Air pollution control districts (APCDs) and air quality management districts (AQMDs) have implemented permit programs to regulate the quantity and type of emissions from non-vehicular sources, as permitted by Health & S C §§42300-42316. Any person seeking to construct or operate equipment that may cause the issuance of air contaminants must obtain a permit. See Health & S C §42301.

© The Regents of the University of California

§11.226 (2) "Air Contaminants"

The term "air contaminants" is broadly defined to include virtually any material, chemical, gas, particle, or odorous material emitted into the atmosphere. It is not limited to those materials for which ambient air quality standards have been established. Health & S C §39013. Air pollution control districts (APCDs) and air quality management districts (AQMDs) must adopt regulations establishing standards for permits (see §11.225). Health & S C §42301. Typical equipment for which a permit is required includes electrical generators, paint spray booths, asphalt batch plants, gasoline storage and dispensing equipment, boilers, and stationary internal combustion engines.

© The Regents of the University of California

§11.227 b. NSR Programs; Offsets

Under the federal Clean Air Act, each SIP prepared for a nonattainment area must contain a permitting program governing the construction and operation of "new and modified major stationary sources." 42 USC §7502(c)(5). Such permitting programs are often referred to as "new source review" (NSR) programs. Each new source review program must set forth "preconstruction review" requirements that applicants must meet before the permitting agencies may issue permits to construct or operate any equipment that will increase nonattainment emissions. 40 CFR §51.165(a)(2).

Air pollution control districts (APCDs) and air quality management districts (AQMDs) have complied with the Clean Air Act's requirements by adopting regulations establishing NSR programs. NSR programs generally require new or modified non-vehicular sources of air pollution to use "best available control technology" (BACT) and to reduce air pollution from other sources within the area where the new source will be located to "offset" the emission increases from the new or modified source. Health & S C §40709.6. An "offset" is a reduction of nonattainment pollutant emissions in an amount somewhat greater than the emissions increase of the same pollutant from the proposed new or modified equipment. 42 USC §7503(c). A company might be allowed to create offsets, for example, by permanently shutting down a permitted piece of equipment, or curtailing production or operating hours. 40 CFR §51.165. Once created, companies may also be able to "bank" offsets, use them at a later time, or sell them to other companies. To obtain a permit to construct, the "offset" ratio must be greater than 1 to 1, with a ratio of 1.2:1 being common. The amount of the offset required depends on the location of the offsetting source. Typically, as the distance from the offsetting source to the new proposed source increases, so does the quantity of offset required. Most APCD and AQMD NSR regulations contain exemptions from offset requirements for "essential public services," but the types of projects that qualify as essential public services may differ among APCDs and AQMDs.

© The Regents of the University of California

§11.228 c. Duration of Permits

Permits may be made valid only for a specified period, subject to being automatically renewed on payment of a "renewal" fee. Health & S C §42300(b). On renewal, permit conditions must be reviewed to ensure they are adequate to ensure compliance with all rules applicable to the permitted equipment. Health & S C §42301(e).

© The Regents of the University of California

§11.229 d. Market-Based Incentives

In addition to traditional "command and control" regulations, the California Air Resources Board (ARB) and EPA both encourage air pollution control districts (APCDs) and air quality management districts (AQMDs) to utilize market-based incentives in their permit programs. These allow the sale, purchase, trade, or substitution of emission reduction credits among various sources of air pollution emissions. Health & S C §§39053.6, 39616, 40500.5, 40714.5.

© The Regents of the University of California

§11.230 e. Applicability of Other Laws

The California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177) and the Permit Streamlining Act (PSA) (Govt C §§65920-65964) can apply to air pollution control district (APCD) and air quality management district (AQMD) permitting activities (non-ministerial permits). See Govt C §65934. However, the inclusion of an air district's amended rule into a state implementation plan by the California Air Resources Board (ARB) is not a "project" subject to CEQA. *Sherwin-Williams Co. v South Coast Air Quality Mgmt. Dist.* (2001) 86 CA4th 1258, 104 CR2d 288.

© The Regents of the University of California

§11.231 f. Fees

Air pollution control districts (APCDs) and air quality management districts (AQMDs) are authorized to charge fees to applicants for and holders of permits. Health & S C §42311. Local, state, and federal government agencies must pay permit fees to the same extent as private entities. Those fees generally take the form of permit application fees, permit evaluation fees, permit renewal fees, and emissions fees (the specific terminology varies and some APCDs and AQMDs combine these fees or do not charge some fees). The fee rates are set by the APCD or AQMD governing board.

© The Regents of the University of California

2. Permit Appeals

§11.232 a. Permit Denials

In the event that an air pollution control districts (APCD) or air quality management district (AQMD) denies an application for a permit to construct or operate equipment for which a permit is required, the applicant may, within 30 days, request the hearing board to hold a hearing on whether the permit was properly denied. Health & S C §42302. After such a hearing, the hearing board may grant a permit that was denied. Health & S C §42309(a).

© The Regents of the University of California

§11.233 b. Permit Issuances

Many air pollution control districts (APCDs) and air quality management districts (AQMDs) also allow appeals from the granting of a permit if conditions in the permit are unacceptable to the applicant.

© The Regents of the University of California

§11.234 c. Exhaustion Requirement

Within 30 days of any decision or action pertaining to the issuance of a permit by an air pollution control district (APCD) or air quality management district (AQMD), any aggrieved person may appeal the issuance of a permit, provided that the aggrieved person "appeared, submitted written testimony, or otherwise participated in the [permitting] action" Health & S C §42302.1.

© The Regents of the University of California

§11.235 D. Global Warming

The California Global Warming Solutions Act of 2006 (commonly known as AB 32 (2006)) is the first statewide comprehensive program to reduce greenhouse gases (GHG). See Health & S C §§38500-38599. Under AB 32 (2006) the Air Resources Board (ARB) is responsible for monitoring and reducing GHG emissions, establishing a statewide GHG emissions cap, and undertaking a variety of other steps related to reducing global warming. See Practice Tip in §11.38.

In 2008, SB 375 was signed into law and is the first law in the nation to control GHG emissions by curbing urban sprawl. SB 375 requires the ARB to develop regional GHG emission reduction targets by September 30, 2010, to be achieved by the automobile and light truck sector by 2020 and 2035. The ARB also must work with California's 18 metropolitan planning organizations to prepare "sustainable communities strategies" to reduce the number of vehicle miles traveled in their respective regions and to demonstrate each region's ability to meet the GHG emission reduction targets. Govt C §65080.

© The Regents of the University of California

§11.236 E. References

On transportation planning, see §§10.251-10.253. For further discussion of air quality regulation, see Longtin, Longtin's California Land Use (2d ed 1987) (Local Government Publications, P.O. Box 2596, Walnut Creek, California 94595) and Manaster & Selmi, California Environmental Law and Land Use Practice, div V, chap 40. (Matthew Bender, rev ed 1997) (updated annually). For detailed discussion of SB 375 and climate change regulation in California, see Practice Under the California Environmental Quality Act, chap 20 (2d ed Cal CEB 2008).

© The Regents of the University of California

VI. HAZARDOUS WASTE

A. Basic Regulatory Scheme

§11.237 1. Federal Law

The two principal federal laws governing hazardous waste are the Resource Conservation and Recovery Act (RCRA) (42 USC §§6901-6992k) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund") (42 USC §§9601-9675).

© The Regents of the University of California

§11.238 a. RCRA

The Resource Conservation and Recovery Act (RCRA) regulates the generation, handling, and disposal of hazardous wastes and solid wastes. Hazardous waste is defined as including any waste on an EPA list and can include all solid waste if it contains elements or materials on the EPA list. 40 CFR §§261.1-261.2. Solid waste is defined as including any garbage, refuse, sludge, or any other waste material resulting from industrial, commercial, mining, or agricultural operations or from community activities, that is being discarded or accumulated, stored, or treated before being discarded. 40 CFR §261.2.

© The Regents of the University of California

§11.239 b. CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides the primary federal legal structure for the cleanup and remediation of contaminated sites. Under CERCLA, the EPA has the power to clean up hazardous substance releases, to recover the costs of such cleanup from the responsible parties, and to order abatement actions in the event of an imminent and substantial endangerment to the public health or welfare or the environment caused by the release of hazardous substances. 42 USC §§9604, 9606-9607.

© The Regents of the University of California

§11.240 2. State Law: Hazardous Waste Control Act

The principal California law governing hazardous wastes is the Hazardous Waste Control Act of 1973 (HWCA) (Health & S C §§25100-25257.1). The HWCA imposes requirements on the disposal, treatment, and storage of hazardous material.

The HWCA parallels the federal Resource Conservation and Recovery Act (RCRA) (42 USC §§6901-6992k). The Department of Toxic Substances Control, a division of the California Environmental Protection Agency, administers the HWCA. The division has adopted implementing regulations. See 22 Cal Code Regs §§66260.1-69214. The state's hazardous waste program was approved by the federal EPA. A number of solid wastes that are not considered hazardous by RCRA standards are classified hazardous under the more stringent California regulations. These are known as "non-RCRA" hazardous wastes.

© The Regents of the University of California

B. Household Hazardous Waste Planning Requirements

§11.241 1. City Household Hazardous Waste Plans

Each city must prepare and adopt a household hazardous waste element (HHWE). Once approved by the California Integrated Waste Management Board, the HHWE becomes an element of the county-wide waste management plan. Pub Res C §§41500, 41750.

Hazardous waste is defined as a waste that may cause or contribute to mortality or serious illness or pose a substantial hazard to human health, is a state-listed hazardous waste (see 22 Cal Code Regs §§66261.1-66261.126), or is a federally listed hazardous waste (40 CFR §§261.1-261.151). See Pub Res C §41500; Health & S C §§25117, 25141.

The HHWE must identify a program for the safe collection, recycling, treatment, and disposal of hazardous wastes that are generated by households in a city. Pub Res C §41500.

PRACTICE TIP 1: Permits are required to hold household hazardous waste events, have city-sponsored programs, or set up permanent drop-off sites. Cities should contact their local Certified Unified Program Agency (CUPA) for permits. Permits are issued through a "Permit By Rule" (PBR) process.

PRACTICE TIP 2: Although the state considers waste oil filters hazardous, the law exempts curbside collection programs from the hazardous waste control laws, CHP inspections, and manifest requirements. Non-discretionary oil grant funds (payout based on population) are available from the California Integrated Waste Management Board.

PRACTICE TIP 3: Variances are no longer needed for household hazardous waste programs.

PRACTICE TIP 4: Household hazardous waste programs can also accept waste from small businesses. Health & S C §25218.3 ("conditionally exempt small quantity generators").

© The Regents of the University of California

§11.242 2. Regional Hazardous Waste Plans

Each county must have a county hazardous waste management plan that identifies the hazardous waste stream generated in that county, the existing facilities to treat, recycle, and dispose of hazardous waste, the potential for recycling, management of small volumes generated by businesses and households, identification of new sites for hazardous waste facilities, and an implementation schedule for the plan. Health & S C §25135.1(d).

The county plan, after being reviewed by the state, must be approved by each city within the county and thereafter by the state. Health & S C §§25135.6-25135.7.

Regional associations of governments, such as the Association of Bay Area Governments or the Southern California Association of Governments, or specified regional joint power authorities, may at their discretion prepare regional hazardous waste management plans. Health & S C §25135.3.

© The Regents of the University of California

§11.243 C. Hazardous Waste Facilities Planning and Approval Requirements

The state has established the Unified Hazardous Waste and Hazardous Materials Management Regulatory Program (Health & S C §§25404-25404.9) to consolidate the administration of a variety of local requirements and ensure the coordination and consistency of any regulations adopted pursuant to those requirements. This is known as the "unified program." The programs covered by the unified program include those facilities covered by certain hazardous waste permit requirements, spill prevention, control and counter-measure plans for above ground tanks and underground storage tanks, hazardous materials release response plans, hazardous materials inventories, requirements related to acutely hazardous materials, and those requirements of the Uniform Fire Code concerning hazardous materials management plans. Counties were required to apply to become a certified unified program agency (CUPA) to implement the program and cities have the option of applying to be designated a CUPA or participating agency.

© The Regents of the University of California

§11.244 1. City Planning Requirement

State law does not preempt city authority to regulate hazardous waste disposal and treatment, as long as a city's regulation does not completely prohibit or unreasonably regulate hazardous waste facilities. Health & S C §25149. See *IT Corp. v Solano Bd. of Supervisors* (1991) 1 C4th 81, 2 CR2d 513; *Casmalia Resources, Ltd. v County of Santa Barbara* (1987) 195 CA3d 827, 833, 240 CR 903. Each city must implement the contents of the county hazardous waste management plan by adopting a city hazardous waste management plan that is consistent with the county plan, by incorporating the county plan into the city's general plan, or by enacting an ordinance that requires that all applicable zoning, subdivision, conditional use permit, and variance decisions must be consistent with the county plan's siting criteria. Health & S C §25135.7(c).

© The Regents of the University of California

2. Application to Build Hazardous Waste Facility

§11.245 a. Notice of Intent; City Advisory Committee

At least 90 days before an applicant for a hazardous waste facility may submit an application for city land use approval, it must file a notice of intent to make an application with the Office of Planning and Research and with local agencies. Health & S C §25199.7. The city must then appoint a seven-member local assessment committee comprised of three community representatives, two representatives of environmental interest groups, and two representatives of affected business and industry. Health & S C §25199.7(d). This committee advises the city council. Health & S C §25199.7(d).

© The Regents of the University of California

§11.246 b. Time Limits for Processing Applications

On receipt of an application for the siting of a hazardous waste facility project, a city must first issue a written determination within 60 days of the application being complete, stating whether the proposed facility is consistent with the city's general plan and zoning ordinance and the county's hazardous waste management plan. Health & S C §25199.5. The city has 1 year to approve or disapprove a hazardous waste disposal facility and 180 days to approve or disapprove other types of hazardous waste facilities. Health & S C §25199.6.

© The Regents of the University of California

§11.247 c. Appeals

Decisions to disapprove may be appealed to the governor, who must convene a seven member state appeal board. Health & S C §25199.10. The appeal board may reverse the city's disapproval if the appeal board makes certain statutory findings. See Health & S C §25199.11.

© The Regents of the University of California

D. Relationship to Water and Air Quality Issues

§11.248 1. Compliance With Water Quality Requirements

The state may issue a permit for a hazardous waste facility only if the project is consistent with all applicable regulations of the State Water Resources Control Board, all applicable plans adopted under Wat C §§13170 and 13240-13247, and all applicable state policies for water quality control adopted under Wat C §§13140-13147. See Health & S C §25204.5.

© The Regents of the University of California

§11.249 2. Compliance With Air Quality Requirements

Each hazardous waste facility must prepare a plan to monitor air emissions from the facility and implement a corrective action plan if the ambient air emissions pose a threat to the public health. Health & S C §25155.10. See also 42 USC §6924(n) (requirement to get air quality permit before construction).

© The Regents of the University of California

E. Obligations of Property Owners

§11.250 1. CERCLA Liability

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund") (42 USC §§9601-9675), the EPA may order the present property owner to clean up the property or the EPA may undertake the cleanup using Superfund monies with recoupment of expenses coming through cost recovery actions brought against responsible parties. 42 USC §9607(a)(4)(A). See *Carson Harbor Village, Ltd. v Unocal Corp.* (9th Cir 2001) 270 F3d 863 (migration of contamination does not constitute "disposal" for purpose of liability).

Property owners may also bring actions for contribution to recover a portion of their cleanup expenses against other responsible parties. 42 USC §9613(f). In some cases innocent landowners who did not cause or contribute to the contamination may alternatively seek to recover all of their "response costs" from the responsible parties through a direct action under 42 USC §9607(a) for joint and several liability. 42 USC §9607(a)(4)(B). Responsible parties include present property owners and operators of the facility, owners and operators of the facility at the time of disposal of hazardous wastes, persons (including cities) who arranged for the disposal or treatment of hazardous wastes or municipal solid waste, and certain hazardous waste transporters. 42 USC §9607(a).

© The Regents of the University of California

§11.251 2. RCRA Liability

Under the Resource Conservation and Recovery Act (RCRA) (42 USC §§6901-6992k), the EPA is authorized to bring suit against any person, including any past or present generator, transporter, or owner or operator of a treatment, storage, or disposal facility, who has contributed or is contributing to such handling, storage, treatment, transportation, or disposal, to restrain that activity, or to order that person to take any other action as may be necessary, or both. Although the EPA concerns itself primarily with the operator, a disposal facility owner may be fined for regulatory non-compliance. 42 USC §§6903, 6973. Private citizens may bring suit for similar violations. 42 USC §6972.

© The Regents of the University of California

§11.252 3. Notice to Buyers

Under state law, any owner of nonresidential real property who knows, or has reasonable cause to believe, that any release of hazardous substance has come to be located on or beneath that real property must, before the sale, lease, or rental of the real property by that owner, give written notice of that condition to the buyer, lessee, or renter of the real property. Health & S C §25359.7. Failure to provide notice can subject the owner to actual damages, other remedies provided at law, and civil penalties not to exceed $5,000 for each violation. Health & S C §25359.7.

© The Regents of the University of California

§11.253 4. Developer Obligations

Every applicant for a development project must, before the lead agency accepts the application as complete, determine whether the project site or any alternatives is on a list of hazardous waste sites. Govt C §65962.5. The applicant must submit a signed statement that the applicant has consulted the lists sent to the city by the Department of Toxic Substances Control and indicating whether or not the project site is on the list. Govt C §65962.5(f).

© The Regents of the University of California

§11.254 F. Brownfields Cleanup

The Polanco Redevelopment Act (Health & S C §§33459-33459.8) and the California Land Environmental Restoration and Reuse Act (Health & S C §§25401-25402.3 and 57008-57010) give redevelopment agencies, cities, and counties the authority to either order or directly undertake the cleanup of abandoned and underutilized parcels of contaminated property (commonly known as "brownfields"). These Acts also provide immunity from liability for redevelopment agencies, cities, counties, and subsequent property purchasers, for sites cleaned up under a cleanup plan approved by the State Department of Toxic Substances Control (DTSC) or a Regional Water Quality Control Board.

© The Regents of the University of California

§11.255 G. References

For discussion of franchises, refuse collection, and recycling, see §§6.92-6.105. On municipal services and utilities, see chap 6. On land use, see chap 10. For further discussion of hazardous waste, see Longtin, Longtin's California Land Use (2d ed 1987), and Manaster and Selmi, California Environmental Law and Land Use Practice chap 20 (Matthew Bender, rev ed 1997) (updated annually).

© The Regents of the University of California

VII. ENDANGERED SPECIES

A. Overview of Endangered Species Protection

§11.256 1. Importance

The federal Endangered Species Act (ESA) (16 USC §§1531-1544) and its California counterpart, the California Endangered Species Act (CESA) (Fish & G C §§2050-2115.5), have emerged as statutes of significant importance for city attorneys, city planners, private developers, and opponents of public and private development projects. This has not always been the case. In the 1970s, for example, the ESA was of interest primarily to wildlife biologists, federal regulators, alligator shoe manufacturers, and the Tennessee Valley Authority, which was forced to halt ongoing construction of the $150 million Tellico Dam project because of the presence of an endangered fish, the snail darter. Later conflicts between development interests and the California gnatcatcher (southern California), the tiger salamander and red-legged frog (central and northern California), and the northern spotted owl (Pacific northwest) substantially increased the level of private and public interest awareness on the west coast of the importance of concepts such as habitat protection and biodiversity. Conflicts have arisen between water for endangered fish and water for struggling farmers. Throughout California, endangered species issues are often the most challenging and contentious aspects of land development and resource use projects.

© The Regents of the University of California

§11.257 2. Scope of Discussion

The Endangered Species Act (ESA) (16 USC §§1531-1544) provides the legal means for the conservation and protection of threatened or endangered species of fish, wildlife, and plants. The California Endangered Species Act (CESA) (Fish & G C §§2050-2115.5) is generally similar to the ESA, but with some important differences. This chapter discusses the major features of the ESA and how their application by public agencies and private litigants can delay or halt public and private development projects. The chapter also outlines the CESA and compares it to the ESA.

© The Regents of the University of California

B. Federal Endangered Species Act of 1973

§11.258 1. Purpose of ESA

The purpose of the Endangered Species Act (ESA) (16 USC §§1531-1544) is "to provide for conservation, protection and propagation of endangered species … by Federal action and by encouraging the establishment of State endangered species conservation programs." S Rep No. 307, 93rd Cong, 1st Sess (1973) 1, reprinted in 1973 US Code Cong & Ad News 2989. The United States Supreme Court has stated that the ESA represents "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v Hill* (1978) 437 US 153, 180, 57 L Ed 2d 117, 98 S Ct 2279 (completion of multimillion-dollar dam enjoined to protect snail darter).

© The Regents of the University of California

§11.259 2. Implementation

For most plant and wildlife species, the Endangered Species Act (ESA) (16 USC §§1531-1544) is implemented by the Secretary of the Interior, acting through the United States Fish and Wildlife Service (FWS). For marine species, including anadromous fish, the ESA is implemented by the Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS).

© The Regents of the University of California

3. Species Protected Under ESA

§11.260 a. Threatened and Endangered Species

An "endangered species" is any species "in danger of extinction throughout all or a significant portion of its range," while a "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 USC §1532(6), (20). Species that are "listed" as threatened or endangered under the Endangered Species Act (ESA) (16 USC §§1531-1544) are protected by law. See 16 USC §§1533, 1538. For example, the "take" of listed species is prohibited unless specifically authorized by a permit. See, e.g., 16 USC §1538(a)(1).

The Secretary of the Interior (and in some cases the Secretary of Commerce) maintains lists of "threatened" and "endangered" species. 16 USC §1533. The Secretary lists species through traditional notice and comment rulemaking, by publishing a proposed rule in the Federal Register, providing an opportunity to comment, and having the Secretary issue a final rule. The list of threatened and endangered species of wildlife is found in 50 CFR §17.12. Threatened and endangered plants are listed at 50 CFR §17.12.

The California list of endangered, rare, or threatened plants can be found in 14 Cal Code Regs §670.2. The California list of endangered or threatened animals is found in 14 Cal Code Regs §670.5.

© The Regents of the University of California

§11.261 b. Candidate Species

"Candidate species" are those that are apparently suitable for listing but have not been formally proposed. 50 CFR §424.02(b). See *City of Las Vegas v Lujan* (DC Cir 1989) 891 F2d 927 (construction in southern Nevada and emergency listing of desert tortoise). The Secretary of the Interior maintains an official list of "candidate" species, and must make prompt use of the authority under the Endangered Species Act (ESA) §4(b)(7) (16 USC §1533(b)(7)) to prevent significant risk to the well-being of "candidate species." See ESA §4(b)(3)(C)(iii) (16 USC §1533(b)(3)(C)(iii). Candidate species do not receive any legal protection unless and until they are subsequently listed as either threatened or endangered.

© The Regents of the University of California

§11.262 c. Modifications to Lists

Any interested person may petition to add or remove any species. Persons requesting review must provide substantial evidence that the review is justified. Endangered Species Act (ESA) §4(b)(3) (16 USC §1533(b)(3)). The U. S. Fish and Wildlife Service (FWS) must make a determination whether species warrant listing or not within 12 months of receiving the petition. ESA §4(b)(3)(B) (16 USC §1533(b)(3)(B)). See *Biodiversity Legal Found. v Badgley* (9th Cir 2002) 309 F3d 1166, 1171.

© The Regents of the University of California

§11.263 d. Critical Habitat

In addition to protecting listed species directly, the Endangered Species Act (ESA) protects the "critical habitat" of these species from destruction or adverse modification, once that habitat is formally designated. 16 USC §1536(a)(2). A specie's critical habitat may include the geographical area occupied by the species at the time it is listed, as well as areas outside this range that are "essential for the conservation of the species." 16 USC §1532(5)(A). Designations of critical habitat, like species listing decisions, are accomplished through notice and comment rulemaking.

© The Regents of the University of California

4. Take Prohibition Under ESA

§11.264 a. Prohibition Against "Takings"

Section 9 of the Endangered Species Act (ESA) (16 USC §§1531-1544) prohibits the "taking" of any threatened or endangered species of fish or wildlife. ESA §9(a)(1)(B)-(C) (16 USC §1538(a)(1)(B)-(C)); 16 USC §1533(d); *Palila v Hawaii Dep't of Land & Natural Resources* (D Ha 1979) 471 F Supp 985, aff'd (9th Cir 1981) 639 F2d 495. A "take" is defined broadly to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA §3(19) (16 USC §1532(19)).

NOTE: Listed plants do not benefit from this same protection. For example, it is legal to destroy listed plant species on private property. See 16 USC §§1533(d), 1538(a)(2).

© The Regents of the University of California

§11.265 b. "Harm"

With respect to land use decisions, the most pertinent aspect of the "take" definition is the inclusion of the term "harm." "Harm" is defined by regulation as an act that actually kills or injures wildlife. It may include significant habitat modification or degradation when it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. 50 CFR §17.3.

In several cases, federal courts have deferred to the regulatory definition and ruled that certain types of habitat modification constitute a "take." See *National Wildlife Fed. v Burlington N. R.R., Inc.* (9th Cir 1994) 23 F3d 1508; *Sierra Club v Yeutter* (5th Cir 1991) 926 F2d 429; *Palila v Hawaii Dep't of Land & Natural Resources* (9th Cir 1988) 852 F2d 1106; *Palila v Hawaii Dep't of Land & Natural Resources* (9th Cir 1981) 639 F2d 495. The United States Supreme Court has interpreted this regulation as prohibiting habitat modification that will actually kill or injure a particular member of an endangered species when such harm is proximate and foreseeable. *Babbitt v Sweet Home Chapter* (1995) 515 US 687, 132 L Ed 2d 597, 115 S Ct 2407.

© The Regents of the University of California

§11.266 c. Examples of Projects Affected

Examples of development projects affected by the Endangered Species Act (ESA) (16 USC §§1531-1544) include the following:

- *Sierra Club v Marsh* (9th Cir 1987) 816 F2d 1376 (440-room hotel and convention center, high-rise residential buildings on San Diego Bay; highway and flood control project; California least tern and light-footed clapper rail);
- *Friends of Endangered Species, Inc. v Jantzen* (9th Cir 1985) 760 F2d 976 (development of 2235 residential units on San Bruno Mountain; Mission Blue Butterfly); and
- *Maine Audubon Soc'y v Purslow* (D Me 1987) 672 F Supp 528 (17-lot residential subdivision; bald eagle).

© The Regents of the University of California

5. Consultation for Federal and "Federal-Nexus" Projects

§11.267 a. Requirement

All federal agencies must ensure that the actions they fund, authorize (such as through the issuance of a permit), or carry out are not likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of designated critical habitat. Endangered Species Act (ESA) §7(a)(2) (16 USC §1536(a)(2). To implement and comply with this obligation, federal agencies are required to consult with the United States Fish and Wildlife Service (FWS) or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) when their actions may affect listed species or designated critical habitat. Endangered Species Act (ESA) §7(c)(1) (16 USC §1536(c)(1)); 50 CFR §402.01(b) (delegating authority to administer the ESA to FWS or NMFS); *Turtle Island Restoration Network v National Marine Fisheries Serv.* (9th Cir 2003) 340 F3d 969 (NMFS fishing permits to longline fishing vessels were "agency action" that trigger ESA §7 consultation). Private projects that require a federal permit or approval (such as a Clean Water Act wetland fill permit issued by the Army Corps of Engineers) trigger the ESA §7 consultation requirement when the project may affect listed species or designated critical habitat.

© The Regents of the University of California

§11.268 b. Biological Assessment and Incidental Take Authorization

The consulting federal "action agency" must prepare a "biological assessment" analyzing the effects of its proposed action on the listed species or designated critical habitat. Endangered Species Act (ESA) §7(c)(1) (16 USC §1536(c)(1)). If the assessment concludes that a listed species or its critical habitat is likely to be affected, the agency must formally "consult" with the United States Fish and Wildlife Service (FWS). ESA §7(a)(2) (16 USC §1536(a)(2)); 50 CFR §§402.13-402.14. Formal consultation ordinarily results in the issuance of a "biological opinion" by the FWS or the National Marine Fisheries Service (NMFS) that determines whether or not the proposed action will jeopardize the continued existence of the species. See ESA §7(b) (16 USC §1536(b)); *Thomas v Peterson* (9th Cir 1985) 753 F2d 754, 763 (proposed timber road in a "recovery corridor;" Rocky Mountain Gray Wolf).

The FWS is required by its own regulations to conclude formal consultation within 90 days, and to produce a biological opinion within an additional 45 days. 16 USC §1536(a)(2); 50 CFR §402.14(e). Most consultations result in a so-called "no jeopardy" opinion, in which case the proposed action may be completed subject to the terms and conditions of the opinion. If the action will result in take of listed species incidental to otherwise lawful activity, the FWS must include an "incidental take statement" in the biological opinion document, which authorizes the described incidental take. 16 USC §1536(b)(3)(A); 50 CFR §402.14(i)(1). In contrast, if the biological opinion indicates that the proposed action is likely to jeopardize the continued existence of a listed species, then the biological opinion must suggest reasonable and prudent alternatives to the proposed action that would avoid such jeopardy. 16 USC §1536(b)(4); 50 CFR §402.14(g)(5). See also U.S. Fish & Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook at 4-43 (1998) (http://www.fws.gov/endangered/esa-library/#consultations); *Center for Biological Diversity v U.S. Fish & Wildlife Serv.* (ND Cal 2009) 623 F Supp 2d 1044, 1048. As long as reasonable and prudent alternatives exist, taking of listed species in accordance with the incidental take statement is not a prohibited taking, as long as the project complies with such alternatives. 16 USC §1536(o).

© The Regents of the University of California

§11.269 c. Examples of ESA §7 Consultations

The United States Fish and Wildlife Service and the National Marine Fisheries Service engage in thousands of federal Endangered Species Act (ESA) §7 consultations each year. Examples of ESA §7 consultations on notable federal projects include the following: *Tennessee Valley Auth. v Hill* (1978) 437 US 153, 57 L Ed 2d 117, 98 S Ct 2279 (dam completion enjoined; snail darter); *Conner v Burford* (9th Cir 1988) 848 F2d 1441, cert denied sub nom *Sun Exploration & Prod. Co. v Lujan* (1989) 489 US 1012 (oil and gas leases; bald eagle, peregrine falcon, gray wolf, and grizzly bear); and *Roosevelt Campobello Int'l Park Comm'n v EPA* (1st Cir 1982) 684 F2d 1041 (National Pollutant Discharge Elimination System (NPDES) permit for private sector refinery development; bald eagles and the right and humpback whales).

© The Regents of the University of California

6. Habitat Conservation Plans and §10(a) "Incidental Take" Permits

§11.270 a. ESA §10(a)

As noted in §§11.267-11.268, federal projects, and non-federal projects that involve federal funding or approval (a so-called "federal nexus"), can obtain authorization to take listed wildlife species incidental to otherwise lawful activities through the Endangered Species Act (ESA) §7 consultation process. Under federal ESA §10(a) (16 USC §1539(a)), non-federal projects that lack a federal nexus can obtain incidental take authorization by submitting a Habitat Conservation Plan (HCP) and obtaining an Incidental Take Permit from the Fish and Wildlife Service or the National Marine Fisheries Service. Such HCPs and permits are often valid for long periods of time, such as 30 to 50 years, or even more. The ESA §10 implementing regulations are codified at 50 CFR §17.22.

© The Regents of the University of California

§11.271 b. Habitat Conservation Plan

A habitat conservation plan (HCP) must specify, among other things, the steps the applicant will take to minimize and mitigate the impacts of the proposed take to the maximum extent practicable. 16 USC §1539(a)(2)(B)(ii). The HCP must also assure that the applicant will have funding available to implement the promised mitigation and monitoring obligations. 16 USC §1539(a)(2)(B)(iii). See *Friends of Endangered Species, Inc. v Jantzen* (9th Cir 1985) 760 F2d 976 (proposed development of 2235 residential units; Mission Blue Butterfly). See also Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SWLJ 1393 (1991); Hoffman, *The Federal Endangered Species Act as a Restraint on Private Land Development*, 6 Cal Real Prop J 43 (Fall 1988); Comment, *Habitat Conservation Plans Under the Endangered Species Act*, 24 San Diego L Rev 243 (1987).

© The Regents of the University of California

§11.272 (1) Project-Specific vs. Regional HCPs

The Endangered Species Act (ESA) §10(a) habitat conservation plan (HCP) process has proven to be extremely flexible. At one end of the spectrum, it can accommodate very small, individual projects; at the other end, "regional" HCPs, which are usually developed by one or more cities or counties, can cover extremely large geographic areas.

© The Regents of the University of California

§11.273 (2) Multi-Species §10(a) Permits

It is possible to obtain Endangered Species Act (ESA) §10(a) permits covering the "taking" of more than one species, including species that are not yet listed. For species that are not yet listed as threatened or endangered, if they are treated in the habitat conservation plan (HCP) as if they were so listed (which means that impacts to such species must be minimized and mitigated to the maximum extent practicable), then if they become listed during the life of the HCP and associated Incidental Take Permit, incidental take of such species is automatically authorized. Handbook for Habitat Conservation Planning and Incidental Take Permitting Process (U.S. Fish and Wildlife Service and National Marine Fisheries Service, Nov. 1996) at 4-3. See 61 Fed Reg 63854 (December 2, 1996).

© The Regents of the University of California

§11.274 (3) "No Surprises" and the Permit Revocation Rule

One significant benefit of the Endangered Species Act (ESA) §10(a) habitat conservation plan (HCP) process is that the ESA §10 regulations contain so-called "no surprises" assurances, meaning that as long as the applicant properly implements an approved HCP, then during the term of the HCP the Fish and Wildlife Service (FWS) cannot require further mitigation for species impacts even if the overall condition of the species declines. The only exception to this is the permit revocation rule, under which HCP permits may be revoked as a last resort in the narrow and unlikely situation in which an unforeseen circumstance results in likely jeopardy to a species covered by the permit and the FWS has not been successful in remedying the situation through other means. 50 CFR §§17.22(b)(8), 17.32 (b)(8); 65 Fed Reg 6918. But see *Environmental Protection Info. Ctr. v California Dep't of Forestry & Fire Protection* (2008) 44 C4th 459, 506, 80 CR3d 28 (California ESA does not authorize broad "no surprises" assurances).

© The Regents of the University of California

§11.275 (4) Transferability of Permits

Generally, an incidental take permit is not transferable or assignable; only the person named in the permit and those persons under the permittee's "direct control" may engage in the activities covered by the permit. The idea of "direct control" has been expanded to local government entities thereby extending their own take authority to certain persons. See 50 CFR §13.25(d)-(e). Thus, multiple species permits have been approved that allow cities to issue Endangered Species Act (ESA) and California Endangered Species Act (CESA) "take" authority to developers. See, *e.g.,* Western Riverside County Multiple Species Habit Conservation Plan (MSHCP), discussed at www.rcip.org/conservation.htm.

PRACTICE TIP: In the 1990s, the United States Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) published the Habitat Conservation Planning Handbook (http://www.fws.gov/endangered/esa-library/index.html#hcp), which provides extensive information about the habitat conservation plan (HCP) process. In 2000, the agencies published an addendum to the Handbook (http://www.fws.gov/endangered/esa-library/index.html#hcp), which addresses the following five policies (65 Fed Reg 35242 (2000)): (1) biological goals and objectives; (2) adaptive management; (3) monitoring; (4) permit duration; and (5) public participation. The purpose of the addendum is "to provide clarifying guidance" to incidental take permit applicants, and to "promote efficiency and nationwide consistency" among the services within the habitat conservation plan (HCP) program.

© The Regents of the University of California

7. Enforcement

§11.276 a. Federal Enforcement

Violations of the Endangered Species Act (ESA) are subject to enforcement by the federal government through administrative, civil, and criminal enforcement actions. ESA §11 (16 USC §1540). Like many federal environmental statutes, the ESA also contains a citizen suit provision, which authorizes any person or organization to sue any entity that is violating the ESA. 16 USC §1540(g). Recent cases suggest a trend toward ESA challenges based on procedural grounds. In *National Ass'n of Home Builders v Norton* (9th Cir 2003) 340 F3d 835, a cursory Fish and Wildlife Service (FWS) 12-month determination on how it would proceed with a critical habitat determination satisfied the ESA; however, the court ordered the FWS to declare a date when it would begin the revision and to provide an estimate of how long it would take. In *Biodiversity Legal Found. v Badgley* (9th Cir 2002) 309 F3d 1166, the court upheld an environmental and citizen group challenge that FWS had exceeded the statutory requirement to determine whether listing a species was warranted within 12 months of the petition.

© The Regents of the University of California

§11.277 (1) Jurisdiction and Venue

United States district courts have jurisdiction over civil actions brought under the citizen suit provisions of the Endangered Species Act (ESA) without regard to diversity of citizenship; there is no jurisdictional amount required. Venue lies in the judicial district in which the ESA violation is alleged to have occurred. ESA §11(c), (g)(3)(A) (16 USC §1540(c), (g)(3)(A)); *Center for Biological Diversity v U.S. Bureau of Land Mgmt.* (ND Cal, April 14, 2009, No. 08-05646) 2009 US Dist. Lexis 34249.

© The Regents of the University of California

§11.278 (2) Limits on Federal Power

Limits on federal legislative power exist. In *Solid Waste Agency v United States Army Corps of Eng'rs* (2001) 531 US 159, 148 L Ed 2d 576, 121 S Ct 675, the Court held the Corps's "Migratory Bird Rule" impermissibly extended the scope of the Clean Water Act (33 USC §§1251-1387) term "navigable waters" to isolated waters. Even if the statutory language were not clear, the Corps's contrary construction would not be entitled to administrative deference under *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.* (1984) 467 US 837, 81 L Ed 2d 694, 104 S Ct 2778 because of the "serious constitutional problems" that such construction would raise. The Court determined that the Corps's assertion of jurisdiction could impinge on states' traditional power to regulate land and water use, and could not be justified under the Commerce Clause. See also *Rapanos v U.S.* (2006) 547 US 715, 165 L Ed 2d 159, 126 S Ct 2208 (plurality opinion rejecting Corps's expansive interpretation of Clean Water Act with respect to federal jurisdiction over wetlands).

Although related to the Clean Water Act, these rulings may affect other statutes, such as the Endangered Species Act (ESA) (16 USC §§1531-1544), which target species and geographical places rather than commercial activities. But see *Gibbs v Babbitt* (4th Cir 2000) 214 F3d 483 (finding that a regulation limiting the taking of red wolves on private property was valid under the Commerce Clause of the United States Constitution as involving regulable economic and commercial activity, as the taking implicates economic activities in the areas of tourism, scientific research, and possible future commercial trade in pelts).

© The Regents of the University of California

§11.279 (3) Standing

Standing under the Endangered Species Act (ESA) is afforded to "any person," subject to the US Const art III "cases and controversies" limitation on federal court jurisdiction. ESA §11(g)(1) (16 USC §1540(g)(1)); *Allied-Signal, Inc. v Lujan* (ND Cal 1990) 736 F Supp 1558 (hazardous waste cleanup, salt-marsh harvest mouse). ESA's citizen-suit provisions are liberally construed and expand the zone-of-interest test for standing in ESA cases. *Bennett v Spear* (1997) 520 US 154, 137 L Ed 2d 281, 117 S Ct 1154 (irrigation districts and ranchers whose economic interests were detrimentally affected had standing to file suit challenging issuance of a biological opinion as a de facto "critical habitat" determination issued in violation of ESA requirements that economic impacts be considered before such determination). In *Lujan v Defenders of Wildlife* (1992) 504 US 555, 119 L Ed 2d 351, 112 S Ct 2130, the United States Supreme Court held that plaintiffs had no standing to challenge a regulation promulgated under the ESA when the plaintiffs had failed to show they would be "directly affected" by the regulation or the alleged injury was redressable. An animal is not a "person" authorized to sue under the ESA. See *Cetacean Community v Bush* (9th Cir 2004) 386 F3d 1169 ("Animals are not authorized to sue in their own names to protect themselves").

Similarly, any person has standing to seek an injunction to compel the Secretary of the Interior to take action to prevent the taking of any resident endangered or threatened species. ESA §11(g)(1)(B) (16 USC §1540(g)(1)(B)). Any person may commence suit in a United States district court to enjoin any person, including any government agency, alleged to be in violation of the ESA. ESA §11(c), (g)(1)(A) (16 USC §1540(c), (g)(1)(A)). See *Bennett v Spear* (1997) 520 US 154, 137 L Ed 2d 281, 117 S Ct 1154. See also *Biodiversity Legal Found. v Badgley* (9th Cir 2002) 309 F3d 1166 (injunction required based on Congressional intent that continued existence of endangered species threatens incalculable harm regardless of the equities involved).

© The Regents of the University of California

(4) Burden of Proof

§11.280 (a) Review of Agency Actions

In *Thomas v Peterson* (9th Cir 1985) 753 F2d 754, the plaintiffs alleged that the United States Forest Service had failed to follow the three-step consultation procedure prescribed in the Endangered Species Act (ESA) §7 (16 USC §1536) for a gray wolf. The *Thomas* court stated that the plaintiff's burden in establishing a procedural violation in an ESA procedural case "is to show that the circumstances triggering the procedural requirement exist, and the required procedures have not been followed." 753 F2d at 765.

© The Regents of the University of California

§11.281 (b) Civil "Takings" Cases

In a civil action brought to establish a violation of the "taking" provision, the plaintiff must show that the "taking" has occurred. *Palila v Hawaii Dep't of Land & Natural Resources* (9th Cir 1981) 639 F2d 495, 497 (sheep destroying habitat). If a violation of Endangered Species Act (ESA) substantive provisions has occurred or will occur, the court must enforce the ESA. *Tennessee Valley Auth. v Hill* (1978) 437 US 153, 173, 57 L Ed 2d 117, 98 S Ct 2279 (dam; fish).

© The Regents of the University of California

§11.282 (c) Criminal Cases

In a criminal prosecution for illegal "taking," the government is not required to prove that the defendant had the specific intent to take an endangered species. *U.S. v McKittrick* (9th Cir 1998) 142 F3d 1170 (violations of Endangered Species Act (ESA) (16 USC §§1531-1544) are crimes of general intent). In a prosecution of a hunter for shooting a grizzly bear, the government's burden was to prove: (1) the defendant knowingly took the animal within the United States; (2) the animal was a grizzly bear; and (3) the defendant did not have permission to "take" the bear. The government was not required to prove that the defendant knew he was shooting a grizzly bear. *U.S. v St. Onge* (D. Mont. 1988) 676 F Supp 1044, 1045 (reserving ruling on government's motion in limine as to defendant's belief he was shooting an elk). See also *U.S. v Ivey* (5th Cir 1991) 949 F2d 759 (holding 16 USC §1538(c) does not require specific intent); *U.S. v Nguyen* (5th Cir 1990) 916 F2d 1016 (government was not required to prove that defendant knew loggerhead sea turtle was threatened species); *U.S. v Billie* (SD Fla 1987) 667 F Supp 1485, 1492-1493 (government need only establish that defendant acted with general intent to establish violation under 16 USC §1540(b)(1)).

© The Regents of the University of California

§11.283 (d) Injunctive Relief

Traditional preliminary injunction analysis does not apply to injunctions issued under the ESA. *National Wildlife Fed. v Burlington N. R.R., Inc.* (9th Cir 1994) 23 F3d 1508, 1510. "Congress has determined that under the ESA [Endangered Species Act (16 USC §§1531-1544)] the balance of hardships always tips sharply in favor of endangered or threatened species." *Marbled Murrelet v Babbitt* (9th Cir 1996) 83 F3d 1068, 1073. Thus, preliminary injunctive relief may properly be granted without weighing of the likely economic harm to the public, though physical impacts may still be considered. *National Wildlife Fed. v National Marine Fisheries Serv.* (9th Cir 2005) 422 F3d 782. But see *Winter v Natural Resources Defense Council, Inc.* (2008) ___ US ___, 172 L Ed 2d 249, 129 S Ct 365; *Earth Island Inst. v Carlton* (ED Cal, Aug. 20, 2009, No. 09-2020) 2009 US Dist Lexis 74066.

© The Regents of the University of California

§11.284 (5) Standard of Review of Agency Actions

In reviewing federal agency actions under the Endangered Species Act (ESA), the courts apply the "arbitrary or capricious" standard of the judicial review provisions of the federal Administrative Procedure Act. 5 USC §706(2)(A); *National Ass'n of Home Builders v Norton* (9th Cir 2003) 340 F3d 835 (pygmy-owls); *Tribal Village of Akutan v Hodel* (9th Cir 1988) 869 F2d 1185, cert denied (1989) 493 US 873 (oil lease sale; Pacific gray whale); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v Peterson* (DC Cir 1982) 685 F2d 678, 685-686 (mineral drilling).

© The Regents of the University of California

§11.285 (6) Notice Requirements

The Endangered Species Act's (ESA) broad citizen suit standing provision is narrowed by the requirement that 60 days' written notice be given to the Secretary of the Interior and any alleged violator before suit may be filed under certain provisions of the ESA. ESA §11(g)(2)(A)(i) (16 USC §1540(g)(2)(A)(i)). See also *Save the Yaak Comm. v Block* (9th Cir 1988) 840 F2d 714 (dismissing ESA portion of complaint to enjoin road construction and timber sales for failure to comply with 60-day notice); *Maine Audubon Soc'y v Purslow* (D Me 1987) 672 F Supp 528 (dismissing complaint for failure to comply with 60-day notice requirement); *Sierra Club v Block* (D DC 1985) 614 F Supp 488 (court had jurisdiction despite failure to provide 60-day notice when agency not prejudiced).

© The Regents of the University of California

§11.286 (7) Related Litigation

The planning, data-gathering, and data-analysis obligations imposed on federal agencies by the Endangered Species Act (ESA) §7 (16 USC §1536) in many respects parallel requirements imposed by the National Environmental Policy Act of 1969 (NEPA) (42 USC §§4321-4370h). For that reason, it has become routine to find ESA counts joined with counts alleging that a federal agency has failed to follow the environmental impact analysis obligations imposed by NEPA. See, *e.g., Region 8 Forest Serv. Timber Purchasers Council v Alcock* (ND Ga 1990) 736 F Supp 267, aff'd in part and vacated in part (11th Cir 1993) 993 F2d 800 (challenging forest service regulations under ESA, NEPA, and the National Forest Management Act (16 USC §§1600-1614)).

© The Regents of the University of California

§11.287 b. State Court Litigation

Under the Endangered Species Act (ESA) §6 (16 USC §1535), the Secretary of the Interior is authorized to enter into cooperative management agreements with states that have acceptable conservation programs. Such an agreement makes the state eligible for federal funding. It is not surprising to find that here, as with other programs in environmental law, the states' programs fit the federal template. As a consequence, there has been very little endangered species litigation in the state courts. Among the rare examples are *Department of Fish & Game v Anderson-Cottonwood Irrig. Dist.* (1992) 8 CA4th 1554, 11 CR2d 222 (state statute's "take" provision applies to lawful operation of pump diversion; Chinook salmon); *People v K. Sakai Co.* (1976) 56 CA3d 531, 128 CR 536 (state statute not preempted by ESA, argument that endangered species statutes constituted a "taking" rejected as without merit; seizure of whale meat from grocery), and *State v Billie,* 497 So 2d 889 (Fla Dist Ct App 1986) (ESA does not preempt right of states to enact consistent legislation concerning endangered species conservation; Florida panther). See also *Palladio, Inc. v Diamond* (SD NY 1970) 321 F Supp 630, aff'd per curiam (2d Cir 1971) 440 F2d 1319, cert denied (1971) 404 US 983 (predecessor statute; prohibition by state of sale of alligator shoes not preempted by federal law).

© The Regents of the University of California

C. California Endangered Species Act (CESA)

§11.288 1. Overview

The California Endangered Species Act (CESA) (Fish & G C §§2050-2115.5) generally parallels the main provisions of the federal ESA, but there has been much less judicial interpretation of the CESA. At present, there are only a few published decisions interpreting the CESA's provisions. See *Environmental Protection Info. Ctr. v California Dep't of Forestry & Fire Protection* (2008) 44 C4th 459, 80 CR3d 28; *Mountain Lion Found. v Fish & Game Comm'n* (1997) 16 C4th 105, 65 CR2d 580; *Center for Biological Diversity v Fish & Game Comm'n* (2008) 166 CA4th 597, 82 CR3d 855; *National Parks & Conserv. Ass'n v County of Riverside* (1999) 71 CA4th 1341, 84 CR2d 563; *San Bernardino Valley Audubon Soc'y v City of Moreno Valley* (1996) 44 CA4th 593, 51 CR2d 897; *Natural Resources Defense Council v Fish & Game Comm'n* (1994) 28 CA4th 1104, 33 CR2d 904; *Department of Fish & Game v Anderson-Cottonwood Irrig. Dist.* (1992) 8 CA4th 1554, 11 CR2d 222.

© The Regents of the University of California

2. Species Protected Under the CESA

§11.289 a. Threatened and Endangered Species

The definitions of threatened and endangered species under the California Endangered Species Act (CESA) (Fish & G C §§2050-2115.5) are generally similar to those under the federal Endangered Species Act (ESA) (16 USC §§1531-1544). CESA defines "endangered species" as a species that is "in serious danger of becoming extinct throughout all, or a significant portion, of its range." Fish & G C §2062. A species is considered "threatened" if it is not presently threatened with extinction, but is likely to become endangered in the foreseeable future in the absence of CESA's special protections. Fish & G C §2067. In addition, any animal determined by the Fish and Game Commission to be "rare" on or before January 1, 1985, is also a "threatened species" for CESA purposes. Fish & G C §2067. Further, unlike the ESA, CESA does not provide protection for insects.

© The Regents of the University of California

§11.290 b. Candidate Species

A species is a "candidate" for listing as threatened or endangered if the Fish and Game Commission (the entity that makes CESA listing determinations) issues a formal notice indicating that the Department of Fish and Game (DFG) is reviewing the species for possible listing, or for which the Commission has published a notice of proposed rulemaking to list the species. Fish & G C §2068. In contrast to the federal ESA, under CESA "candidate" species receive all of the same protections as do listed species. Fish & G C §2085.

© The Regents of the University of California

§11.291 c. Listing

The procedure for listing a species as threatened or endangered under the California Endangered Species Act (CESA) (Fish & G C §§2050-2115.5) generally parallels that under the Endangered Species Act (ESA) (16 USC §§1531-1544). Fish & G C §§2070-2079. Any person may petition the Commission to list a species as threatened or endangered. Fish & G C §2071. The Commission in turn refers the petition to the Department of Fish and Game (DFG), which conducts a 90-day review of the petition and other available information, and returns a recommendation to the Commission. Fish & G C §2073.5. Following a public hearing, the Commission determines whether the petitioned action "may be warranted." Fish & G C §2074.2. If so, the species is designated as a "candidate" species, and DFG then conducts an in-depth 12-month status review of the species, at which point DFG makes another recommendation to the Commission and the Commission in turn makes a final decision whether to list the species as threatened or endangered. Fish & G C §§2074.6, 2075.5.

Like the ESA, the CESA also provides for immediate, emergency listing of species if the Fish and Game Commission finds that "there is any emergency posing a significant threat to the continued existence of the species." Fish & G C §2076.5. Unlike the ESA, however, the CESA does not specify a time limit for an emergency listing.

© The Regents of the University of California

§11.292 (1) Listed Plants

The California list of endangered, rare, or threatened plants can be found at 14 Cal Code Regs §670.2; see also www.dfg.ca.gov/biogeodata/cnddb/pdfs/TEPlants.pdf (CDFG, July 2009).

© The Regents of the University of California

§11.293 (2) Listed Animals

The California list of endangered or threatened animals is at 14 Cal Code Regs §670.5; see also www.dfg.ca.gov/biogeodata/cnddb/pdfs/TEAnimals.pdf.

© The Regents of the University of California

d. "Take" Prohibition Under CESA

§11.294 (1) Definition of "Take"

The California Endangered Species Act (CESA) (Fish & G C §§2050-2115.5) "take" prohibition differs from the federal ESA take prohibition in several important respects. Unlike the federal ESA, under which listed plants receive little protection, the CESA take prohibition fully applies to CESA-listed plants. On the other hand, the definition of "take" under CESA is narrower than the definition of take under the ESA. Fish & G C §§2080-2085. CESA prohibits the take of all threatened, endangered, and candidate species unless authorized by the Department of Fish and Game (DFG) or by the statute itself. Fish & G C §2080. "Take" is defined as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture or kill." Fish & G C §86. No courts have interpreted the CESA's taking provisions to include harm to habitat, as federal courts have done under the ESA. See 78 Ops Cal Atty Gen 137 (1995) ("state law does not prohibit indirect harm to state-listed endangered or threatened species by way of habitat modification"); see also *Environmental Protection Info. Ctr. v California Dep't of Forestry & Fire Protection* (2008) 44 C4th 459, 507, 80 CR3d 28 (in context of incidental take permit under section 2081(b), "take" means to catch, capture or kill); *Environmental Council of Sacramento v City of Sacramento* (2006) 142 CA4th 1018, 1040, 48 CR3d 544 ("impacts of taking" does not mean taking of habitat alone). In contrast to the federal ESA, in which "harm" and "harassment" constitute a "take," CESA requires mortality for a "take." See §11.264 for federal ESA definition of "take."

© The Regents of the University of California

§11.295 (2) Incidental Take Permit

An "incidental take" permit may be issued by the California Department of Fish and Game (DFG) under Fish & G C §2081(b) if the impacts of the take are minimized and fully mitigated. In addition, individuals who have received an "incidental take" permit from the federal government do not need to obtain a separate CESA permit as long as DFG finds the federal approval to be consistent with CESA (a so-called "consistency determination"). Fish & G C §2080.1(c).

© The Regents of the University of California

§11.296 (3) Enforcement

A violation of the California Endangered Species Act (CESA) take prohibition is a criminal misdemeanor. Fish & G C §12000.

PRACTICE TIP 1: The Natural Community Conservation Planning Act (Fish & G C §§2800-2835) was enacted in 1991 and significantly amended in 2002. These provisions provide for voluntary cooperation among the Department of Fish and Game, landowners, and other interested parties to develop natural community conservation "plans" (NCCPs) that provide for early coordination of efforts to protect listed species or species that are not yet listed. These plans are intended to involve affected landowners early in the process, provide greater certainty to landowners and other parties about the limits that may be imposed on them, and provide a method for addressing the needs of many species at one time rather than one species at a time. Fish & G C §2801. Having a plan in place may also allow earlier "take" of the species than other provisions of the CESA. Fish & G C §2835. NCCPs may also be prepared in conjunction with habitat conservation plans (HCPs) under the federal Endangered Species Act (ESA) (16 USC §§1531-1544). See §§11.270-11.275. Cities and counties have also pushed forward with more joint, large scale NCCPs and multiple species habitat conservation plans (HCPs).

PRACTICE TIP 2: In 1993, the California legislature enacted the Habitat Maintenance Funding Act (Fish & G C §§2900-2901). The Act authorizes cities and counties to form habitat maintenance assessment districts to finance the long-term maintenance or improvement of natural habitat under a specified plan approved by the owner of the land to be improved and the Department of Fish and Game. This may be a useful tool to consider for the preservation of habitat.

PRACTICE TIP 3: Note that even if a species is not listed as threatened or endangered under CESA, it may still be considered sensitive under the California Environmental Quality Act (Pub Res C §§21000-21177), and thus may be subject to CEQA-based mitigation, even if no CESA obligations are triggered. A project that would substantially affect a threatened, rare, or endangered species or its habitat is normally considered to have a significant effect on the environment. See CEQA Guidelines, Appendix G, checklist item IV. If a project would substantially reduce the number or restrict the range of such species, the CEQA Guidelines mandate a finding of significance. 14 Cal Code Regs §§15065(a), 15380. A project that would substantially affect sensitive wildlife habitat, including habitat for threatened, endangered, and rare species, is deemed a project of statewide, regional, or area-wide significance; on such a project, a local lead agency must prepare a draft EIR and submit it to the State Clearinghouse (see §1.101) for review by state agencies. 14 Cal Code Regs §§15206, 15380. However, CEQA "neither requires a lead agency to reach a legal conclusion regarding 'take' of an endangered species nor compels an agency to demand an applicant to obtain an incidental take permit from another agency." *Association of Irritated Residents v County of Madera* (2003) 107 CA4th 1383, 1397, 133 CR2d 718.

© The Regents of the University of California

§11.297 D. References

On property acquisition, see §§8.1-8.79. On land use, see chap 10.

For further discussion related to endangered species, see also the following:

- Longtin, Longtin's California Land Use (2d ed 1987);
- Manaster & Selmi, California Environmental Law and Land Use Practice, chap 20 (Matthew Bender, rev ed 2005) (updated annually);
- Grad, Environmental Law §12.04[7] (2002);
- Skillern, Environmental Protection (1995);
- Schnidman, Abrams & Delaney, Handling the Land Use Case §9.29 (3d ed 2007); and
- Stanford Environmental Law Society Handbook, The Endangered Species Act (Stanford University Press, 2001).

© The Regents of the University of California

12

Code Enforcement

I. CODE ENFORCEMENT AUTHORITY §12.1

II. CIVIL ENFORCEMENT
- A. Local Ordinances: Injunctive Relief and Burden of Proof §12.2
  - 1. General Public Nuisance
    - a. Standard §12.3
    - b. Injunctive Relief and Doctrine of Public Nuisance Per Se §12.4
    - c. Judicial Abatement of Public Nuisances §12.5
  - 2. State Housing Law: Notice and Remedies §12.6
    - a. State Housing Law: Civil Penalties and Franchise Tax Board Deductions §12.7
    - b. State Housing Law: Relocation Assistance May Be Required §12.8
    - c. State Housing Law: Receiver May Be Appointed §12.9
- B. Specialized Civil Abatement Actions
  - 1. Unfair Competition Act
    - a. Code Violations as Unfair Competition §12.10
    - b. Procedural Requirements Under Unfair Competition Act §12.11
    - c. Remedies Under Unfair Competition Act §12.12
  - 2. Red Light Abatement Act: Enforcement and Remedies §12.13
  - 3. Drug House Abatement Act: Enforcement and Remedies §12.14
  - 4. Abatement of Buildings Used for Counterfeiting Activities §12.15
- C. Civil Remedies
  - 1. Injunctive Relief §12.16
  - 2. Civil Contempt §12.17
  - 3. Criminal Contempt §12.18
  - 4. Civil Penalties and Cost Recovery Generally §12.19
    - a. Civil Penalties and Cost Recovery Under State Housing Law §12.20
    - b. Civil Penalties and Cost Recovery Under Unfair Competition Act §12.21
    - c. Cost Recovery in Specified Civil Nuisance Abatement Actions §12.22
    - d. Local Ordinances Permitting Cost Recovery in Nuisance Abatements §12.23
    - e. Local Ordinances Permitting Cost Recovery in Public Nuisance Abatements and Code Enforcement §12.24
    - f. Local Civil Penalties Ordinances §12.25
  - 5. Treble Damages for Repeat Violations and Punitive Damages Possible §12.26
  - 6. Receivership May Be Ordered §12.27

III. CRIMINAL ENFORCEMENT
- A. Misdemeanors Versus Infractions §12.28
  - 1. Penalty Provision §12.29
  - 2. Ongoing Violations §12.30
- B. Prosecutorial Penalty Options
  - 1. Infractions and Misdemeanors Punishable by Penal Code §12.31
  - 2. Hybrid Systems
    - a. Sliding Scale System §12.32
    - b. Shortcomings of a Sliding Scale System §12.33
    - c. Discretionary Penalty Provisions §12.34
    - d. Bail Forfeiture and Referrals §12.35
    - e. Pleas in Abeyance §12.36
- C. State Criminal Statutes
  - 1. State Housing Law Violations §12.37
  - 2. Criminal Nuisance; Limitation §12.38
- D. Criminal Procedure
  - 1. Overview of Criminal Justice Process
    - a. Complaint §12.39
    - b. Arraignment and Plea §12.40
    - c. Trial §12.41
  - 2. Due Process Analysis of Complaint
    - a. Notice of Crime §12.42

b. Notice of Charges §12.43
3. Identification of Proper Defendants §12.44
4. Strict Criminal Liability Possible §12.45
5. Field Citation Versus Arrest Warrant §12.46
a. Field Citations; Alternative to Arrest §12.47
b. Consequences of Failure to Appear §12.48
c. Criminal Complaint Option §12.49
d. Arrest Warrant and Its Execution §12.50
e. Notify Warrant Option §12.51
6. Corporate Defendants
a. Piercing the Corporate Veil §12.52
b. Filing Criminal Complaint Against Corporation §12.53
7. Sentencing and Terms of Probation
a. Scope of Probation §12.54
b. Conditional Sentence—Informal Probation §12.55
c. Probation Terms §12.56
d. Infractions and Probation §12.57
8. Probation Revocation
a. Grounds for Revocation §12.58
b. Probation Revocation Procedure §12.59
(1) Show Cause Hearing §12.60
(2) Due Process Must Be Observed §12.61
(3) Admissible Evidence §12.62
(4) Defendant Has Right to Confront Witnesses; Applicable Standard of Proof §12.63
9. Extension of Probation §12.64
10. Cost Recovery in Criminal Code Enforcement §12.65

IV. ADMINISTRATIVE ENFORCEMENT
A. Administrative and Summary Abatement §12.66
1. Evidence Gathering and Inspection Warrants Under Administrative Abatement §12.67
2. Summary (Emergency) Abatement May Be Necessary §12.68
3. Consent or Court Order for Abatement Work §12.69
4. State Housing Law: Demolition or Repair §12.70
5. Administrative Abatement Procedures for Substandard Residential Buildings §12.71
6. Vehicle Abatement Laws §12.72
7. Sign Enforcement Restrictions §12.73
8. Vacant Residential Property Acquired Through Foreclosure §12.74
a. Procedure for Enforcement Under CC §2929.3 §12.75
b. Local Ordinances Are Not Preempted §12.76
B. Administrative Hearings and Due Process §12.77
1. Notice §12.78
2. Impartial Hearing Body or Officer Required §12.79
3. Conduct of the Hearing §12.80
C. Other Available Administrative Processes
1. Mediation and Office Hearings §12.81
2. Recordation of Violation Notices §12.82
3. Notice of Pending Action §12.83

© The Regents of the University of California

§12.1 I. CODE ENFORCEMENT AUTHORITY

This chapter deals generally with the enforcement of ordinances and code over property and its conditions. The police power is the legal basis for the enactment and enforcement of municipal ordinances that regulate conditions that may become a nuisance or health hazard or that promote social, economic, or aesthetic considerations. See Cal Const art XI, §7; *Schroeder v Municipal Court* (1977) 73 CA3d 841, 848, 141 CR 85 (zoning regulations); *Sullivan v City of Los Angeles* (1953) 116 CA2d 807, 810, 254 P2d 590 (building regulations).

On topics covered by this chapter, including code enforcement generally; administrative hearings and process; real property nuisance law; abatement actions, liens, fines, penalties, and damages; landlord liability; injunctive relief; and State Housing Law (Health & S C §§17910-17998.3), see California Administrative Hearing Practice (2d ed Cal CEB 1997); California Land Use Practice (Cal CEB 2006); California Landlord-Tenant Practice (2d ed Cal CEB 1997); California Real Property Remedies and Damages (2d ed Cal CEB 2002).

© The Regents of the University of California

II. CIVIL ENFORCEMENT

§12.2 A. Local Ordinances: Injunctive Relief and Burden of Proof

A violation of a valid building or other local ordinance may be abated by an injunction. *City & County of San Francisco v City Inv. Corp.* (1971) 15 CA3d 1031, 1041, 93 CR 690 (fire); *City of San Mateo v Hardy* (1944) 64 CA2d 794, 796, 149 P2d 307 (zoning and building); *City of Stockton v Frisbie & Latta* (1928) 93 CA 277, 289, 270 P 270 (zoning). When a city seeks to enforce a valid zoning, building, or fire ordinance by injunction, the court's inquiry is limited to whether a violation exists; no proof of a public nuisance is necessary. *City & County of San Francisco v Burton* (1962) 201 CA2d 749, 756, 20 CR 378. For a preliminary injunction, the public entity must show a reasonable probability that it will prevail on the merits; such a showing gives rise to a rebuttable presumption that the potential harm to the public of not granting the injunction outweighs the harm to the defendants of granting it. *IT Corp. v County of Imperial* (1983) 35 C3d 63, 72, 196 CR 715.

© The Regents of the University of California

1. General Public Nuisance

§12.3 a. Standard

A condition may be considered a public nuisance if it meets the common law or general statutory definition, or if that condition is specifically defined by state or local law as a public nuisance. See CC §§3479-3480. Substandard buildings and housing code violations constitute a public nuisance. *City of Bakersfield v Miller* (1966) 64 C2d 93, 99, 48 CR 889, cert denied (1966) 384 US 988. Conditions on property amounting to a fire hazard have also been recognized as a public nuisance. *Vedder v County of Imperial* (1974) 36 CA3d 654, 661, 111 CR 728; *San Diego County v Carlstrom* (1961) 196 CA2d 485, 16 CR 667; *People v Oliver* (1948) 86 CA2d 885, 889, 195 P2d 926. In some circumstances, a city may abate a public nuisance despite grandfather rights. *City of Oakland v Superior Court* (1996) 45 CA4th 740, 756, 53 CR2d 120; *Suzuki v City of Los Angeles* (1996) 44 CA4th 263, 277, 51 CR2d 880 (lawful non-conforming use still subject to nuisance abatement). The appropriate focus is whether an entire neighborhood or community, or at least a considerable number of persons, are affected in the manner and by the factors that make the condition a public nuisance. *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1209, 52 CR2d 518. Whether a nuisance will be continuing or permanent depends not on the offending party's interest in continuing the nuisance, but on the type of harm suffered. *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270, 1275.

© The Regents of the University of California

§12.4 b. Injunctive Relief and Doctrine of Public Nuisance Per Se

Any public nuisance may be enjoined. Any city attorney in any town or city in which a nuisance exists or any district attorney may bring a civil action in the name of the People of the State of California to abate a public nuisance. CCP §731.

When a public nuisance has been statutorily defined, it is considered a "nuisance per se" and the function of the court is to determine whether such a statutory violation in fact exists, without any independent assessment of the danger caused by the violation. *City of Costa Mesa v Soffer* (1992) 11 CA4th 378, 385, 13 CR2d 735 (vehicle abatement); *McClatchy v Laguna Lands, Ltd.* (1917) 32 CA 718, 725, 164 P 41. Cities may declare by ordinance what constitutes a public nuisance. Govt C §38771. Many municipalities have enacted ordinances that define violations of building, housing, and related codes or improper property maintenance resulting in substandard conditions as a public nuisance. In addition, all municipalities adopt by reference the California Building Standards Code as issued by the California Building Standards Commission (CBSC) and the International Conference of Building Officials (ICBO), along with any local amendments. These codes also specify certain violations that constitute a public nuisance.

© The Regents of the University of California

§12.5 c. Judicial Abatement of Public Nuisances

Cities may adopt an ordinance that authorizes a court to order the owner of property or any person or minor guilty of vandalism or graffiti to pay treble the costs of abatement on the entry of a second or subsequent judgment in a 2-year period for conditions that were abated as a nuisance. Govt C §§38772, 38773.7. This treble damage provision expressly excludes substandard conditions abated under the State Housing Law (Health & S C §§17910-17998.3). On the State Housing Law, see §§12.6-12.9.

© The Regents of the University of California

§12.6 2. State Housing Law: Notice and Remedies

Under the State Housing Law (Health & S C §§17910-17998.3), after the enforcement agency (see Health & S C §§17960-17967) declares a building to be "substandard" (see Health & S C §17920.3), and if there is no correction within 30 days (or shorter period if necessary to remedy an immediate threat to the health and safety of the public or occupants), the enforcement agency may file a civil action against the owner or other responsible party. Health & S C §§17980-17982. In these actions, the municipality may ask the court to enjoin the violation, to grant a preliminary injunction, and to issue an order permitting the locality to abate any public nuisance, including appointment of a receiver. Health & S C §§17980-17982. Additional remedies are allowed if the building's violations are so extensive and of such a nature that the health and safety of the residents or the public is "substantially endangered." Health & S C §§17980.6-17980.7.

PRACTICE TIP: The enforcement agency may want to consider establishing written policies for its inspectors in determining when a building is "substandard" and "substantially substandard."

© The Regents of the University of California

§12.7 a. State Housing Law: Civil Penalties and Franchise Tax Board Deductions

If the substandard building is in such a state of disrepair that the health and safety of the residents or the public is "substantially" endangered, the court may order the violator to pay penalties in the event of repeat violations and may order the violator to not claim any deduction on state taxes for interest, taxes, expenses, depreciation, or amortization on the property for a period of up to 2 years. Health & S C §§17980.6-17980.7(b). See also Rev & T C §§17274, 24436.5 (administrative process for local agencies to prevent owners from claiming state tax deductions for "substandard housing").

© The Regents of the University of California

§12.8 b. State Housing Law: Relocation Assistance May Be Required

In the event that repairs are undertaken by an owner as a result of a court order and the conditions of the premises or the rehabilitation "significantly affect the safe and sanitary use of the premises by any lawful tenant," the court must order the owner to pay to the tenant specified moving and storage costs and relocation compensation, as well as to offer the tenant the first right to reoccupy the premises after repairs are complete. Health & S C §17980.7(d)(3), (d)(5). Tenants who are displaced or subject to displacement by local enforcement activities as a result of a violation so extensive and of such a nature that the immediate health and safety of the residents are endangered are entitled to relocation benefits from the owner. The local enforcement agency determines tenant eligibility for relocation benefits. Health & S C §§17975-17975.10.

© The Regents of the University of California

§12.9 c. State Housing Law: Receiver May Be Appointed

If the owner does not correct the condition that caused the violation, a court may order the appointment of a receiver on application of the municipality. The receiver then assumes responsibility for making the repairs and relocating tenants if necessary. Health & S C §17980.7(c). The court has wide discretion in approving the receiver's proposed actions, including demolition of the property. *City of Santa Monica v Gonzalez* (2008) 43 C4th 905, 931, 76 CR3d 483.

© The Regents of the University of California

B. Specialized Civil Abatement Actions

1. Unfair Competition Act

§12.10 a. Code Violations as Unfair Competition

Under the Unfair Competition Act (Bus & P C §§17200-17210), unfair competition is broadly defined to encompass "anything that can properly be called a business practice and that at the same time is forbidden by the law." *Barquis v Merchants Collection Ass'n of Oakland, Inc.* (1972) 7 C3d 94, 112, 101 CR 745 (interpreting predecessor CC §3369). Unfair competition encompasses repeated violations of state and local regulations, so long as they are a part of a "business practice." See *People v McKale* (1979) 25 C3d 626, 632, 159 CR 811 (violation of title 25 of the California Code of Regulations; violation of the Mobilehome Parks Act (Health & S C §§18200-18700)). In the context of the business of renting substandard rental residential property, an owner's long-term and ongoing pattern of failure and refusal to comply with the building and housing laws on several or more properties could constitute an unlawful business practice. See *Stoiber v Honeychuck* (1980) 101 CA3d 903, 928, 162 CR 194 (if properly pled, action under the Unfair Competition Act might be appropriate to enjoin a landlord's maintenance of substandard, uninhabitable rental properties).

© The Regents of the University of California

§12.11 b. Procedural Requirements Under Unfair Competition Act

An action under the Unfair Competition Act (Bus & P C §§17200-17210) may be brought by the Attorney General, the city attorney of any city with a population of greater than 750,000, or, with the consent of the district attorney, by a city prosecutor or city attorney in any city, or city and county, having a full-time prosecutor or, with the consent of the district attorney, by any city attorney in the name of the people of the state, on their own complaint, or by the district attorney. Bus & P C §17204. Any action to enforce any cause of action under the Unfair Competition Act must be commenced within 4 years after the cause of action accrued. Bus & P C §17208.

© The Regents of the University of California

§12.12 c. Remedies Under Unfair Competition Act

Injunctive relief may also be available under the Unfair Competition Act (Bus & P C §§17200-17210). Under this Act, an action for injunction and for civil penalties of up to $2500 for each violation may be brought against any individual or entity that engages in "unfair competition." Bus & P C §§17203, 17206. Any person who intentionally violates an injunction will be liable for a civil penalty not to exceed $6000 for each day of each violation. Bus & P C §17207. Prevailing plaintiffs under the Unfair Competition Act are generally limited to injunctive relief and restitution, and may not receive damages, much less treble damages or attorney fees. *Cel-Tech Communications, Inc. v Los Angeles Cellular Tel. Co.* (1999) 20 C4th 163, 179, 83 CR2d 548. Copies of briefs filed under this Act must be served on the Attorney General within 3 days of filing. The same is true if an action involving the application of this Act is the subject of any appeal at the superior, appellate, or state supreme court. Bus & P C §17209.

PRACTICE TIP: The city attorney in a city that does not have a population in excess of 750,000 may want to consider referral to the district attorney. An agreement may be crafted to give a part of any civil penalties recovered to the city to offset the cost of developing the case. Alternatively, it may be possible for a city attorney in a jurisdiction of insufficient population to enter into an agreement with the local district attorney to be "cross-deputized" as a district attorney for a particular case. This has been done in other contexts and has usually been accomplished simply by the exchange of letters.

© The Regents of the University of California

§12.13 2. Red Light Abatement Act: Enforcement and Remedies

Another code enforcement tool is the Red Light Abatement Law (Pen C §§11225-11235). The Act covers buildings or places used for the purpose of illegal gambling, lewdness, assignation, or prostitution, and buildings or places used as bathhouses that encourage or permit conduct that could lead to the transmission of AIDS. Pen C §11225 (declaring such establishments nuisances that must be enjoined and abated).

A city attorney or district attorney may maintain an action in equity to abate and enjoin the nuisance. Pen C §11226.

Damages may be recovered whether the nuisance is public or private. Pen C §11225. The Act provides for punishment for contempt for violation or disobedience of an injunction (Pen C §11229), the fines for which become an enforceable lien against the property in violation (see Pen C §11233). If the existence of a nuisance is established, the court may order the removal and sale of all items used in maintaining the nuisance and the eventual closure of the building. In lieu of closure, the court may order the person who is responsible for the nuisance to pay damages in an amount not to exceed the fair market rental value of the building for 1 year. Pen C §11230. Attorney fees may be awarded under CC §3496.

© The Regents of the University of California

§12.14 3. Drug House Abatement Act: Enforcement and Remedies

The Drug House Abatement Act (Health & S C §§11570-11587) applies to buildings or places used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, and buildings or places in which those acts take place. Health & S C §11570 (declaring such places nuisances that must be enjoined and abated). A city attorney or district attorney may maintain an action in equity to abate and enjoin the nuisance. Health & S C §11571.

A temporary injunction is obtainable. Health & S C §11573. The condition may be enjoined, abated, and prevented, and damages may be recovered, whether the nuisance is public or private. Health & S C §§11571, 11581. Violation of an injunction or abatement order is punishable as contempt of court, by a fine between $500 and $10,000, imprisonment for 1-6 months, or both. Health & S C §11580. Contempt fines are enforceable as a lien against the property. Health & S C §11587. The Act also provides for closure of the premises for up to 1 year during both the preliminary and permanent injunction phases (preliminary, Health & S C §11573.5(b); permanent, Health & S C §11581(b)). If a nuisance is established in the action, an order for closure, in most instances, and removal of fixtures will be entered as part of judgment. Health & S C §11581. Plaintiff's costs are an enforceable lien against the property in violation. Health & S C §11579. Attorney fees and investigation costs may be awarded in these actions. CC §3496; *City of Oakland v McCullough* (1996) 46 CA4th 1, 5, 53 CR2d 531.

PRACTICE TIP: Many of the provisions in the Drug House Abatement Act were borrowed from the Red Light Abatement Law (Pen C §§11225-11235) (see §12.13). Given the similar provisions found in the Red Light Abatement Act, one could cite reported decisions interpreting the Red Light Abatement Act powers for the Drug House Abatement Act. Carefully documenting a continuous or escalating pattern of drug activity is helpful in securing an injunction. Generally, the court will want to see that the enforcement agency has undertaken a methodical approach to abate the drug nuisance, such as sending notification letters, holding meetings, and having discussions with the property owner or business owner, all to no avail. Declarations from neighboring businesses or residents on the negative effects of activities are particularly valuable.

© The Regents of the University of California

§12.15 4. Abatement of Buildings Used for Counterfeiting Activities

Under Bus & P C §17800, when a person is convicted of violating Pen C §350(a)(2) or §653w, a nonresidential building or place used by that person for the purpose of willfully manufacturing, intentionally selling, or knowingly possessing for sale any counterfeit goods is deemed a nuisance which may be enjoined, abated, and prevented, and for which damages may be recovered.

Like actions brought under the Red Light Abatement Law (Pen C §§11225-11235), a city attorney or district attorney may maintain an action in equity to abate and enjoin the nuisance. Pen C §11226. However, unlike actions under the Red Light Abatement Act, a property owner must be provided with 30 days' notice before the filing of an action to abate the nuisance. Bus & P C §17800(b).

The court may apply the remedies and procedures provided by the Red Light Abatement Act for purposes of abating a building used for counterfeiting activities. Bus & P C §17800(a). However, an abatement of a building used for counterfeiting activities brought under Pen C §11230 is discretionary rather than mandatory, and may be for a period of up to 1 year. Bus & P C §17800(a).

© The Regents of the University of California

C. Civil Remedies

§12.16 1. Injunctive Relief

Injunctive relief may take the form of a court order prohibiting the maintenance of code violations (prohibitory injunction) or requiring the defendant or violator to remedy those conditions (mandatory injunction). Because courts are often reluctant to issue a mandatory preliminary injunction, the order should be phrased in such a way that it "prohibits" the defendant's maintenance of property in a condition that is in violation of state local law or that constitutes a public nuisance. Appeals taken to mandatory injunctions stay enforcement of the judgment. Appeals of prohibitory injunctions do not. *City of Pasadena v City of Alhambr*a (1946) 75 CA2d 91, 95, 170 P2d 499.

PRACTICE TIP: When a governmental entity seeks to enjoin violations of a statute or ordinance that expressly provides for injunctive relief, the traditional two-prong test for preliminary injunctions does not apply. *IT Corp. v County of Imperial* (1983) 35 C3d 63, 196 CR 715. Instead, the governmental entity need only prove that it is "reasonably probable" that it will prevail on the merits, which gives rise to the rebuttable presumption that the potential harm to the public outweighs the potential harm to the defendant. 35 C3d at 72. Once the rebuttable presumption arises, to avoid issuance of the preliminary injunction, the defendant must prove that the injunction will inflict grave and irreparable harm. If grave and irreparable harm is shown, only then does the court balance the two factors that traditionally are applied to the issuance of preliminary injunctive relief. Injunctions granted under the Red Light Abatement Law (Pen C §§11225-11235) or the Drug House Abatement Act (Health & S C §§11570-11587) statutes remain in place pending any appeal. CCP §917.8(d). On the Red Light Abatement Act, see §12.13; on the Drug House Abatement Act, see §12.14.

© The Regents of the University of California

§12.17 2. Civil Contempt

After the court has ordered corrections of the conditions, either through a preliminary injunction or a permanent injunction, the defendant may still fail to comply. Contempt proceedings are the usual legal process by which a defendant is compelled to comply with a court order or is punished for his or her failure to comply. The punishment of civil contempt may be a fine not exceeding $1000 or imprisonment not exceeding 5 days, or both, for each contemptuous act. CCP §1218. In addition, the party adjudged guilty may be ordered to pay reasonable attorney fees and costs to the party initiating the contempt proceeding. A jury trial is discretionary in a civil contempt proceeding. *Mitchell v Superior Court* (1989) 49 C3d 1230, 1249, 265 CR 144. A violation or disobedience of the injunction or abatement order issued under the Drug House Abatement Act may be punished by a fine of not less than $500 nor more than $10,000, or by imprisonment in the county jail for not less than 1 month nor more than 6 months, or both. Health & S C §11580. On the Red Light Abatement Law, see §12.13; on the Drug House Abatement Act, see §12.14.

© The Regents of the University of California

§12.18 3. Criminal Contempt

If the defendant fails to comply with the requirements enumerated in a preliminary or permanent injunction, a criminal contempt action may be brought against the defendant as punishment for his or her failure to comply. A person who willfully disobeys any process or order lawfully issued by any court is guilty of a misdemeanor. Pen C §166(a)(4). A misdemeanor is punishable by imprisonment in the county jail not exceeding 6 months or by fine not exceeding $1000, or by both. Pen C §19. A jury trial is mandatory when demanded in a criminal contempt proceeding if the punishment is substantial. *Bloom v Illinois* (1968) 391 US 194, 198, 20 L Ed 2d 522, 88 S Ct 1477.

© The Regents of the University of California

§12.19 4. Civil Penalties and Cost Recovery Generally

The general rule is that a municipality cannot recover its litigation and related enforcement costs. However, as discussed in §§12.20-12.25, there are a number of statutes that expressly provide for cost recovery, attorney fees, or civil penalties in connection with code enforcement proceedings.

© The Regents of the University of California

§12.20 a. Civil Penalties and Cost Recovery Under State Housing Law

The State Housing Law (Health & S C §§17910-17998.3) contains a "one-way" fee provision allowing recovery of all reasonable and actual costs of enforcement, including inspection, investigation, attorney fees, and costs of prosecution when a building is "substantially" substandard and the owner fails to comply within a reasonable time with the terms of an order or notice to repair or abate. Health & S C §17980.7(d)(1); *City & County of San Francisco v Ballard* (2006) 136 CA4th 381, 400, 39 CR3d 1. But see Health & S C §17980.7(c)(11) (two-way fee provision authorizing award of attorney fees to "prevailing party" when city seeks appointment of receiver). In addition, the court may order the violator to pay penalties in the event of repeat violations and may order the violator not to claim any deduction with respect to state taxes for interest, taxes, depreciation, or amortization related to the subject property for a period of up to 2 years. Health & S C §§17980.7(b), 17995-17995.5 (criminal penalties); Rev & Tax C §§17274, 24436.5. The usual rule that a prevailing party may recover its costs does not apply when a city is unsuccessful in proving the existence of the substandard conditions. Health & S C §17984.

© The Regents of the University of California

§12.21 b. Civil Penalties and Cost Recovery Under Unfair Competition Act

The Unfair Competition Act (see §§12.10-12.12) allows for the recovery of civil penalties of up to $2500 for each violation, in addition to injunctive relief. Bus & P C §17206. If the action is brought by a district attorney, the money recovered is paid to the county treasurer. If the action is brought by a city attorney, one-half of the recovery is paid to the county treasurer and one-half is paid to the city treasurer. Bus & P C §17206(c).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/12 Code Enforcement/§12.22 c. Cost Recovery in Specified Civil Nuisance Abatement Actions

§12.22 c. Cost Recovery in Specified Civil Nuisance Abatement Actions

Municipalities can recover the cost of investigation and attorney fees in abatement involving obscene matter, gambling, prostitution, drugs, and the sale of liquor. CC §3496. Other statutes that provide authority for cost recovery include: Bus & P C §5499.9 (illegal on-premises signs), Govt C §§39560-39588 (weed abatement program), and Govt C §38773.6 (graffiti abatement).

© The Regents of the University of California

§12.23 d. Local Ordinances Permitting Cost Recovery in Nuisance Abatements

A local legislative body may provide by ordinance for the abatement of any nuisance at the expense of the persons maintaining it. Govt C §§38773-38773.5. The local legislative body may establish an ordinance for the recovery of abatement and related administrative costs by a nuisance abatement lien (Govt C §38773.1) or by special assessment (Govt C §38773.5). If, however, the property is transferred to a bona fide purchaser for value before the first tax installment is delinquent, the costs are transferred to the unsecured roll. Govt C §38773.5(c). Unlike the nuisance abatement lien, the special assessment has the tax lien priority. Govt C §53935. For recovery of attorney fees, the ordinance must specify that the prevailing party is entitled to such recovery and the city must elect at the initiation of the nuisance abatement proceedings to seek recovery of its attorney fees if it is considered the prevailing party. Govt C §38773.5; *City of Monte Sereno v Padgett* (2007) 149 CA4th 1530, 1537, 58 CR3d 218 (judgment awarding attorney fees to city reversed when ordinance provided for recovery of fees solely by city and not "prevailing party").

PRACTICE TIP: The express text of Govt C §38773.5(b) permits a city to adopt an ordinance allowing for recovery of attorney fees in any action, administrative proceeding, or special proceeding to abate a nuisance, subject to the procedural requirements of that statute. Many agencies construe the attorney fees language of this code to allow for recovery of attorney fees in any nuisance abatement proceeding, including the lien procedure described in Govt C §38773.1. However, a few agencies believe that the recovery of attorney fees authorized under this provision is limited to those actions when the agency seeks to recover costs through the special assessment procedure, based on the text of Govt C §38773.5(a). The confusion is due, in part, to the silence in the lien procedure statute on the issue of attorney fees. See Govt C §38773.1. Until there is a judicial determination of the permissible scope of Govt C §38773.5(b) on the recovery of attorney fees, it is at least arguable that the statute is not limited to special assessment cases, but can be used to claim attorney fees "in any action, administrative proceeding, or special proceeding to abate a nuisance," regardless of which method of cost recovery (lien or special assessment) is used. In addition, following the decision in *City of Monte Sereno v Padgett* (2007) 149 CA4th 1530, 58 CR3d 218, cities should review their existing ordinances to ensure that the ordinance provides for recovery of attorney fees by the prevailing party, instead of solely by the city.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/12 Code Enforcement/§12.24 e. Local Ordinances Permitting Cost Recovery in Public Nuisance Abatements and Code Enforcement

§12.24 e. Local Ordinances Permitting Cost Recovery in Public Nuisance Abatements and Code Enforcement

In addition to the authority for nuisance abatement (see §§12.3-12.5) and cost recovery by cities under local ordinances described in §12.23, there is separate authority for cities to adopt local ordinances to recover costs in the abatement of public nuisances and in the enforcement of specified health and safety laws, including housing, fire safety, building, and zoning laws and other specified local ordinances, through imposition of a lien. Govt C §54988. Note that this section of the code expressly provides that it is not applicable against owner-occupied residences.

© The Regents of the University of California

§12.25 f. Local Civil Penalties Ordinances

A city legislative body may "impose fines, penalties and forfeitures," with a penalty in the form of a fine not exceeding one thousand dollars ($1000). Govt C §36901. See also Pen C §594.5 (aerosol container laws). A city may by ordinance make any violation of any of its ordinances subject to an administrative fine or penalty. Govt C §53069.4. Certain prerequisites apply, such as the establishment of administrative procedures by the city to govern the imposition, enforcement, collection, and administrative review of the administrative fines or penalties. (On due process requirements for administrative hearings, see §§12.77-12.80.) Note the following requirements regarding local civil penalties ordinances:

- **Charter city limitations.** A charter city could enact an ordinance that provides for different penalties as long as such penalties do not exceed any maximum limits set by its charter. *County of Los Angeles v City of Los Angeles* (1963) 219 CA2d 838, 844, 33 CR 503.
- **Excessive fines limited.** The fine imposed by statute or ordinance must not be "excessive," as determined on a case-by-case basis. Cal Const art I, §17; *Hale v Morgan* (1978) 22 C3d 388, 404, 149 CR 375. A penalty mandatory in amount and potentially unlimited in duration may be held unconstitutional. *City & County of San Francisco v Sainez* (2000) 77 CA4th 1302, 1310, 92 CR2d 418.
- **Ordinance requirements.** Before a municipality may impose administrative fines or civil penalties, an enabling ordinance must establish that any person in violation of the municipal code will be liable for the administrative fine or civil penalty and that the municipality is authorized to recover the fine or penalty by a civil lawsuit. See Govt C §§36901, 53069.4.
- **Notice and hearing requirements.** When a municipality has discretion to impose fines or penalties, it must give notice to the violating party before imposing the penalty, and give the party an opportunity to be heard and present any facts or arguments on which the exercise of the discretion may be predicated. *Merco Constr. Eng'rs, Inc. v Los Angeles Unified Sch. Dist.* (1969) 274 CA2d 154, 166, 79 CR 23.

© The Regents of the University of California

§12.26 5. Treble Damages for Repeat Violations and Punitive Damages Possible

A local legislative body may, by ordinance, provide that on entry of a second or subsequent civil or criminal judgment within a 2-year period for abatement of a public nuisance, the court may order the owner to pay treble the costs of abatement, except in cases under Health & S C §17980. See Govt C §38773.7. Furthermore, cities may recover punitive damages in the same manner as private parties. *City of Sanger v Superior Court* (1992) 8 CA4th 444, 449, 10 CR2d 436.

© The Regents of the University of California

§12.27 6. Receivership May Be Ordered

A city may seek a court order to abate and obtain a receiver for a substandard building if the owner does not correct the violation within a reasonable time. See Health & S C §§17980.6-17980.7 (defining powers and duties of the receiver and providing for receiver's fees).

PRACTICE TIP: In seeking the appointment of a receiver, a locality should be aware of other practical limitations. These include the need to locate an individual willing to take on the role of a receiver and the extent to which the rents cover the expenses of repair as well as the day-to-day operating expenses.

© The Regents of the University of California

III. CRIMINAL ENFORCEMENT

§12.28 A. Misdemeanors Versus Infractions

Violation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction. The city attorney may prosecute these violations in the name of the people of the State of California. Govt C §36900(a).

PRACTICE TIP 1: The prosecutor cannot be hired on a contingent-fee basis. See *People ex rel Clancy v Superior Court* (1985) 39 C3d 740, 218 CR 24.

PRACTICE TIP 2: Individuals who repeatedly thwart the city's code enforcement compliance efforts can sometimes be brought into compliance quickly, after a misdemeanor citation is issued or a misdemeanor complaint is filed. If the city attorney has the authority to reduce misdemeanors to infractions, then the city attorney can offer to reduce the misdemeanor to an infraction, provided that the defendant brings the condition into compliance with city codes within a designated time period. Reducing a misdemeanor to an infraction should be accomplished on the court's record and put into a written plea agreement whenever possible, setting the terms of such reduction, in addition to any timelines for remedying the violation. Provision should also be made for the consequences of defendant's failure to remedy the condition within the designated time period. Such a procedure often obtains compliance without the necessity of a trial. However, if the defendant refuses to agree to such a conditional reduction, then set it up so that the case will proceed to trial.

© The Regents of the University of California

§12.29 1. Penalty Provision

The penalty need not be defined in the terms of each ordinance to establish a crime. The penalty provision can be placed elsewhere in a municipal code or charter. *Richter v Lightston* (1911) 161 C 260, 264, 118 P 790. See also *Benane v International Harvester Co.* (1956) 142 CA2d Supp 874, 880, 299 P2d 750; *Alechoff v Los Angeles Gas & Elec. Corp.* (1927) 84 CA 33, 39, 257 P 569.

© The Regents of the University of California

§12.30 2. Ongoing Violations

A crime can be charged for each day a violation continues, following service of a notice of the violation. Pen C §373a. Such provision does not violate the double jeopardy clause. *Dapper v Municipal Court* (1969) 276 CA2d 816, 818, 81 CR 340.

PRACTICE TIP: The language of the municipal code should also reflect the continuous nature of the offense by including a prohibition against maintaining a property or a building that was built in violation of the municipal code. For example, a municipality may discover an illegal dwelling unit or garage conversion several years after the owner actually built the structure without proper permits. The operative term is "maintain." The owner is guilty of maintaining an illegal dwelling unit. Therefore, the owner could be prosecuted years after the actual conversion.

© The Regents of the University of California

B. Prosecutorial Penalty Options

§12.31 1. Infractions and Misdemeanors Punishable by Penal Code

An infraction is not punishable by imprisonment. A person charged with an infraction is not entitled to a jury trial and is not entitled to be represented by a public defender unless in custody. Pen C §19.6. The powers of peace officers, court jurisdiction, periods for commencing action, and burden of proof are the same for misdemeanors and infractions. Pen C §19.7.

Actions brought as misdemeanors are punishable by 6 months in jail, a $1000 fine, or both, unless otherwise provided in an ordinance. Pen C §19.

© The Regents of the University of California

2. Hybrid Systems

§12.32 a. Sliding Scale System

Some municipalities have developed a hybrid system. Some impose penalties on a sliding scale. Under this system, violations are initially treated as infractions with an increase in the fine charged for each subsequent violation. The violator may be charged with a misdemeanor after three convictions as infractions. See also Govt C §36900 (providing for escalation of fines for subsequent violations).

© The Regents of the University of California

§12.33 b. Shortcomings of a Sliding Scale System

The inspector must investigate and prepare reports for each case until the magic number of infractions transforms the offense to a misdemeanor. This may also cause several more trips to the courthouse for the municipal attorney. Consequently, enforcement personnel must keep accurate records about the number of prior convictions. The problem with this system is it fails to penalize and deter the serious first-time violator; it also requires detailed recordkeeping.

© The Regents of the University of California

§12.34 c. Discretionary Penalty Provisions

In response to the shortcomings of the sliding-scale penalty provision, a city may wish to enact a discretionary penalty provision, or wobbler. Under this approach, all violations are designated misdemeanors, yet the municipal attorney may charge and prosecute any violation as an infraction. The serious first-time offender is confronted with the full deterrent impact of the misdemeanor. When mitigating circumstances are present, the prosecutor can make a motion in arraignment court to reduce the charge to an infraction. See also Pen C §17(d) (relating to defendant's and court's option to change offense from infraction to misdemeanor, and vice versa). The defendant may, however, elect to have the case proceed as a misdemeanor, thereby giving the defendant the right to an attorney and a jury trial. Pen C §17(d)(1). The hybrid ordinance is a formal procedural mechanism to exercise the prosecutor's inherent negotiation authority. Similar discretion is found in the Penal Code relating to violations of state law. Pen C §17(d).

© The Regents of the University of California

§12.35 d. Bail Forfeiture and Referrals

Instead of or in addition to the imposition of a penalty or fine, jail time, or court-ordered probation, prosecuting attorneys should become familiar with other disposition options available in their county, such as bail forfeiture and referrals.

For bail forfeiture, the provisions of Pen C §1269b(c) require judges in each county to adopt a county-wide bail schedule for all misdemeanors and infractions. Some counties require each municipality to prepare and adopt, subject to court approval, a bail schedule for municipal code violations. If such a schedule is adopted and a defendant is charged with an infraction, in some cases the defendant may pay and forfeit the bail amount before the arraignment date in lieu of further proceedings. Pen C §853.6(e)(3). Generally speaking, bail forfeitures are not the equivalent of convictions. *Wyatt v Municipal Court* (1966) 242 CA2d 845, 849, 51 CR 862. See 7 Ops Cal Atty Gen 143, 144 (1946).

Referrals include diversion, community service programs, alcohol awareness, and other such alternative sentencing options.

© The Regents of the University of California

§12.36 e. Pleas in Abeyance

As part of a plea agreement, the violator can enter a guilty or no contest plea, and agree to have the case continued for a period of 6 months. During that time, if the violator corrects all the violations and complies with the enforcement agency's request, the prosecutor could make a motion to dismiss the action in its entirety.

PRACTICE TIP: A municipality must weigh the deterrent impact of misdemeanor prosecutions versus the procedural burdens. A defendant has no constitutional right to a jury trial or court-appointed counsel for infractions. The municipality must decide whether it has the adequate staff necessary to conduct misdemeanor prosecutions; however, the amount of time spent selecting a jury may be worth the effort because it will establish misdemeanor probationary terms to prevent future code violations. Formal probation is generally not available for infractions, although informal or unsupervised probation may be available.

© The Regents of the University of California

C. State Criminal Statutes

§12.37 1. State Housing Law Violations

Anyone who violates the provisions of the State Housing Law (Health & S C §§17910-17998.3) or violates any state building standards, including the California Building Standards Code or any rule or regulation promulgated under the State Housing Law, is guilty of a misdemeanor and may be punished by a fine of up to $1000, imprisonment for up to 6 months, or both. Health & S C §17995.

The penalty for a person who is convicted for a second or subsequent time in 5 years is increased to a maximum fine of $5000 or imprisonment up to 6 months, or both. Health & S C §17995.1. The penalty for a flagrant repeat offender increases to include the penalty of imprisonment from 6 months to 1 year. Health & S C §17995.3. However, this section has several prerequisites. In summary, the violations must be extensive and endanger the health and safety of residents or public. They must also be due to the defendant's habitual neglect of customary maintenance and disregard for residents. Finally, they must involve at least four serious violations of a specified nature. See Health & S C §17995.3(a)-(g).

© The Regents of the University of California

§12.38 2. Criminal Nuisance; Limitation

Any person who maintains or willfully omits to perform any legal duty to remove any public nuisance is guilty of a misdemeanor. Pen C §372. One possible limitation to prosecuting an individual under the general provisions of Pen C §372 is that it applies to any person maintaining a public nuisance "the punishment for which is not otherwise prescribed." Pen C §372. See also *People v Cooper* (1944) 64 CA2d Supp 946, 948, 149 P2d 86. Thus, it could be argued that violations of local ordinances are already prescribed by the municipal code. This same limitation probably does not apply to prosecution under the more specific provisions of Pen C §373a. The provisions of Pen C §373a make it a misdemeanor to maintain a public nuisance after notice to abate from a health officer, district attorney, city attorney, or prosecutor. The provisions of Pen C §373a also make the continued existence of a public nuisance a separate misdemeanor for each day after such notice is given.

© The Regents of the University of California

D. Criminal Procedure

1. Overview of Criminal Justice Process

§12.39 a. Complaint

The criminal justice system starts with an investigation, the submission of the investigation to a prosecutor for review, and, if appropriate, the filing of a complaint. This complaint can take the form of a field citation issued by enforcement officials or a complaint written and filed by the municipal attorney. See Pen C §853.6. All such complaints must comply with the fundamental requirements of due process. Pen C §950.

PRACTICE TIP: It is useful to advise code enforcement personnel issuing criminal citations to assign a specific court date to the defendant at the time of issuance of the citation. That way, if the defendant fails to appear on the date promised, the court has the authority to issue a bench warrant. Pen C §978.5(4). Otherwise, some courts require the citing officer to complete a declaration before a warrant will be issued.

© The Regents of the University of California

§12.40 b. Arraignment and Plea

Once a complaint is filed, the defendant's first appearance is at arraignment. Here, the defendant can plead guilty, not guilty, or no contest. Pen C §988. Depending on the defendant's decision and the circumstances of the case, a trial date may be set by the arraignment court. Some jurisdictions impose an intermediate hearing in the trial setting department for settlement negotiations if defendant is represented by counsel. This may be termed a pretrial conference, readiness hearing, trial setting conference, or some other designation. The city attorney should be prepared to provide discovery to the defendant or his or her counsel. Reports prepared by code enforcement officers and any physical evidence to be used at trial must be provided to the defendant 30 days before trial. Pen C §§1054-1054.10.

PRACTICE TIP: Enforcement personnel should be adequately trained on report writing requirements. Whenever possible, each inspection should be written as a thorough, separate report to facilitate the criminal discovery process.

© The Regents of the University of California

§12.41 c. Trial

If the case does not settle at pretrial, or if the defendant has no counsel, a trial date is set. See Pen C §1382(a)(3) (timing requirements). At trial, the defendant may request or waive his or her constitutional right to a jury trial only if the complaint charged the violations as misdemeanors. Otherwise, a judge will hear the evidence to determine the defendant's guilt or innocence. On misdemeanors and infractions, see §§12.28, 12.31.

© The Regents of the University of California

2. Due Process Analysis of Complaint

§12.42 a. Notice of Crime

Whether an ordinance provides for a misdemeanor or an infraction, the ordinance must satisfy the threshold standards of the due process clause. Statutes that either forbid or require the doing of an act must not be drafted in terms so vague that "persons of common intelligence must necessarily guess at its meaning and differ as to its application." *People v McCaughan* (1957) 49 C2d 409, 414, 317 P2d 974 (quoting *Connally v General Constr. Co.* (1926) 269 US 385, 391, 70 L Ed 322, 46 S Ct 126). See also *Sechrist v Municipal Court* (1976) 64 CA3d 737, 134 CR 733 (upholding language of zoning ordinance in criminal prosecution against due process attack).

© The Regents of the University of California

§12.43 b. Notice of Charges

Due process requires that a person accused of committing a crime be reasonably advised of the charges against him or her so that the person has an opportunity to prepare and present his or her defense and to avoid surprises at trial. *People v Thomas* (1987) 43 C3d 818, 823, 239 CR 307. See also *Sechrist v Municipal Court* (1976) 64 CA3d 737, 134 CR 733 (finding criminal complaint against zoning violations gave accused adequate notice of charged offense).

© The Regents of the University of California

§12.44 3. Identification of Proper Defendants

In most code enforcement cases, the prosecuting attorney can usually charge the tenant, occupant, property owner, or all three. This decision will sometimes be determined by the nature of the charges. For instance, a building code violation is likely to be the responsibility of the property owner, whereas an inoperative vehicle is likely to be the responsibility of the tenant or occupant. When the owner resides at the property, the choice is simple. For absentee owners, the general rule is that when the owners have been placed on notice of the violation, they may be compelled to make their property safe, regardless of who caused the condition. *People v Greene* (1968) 264 CA2d 774, 778, 70 CR 818.

© The Regents of the University of California

§12.45 4. Strict Criminal Liability Possible

Landowner liability may be subject to strict liability principles. "[W]hether the context be civil or criminal, liability and the duty to take affirmative action flow not from the landowner's active responsibility for a condition of his land that causes such harm but rather, and quite simply, from his very possession and control of the land in question." *Leslie Salt Co. v San Francisco Bay Conservation Comm'n* (1984) 153 CA3d 605, 622, 200 CR 575.

Intent may be irrelevant. The general rule in California requires that every crime or public offense must have the joint operation of act and criminal intent. Pen C §20. An exception to this rule is the doctrine of criminal liability without fault, which has been applied to statutes enacted for the benefit of public morals, health, peace, and safety. *People v Travers* (1975) 52 CA3d 111, 114, 124 CR 728. In general, such statutes involve offenses of a regulatory nature. *People v Travers, supra*. The court applied the doctrine of strict liability to a conviction involving violations of various provisions of the Uniform Building and Fire Codes adopted by the Los Angeles Municipal Code in *People v Bachrach* (1980) 114 CA3d Supp 8, 12, 170 CR 773. Notice to the owner was not necessary. 114 CA3d Supp 8, 13. See also *Delfino v Sloan* (1993) 20 CA4th 1429, 25 CR2d 265 (dog at large); *People v Balmer* (1961) 196 CA2d Supp 874, 17 CR 612 (strict liability for unsanitary conditions in nursing home).

© The Regents of the University of California

§12.46 5. Field Citation Versus Arrest Warrant

A criminal action can be initiated by a field citation or by filing a complaint and issuing an arraignment letter or notify warrant, or by executing an arrest warrant. The following sections (§§12.47-12.51) detail the options available for bringing an individual suspected of a code enforcement violation to court.

© The Regents of the University of California

§12.47 a. Field Citations; Alternative to Arrest

When authorized by ordinance, code enforcement and other enforcement personnel have authority to issue a criminal citation. See Pen C §836.5. This citation authority would apply regardless of whether the offense is a misdemeanor or infraction. See Pen C §§853.5 (infractions), §853.6 (misdemeanors). On misdemeanors and infractions, see §§12.28, 12.31.

In most situations, the zoning or building inspector issues field citations as a substitute for a physical arrest. Unless the defendant demands to be taken before a magistrate, a field citation may be issued to the violator based on his or her written promise to appear. Pen C §§836.5(c), 853.5 (infractions), §853.6 (misdemeanors). A copy of this citation may become the criminal complaint. Pen C §§836.5-853.6.

© The Regents of the University of California

§12.48 b. Consequences of Failure to Appear

A defendant who fails to appear for his or her scheduled arraignment date after being issued and signing a misdemeanor field citation, is subject to arrest. The court will automatically issue and deliver a warrant for the defendant's arrest within 20 days after the failure to appear. Pen C §853.8. This can also be charged as a new and separate misdemeanor offense. Pen C §853.7. If no citation was issued, and thus defendant did not sign a written promise to appear, the municipal attorney would need to obtain an arrest warrant. Pen C §1427.

PRACTICE TIP: The effectiveness of any citation program depends on the training and skill of the individual inspectors. Although public officers and employees are not subject to the mandatory Peace Officer Standards and Training (POST) requirements, it is a prudent policy to enroll city inspectors in a powers-of-arrest course. See Pen C §§832, 836.5. Most cities require completion of such courses as a requirement to issue field citations. Failure to follow the arrest and citation procedures or inability to write adequate case reports can result in dismissal of the charge. Additionally, it is sometimes advisable for code enforcement officers to request the assistance of a peace officer rather than handle volatile situations on their own.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/12 Code Enforcement/§12.49 c. Criminal Complaint Option

§12.49 c. Criminal Complaint Option

Instead of issuing a misdemeanor field citation, the prosecuting attorney can file a criminal complaint. This method of initiating a criminal case may be employed when the property owner or tenant cannot be located to sign a field citation. See Pen C §§948-949 (authority to file complaints in superior court), 950 (form of complaint).

© The Regents of the University of California

§12.50 d. Arrest Warrant and Its Execution

Once the complaint is filed, the prosecuting attorney may immediately file a declaration in support of an arrest warrant. This declaration sets the factual basis surrounding the violation and issuance of the complaint. See Pen C §1427.

A peace officer, or any public officer or employee authorized to serve process, has authority to execute an arrest warrant for a violation of a statute or ordinance that such person has the duty to enforce. Pen C §816. The form of the warrant is provided by Pen C §814. The defendant must be taken before a magistrate without unnecessary delay and, in any event, within 48 hours after the arrest, excluding Sundays and holidays. Pen C §825.

© The Regents of the University of California

§12.51 e. Notify Warrant Option

Instead of immediately applying to the court for arrest warrants, some municipalities send defendants official courtesy notices called arraignment letters or notify warrants listing the municipal code violations and establishing appearance dates in municipal arraignment court. In such cases, a complaint has already been filed and signed by the prosecutor. Because most of the zoning and building code violators are not typical criminals, this notice is generally successful in securing their appearance.

PRACTICE TIP: The issuance of a warrant does not guarantee that police officers, sheriffs, or marshals will physically arrest the defendant. Given the backlog of many metropolitan correctional facilities, some law enforcement agencies execute arrest warrants by giving priority to felons and serious misdemeanants before zoning and building code violators. Therefore, a meeting with the local law enforcement officials responsible for the execution of arrest warrants is advisable to express the municipality's concerns about arresting serious code violators.

© The Regents of the University of California

6. Corporate Defendants

§12.52 a. Piercing the Corporate Veil

The doctrine of "piercing the corporate veil" allows a court to disregard the corporate entity and hold the individuals of the controlling corporation responsible when the corporation is being used by the individuals or another corporation to commit fraud, circumvent statutes, or perpetrate other wrongful inequitable acts. The city must show that (*Minifie v Rowley* (1921) 187 C 481, 487, 202 P 673; *Kohn v Kohn* (1950) 95 CA2d 708, 718, 214 P2d 71):

- The individual or another corporation dominates or controls the corporation; and
- In the particular case, justice and equity may best be achieved by disregarding the corporate entity.

See also *People v Conway* (1974) 42 CA3d 875, 888, 117 CR 251.

© The Regents of the University of California

§12.53 b. Filing Criminal Complaint Against Corporation

When the defendant is a corporation, state law establishes the procedures for filing a criminal complaint. See Pen C §§1390-1397. The attorney schedules a date for arraignment by presenting a summons for the judge's signature. The summons must be served on the designated agent or corporate officers at least 5 days before the scheduled appearance in arraignment court. If the corporation fails to appear after the summons has been served, "a plea of not guilty shall be entered, and the same proceedings had therein as in other cases." Pen C §1427.

© The Regents of the University of California

7. Sentencing and Terms of Probation

§12.54 a. Scope of Probation

The primary advantage of a misdemeanor prosecution is placing the defendant on 1, 2, or 3 years of informal probation (also known as summary probation) subject to specific terms and conditions related to the violation(s) committed. Pen C §§1203(a), 1203a. The California Penal Code is silent as to the maximum period of probation for infractions. The provisions of Pen C §1203(a) allow the judge to place the defendant on either formal probation or a conditional sentence (also known as informal probation) for the violation of a misdemeanor or an infraction. Formal probation suspends the imposition or execution of a sentence under the close supervision of a probation officer.

PRACTICE TIP: It is rare that a court will grant formal probation in a misdemeanor or infraction action. However, the court may be inclined to do so particularly in a misdemeanor action on a showing by the municipal attorney that the defendant has previously had his or her probation revoked and reinstated on numerous occasions or has committed the particular violation(s) several times before and, thus, the case requires the assistance of a probation officer to oversee defendant's compliance with the terms and conditions of probation.

© The Regents of the University of California

§12.55 b. Conditional Sentence—Informal Probation

A conditional sentence, or informal probation, suspends the imposition or execution of a sentence and orders the revocable release of the defendant without the supervision of a probation officer, subject to terms and conditions established by the court. Pen C §1203(a). A judge has authority to summarily pronounce informal misdemeanor probation. Pen C §1203(d). In the vast majority of misdemeanor prosecutions, superior court judges and commissioners summarily grant informal probation to defendants, releasing them to the community on the defendant's agreement to comply with specified conditions or terms of probation or the payment of a fine, or both.

© The Regents of the University of California

§12.56 c. Probation Terms

The terms of informal probation, or a conditional sentence, are contractual in nature. *In re Application of D.O. Young* (1932) 121 CA 711, 714, 10 P2d 154. The courts have broad authority to draft the terms of probation to fit the case. Probation conditions must reasonably relate to either (*People v Lent* (1975) 15 C3d 481, 486, 124 CR 905):

- The crime for which the defendant was convicted; or
- Some type of future criminality.

In sentencing the person, the court may consider any information about the defendant that could have been included in a probation report. Pen C §1203(d).

© The Regents of the University of California

§12.57 d. Infractions and Probation

Some judges refuse to impose probationary conditions that apply to future criminal conduct when the violation is an infraction. Although the law expressly empowers the court in infraction cases to grant a conditional sentence, it fails to establish any time period for future enforcement of the conditions. See Pen C §1203(a)-(b). Therefore, a conditional sentence for an infraction must necessarily relate only to the criminal acts charged in the complaint; the municipality may not be able to obtain protection against future violations.

PRACTICE TIP: The granting of probation is one of the biggest advantages to enforcing a municipal violation through criminal prosecution. In most municipal cases, when informal probation is granted by the court, the defendant has agreed to submit to informal probation subject to specific terms and conditions under a written plea bargain arrangement with the municipal attorney in which the defendant pleads guilty or no contest to one or more counts or charges, and the municipal attorney dismisses any remaining counts or charges. In the alternative, the court may grant probation (or a conditional sentence) to a defendant after a defendant has been convicted by a jury or found guilty by a court. Probation conditions may require the defendant to take remedial action, to stop doing an act, or to stay away from a certain location. The court may also require the defendant to pay all outstanding enforcement fines.

© The Regents of the University of California

8. Probation Revocation

§12.58 a. Grounds for Revocation

Probation may be revoked by the court on the grounds provided in Pen C §1203.2(a) and the case law interpreting it. In some circumstances, probation can even be revoked although the accused has not violated the specific probationary terms or conditions. *Miller v Oberhauser* (9th Cir 1961) 293 F2d 29, 32. If general conduct indicates that the probationer is unfit to be at large, or if the probationer fails to reestablish himself or herself as a worthy citizen, is incapable of leading a law-abiding life, or is not safe to remain in society, probation can be revoked without specific violations of the probationary conditions. *People v Delles* (1968) 69 C2d 906, 911, 73 CR 389; *People v Monette* (1994) 25 CA4th 1572, 1575, 31 CR2d 203; *People v Hunter* (1940) 42 CA2d 87, 91, 108 P2d 472; *In re Application of D.O. Young* (1932) 121 CA 711, 714, 10 P2d 154.

© The Regents of the University of California

§12.59 b. Probation Revocation Procedure

The municipal attorney's first step in the probation revocation procedure is to have the zoning and building inspectors or code compliance (or enforcement) officers prepare a declaration supporting revocation of probation. This declaration must describe the current violations committed by the defendant or the defendant's failure to comply with the probationary conditions, or both. After obtaining a hearing date, the attorney serves the defendant with an order to show cause why probation should not be revoked.

© The Regents of the University of California

§12.60 (1) Show Cause Hearing

At the order to show cause hearing, the defendant may either admit the violation or request an evidentiary hearing. When the defendant admits the violation, the judge may summarily revoke the probation and either send the defendant to jail or impose a fine, or both. The judge may also revoke and reinstate probation on the same terms and conditions as before, or modify the terms and conditions of probation, requiring the defendant to accept stricter probationary terms. See Pen C §1203a.

© The Regents of the University of California

§12.61 (2) Due Process Must Be Observed

Due process requires, among other things, notice of the grounds for probation revocation and the opportunity to be heard by a neutral fact finder. See *People v Vickers* (1972) 8 C3d 451, 456, 105 CR 305.

© The Regents of the University of California

§12.62 (3) Admissible Evidence

Hearsay evidence is generally not admissible at a probation revocation hearing unless the declarant's unavailability is demonstrated or some other good cause is shown for the admission of hearsay evidence. *People v Arreola* (1994) 7 C4th 1144, 1148, 1159, 31 CR2d 631. However, hearsay evidence has been admissible under other circumstances when the testimony bears a substantial degree of trustworthiness and there are sufficient indicia of reliability, or when good cause exists. *People v Brown* (1989) 215 CA3d 452, 454, 263 CR 391; *People v Burden* (1980) 105 CA3d 917, 921, 166 CR 542, cert denied (1980) 449 US 975. No violation of the Fifth Amendment occurs if the defendant testifies at a revocation hearing before trial on new charges. *People v Jasper* (1983) 33 C3d 931, 934, 191 CR 648; *People v Carter* (1975) 48 CA3d 369, 121 CR 677.

© The Regents of the University of California

§12.63 (4) Defendant Has Right to Confront Witnesses; Applicable Standard of Proof

The defendant is entitled to the identity of an informant as a material witness in a probation revocation hearing. *Goodlow v Superior Court* (1980) 101 CA3d 969, 972, 162 CR 121. The probationer is entitled to exercise the right to confront witnesses unless good cause exists for not allowing confrontation. *People v Winson* (1981) 29 C3d 711, 175 CR 621, cert denied (1981) 455 US 975.

Proof of a violation of the terms and conditions of probation may be made by a preponderance of the evidence (formerly, the standard was clear and convincing evidence). See *People v Rodriguez* (1990) 51 C3d 437, 272 CR 613.

© The Regents of the University of California

§12.64 9. Extension of Probation

The court may extend the probationary period at any time before it expires. *People v Williams* (1944) 24 C2d 848, 850, 151 P2d 244. See Pen C §1203.2.

PRACTICE TIP: Modification of probation should take less than 20 days depending on the superior court's calendar. Therefore, probation revocation of a misdemeanor code violation provides a municipality with adequate protection against future violations within the applicable statutory time period.

© The Regents of the University of California

§12.65 10. Cost Recovery in Criminal Code Enforcement

One court has commented (in dicta) that cities may have the power to recover costs of criminal code enforcement under Govt C §36901, but held that there is no state law authority for counties to recover such costs. *People v Minor* (2002) 96 CA4th 29, 37, 116 CR2d 591. However, the court cast some doubt on its own comment by noting parenthetically that it "is by no means obvious" that cities have such authority under the statute. 96 CA4th at 41.

© The Regents of the University of California

IV. ADMINISTRATIVE ENFORCEMENT

§12.66 A. Administrative and Summary Abatement

Instead of pursuing criminal prosecution or a civil injunction, the city may determine that administrative or summary abatement is the more appropriate remedy.

NOTE: For purposes of this part, the term abatement will be limited to the process of administrative or summary abatement instead of its generic use to rid or remove code violations or public nuisances.

Cities are authorized to enact ordinances declaring (see Govt C §§36901, 38771, 38773.5(a)):

- What constitutes a nuisance;
- The procedures for abating nuisance conditions;
- The recovery of costs to abate the nuisance; and
- The collection of civil penalties.

Both general law and charter cities may enact ordinances declaring what constitutes a nuisance and procedures for abatement and recovery of costs under their police powers under Cal Const art XI, §7. See *City of Los Angeles v Shpegel-Dimsey, Inc.* (1988) 198 CA3d 1009, 1017-1018, 244 CR 507; *Thain v City of Palo Alto* (1962) 207 CA2d 173, 179, 24 CR 515. In addition, charter cities have additional authority under the home rule doctrine to make and enforce nuisance abatement ordinances on subjects that are considered municipal affairs. See *Sherwin-Williams Co. v City of Los Angeles* (1993) 4 C4th 893, 897 n1, 16 CR2d 215. However, for drug-related forfeitures, the state's Uniform Controlled Substances Act (Health & S C §§11000-1651) occupies the field of penalizing crimes involving controlled substances, even if declared local nuisances. See *O'Connell v City of Stockton* (2007) 41 C4th 1061, 63 CR3d 67. The same is true as to prostitution-related forfeitures. *O'Connell v City of Stockton, supra.*

© The Regents of the University of California

§12.67 1. Evidence Gathering and Inspection Warrants Under Administrative Abatement

The most crucial aspect of an administrative abatement is the collection of evidence supporting the abatement. Documenting code violations is not always possible without entry onto the property and into areas where there is a reasonable expectation of privacy, and it may be necessary to obtain either written consent to enter from the property owner (or the tenant, if applicable) or to apply to the court for an inspection warrant (based on the declaration of the code enforcement officer) authorizing entry onto the property by the code enforcement personnel. Although not peace officers, enforcement inspectors must adhere to the Fourth Amendment when they inspect private property.

PRACTICE TIP: The statutory procedure for obtaining and executing an inspection warrant is described in CCP §§1822.50-1822.57. Care should be taken to include in the inspection warrant papers the exact areas to be inspected, the personnel to take part in the inspection (including police officers for safety), and any equipment to be used in the inspection, such as cameras, video equipment, or testing devices.

© The Regents of the University of California

§12.68 2. Summary (Emergency) Abatement May Be Necessary

The choice between pursuing administrative or summary abatement lies with the seriousness of the violation(s) and the imminent risk of harm. In most code enforcement cases, the department is well advised to use either a judicial or administrative hearing process to obtain an order that justifies its actions. Yet summary abatement may have to be used in rare emergency cases. *Thain v City of Palo Alto* (1962) 207 CA2d 173, 24 CR 515. A summary abatement situation exists when conditions are so severe that immediate action is required without time to seek a court or administrative order. Such a scenario could occur with a sewage leak, structural damage caused by a fire, an earthquake, or other natural disaster, but it could also occur when conditions exist that pose a high risk of harm to persons, including curious children (*e.g.,* a vehicle up on blocks accessible from a public street, or an open and accessible vacant building near a school). Whenever a city exercises its summary abatement powers, it must provide the party responsible for the nuisance with a post-abatement hearing to contest the validity of the summary abatement. Consequently, the city must collect all evidence necessary to prove its case in an administrative hearing before summarily abating a nuisance. Additionally, code enforcement staff should limit summary abatement to alleviating only the immediate dangerous conditions. Once these conditions are neutralized, staff may proceed with any remaining violations through formal administrative or judicial abatement proceedings.

PRACTICE TIP: Administrative and summary abatement frequently result in the local enforcement agency performing the corrective action. Instead of seeking a court order that compels the property owner or building manager to comply with the state or local regulations, abatement orders authorize municipal work crews or private contractors to enter the premise and perform the work themselves. Such orders may best be reserved for those situations when the property owner or other responsible party cannot be located or when the owner lacks the financial or physical ability to correct the violations. All attempts to contact the property owner before proceeding with summary abatement should be well documented.

© The Regents of the University of California

§12.69 3. Consent or Court Order for Abatement Work

Except in emergency situations justifying summary abatement, it is prudent practice either to (1) obtain written consent to enter and abate from the property owner(s) and any tenants, or (2) apply to the court for an inspection warrant authorizing entry onto the property to effectuate the necessary abatement work, especially if the abatement encompasses areas where the property owner or tenant has a reasonable expectation of privacy. See *Conner v City of Santa Ana* (9th Cir 1990) 897 F2d 1487. One state appellate court, quoting the California Supreme Court, also held that "in the absence of consent or exigent circumstances, government officials engaged in the abatement of a public nuisance must have a warrant to enter any private property where such entry would invade a constitutionally protected privacy interest." *Flahive v City of Dana Point* (1999) 72 CA4th 241, 246, 85 CR2d 51. The court stated that although there is no statutory procedure for obtaining a warrant to abate a nuisance, a procedure that mirrors statutory requirements for other types of warrants is sufficient. This procedure should include (72 CA4th at 246 n8):

- A warrant issued on reasonable cause to believe grounds for the abatement existed;
- An affidavit that particularly describes the place to be inspected and designates the purpose for the intrusion and the limitations on it;
- A warrant valid for a reasonable time and limited to the hours during which it could be executed;
- Requiring the city to post notice on the property at least 24 hours before the abatement;
- Requiring that consent to enter the property was sought and denied, or providing the reasons why consent was not sought;
- Only reasonable force used to execute the warrant; and
- After the abatement is complete, the city files a sworn return stating with particularity what actions were taken to abate the nuisance and the results.

A valid abatement warrant may also protect a city and its code enforcement officers from liability. *Ogborn v City of Lancaster* (2002) 101 CA4th 448, 558, 124 CR2d 238 (denying due process claim because court found code officers reasonably relied on the inspection and abatement warrant).

© The Regents of the University of California

§12.70 4. State Housing Law: Demolition or Repair

Administrative abatement proceedings against a substandard structure may result in repair or demolition by the locality if the owner fails to correct the code violations or demolish the substandard building, or selects an option that cannot be completed within a reasonable time. Health & S C §17980(b). Although demolition is authorized, it is the remedy of last resort, and only if certain conditions exist. Repair is preferred when it is economically feasible, unless the owner says otherwise. See Health & S C §17980.

© The Regents of the University of California

§12.71 5. Administrative Abatement Procedures for Substandard Residential Buildings

The procedures for abating substandard conditions in residential buildings are outlined in 25 Cal Code Regs §§50-70. However, municipalities may enact their own substantive and procedural regulations imposing the same requirements as the statewide standards and may make certain amendments subject to express findings. See Health & S C §17958. See also Govt C §§38771-38775; 55 Ops Cal Atty Gen 157 (1972). For residential rental property, notice of abatement proceedings must be provided to tenants by posting notice in a conspicuous place on the property and by either first-class mail to, or posting notice in a prominent place on, each affected residential unit. Health & S C §§17980, 17980.6.

© The Regents of the University of California

§12.72 6. Vehicle Abatement Laws

A city may adopt an ordinance establishing procedures for abatement and removal, as a public nuisance, of abandoned, wrecked, dismantled, or inoperative vehicles from private or public property and for recovery of administrative and removal costs. Veh C §22660. The ordinance must contain certain provisions, including notice to Department of Motor Vehicles within 5 days of removal and an exemption for lawfully stored vehicles, among others. Veh C §22661.

Under Veh C §22659.5, cities may also adopt an ordinance declaring a motor vehicle to be a public nuisance subject to seizure and an impoundment for up to 30 days when the motor vehicle is used in, and the driver arrested for, the commission, or attempted commission, of various prostitution-related offenses (Pen C §§266h-266i, and 647(b)), or illegal dumping of waste matter on public or private roads or property in violation of Pen C §374.3(h), when the owner or operator of the vehicle has been convicted of the same offense within 3 years.

© The Regents of the University of California

§12.73 7. Sign Enforcement Restrictions

Code enforcement officers seeking to enforce local sign ordinances should be aware of the On-Premises Advertising Act (Bus & P C §§5490-5499) and the Outdoor Advertising Act (Bus & P C §§5200-5486). Both acts place heavy restrictions on abatement of non-conforming signs without compensating the sign owner.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/12 Code Enforcement/§12.74 8. Vacant Residential Property Acquired Through Foreclosure

§12.74 8. Vacant Residential Property Acquired Through Foreclosure

Fines of up to $1000 per day may be imposed against an owner, including a bank or lending institution, that fails to maintain vacant residential property that was purchased at a foreclosure sale or acquired through foreclosure or a deed of trust. See CC §2929.3(a). "Failure to maintain" means failure to care for the exterior of a property, including (CC §2929.3(b)):

- Excessive foliage growth;
- Failure to prevent trespassers or squatters from remaining on the property;
- Failure to prevent mosquito larvae; or
- The existence of other conditions that create a public nuisance.

NOTE: The provisions of CC §2929.3 will remain in effect until January 1, 2013, unless otherwise extended or repealed.

© The Regents of the University of California

§12.75 a. Procedure for Enforcement Under CC §2929.3

The governmental entity must provide a minimum of 30 days' written notice to the legal owner of the property to remedy the violation, and provide for a hearing and an opportunity to contest the violation before the imposition of a fine. CC §2929.3(a)(2). Notice of less than 30 days may be provided when the entity determines that a condition threatens public health or safety, provided that notice of that determination and time for compliance is given. CC §2929.3(c). In either case, on the day following the expiration of the period to remedy the violation, a fine of up to $1000 per day may be imposed until the violation is corrected. See CC §2929.3(a)(2). Fines and penalties collected under this section must be "directed to" local nuisance abatement programs. CC §2929.3(d).

© The Regents of the University of California

§12.76 b. Local Ordinances Are Not Preempted

The provisions of CC §2929.3 do not preempt local ordinances directed at vacant properties. CC §2929.3(f). However, a governmental entity may not impose fines under both CC §2929.3 and a local ordinance. CC §2929.3(e).

© The Regents of the University of California

§12.77 B. Administrative Hearings and Due Process

Courts have established the minimum due process safeguards for administrative hearings to include:

- Adequate notice to the proper parties;
- A reasonable opportunity to be heard; and
- A chance to controvert the evidence.

Public nuisance ordinances should provide notice and hearing provisions, but absent express language, requirement for notice and hearing may be implied. *Bess v Park* (1956) 144 CA2d 798, 802, 301 P2d 978. In administrative abatement hearings, the municipality has the burden to prove by a preponderance of the evidence that the alleged violations or conditions are a public nuisance that requires abatement by either repair, removal, or demolition. *Leppo v City of Petaluma* (1971) 20 C3d 711, 718, 97 CR 840. A proceeding before an administrative officer or board is adequate if the basic requirements of notice and opportunity for hearing are met. *Blinder, Robinson & Co. v Tom* (1986) 181 CA3d 283, 226 CR 339. A full judicial-type hearing is not required. *Mohilef v Janovici* (1996) 51 CA4th 267, 58 CR2d 721.

© The Regents of the University of California

§12.78 1. Notice

Notice is essential to allow the citizen a chance to defend charges (*People v Swink* (1984) 150 CA3d 1076, 1079, 198 CR 290, superseded by statute on other grounds as stated in *People v American Bankers Ins. Co.* (1991) 227 CA3d 1289, 278 CR 314):

- Before property interests are disturbed;
- Before assessments or penalties are imposed; and
- When a penalty or forfeiture might be suffered for the mere failure to act.

The right to a hearing that provides the person in violation the opportunity to present arguments in response to the penalty, fine, or disturbing of a property right is also a minimal requirement of the Fourteenth Amendment. *Ohio Bell Tel. Co. v Pub. Util. Comm'n* (1937) 301 US 292, 305, 81 L Ed 1093, 57 S Ct 724.

© The Regents of the University of California

§12.79 2. Impartial Hearing Body or Officer Required

When due process requires a hearing, the hearing body or officer must be impartial. *Haas v County of San Bernardino* (2002) 27 C4th 1017, 1025, 119 CR2d 341. Administrative hearing bodies or officers must be appointed in a way that does not create the risk that decisions that favor the public agency will be rewarded with future remunerative work. 27 C4th at 1024. A hearing officer must be disqualified from the proceeding when the public agency unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's good will. 27 C4th at 1026.

PRACTICE TIP 1: When conducting an administrative hearing, consider having an independent attorney sit as counsel for the administrative body. When the attorney who prosecutes an administrative action or assists staff with prosecution of the administrative action also serves as the advisor to the administrative tribunal, there is a possibility of bias and a potential due process violation. *Nightlife Partners, Ltd. v City of Beverly Hills* (2003) 108 CA4th 81, 133 CR2d 234; *Howitt v Superior Court* (1992) 3 CA4th 1575, 5 CR2d 196. However, in large city attorney offices, different attorneys from the same office may represent the board and may act as prosecutor provided certain criteria are met. *Nightlife Partners, Ltd. v City of Beverly Hills, supra.*

PRACTICE TIP 2: Once an administrative body renders its decision, the decision should be served personally or by certified mail, return receipt requested, on the defendant in the administrative action. The administrative body's decision should include notice of the number of days that the defendant has to appeal the decision, and with whom the appeal must be filed if there is an administrative appeal right. If the administrative body's decision is final, the decision should specify the right of judicial review.

© The Regents of the University of California

§12.80 3. Conduct of the Hearing

In administrative abatement hearings, the municipality has the burden to prove by a preponderance of evidence the alleged code violations or public nuisance. See *Leppo v City of Petaluma* (1971) 20 C3d 711, 718, 97 CR 840. Due process under the federal and state constitutions does not entitle the party who is the subject of the administrative abatement proceeding to have a full judicial-type hearing; it is sufficient that the party receives adequate notice of the nature of the alleged violations or nuisance and a meaningful opportunity to respond to the charges. *Mohilef v Janovici* (1996) 51 CA4th 267, 276, 58 CR2d 721 (no right to sworn testimony, cross-examination of witnesses, discovery, or subpoenas in nuisance abatement hearing).

© The Regents of the University of California

C. Other Available Administrative Processes

§12.81 1. Mediation and Office Hearings

Department inspectors, often with the city attorney, employ various dispute resolution methods to negotiate an agreement with the owner to comply with the law before initiating any judicial or administrative abatement proceedings. Any such negotiated agreement should be reduced to writing as a Compliance Agreement or Settlement Agreement, specifying the completion dates for corrective action as well as the consequences for failure to comply.

© The Regents of the University of California

§12.82 2. Recordation of Violation Notices

Notices or instruments relating to the abatement proceeding may be recorded. See Govt C §38773.5(e). The notice should provide sufficient information to identify the code violations or the nuisance conditions. Some municipalities impose a process in which they record the notice of violation against the property but permit the owner to appeal their decision. Such notices put prospective buyers of the property on notice of the pending code violations or nuisance conditions, and provide an incentive for correction of the conditions when the owner desires to sell the property.

© The Regents of the University of California

§12.83 3. Notice of Pending Action

Similar to a lis pendens in civil actions, a notice of pending action can be recorded on the property providing information that there is a pending action involving the property, including contact information, without specifying that any violations are present. This recorded notice provides notice to subsequent purchasers, without necessitating reinitiation of the ongoing enforcement action were a property to change hands.

© The Regents of the University of California

13

Liability and Litigation

I. INTRODUCTION §13.1

II. MANDATE/JUDICIAL REVIEW OF MUNICIPAL DECISIONS §13.2
- A. Traditional Mandamus §13.3
  - 1. When Traditional Mandamus Is Proper Method of Review
    - a. Ministerial Versus Discretionary Acts §13.4
    - b. Legislative Versus Adjudicatory Acts §13.5
  - 2. Scope of Review in Traditional Mandamus Action §13.6
    - a. No Inquiry Into Legislators' Motives §13.7
    - b. Impact on Scope of Review in Land Use Cases §13.8
  - 3. Admissible Evidence in Traditional Mandamus Action §13.9
  - 4. Burden of Proof in Traditional Mandamus Action §13.10
    - a. Reasonable Relation Test §13.11
    - b. Presumption of Validity §13.12
    - c. Exhaustion of Administrative Remedies §13.13
  - 5. Statute of Limitations Applicable to Traditional Mandamus Actions §13.14
  - 6. Appeal of Orders in Traditional Mandamus Actions §13.15
- B. Administrative Mandamus §13.16
  - 1. Scope of Review in Administrative Mandamus Actions §13.17
    - a. Standard of Review in Administrative Mandamus Actions §13.18
      - (1) Substantial Evidence Test §13.19
      - (2) Independent Judgment Test §13.20
    - b. Admissible Evidence in Administrative Mandamus Actions §13.21
    - c. Burden of Proof in Administrative Mandamus Actions §13.22
  - 2. Statute of Limitations Applicable to Administrative Mandamus Actions §13.23
- C. Constitutional Limitations on Mandate/Judicial Review of Legislation §13.24
  - 1. Equal Protection (Discriminatory Classification) §13.25
  - 2. Substantive Due Process (Arbitrary or Unreasonable Regulation) §13.26
  - 3. Ripeness §13.27

III. GOVERNMENT CLAIMS ACT
- A. Claims Requirement §13.28
- B. Actions for Which Claims Are Required §13.29
- C. Actions for Which Claims Are Not Required §13.30
  - a. Statutory Exceptions §13.31
  - b. Actions for Relief Other Than Money or Damages §13.32
  - c. Public Entity's Defenses §13.33
  - d. Actions Based on Roster of Public Agencies §13.34
    - (1) Which Agencies Must File Information §13.35
    - (2) Information Required §13.36
    - (3) When Information Must Be Filed §13.37
  - e. Cross-Complaints in Actions Commenced by Entity §13.38
  - f. Local Claim Requirements §13.39
    - (1) By Ordinance §13.40
    - (2) By Contract §13.41
- D. Claim Presentation Procedures
  - 1. What Constitutes a Sufficient Claim §13.42
    - a. Required Contents §13.43
    - b. Use of Local Forms §13.44
    - c. Substantial Compliance With Claim Presentation Requirements §13.45
    - d. Examples of Unconventional Claims §13.46
    - e. Non-Claims §13.47
    - f. Complaints §13.48
  - 2. Who Must Present a Claim and to Whom §13.49
    - a. Heirs §13.50
    - b. Children's Claims §13.51
    - c. Spouses' Claims §13.52

d. Workers' Compensation Carrier §13.53
e. Class Actions §13.54
3. When to Present a Claim
a. Time for Presentation §13.55
b. Calculation of the Presentation Period §13.56
(1) General Rule on Cause of Action Accrual §13.57
(2) When Accrual Is Delayed §13.58
c. Tolling of the Presentation Period §13.59
d. Notice of Untimely Claim §13.60
e. Amendments to Claims §13.61
E. Consideration of Claim
1. Notice of Insufficiency §13.62
2. Time to Act on Claim
a. Entity Has 45 Days to Act on Claim §13.63
b. Failure to Timely Act Is Rejection by Operation of Law §13.64
3. Types of Entity Action on Claim §13.65
4. Notice of Entity Action on Claim §13.66
F. Statute of Limitations for Filing Action on Claims
1. Actions in Which Claim Is Required §13.67
2. Actions in Which No Claim Is Required §13.68
3. Avoiding Waiver of Statute of Limitations §13.69
G. Late Claim Procedures §13.70
1. Time Limit §13.71
2. Grounds for Relief §13.72
a. Standard for Excusable Neglect §13.73
b. Minors §13.74
c. Incapacitated Adults §13.75
d. Equitable Estoppel §13.76
3. Evaluation of Late Claim Applications §13.77
4. Action on Late Claim Applications §13.78
H. Petition to Be Relieved From Claims Requirement §13.79
1. Time Limit §13.80
2. Grounds for Relief §13.81
3. Statute of Limitations If Petition Granted §13.82
4. Review of Determination §13.83
a. If Petition Is Granted §13.84
b. If Petition Is Denied §13.85

IV. INDEMNIFICATION OF PUBLIC EMPLOYEES AND OFFICERS
A. General Obligations
1. Duty to Defend §13.86
2. Duty to Indemnify §13.87
B. Scope of Employment §13.88
C. Punitive Damages §13.89

V. MUNICIPAL LIABILITY §13.90
A. Principles of Immunity §13.91
1. Tort Immunities Generally §13.92
2. Specific Immunities Under Government Claims Act §13.93
B. Municipal Tort Liability Generally §13.94
1. Discretionary Acts §13.95
a. Discretionary Versus Ministerial Acts §13.96
b. Employee Immunity §13.97
c. Mandatory Duties §13.98
2. Dangerous Condition of Public Property §13.99
a. What Constitutes "Owned or Controlled" Property §13.100
b. What Constitutes a "Dangerous Condition" §13.101
(1) Dangerous Condition on Adjacent Property §13.102
(2) Trivial Defect on Property §13.103
c. What Constitutes "Legal Cause" of Injury §13.104
d. What Constitutes Notice of Dangerous Condition §13.105
e. Affirmative Defenses to Action for Dangerous Condition of Property §13.106
3. Checklist for Approaching Tort Liability
a. Before Lawsuit Is Filed §13.107
b. After Lawsuit Is Filed §13.108

C. Municipal Liability for Intentional Torts §13.109
D. Municipal Liability for Libel and Slander
1. Legislative or Other Official Proceeding §13.110
2. Discharge of Official Duty §13.111
3. Civil Rights Liability for Defamation §13.112
E. Municipal Liability for Constitutional Claims §13.113
F. Municipal Liability for Civil Rights/42 USC §1983 Claims §13.114
1. Scope of §1983 §13.115
a. Constitutional Rights §13.116
b. Other Rights/Interests §13.117
c. Property Interests §13.118
d. Liberty Interests §13.119
e. Violation of Federal Laws §13.120
f. Wrongful Death §13.121
g. Section 1983 Actions in State Court §13.122
2. Immunities Under §1983
a. No Immunity Under §1983 for Local Governments §13.123
b. Individual Immunities §13.124
(1) Absolute Immunity §13.125
(2) Qualified Immunity §13.126
c. Immunity for States §13.127
d. Collateral Estoppel §13.128
3. Prima Facie Case for §1983 Claim §13.129
a. Required Allegations §13.130
(1) Deprivation of Federally Protected Right §13.131
(2) Action Under Color of State Law §13.132
b. Required Causation §13.133
c. Municipal Policy or Custom §13.134
(1) Liability May Arise From Acts of Lower-Level Employees §13.135
(2) Liability May Arise From a Pattern of Inadequate Training §13.136
(3) Policy of Custom Must Be Attributable to a Policy-Maker §13.137
(4) Violation Must Be Caused by Policy or Custom §13.138
d. Defendant's State of Mind: Specific Intent Is Not Required §13.139
4. Availability of Remedies Under State Law §13.140
5. Naming Defendants Under §1983 §13.141
6. Liability for Causing the Acts of Others §13.142
7. Duty to Provide Defense in §1983 Suits §13.143
8. Remedies Under §1983
a. Damages §13.144
(1) Nominal Damages §13.145
(2) Compensatory Damages/ §13.146
(3) Punitive Damages §13.147
b. Injunctions §13.148
c. Attorney Fees and Costs §13.149
d. Civil Penalties §13.150
9. Forum Considerations: State Versus Federal Court §13.151
10. Statute of Limitations for §1983 Claims §13.152
G. Municipal Antitrust Liability §13.153
H. Municipal Contract Liability §13.154
I. Personal Liability of Officers and Employees §13.155
J. No Municipal Liability for Punitive Damages §13.156
K. Municipal Liability for Attorney Fees
1. Arbitrary or Capricious Administrative Actions §13.157
2. Attorney Fees in Civil Rights Actions §13.158
a. What Constitutes Successful Party §13.159
b. Calculating Attorney Fees Awards §13.160
3. Attorney Fees in Eminent Domain, Inverse Condemnation, and Mandamus Actions §13.161
4. Attorney Fees in Other Actions §13.162
5. Private Attorney General Doctrine/CCP §1021.5 §13.163
a. What Constitutes Prevailing or Successful Party §13.164
b. How to Calculate Amount of Award §13.165
L. Right of Municipality to Recover Attorney Fees
1. Motion for Costs and Attorney Fees Under CCP §1038 §13.166
a. Criteria for Granting Motion §13.167
b. Timing of Motion §13.168

2. Motion for Sanctions Under CCP §128.5 §13.169
3. Discovery Costs §13.170
4. Implied Indemnity §13.171
5. Contract Claims §13.172

VI. ACTIONS BROUGHT BY MUNICIPALITY
A. Municipality As Plaintiff §13.173
B. Equitable Estoppel Defense as Applied to Municipalities §13.174
1. General Elements of Estoppel §13.175
2. Application of Estoppel Defense Against Cities Depends on Two Additional Factors §13.176
3. Cases Considering Application of Estoppel Defense to Municipalities §13.177
C. Application of Claims Statute to Suit by One City Against Another Public Entity §13.178
D. Indemnity Actions by Municipalities §13.179
1. Express (Contractual) Indemnification §13.180
2. Joint Powers Agreements §13.181
3. Equitable Indemnity §13.182
E. Subrogation Actions by Municipalities §13.183
F. Validation Actions Brought by Municipalities
1. When Validation Action Is Used §13.184
2. Validation Procedures §13.185
3. Legislative Validation Actions §13.186
4. Available Remedies §13.187

© The Regents of the University of California

§13.1 I. INTRODUCTION

This chapter presents an overview of the many issues concerning municipal claims, liability, and litigation. Topics include petitions for writ of mandate, governmental claim filing procedures, municipal liability, indemnification of public employees, immunities, constitutional liability claims, and elements of damages and attorney fees. This chapter also briefly discusses actions brought by a municipality.

On topics covered by this chapter, see generally California Administrative Hearing Practice (2d ed Cal CEB 1997); California Administrative Mandamus (3d ed Cal CEB 2003); California Civil Writ Practice (4th ed Cal CEB 2008); California Attorney Fee Awards, chap 3 (3d ed Cal CEB 2010); California Government Tort Liability Practice (4th ed Cal CEB 1999); California Tort Guide, chap 8 (4th ed Cal CEB 2009).

© The Regents of the University of California

§13.2 II. MANDATE/JUDICIAL REVIEW OF MUNICIPAL DECISIONS

A petition for writ of mandate may be available to challenge a city's legislative, ministerial, or adjudicatory actions. Generally, "a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specified set of existing facts." *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 34 n2, 112 CR 805. A ministerial act is an act specifically required by law, involving little or no discretion by the public agency, when the agency has a clear and present duty to act. *City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614.

The appropriate form of mandate is determined by the nature of the action under review. *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1482, 75 CR3d 393. Generally, administrative mandamus is the proper form of mandate to challenge adjudicatory actions of a local agency, while traditional (or ordinary) mandamus is the proper form of action to review ministerial and legislative or "quasi-legislative" actions of a local agency. *California Water Impact Network v Newhall County Water Dist., supra*; *Friends of the Old Trees v Department of Forestry & Fire Protection* (1997) 52 CA4th 1383, 1389, 61 CR2d 297.

© The Regents of the University of California

§13.3 A. Traditional Mandamus

Traditional (or ordinary) mandamus is the proper form of action to challenge reviewable ministerial or quasi-legislative acts of a city. *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483, 75 CR3d 393. The statutory authority for traditional mandamus actions is CCP §1085. See *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 566, 38 CR2d 139; *Hutchinson v City of Sacramento* (1993) 17 CA4th 791, 21 CR2d 779.

On traditional mandamus, see California Civil Writ Practice, chap 2 (4th ed Cal CEB 2008).

© The Regents of the University of California

1. When Traditional Mandamus Is Proper Method of Review

§13.4 a. Ministerial Versus Discretionary Acts

A ministerial act is one that a public officer or entity is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his or her own judgment or opinion concerning the act's propriety or impropriety, when a given state of facts exists. *Rodriguez v Solis* (1991) 1 CA4th 495, 501, 2 CR2d 50 (denial of permit applications for freestanding advertising signs). The petitioner bears the burden of proof. *Branciforte Heights, LLC v City of Santa Cruz* (2006) 138 CA4th 914, 934, 42 CR3d 96.

The difference between ministerial and discretionary actions can involve difficult and subtle distinctions. See *Hutchinson v City of Sacramento* (1993) 17 CA4th 791, 796, 21 CR2d 779 (speed limit ordinance is legislative, not ministerial). Court decisions on building permits vary. See *Friends of Westwood, Inc. v City of Los Angeles* (1987) 191 CA3d 259, 281, 235 CR 788 (city's approval process for issuance of building permit for large office building was discretionary); *Slagle Constr. Co. v County of Contra Costa* (1977) 67 CA3d 559, 563, 136 CR 748 (issuance of building permit may involve some discretion); *Ellis v City Council of the City of Burlingame* (1963) 222 CA2d 490, 497, 35 CR 317 (issuance of building permit is ministerial act).

© The Regents of the University of California

§13.5 b. Legislative Versus Adjudicatory Acts

Quasi-legislative acts are also reviewable by traditional mandamus. See *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 567, 38 CR2d 139; *State v Superior Court (Veta)* (1974) 12 C3d 237, 247, 115 CR 497.

Whether an act is legislative or adjudicatory is not always clear. See, *e.g., Southwest Diversified, Inc. v City of Brisbane* (1991) 229 CA3d 1548, 1557, 280 CR 869 (discussing legislative versus adjudicatory acts in land use context). Generally, a legislative act is the formulation of a rule to be applied in all future cases, and an adjudicatory act is the application of legislative rules to a specific set of existing facts. *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 34 n2, 112 CR 805; *California Aviation Council v City of Ceres* (1992) 9 CA4th 1384, 1390, 12 CR2d 163. An award of a public contract, and all of the acts leading up to the award, have been found to be legislative in character. *Mike Moore's 24-Hour Towing v City of San Diego* (1996) 45 CA4th 1294, 1303, 53 CR2d 355. Actions or decisions for which the agency was not required to hold an evidentiary hearing may also be reviewable under traditional mandate. *McGill v Regents of Univ. of Cal.* (1996) 44 CA4th 1776, 1785, 52 CR2d 466 (denial of tenure). Rezoning of property is generally a quasi-legislative act. *City of Carmel-By-The-Sea v Board of Supervisors* (1986) 183 CA3d 229, 238, 227 CR 899. However, matters that would usually appear to be quasi-legislative have been found to be adjudicatory. See *Consaul v City of San Diego* (1992) 6 CA4th 1781, 1792, 8 CR2d 762 ("peculiar nature" of rezoning decision, seeming to declare specific rights in particular factual situation, sounded both legislative and adjudicatory); *Mountain Defense League v Board of Supervisors* (1977) 65 CA3d 723, 729, 135 CR 588 (general plan amendment with simultaneous approval of private development plan was quasi-judicial act subject to the substantial evidence test).

© The Regents of the University of California

§13.6 2. Scope of Review in Traditional Mandamus Action

The two basic requirements of a traditional mandamus action that seeks to compel a ministerial act are (*City of Dinuba v County of Tulare* (2007) 41 C4th 859, 868, 62 CR3d 614):

(1) a clear, present duty on the part of respondent, and

(2) a clear, present, and beneficial right in petitioner to performance of that duty.

Judicial review of quasi-legislative acts is usually limited to a determination of whether:

- The act was arbitrary or capricious;
- The act was entirely lacking in evidentiary support; or
- The city failed to follow the procedures required by law.

Strumsky v San Diego County Employees Retirement Ass'n (1974) 11 C3d 28, 34 n2, 112 CR 805. But see *Silicon Valley Taxpayers' Ass'n, Inc. v Santa Clara County Open Space Auth.* (2008) 44 C4th 431, 449, 79 CR3d 312 (judicial review of compliance with Proposition 218 assessments is governed by independent review/de novo standard in light of constitutional nature and language adopted by proposition).

The scope of judicial review may be affected by specific statutes or constitutional provisions. See, *e.g.,* Cal Const art XIIID, §§4(f), 6(b)(5) (burden is on agency to demonstrate compliance with Proposition 218); Govt C §56107 (challenge to Local Agency Formation Commissions (LAFCO) determinations), §65009 (challenge to local zoning and planning decisions), §§65750-65763 (challenge to adequacy of general plan); Pub Res C §21168.5 (California Environmental Quality Act challenge in all cases other than those in which hearing is required by law).

Traditional mandamus does not lie to control discretion that is lawfully entrusted to an administrative body except to compel the exercise of discretion. *Common Cause v Board of Supervisors* (1989) 49 C3d 432, 442, 261 CR 574; *Saathoff v City of San Diego* (1995) 35 CA4th 697, 702, 41 CR2d 352 (award of contract). In determining if mandate will lie for abuse of discretion, the agency's action will be upheld if reasonable minds may disagree as to the wisdom of the action. *Helena F. v West Contra Costa Unified Sch. Dist.* (1996) 49 CA4th 1793, 1799, 57 CR2d 605 (school district assignment of displaced students).

© The Regents of the University of California

§13.7 a. No Inquiry Into Legislators' Motives

The decision of the legislative body is evaluated on its face, without inquiry into the underlying motive or thought processes of legislators. *City of Fairfield v Superior Court* (1975) 14 C3d 768, 777, 122 CR 543; *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 170, 76 CR3d 93; *Oxnard Harbor Dist. v Local Agency Formation Comm'n* (1993) 16 CA4th 259, 271, 19 CR2d 819. For this reason, discovery of such legislative thought processes is prohibited. *Oxnard Harbor Dist. v Local Agency Formation Comm'n, supra*.

© The Regents of the University of California

§13.8 b. Impact on Scope of Review in Land Use Cases

Cities have broad land use authority within which they may frame local land use regulations. *Federation of Hillside & Canyon Ass'ns v City of Los Angeles* (2004) 126 CA4th 1180, 1195, 24 CR3d 543 (adoption or amendment of general plan is legislative act, which is presumed valid, and court cannot inquire into wisdom of legislative act or review merits of local government's policy decisions). In the light of this expansive police power, judicial review of legislative land use decisions, such as enactment of zoning ordinances and adoption or amendment of general plans, is generally limited to determining whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support. *Federation of Hillside & Canyon Ass'ns v City of Los Angeles, supra*; *Las Virgenes Homeowners Fed'n v County of Los Angeles* (1986) 177 CA3d 300, 305, 223 CR 18. However, there is ample flexibility in the scope of judicial review to accommodate stricter attitudes toward reasonableness if a court believes that a regulation is enacted in bad faith, as in the case of a hasty change by the city that is focused on the individual property in question. See, *e.g*., *Kieffer v Spencer* (1984) 153 CA3d 954, 961, 200 CR 755 (interim ordinance invalid when city made affirmative representations and then adopted urgency ordinance mandating denial of permit); *Arnel Dev. Co. v City of Costa Mesa* (1981) 126 CA3d 330, 336, 178 CR 723 (initiative measure aimed at defeating specific project); *Ogo Assocs. v City of Torrance* (1974) 37 CA3d 830, 834, 112 CR 761 (evidence that moratorium enacted to block project).

© The Regents of the University of California

§13.9 3. Admissible Evidence in Traditional Mandamus Action

In a traditional mandamus action challenging a quasi-legislative act, the evidence is generally confined to the material before the agency at the time it made its decision, as well as matters subject to judicial notice. *San Joaquin County Local Agency Formation Comm'n v Superior Court* (2008) 162 CA4th 159, 167, 76 CR3d 93; *Carrancho v California Air Resources Bd.* (2003) 111 CA4th 1255, 1269, 4 CR3d 536; *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 578, 38 CR2d 139. See Evid C §§450-460 (judicial notice). Extrinsic evidence is admissible only in those rare instances in which (*Western States Petroleum Ass'n, supra*):

- the evidence existed before the decision was made; and
- it was not possible in the exercise of due diligence to present the evidence to the agency before the decision was made.

Extrinsic evidence may, however, be admissible in traditional mandamus cases if the challenged action is a ministerial or an informal administrative action, and the facts are in dispute. *Western States Petroleum Ass'n v Superior Court, supra*.

Because of the rule that evidence in a traditional mandamus proceeding is limited to material before the agency at the time of the action, discovery is generally impermissible in such actions. See *Carrancho v California Air Resources Bd., supra*.

PRACTICE TIP: In dicta, *Western States Petroleum Ass'n* and some court of appeal decisions raised the issue of whether extra-record evidence may be admissible for other purposes, such as to demonstrate agency misconduct. See *Western States Petroleum Ass'n,* 9 C4th at 575 n5; *San Joaquin County Local Agency Formation Comm'n*, 162 CA4th at 169; *Santa Teresa Citizen Action Group v City of San Jose* (2003) 114 CA4th 689, 706, 7 CR3d 868 (observing that in "some cases the extra-record evidence might be admissible to prove that the agency did not proceed as required by law, as when petitioners raise issues such as 'standing …, the accuracy of the administrative record, … procedural unfairness, and … agency misconduct,' " but declining to admit extra-record evidence). However, no published appellate case has yet held that such evidence is admissible.

© The Regents of the University of California

§13.10 4. Burden of Proof in Traditional Mandamus Action

The petitioner contesting the agency's decision generally has the burden of demonstrating the invalidity of the decision by showing that the action was arbitrary, capricious, entirely lacking in evidentiary support, or invalid as a matter of law. *City of Arcadia v State Water Resources Control Board* (2006) 135 CA4th 1392, 1409, 38 CR3d 373; *Citizens for Improved Sorrento Access, Inc. v City of San Diego* (2004) 118 CA4th 808, 814, 13 CR3d 259. But see *Silicon Valley Taxpayers' Ass'n, Inc. v Santa Clara County Open Space Auth.* (2008) 44 C4th 431, 448, 79 CR3d 312 (based on language of constitutional provisions, public agency must demonstrate that it complied with applicable procedural and substantive provisions of Proposition 218). For example, a person attacking the application of a zoning ordinance to particular property must produce sufficient evidence from which the court can make findings that will justify it in concluding that the regulation is unreasonable and invalid as a matter of law. *Wilkins v City of San Bernardino* (1946) 29 C2d 332, 338, 175 P2d 542.

PRACTICE TIP: If the action in mandamus presents no triable issue of fact or is based solely on the administrative record, consider filing a motion for judgment on the writ petition under CCP §1094.

© The Regents of the University of California

§13.11 a. Reasonable Relation Test

Generally, if the underlying act involves the exercise of discretionary legislative power, courts will interfere by mandamus only if the action taken is so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. See *Carrancho v California Air Resources Bd.* (2003) 111 CA4th 1255, 1265, 4 CR3d 536. This is a highly deferential standard. *Carrancho v California Air Resources Bd., supra*. For example, the court will not set aside or disregard the decision of the city council as to matters of opinion and policy unless (*Lockard v City of Los Angeles* (1949) 33 C2d 453, 202 P2d 38):

- The regulation has no reasonable relation to the public welfare, or
- The objective facts show that there has been an oppressive or unwarranted interference with property rights in the exercise of the police power.

© The Regents of the University of California

§13.12 b. Presumption of Validity

The trial court must presume that the decisions of the agency or public official are correct. *California Teachers Ass'n v Ingwerson* (1996) 46 CA4th 860, 865, 53 CR2d 917. Every intendment is indulged in favor of the validity of the regulation. *Town of Los Altos Hills v Adobe Creek Props., Inc.* (1973) 32 CA3d 488, 508, 108 CR 271. In addition, the trial court must presume that an official duty has been regularly performed. Evid C §664.

PRACTICE TIP: Although Evid C §664 and case law presume that actions taken by the agency were properly performed, it is good practice to ensure that the agency has documentary support for all of its actions that can be included as part of any court proceedings.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.13 c. Exhaustion of Administrative Remedies

§13.13 c. Exhaustion of Administrative Remedies

Available administrative remedies must be exhausted before filing a mandamus action. *Metcalf v County of Los Angeles* (1944) 24 C2d 267, 269, 148 P2d 645.

NOTE: This rule does not apply when an administrative remedy is unavailable or inadequate. *Tiernan v Trustees of Cal. State Univ. & Colleges* (1982) 33 C3d 211, 217, 188 CR 115.

To exhaust administrative remedies, a petitioner must (*Campbell v Regents of Univ. of Cal.* (2005) 35 C4th 311, 321, 25 CR3d 320; *Park Area Neighbors v Town of Fairfax* (1994) 29 CA4th 1442, 1447, 35 CR2d 334):

- Pursue any available administrative remedy or procedure offered by the public agency's ordinances, rules, or procedures, including any administrative appeals; and
- Present all legal and factual issues supporting the petitioner's position to the public agency before filing suit.

Generally, a plaintiff must plead facts demonstrating exhaustion of administrative remedies; the failure to do so is a jurisdictional defect. *Pan Pac. Props., Inc. v County of Santa Cruz* (1978) 81 CA3d 244, 251, 146 CR 428 (conclusory allegation in complaint that plaintiffs "have exhausted their administrative remedies" is insufficient). See *State v Superior Court (Bodde)* (2004) 32 C4th 1234, 1239, 13 CR3d 534 (failure to plead exhaustion in government claims context is properly raised by demurrer).

Failure to exhaust administrative remedies may be raised as an affirmative defense. *San Franciscans Upholding the Downtown Plan v City & County of San Francisco* (2002) 102 CA4th 656, 686, 125 CR2d 745.

PRACTICE TIP: Affirmative defenses may be found to have been waived unless raised in the answer or other responsive pleading. See, *e.g., Minton v Cavaney* (1961) 56 C2d 576, 581, 15 CR 641 (statute of limitations); *Epperson v Rosemond* (1950) 100 CA2d 344, 345, 223 P2d 655 (estoppel). Because failure to exhaust administrative remedies is generally considered to be a jurisdictional requirement that must be properly pleaded by the plaintiff (see *Tahoe Vista Concerned Citizens v County of Placer* (2000) 81 CA4th 577, 589, 96 CR2d 880), a city could reasonably take the position that failure to raise the defense in a responsive pleading is not a waiver. See *People v Coit Ranch, Inc.* (1962) 204 CA2d 52, 57, 21 CR 875 (failure to exhaust administrative remedies defense not subject to waiver and may be raised at any point in proceedings). But see *Mission Hous. Dev. Co. v City & County of San Francisco* (1997) 59 CA4th 55, 67, 69 CR2d 185 (failure to exhaust administrative remedies defense may be waived if not raised). However, to avoid a claim of waiver, the better practice is to include the failure to exhaust administrative remedies defense in the answer or other responsive pleading.

© The Regents of the University of California

§13.14 5. Statute of Limitations Applicable to Traditional Mandamus Actions

Code of Civil Procedure §1085 contains no statute of limitations. The applicable statute of limitations will be provided by other statutes. See, *e.g.,* CCP §§338(a) (3-year statute of limitations for liability created by statute); Govt C §65009(c)(1) (90-day statute of limitations for land use matters); Pub Res C §21167 (30- to 180-day statute of limitations under CEQA). The substance of the claim, rather than the form of the action or relief sought, determines the applicable statute of limitations. See *Hensler v City of Glendale* (1994) 8 C4th 1, 22, 32 CR2d 244, cert denied (1995) 513 US 1184. A specific statute of limitations will control over a general provision. See *Howard Jarvis Taxpayers Ass'n v City of Los Angeles* (2000) 79 CA4th 242, 93 CR2d 742.

© The Regents of the University of California

§13.15 6. Appeal of Orders in Traditional Mandamus Actions

An order or ruling on a petition for writ of mandate that contemplates no further action and disposes of all of the issues between the parties may be an appealable order, triggering the time period for a party to file a notice of appeal. *Laraway v Pasadena Unified Sch. Dist.* (2002) 98 CA4th 579, 583, 120 CR2d 213. Courts have treated orders denying petitions as final judgments for appellate purposes. See, *e.g*., *Townsel v San Diego Metro. Transit Board* (1998) 65 CA4th 940, 944 n1, 77 CR2d 231. However, if other causes of action remain pending between the parties after the denial of a petition for a writ of mandate, the denial is not appealable. *Griset v Fair Political Practices Comm'n* (2001) 25 C4th 688, 697, 107 CR2d 149.

© The Regents of the University of California

§13.16 B. Administrative Mandamus

Administrative mandamus is used to review "quasi-judicial" or "adjudicatory" decisions that involve application of a rule or set of rules to a specific project or a set of existing facts or circumstances. *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1482, 75 CR3d 393. Administrative mandamus is appropriate to review a public agency's determination, finding, or decision, made as a result of a proceeding in which by law a hearing is required, evidence is required to be taken, and discretion in the determination of facts is vested in a public agency. *California Water Impact Network v Newhall County Water Dist., supra*. The statutory authority for administrative mandamus actions is CCP §1094.5.

Administrative mandamus extends to final administrative decisions made as a result of proceedings in which the law requires a hearing to be given and evidence to be taken, and when the local agency decision-maker is vested with discretion in the determination of facts. CCP §1094.5(a). When acting in an adjudicatory capacity, a city must support its determination by written findings. See *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 515, 113 CR 836; *Bam, Inc. v Board of Police Comm'rs* (1992) 7 CA4th 1343, 1346, 9 CR2d 738 (findings are not to be after-the-fact ad hoc rationalization for decision already made).

PRACTICE TIP: For a discussion and examples of findings, see Bridging the Gap: Using Findings in Local Land Use Decisions (2d ed 1989), published by the Governor's Office of Planning and Research, Legislative Unit, 1400 Tenth St., Room 250, Sacramento, CA 95814, (telephone (916) 445-4831) and available on the Internet at http://ceres.ca.gov/planning/ (click on "Reports and Publications").

On administrative mandamus, see California Civil Writ Practice, chap 3 (4th ed Cal CEB 2008).

© The Regents of the University of California

§13.17 1. Scope of Review in Administrative Mandamus Actions

Judicial inquiry in an administrative mandamus action is limited to (CCP §1094.5(b)):

- whether the agency has proceeded without, or in excess of, jurisdiction;
- whether there was a fair hearing; and
- whether there was any prejudicial abuse of discretion.

See *Pomona College v Superior Court* (1996) 45 CA4th 1716, 1729, 53 CR2d 662 (discussing "fair trial" inquiry); *Larson v State Personnel Bd.* (1994) 28 CA4th 265, 273, 33 CR2d 412 (analyzing whether agency acted in excess of its jurisdiction).

Abuse of discretion is established when (CCP §1094.5(b)):

- the agency has not proceeded in the manner required by law;
- the order or decision is not supported by the findings; or
- the findings are not supported by the evidence.

See *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 514, 113 CR 836 (discussing abuse of discretion standard); *Evans v DMV* (1994) 21 CA4th 958, 967 n1, 26 CR2d 460, cert denied (1994) 513 US 825 (quoting CCP §1094.5(b)).

© The Regents of the University of California

§13.18 a. Standard of Review in Administrative Mandamus Actions

When an adjudicatory decision is challenged on the basis that the decision- making body has abused its discretion in that the findings are not supported by the evidence, the standard of review is normally the substantial evidence test; however, the independent judgment test applies when the decision substantially affects a fundamental vested right. CCP §1094.5(b)-(c); *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 44, 112 CR 805; *Goat Hill Tavern v City of Costa Mesa* (1992) 6 CA4th 1519, 1525, 8 CR2d 385.

© The Regents of the University of California

§13.19 (1) Substantial Evidence Test

Under the substantial evidence test, the court must determine whether

- substantial evidence supports the administrative findings, and
- the findings support the decision.

These determinations are made in light of the whole administrative record, including evidence that detracts from the decision. Thus, the court engages in a "limited" weighing process, reversing the administrative decision only if a reasonable person could not have reached the agency's conclusion. CCP §1094.5; *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 515, 113 CR 836; *Dunn v County of Santa Barbara* (2006) 135 CA4th 1281, 1289, 38 CR3d 316; *Kirkorowicz v California Coastal Comm'n* (2000) 83 CA4th 980, 986, 100 CR2d 124.

© The Regents of the University of California

§13.20 (2) Independent Judgment Test

Under the independent judgment test, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. CCP §1094.5(c); *Strumsky v San Diego County Employees Retirement Ass'n* (1974) 11 C3d 28, 31, 112 CR 805; *San Benito Foods v Veneman* (1996) 50 CA4th 1889, 1895, 58 CR2d 571. See also *Paoli v California Coastal Comm'n* (1986) 178 CA3d 544, 550, 223 CR 792.

© The Regents of the University of California

§13.21 b. Admissible Evidence in Administrative Mandamus Actions

Generally, the court is limited to a review of the administrative record before the city at the time of the decision. *Cadiz Land Co. v Rail Cycle, L.P.* (2000) 83 CA4th 74, 117, 99 CR2d 378. A court may consider relevant extra-record evidence that existed at the time of the decision if (1) the evidence could not have been produced at the administrative hearing in the exercise of reasonable diligence; and (2) the evidence was improperly excluded by the city. CCP §1094.5(e); *Cadiz Land Co. v Rail Cycle, L.P., supra* (citing *Western States Petroleum Ass'n v Superior Court* (1995) 9 C4th 559, 38 CR2d 139); *Evans v DMV* (1994) 21 CA4th 958, 977, 26 CR2d 460, cert denied (1994) 513 US 825. See *Carrancho v California Air Resources Bd.* (2003) 111 CA4th 1255, 1270, 4 CR3d 536 (noting that contrary rule would improperly encourage interested parties to withhold important evidence at administrative level to use it more effectively to undermine agency's action in court).

© The Regents of the University of California

§13.22 c. Burden of Proof in Administrative Mandamus Actions

The party challenging the city's decision or findings has the burden of proving that the administrative decision is unsupported by the evidence. *International Bhd. of Elec. Workers, Local 889 v Aubry* (1996) 42 CA4th 861, 870, 50 CR2d 1; *Pescosolido v Smith* (1983) 142 CA3d 964, 970, 191 CR 415.

© The Regents of the University of California

§13.23 2. Statute of Limitations Applicable to Administrative Mandamus Actions

Code of Civil Procedure §1094.6(b) imposes a 90-day statute of limitations on specified actions brought under CCP §1094.5. See CCP §1094.6(e) (specifying types of actions subject to CCP §1094.6). However, in order for the 90-day statute of limitations to apply, the local agency must notify the aggrieved party at the time the decision is final that the time during which judicial review may be sought is governed by CCP §1094.6. CCP §1094.6(f). If there is a provision for a written decision or findings, the decision is considered final, and the 90-day statute of limitations commences, on the date the written decision is mailed to the aggrieved party with a copy of the affidavit or certificate of mailing. CCP §1094.6(b). The certificate of mailing must be prepared at the time of mailing; an after-the-fact declaration of mailing is insufficient to demonstrate that the decision was properly mailed. See *Donnellan v City of Novato* (2001) 86 CA4th 1097, 1107, 103 CR2d 882. If any shorter statute of limitations applies (see, *e.g.,* Govt C §65009; Pub Res C §21167), the shorter limitations period controls. CCP §1094.6(g).

PRACTICE TIP: Because the 90-day statute of limitations begins to run on the date a written decision is mailed to the aggrieved party, be sure to keep copies of the proof of mailing on file with the city. This will provide documentary evidence of the commencement of the statute of limitations if the action is filed after the expiration of the limitations period.

NOTE: Code of Civil Procedure §1094.8 provides for an expedited review of challenges to a denial or revocation of a permit to engage in expressive activity.

© The Regents of the University of California

§13.24 C. Constitutional Limitations on Mandate/Judicial Review of Legislation

Constitutional provisions limit the scope of legislation. See, *e.g.,* US Const amend XIV; Cal Const art I, §7. The level of judicial scrutiny applied to the legislation depends on the classification or interest impacted.

PRACTICE TIP: For related material regarding rules of procedure and decorum, procedures that regulate public speech, see §§2.16-2.25; on voters and the Voting Rights Acts, see §§3.62-3.79; campaign regulations, see §§3.176-3.224; on recruitment and qualifications, affirmative action, see §§4.6-4.11; on antidiscrimination laws, see §§4.139-4.268; on public works contracts, affirmative action, see 7.28-7.34; on regulation of adult businesses, see §§9.6-9.16; on rent control, see §§9.47-9.60; on regulating personal conduct, due process, see §§9.82-9.83, 9.102-9.103; on freedom of speech and the First Amendment, see §§9.76, 9.108, 9.118-9.153; and on land use challenges, see 10.362-10.445.

© The Regents of the University of California

§13.25 1. Equal Protection (Discriminatory Classification)

Social and economic legislation is presumed to be constitutional, and a finding of invalidity requires a showing that the legislation fails to bear any rational relationship to a conceivable legitimate purpose. *Associated Home Builders, Inc. v City of Livermore* (1976) 18 C3d 582, 604, 135 CR 41 (when it is "fairly debatable" that local legislative act bears reasonable relation to general welfare, legislative act will be upheld). See US Const amend XIV; Cal Const art I, §7.

The rational relationship test is usually applied to zoning regulations because, as a rule, zoning ordinances are not drafted in a way that obviously entails a suspect classification or touches a fundamental interest. In only a few instances have zoning regulations been reviewed under the strict scrutiny test. See *Hernandez v City of Hanford* (2007) 41 C4th 279, 299, 59 CR3d 442. Spot zoning is said to exist when a small parcel is restricted and given fewer rights than the current surrounding property. This classification is often said to subject an "island" of property to greater restrictions than the "sea" of property around it. Courts have varied on determining the validity of such regulations. See *Wilkins v City of San Bernardino* (1946) 29 C2d 332, 340, 175 P2d 542; *Ross v City of Yorba Linda* (1991) 1 CA4th 954, 2 CR2d 638 (invalid); *City of Orange v Valenti* (1974) 37 CA3d 240, 112 CR 379 (invalid); *People ex rel Dep't of Pub. Works v Southern Pac. Transp. Co.* (1973) 33 CA3d 960, 109 CR 525 (invalid); *Scrutton v County of Sacramento* (1969) 275 CA2d 412, 79 CR 872 (valid).

Legislation drawing classifications based on gender are analyzed under a heightened level of scrutiny and must be substantially related to an important government interest. *Mississippi Univ. for Women v Hogan* (1982) 458 US 718, 723, 73 L Ed 2d 1090, 102 S Ct 3331. See *City of Cleburne v Cleburne Living Ctr.* (1985) 473 US 432, 441, 87 L Ed 2d 313, 105 S Ct 3249 (noting standard of review for gender cases).

Legislation drawing classifications based on race or national origin (suspect classifications) are analyzed under the "strict scrutiny" standard and will be upheld only if the classification is narrowly drawn to serve a compelling governmental interest. *Grutter v Bollinger* (2003) 539 US 306, 326, 156 L Ed 2d 304, 123 S Ct 2325.

© The Regents of the University of California

§13.26 2. Substantive Due Process (Arbitrary or Unreasonable Regulation)

Courts generally will uphold local ordinances or regulations if they reasonably relate to public welfare or a legitimate government interest. *Village of Euclid v Ambler Realty Co.* (1926) 272 US 365, 387, 71 L Ed 303, 47 S Ct 114; *Griffin Dev. Co. v City of Oxnard* (1985) 39 C3d 256, 263, 217 CR 1 (standard of review of economic regulations); *Associated Home Builders, Inc. v City of Livermore* (1976) 18 C3d 582, 601, 135 CR 41 (regional welfare must be considered if regulation has significant effect beyond agency's boundaries).

On procedural rules used to support the validity of regulation, see §§13.10-13.13.

© The Regents of the University of California

§13.27 3. Ripeness

An agency action is not reviewable by the courts until it is final and thus "ripe" for adjudication. *Santa Teresa Citizen Action Group v City of San Jose* (2003) 114 CA4th 689, 708, 7 CR3d 868; *Board of Med. Quality Assur. v Superior Court* (1977) 73 CA3d 860, 862, 141 CR 83. Constitutional claims based on a taking of property are not "ripe" until the agency has made a final decision on how the plaintiff could develop the property, including a meaningful development application and a variance application. *Herrington v County of Sonoma* (9th Cir 1987) 834 F2d 1488, 1494.

© The Regents of the University of California

III. GOVERNMENT CLAIMS ACT

§13.28 A. Claims Requirement

Under the Government Claims Act (formerly known as the Tort Claims Act) (Govt C §§810-998.3), most actions seeking money or damages against a public entity or public employee acting within the scope of his or her employment in California must be preceded by a proper administrative claim. Govt C §905.

Failure to present a timely claim and allege facts demonstrating or excusing compliance with the claim presentation requirement (see §13.49) subjects a complaint to a general demurrer. *State v Superior Court (Bodde)* (2004) 32 C4th 1234, 1239, 13 CR3d 534. Cities may also impose their own local claims requirements in cases in which the claims statutes would not otherwise require a claim. See Govt C §935. On claim presentation procedures under the Government Claims Act, see §§13.42-13.61.

For an overview of the Government Claims Act, see California Government Tort Liability Practice, chap 1 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.29 B. Actions for Which Claims Are Required

Rather than specifying that a claim is required in a particular case, the Government Claims Act (Govt C §§810-998.3) takes an exclusionary approach with respect to actions against public entities and public employees, and provides that a claim is required unless the action is excepted. See Govt C §905. See California Government Tort Liability Practice §§5.20-5.35 (4th ed Cal CEB 1999).

The claims requirement applies to:

- **Personal injury actions**. See *Loehr v Ventura County Community College Dist.* (1983) 147 CA3d 1071, 1081, 195 CR 576 (humiliation and damage to reputation); *Shelton v Superior Court* (1976) 56 CA3d 66, 82, 128 CR 454 (loss of consortium); *Miller v Hoagland* (1966) 247 CA2d 57, 60, 55 CR 311 (slander). The claims requirement applies to intentional torts as to both persons and property. *Toscano v County of Los Angeles* (1979) 92 CA3d 775, 782, 155 CR 146 (false arrest); *Cooper v Jevne* (1976) 56 CA3d 860, 871, 128 CR 724 (fraud); *Collins v County of Los Angeles* (1966) 241 CA2d 451, 454, 50 CR 586 (false arrest and imprisonment); *Tietz v Los Angeles Unified Sch. Dist.* (1965) 238 CA2d 905, 911, 48 CR 245 (intentional infliction of emotional distress).
- **Contract actions**. See *City of Stockton v Superior Court* (2007) 42 C4th 730, 737, 68 CR3d 295 (development agreement); *Schaefer Dixon Assocs. v Santa Ana Watershed Project Auth.* (1996) 48 CA4th 524, 532, 55 CR2d 698 (public works project); *Loehr v Ventura County Community College Dist.* (1983) 147 CA3d 1071, 1077, 195 CR 576 (implied covenant of good faith and fair dealing and employment); *Baillargeon v Department of Water & Power* (1977) 69 CA3d 670, 682, 138 CR 338 (promissory estoppel); *Voth v Wasco Pub. Util. Dist.* (1976) 56 CA3d 353, 355, 128 CR 608 (irrigation contract); *Magnus v Jackson* (1973) 31 CA3d 399, 107 CR 287 (appointed criminal defense counsel's claim for fees); *Myers v County of Orange* (1970) 6 CA3d 626, 636, 86 CR 198 (employment contract).
- **Real and personal property damage actions**. *Mehl v People ex rel Dep't of Pub. Works* (1975) 13 C3d 710, 716, 119 CR 625; *Amador Valley Investors v City of Livermore* (1974) 43 C3d 483, 491, 117 CR 749; *State ex rel Dep't of Transp. v Superior Court* (1984) 159 CA3d 331, 334, 205 CR 518; *Wheeler v County of San Bernardino* (1978) 76 CA3d 841, 846, 143 CR 295.
- **Statutory actions**. *Pacific Tel. & Telegraph Co. v County of Riverside* (1980) 106 CA3d 183, 193, 165 CR 29.
- **Class actions**. *Dhuyvetter v City of Fresno* (1980) 110 CA3d 659, 664, 168 CR 61.
- **Subrogation actions**. *Commercial Union Assurance Co. v City of San Jose* (1982) 127 CA3d 730, 733, 179 CR 814.
- **Indemnification actions**. Govt C §901; *Gehman v Superior Court* (1979) 96 CA3d 257, 158 CR 62, overruled on other grounds in *People ex rel Dep't of Transp. v Superior Court* (1980) 26 C3d 744, 750, 163 CR 585.
- **Actions against public employees**. Govt C §950.2 (suit against public employee acting in scope of his or her employment is barred if plaintiff has not complied with claim filing requirements applicable to employee's employer).

NOTE: The only exception to the requirement that a claim must be filed in an action against a public employee acting in the scope of his or her employment is if the plaintiff pleads and proves that he or she neither knew nor should have known either that: (1) the injury was caused by the public entity; or (2) the injury was caused by an employee of the public entity in the scope of his or her employment as a public employee. Govt C §950.4.

- **Actions brought by minors or incompetents**. But see Govt C §946.6(c)(2) (minors and incompetents may be able to obtain late claim relief). See also *Hernandez v County of Los Angeles* (1986) 42 C3d 1020, 1027, 232 CR 519; *Nguyen v Los Angeles County Harbor/UCLA Med. Ctr.* (1992) 8 CA4th 729, 733, 10 CR2d 709 (parents' cause of action not same as minors'). See also §13.51.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.30 C. Actions for Which Claims Are Not Required

§13.30 C. Actions for Which Claims Are Not Required

The legislature has exempted certain types of actions from the claim requirement, sometimes when there is a similar procedure that meets the same purpose. Other actions are exempted on constitutional grounds or are simply not within the statute. See California Government Tort Liability Practice §§5.36-5.56 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.31 a. Statutory Exceptions

Certain exceptions to the claim requirement are found in Govt C §905 and include:

- Claims related to tax matters and assessments. Govt C §§905(a), (h). On procedures for claims for refund of taxes claimed to be erroneously or illegally determined or collected, see §5.93.
- Mechanics and other construction liens. Govt C §905(b).
- Claims for salary, expenses, pension benefits, workers' compensation, and unemployment compensation. See Govt C §905(c)-(d), (f), (j). But see *Dalton v East Bay Mun. Util. Dist.* (1993) 18 CA4th 1566, 1573, 23 CR2d 230 (class action to recover money and benefits under pension system required compliance when tortious wrongdoing alleged).
- Welfare claims. See Govt C §905(e).
- Claims on bonds, notes, or other evidence of indebtedness and other public-financing matters. See Govt C §905(g).
- Claims by public entities. See Govt C §905(i). But see *City of Ontario v Superior Court* (1993) 12 CA4th 894, 898, 16 CR2d 32 (state required to comply with claim requirement when city exercises authority under Govt C §935 and mandates compliance with Government Claims Act (Govt C §§810-998.3)).
- Claims to penalties withheld on public works projects. See Govt C §905(k).
- Claims concerning the creation of pedestrian malls. See Govt C §905(l).

© The Regents of the University of California

§13.32 b. Actions for Relief Other Than Money or Damages

Because the Government Claims Act (Govt C §§810-998.3) limits the claim requirement to actions for "money or damages," actions for other relief do not require a claim. See Govt C §905. This is not strictly an exception to the general rule, but rather outside its scope. The term "money or damages" includes both actions for tort and actions for breach of contract. *Baines Pickwick Ltd. v Los Angeles* (1999) 72 CA4th 298, 304, 85 CR2d 74. However, the claims statutes apply to any "injury," and injury is construed broadly to include "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person." Govt C §810.8.

Such actions for other relief include:

- **Declaratory relief actions**. *Minsky v Los Angeles* (1974) 11 C3d 113, 121, 113 CR 102; *Otis v City of Los Angeles* (1942) 52 C2d 605, 611, 126 P2d 954. See CCP §1060.
- **Actions for recovery of seized property or damages in lieu thereof**. *Holt v Kelly* (1978) 20 C3d 560, 565 n5, 143 CR 625; *Long v City of Los Angeles* (1998) 68 CA4th 782, 787, 80 CR2d 583; *Hibbard v City of Anaheim* (1984) 162 CA3d 270, 277, 208 CR 733.
- **Mandamus actions for the release of funds** (*County of Sacramento v Lackner* (1979) 97 CA3d 576, 588, 159 CR 1) **or return of property** (*Minsky v City of Los Angeles* (1974) 11 C3d 113, 123, 113 CR 102). See also *Eureka Teacher's Ass'n v Board of Educ.* (1988) 202 CA3d 469, 475, 247 CR 790 (mandamus action for reinstatement and back pay).
- **Injunction to abate nuisance**. *Los Angeles Brick & Clay Prods. Co. v City of Los Angeles* (1943) 60 C2d 478, 486, 141 P2d 46. But see *City of San Jose v Superior Court* (1974) 12 C3d 447, 454, 115 CR 797 (action for monetary relief on nuisance theory).
- **Action on a judgment.** *Barkley v City of Blue Lake* (1996) 47 CA4th 309, 316, 54 CR2d 679.
- **Action for employment discrimination brought under Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996)**. *Garcia v Los Angeles Unified Sch. Dist.* (1985) 173 CA3d 701, 710, 219 CR 544.
- **Inverse condemnation actions.** Govt C §905.1. See also CCP §1245.060 (action for damages resulting from pre-condemnation studies and tests is exempt from claims requirement).
- **Federal civil rights actions.** *Williams v Horvath* (1976) 16 C3d 834, 842, 129 CR 453 (claims under 42 USC §1983); *Sethy v Alameda County Water Dist.* (9th Cir 1976) 545 F2d 1157, 1161 (claims under 42 USC §1981); *Adler v Los Angeles Unified Sch. Dist.* (1979) 98 CA3d 280, 288, 159 CR 528.

PRACTICE TIP: Because many types of claims against public entities could be alleged as violations of federal civil rights laws, the lack of a claim requirement in federal civil rights actions constitutes a major exception to the claims requirement. However, when actions in federal or state courts contain both federal causes of action and state tort (or other state law) causes of action, those state law causes of action may be dismissed if the claim procedures have not been followed. *Ellis v City of San Diego* (9th Cir 1999) 176 F3d 1183, 1189; *Karim-Panahi v Los Angeles Police Dep't* (9th Cir 1988) 839 F2d 621, 627.

- **Actions seeking multiple kinds of relief.** A complaint seeking both non-monetary and monetary relief presents difficult questions, and the cases are in conflict. The general test is whether the monetary relief sought is "incidental" or "ancillary" to the non-monetary relief, or vice-versa. See *Loehr v Ventura County Community College Dist.* (1983) 147 CA3d 1071, 1081, 195 CR 576 (claim required for petition for mandamus to reinstate employee that was held "incidental" to complaint for money based on breach of contract). See also *Eureka Teacher's Ass'n v Board of Educ.* (1988) 202 CA3d 469, 475, 247 CR 790.

© The Regents of the University of California

§13.33 c. Public Entity's Defenses

When a public entity brings an action, no claim is required to assert affirmative defenses or defensive cross-complaints. *Krainock v Superior Court* (1990) 216 CA3d 1473, 1478, 265 CR 715.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.34 d. Actions Based on Roster of Public Agencies

§13.34 d. Actions Based on Roster of Public Agencies

If a public agency is required to maintain information concerning itself in the Roster of Public Agencies and does not do so, then no claim is required. Govt C §946.4(a)(1).

© The Regents of the University of California

§13.35 (1) Which Agencies Must File Information

The public agencies required to file information include all political subdivisions, districts, authorities, and public corporations, except cities and counties. Govt C §§53050, 53051. Operating units of municipalities are not required to file (see *Hovd v Hayward Unified Sch. Dist.* (1977) 74 CA3d 470, 472, 141 CR 527); however, independent local entities, frequently created as financing mechanisms, must keep current information on file.

PRACTICE TIP: The information filing requirements and the consequences of failure to comply are sometimes overlooked. It is crucial that the rosters for joint powers authorities, redevelopment agencies, other financing authorities, and all other subdivisions, districts, authorities, and public corporations, except cities and counties, be filed and kept up-to-date.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.36 (2) Information Required

§13.36 (2) Information Required

The information required in the Roster of Public Agencies includes the name and address of the agency and the names and addresses of its governing board and officers; it must be updated to reflect changes. Govt C §§946.4(a), 53051. The information must be filed with the Secretary of State and the county clerk in each county in which the entity maintains an office. There is no requirement of a showing of actual deception or confusion on the part of the claimant when an agency has failed to comply with roster information. *Wilson v San Francisco Redev. Agency* (1977) 19 C3d 555, 562, 138 CR 720.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.37 (3) When Information Must Be Filed

§13.37 (3) When Information Must Be Filed

The information must be on file within 70 days after accrual of the claimant's cause of action. Govt C §946.4(a).

© The Regents of the University of California

§13.38 e. Cross-Complaints in Actions Commenced by Entity

When an entity brings an action against a party, a cross-complaint arising out of the same transaction can generally be filed without filing a claim, as long as the cross-complaint does not inject new matter into the action. *Krainock v Superior Court* (1990) 216 CA3d 1473, 1478, 265 CR 715.

© The Regents of the University of California

§13.39 f. Local Claim Requirements

By its own action, a local public entity may impose a claim requirement in cases in which the government claims statutes would not require a claim. See Govt C §935. See also *City of Ontario v Superior Court* (1993) 12 CA4th 894, 903,16 CR2d 32 (state's failure to comply with local claims requirement barred indemnity claim). A local public entity may establish its own claim requirement for claims relating to local taxes. *Pasadena Hotel Dev. Venture v City of Pasadena* (1981) 119 CA3d 412, 414, 174 CR 52. On procedures for claims for refund of taxes claimed to be erroneously or illegally determined or collected, see §5.93. Claims for back wages may be precluded by failure to comply with a local ordinance adopted under Govt C §935. *California Sch. Employees Ass'n v Azusa Unified Sch. Dist.* (1984) 152 CA3d 580, 586, 199 CR 635. This option is not available, however, with respect to inverse condemnation actions and federal civil rights actions. See Govt C §901; *Sethy v Alameda County Water Dist.* (9th Cir 1976) 545 F2d 1157, 1161 (involving claims under 42 USC §1981); *Williams v Horvath* (1976) 16 C3d 834, 842, 129 CR 453 (involving claims under 42 USC §1983).

NOTE: In the absence of explicit language to the contrary, a locally adopted claims procedure will not be applied retroactively to previous accrued claims. *Adler v Los Angeles Unified Sch. Dist.* (1979) 98 CA3d 280, 287, 159 CR 528.

© The Regents of the University of California

§13.40 (1) By Ordinance

A local public entity may impose a claims requirement by charter provision or ordinance as to those matters listed in Govt C §905, unless the action is governed by some other statute or regulation "expressly relating thereto." Govt C §935.

PRACTICE TIP: Government Code §935 specifically empowers local public entities to establish their own policies and procedures for the presentation of those claims excepted by Govt C §905, provided that the local claims requirements are similar to, and no more restrictive than, those established by the Government Claims Act. Local public entities should establish procedures by ordinance for those claims that are otherwise exempted by Govt C §905. See *City of Ontario v Superior Court* (1993) 12 CA4th 894, 898, 16 CR2d 32. On claims for refund of taxes alleged to be improperly collected, see §5.93.

© The Regents of the University of California

§13.41 (2) By Contract

A public entity may include in its written contracts a specified procedure for claims, either explicitly or by incorporating a specified ordinance or resolution. Govt C §930.2. See *Arntz Builders v City of Berkeley* (2008) 166 CA4th 276, 279, 82 CR3d 605 (claim procedure in contract). But see Pub Cont C §§20104-20104.6 (specifying certain procedures for public works claims). The contractual procedure may specify a shorter time to present a claim than would otherwise be required and may include a requirement that a claim be presented and acted on before bringing suit. Govt C §§930.4, 930.6.

If a contractual claim procedure is established, it governs to the exclusion of the statutory provisions unless the claim period specified is less than 1 year, in which case the late claim procedures set out in the Government Claims Act apply. Govt C §930.4.

PRACTICE TIP: This is another easy way to protect public entities. All contracts should incorporate a resolution or ordinance essentially duplicating the statutory claim procedure for claims.

© The Regents of the University of California

D. Claim Presentation Procedures

§13.42 1. What Constitutes a Sufficient Claim

A claim need not be perfect, or even close to meeting all of the requirements. Any document received by a public entity indicating that monetary damages are sought and that litigation may ensue should be treated as a claim. A claim that does not include the information necessary for investigation and consideration is insufficient. The entity can seek further information by sending a notice of insufficiency within 20 days after the claim presentation. Govt C §910.8. A failure to treat the document as a claim may result in a loss of claim defenses. See Govt C §§910.8, 911.

Government Code §915 requires a claim to be delivered or mailed to the clerk, secretary, auditor, or governing body of the local public entity.

On the contents and form of a claim, see California Government Tort Liability Practice §§6.1-6.10 (4th ed Cal CEB 1999).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.43 a. Required Contents

§13.43 a. Required Contents

Claims must contain all of the following (Govt C §910):

- Name and mailing address of the claimant;
- Mailing address to which notices should be sent;
- Date, place, and circumstances giving rise to the claim;
- General description of the injury, damage, or loss for which the claimant seeks payment;
- Name of any public employee causing the loss, if known; and
- Amount claimed and basis of computation if the claim is under $10,000 (if the amount is over $10,000, no amount is to be included, but the claim must indicate whether the claim would be a limited civil case, *i.e.,* $25,000 or less).

The claim must also be signed, either by the claimant or some person on the claimant's behalf, unless the claim is by a vendor, in which case it can be presented on the vendor's bill or invoice. Govt C §910.2.

© The Regents of the University of California

§13.44 b. Use of Local Forms

A local public entity may provide its own claim form that may require additional content, as long as it meets the requisites of Govt C §§910 and 910.2. The person presenting a claim should use the entity's form for his or her claim to be deemed in conformity with Govt C §§910 and 910.2. Govt C §910.4. The entity's form could provide for the inclusion of more information than required by the Government Code, as such information that may materially assist the entity in investigating and evaluating the merits of the claim.

PRACTICE TIP: Do not rely too heavily on the use of locally adopted forms. As indicated in §13.46, courts have been willing to treat unconventional submittals as claims for purposes of the claims statutes.

© The Regents of the University of California

§13.45 c. Substantial Compliance With Claim Presentation Requirements

Claims may be rather general and vague. Substantial compliance with the claims requirement is all that is required. *Wheeler v County of San Bernardino* (1978) 76 CA3d 841, 847, 143 CR 295. To substantially comply with the claims requirement, a claimant must make an effort to supply each of the essential elements of a claim. *Loehr v Ventura County Community College Dist.* (1983) 147 CA3d 1071, 1083, 195 CR 576. However, a material defect or omission in a claim precludes a finding of substantial compliance. *Hall v City of Los Angeles* (1941) 19 C2d 198, 202, 120 P2d 13 (failure to designate location of accident was not substantial compliance); *Del Real v City of Riverside* (2002) 95 CA4th 761, 769, 115 CR2d 705 (letter from potential claimant's attorney to city employee alleged to have caused car accident indicating that attorney was investigating and seeking information about accident and insurance coverage was not claim); *Dilts v Cantua Elementary Sch. Dist.* (1987) 189 CA3d 27, 36, 234 CR 612 (letters between attorneys do not equal claim). But see *Johnson v City of Oakland* (1961) 188 CA2d 181, 184, 10 CR 409 (claim that gave correct address number, but incorrect street, was substantial compliance, but city was entitled to contest whether incorrect address was given in bad faith with intent to mislead).

There are two components of the test for substantial compliance (*City of San Jose v Superior Court* (1974) 12 C3d 447, 456, 115 CR 797):

- Is there some compliance with all of the statutory requirements, and, if so,
- Is this compliance sufficient to constitute substantial compliance?

Substantial compliance is met when the claim contains sufficient information to reasonably enable the public entity to make an adequate investigation of the merits of the claim. *Loehr v Ventura County Community College Dist.* (1983) 147 CA3d 1071, 1083, 195 CR 576. However, the claimant will not be permitted to proceed on a theory of liability in the lawsuit that is not fairly reflected in the claim. *Watson v State* (1993) 21 CA4th 836, 844, 26 CR2d 262 (claim insufficient); *Turner v State* (1991) 232 CA3d 883, 888, 284 CR 349 (claim insufficient); *White v Superior Court* (1990) 225 CA3d 1505, 1511, 275 CR 706 (claim that varied from complaint found sufficient because claim and complaint identified same party as principal actor in case); *Blair v Superior Court* (1990) 218 CA3d 221, 227, 267 CR 13 (claims sufficient when mere elaborations of theory of liability were not substantially different from facts in claim).

© The Regents of the University of California

§13.46 d. Examples of Unconventional Claims

The following were treated as claims, despite their unconventional nature:

- A letter sent to a hospital, which indicated that the writer intended to bring a lawsuit for medical malpractice, even though the writer did not know the hospital was operated by a public entity or intend the letter as a tort claim. *Phillips v Desert Hosp. Dist.* (1989) 49 C3d 699, 709, 263 CR 119 (overruling *Lutz v Tri-City Hosp.* (1986) 179 CA3d 807, 224 CR 787).
- A letter from an attorney stating that he had been retained to represent a client with respect to an accident and asking that the letter be forwarded to any insurance carrier to avoid "formal proceedings." *Foster v McFadden* (1973) 30 CA3d 943, 947, 106 CR 685.
- A letter demanding reinstatement of and reciting loss to ex-employee. *Myers v County of Orange* (1970) 6 CA3d 626, 637, 86 CR 198.
- Correspondence from a claimant's attorney to the entity's outside attorney, making reference to a demand for money. *Wilson v Tri-City Hosp. Dist.* (1990) 221 CA3d 441, 449, 270 CR 436.

PRACTICE TIP: Government Code §915 requires that a claim be delivered or mailed to the clerk, secretary, auditor, or governing body of a local public entity. However, a person who has a complaint with a public entity may correspond directly with the particular department or office of the entity that is believed to have caused or created the problem that brought about the complaint. In light of the fact that a letter sent to a city department could be construed by a court to be a claim for money or damages, employees responsible for handling incoming correspondence should be trained to recognize possible claims and to forward such correspondence to the appropriate department (*e.g.,* risk management department) that handles claims for the public entity, so that a decision can be made on appropriate handling of the claim. City staff should also be trained to forward such correspondence to the city attorney for further direction before forwarding it to the city clerk, secretary, auditor, or governing body.

© The Regents of the University of California

§13.47 e. Non-Claims

A letter of complaint or a letter stating the identity of an injured person's attorney that makes no reference to a claim for monetary damages need not be treated as a claim. *Green v State Ctr. Community College Dist.* (1995) 34 CA4th 1348, 1359, 41 CR2d 140. See *Del Real v City of Riverside* (2002) 95 CA4th 761, 769, 115 CR2d 705 (sustaining summary judgment when claim failed to describe nature of accident, public employee involved, or injury or loss allegedly suffered). However, a test claim served on a department of the entity or even a sufficiently related, but legally separate, entity may amount to substantial compliance with the statute. *Elias v San Bernardino County Flood Control Dist.* (1977) 68 CA3d 70, 74, 135 CR 621. In addition, a packet of material sent to the county engineer (as opposed to the county clerk, secretary, auditor, or governing board) seeking additional payment did not constitute a claim against the county. *Westcon Constr. Corp. v County of Sacramento* (2007) 152 CA4th 183, 200, 61 CR3d 89.

© The Regents of the University of California

§13.48 f. Complaints

A lawsuit served on a public entity within the claim period does not constitute a claim. *Stromberg, Inc. v Los Angeles County Flood Control Dist.* (1969) 270 CA2d 759, 766, 76 CR 183.

© The Regents of the University of California

§13.49 2. Who Must Present a Claim and to Whom

The government claims statutes require "presentation" of a claim, which should not be confused with "filing." A claim is presented when the claim is personally delivered or deposited in the United States mail. Govt C §915.2; *Call v Los Angeles County Gen. Hosp.* (1978) 77 CA3d 911, 916, 143 CR 845.

Each claimant must comply with the claims presentation requirements. Even if some other person has presented a claim that fully discloses the facts and theory of liability applicable to the claimant, failure to present a claim on a claimant's own behalf may bar an action. Hence, a claim filed by the employer of a decedent is insufficient to allow the decedent's widow to proceed with a lawsuit. *Pacific Tel. & Telegraph Co. v County of Riverside* (1980) 106 CA3d 183, 190, 165 CR 29; *Roberts v State* (1974) 39 CA3d 844, 848, 114 CR 518.

On claim presentation, see California Government Tort Liability Practice §§6.11-6.31 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.50 a. Heirs

A personal injury claim presented by the victim is not sufficient to allow his or her heirs to proceed with a wrongful death suit when he or she subsequently dies. *Lewis v City & County of San Francisco* (1971) 21 CA3d 339, 341, 98 CR 407; *Petersen v City of Vallejo* (1968) 259 CA2d 757, 765, 66 CR 776.

© The Regents of the University of California

§13.51 b. Children's Claims

A claim filed by a minor for his or her own injuries may not be relied on by the minor's parents in a suit to recover for their own injuries. The parents' injuries are separate and distinct and thus they must file their own independent claims. *Nguyen v Los Angeles County Harbor/UCLA Med. Ctr.* (1992) 8 CA4th 729, 734,10 CR2d 709.

© The Regents of the University of California

§13.52 c. Spouses' Claims

A claim that clearly discloses the injury to the claimant and another will be adequate for both, as when a husband submits a claim reciting his wife's injuries as well. *Lacy v City of Monrovia* (1974) 44 CA3d 152, 155, 118 CR 277.

© The Regents of the University of California

§13.53 d. Workers' Compensation Carrier

A workers' compensation carrier may be entitled to intervene in a worker's personal injury action without filing a claim, because all of its damages are encompassed within the worker's claim. *San Diego Unified Port Dist. v Superior Court* (1988) 197 CA3d 843, 852, 243 CR 163.

© The Regents of the University of California

§13.54 e. Class Actions

A claim must be filed before any class action may be filed. *City of San Jose v Superior Court* (1974) 12 C3d 447, 454, 115 CR 797.

© The Regents of the University of California

3. When to Present a Claim

§13.55 a. Time for Presentation

The time for presentation of a claim depends on the type of cause of action involved:

- **Six months.** A claim for wrongful death, personal injury, or damage to personal property or growing crops must be presented on or before 6 months after the cause of action accrues. Govt C §911.2(a). The 6-month period governs not merely physical injury, but damage to "reputation, character, feelings or estate." *Toscano v County of Los Angeles* (1979) 92 CA3d 775, 782, 155 CR 146 (false arrest and imprisonment); *Cooper v Jevne* (1976) 56 CA3d 860, 871, 128 CR 724 (fraud); *Shelton v Superior Court* (1976) 56 CA3d 66, 82, 128 CR 454 (loss of consortium).
- **One Year.** A claim for any other cause of action may be presented as late as 1 year after the cause of action accrues. Govt C §911.2(a). Claims subject to the 1-year period are those based on contract or damage to real property. *Mehl v People ex rel Dep't of Pub. Works* (1975) 13 C3d 710, 716, 119 CR 625 (flooding); *Amador Valley Investors v City of Livermore* (1974) 43 C3d 483, 489, 117 CR 749 (pollution); *Magnus v Jackson* (1973) 31 CA3d 399, 107 CR 287 (implied contract); *Voth v Wasco Pub. Util. Dist.* (1976) 56 CA3d 353, 359, 128 CR 608 (contract).
- **Combined or mixed claims.** In certain cases, the claimant may have the option of proceeding either on a tort or contract remedy, in which case the claim period will depend on the theory adopted by the claimant. *Lawrence Berkeley Labs, Inc. v Mitchell* (1952) 39 C2d 56, 62, 244 P2d 385. When a claim asserts related theories within both the 6-month and 1-year claim periods, it is unclear whether the longer period applies or the periods should be counted separately. *Smith v County of Los Angeles* (1989) 214 CA3d 266, 262 CR 754 (longer period); *Baillargeon v Department of Water & Power* (1977) 69 CA3d 670, 682, 138 CR 338 (separate periods).

On time limits for presentation, see California Government Tort Liability Practice §§6.11-6.31 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.56 b. Calculation of the Presentation Period

Despite the language of Govt C §§911.2 and 6804, "six months" means the longer of 6 calendar months or 182 days. *Marchuk v Ralphs Grocery Co.* (1990) 226 CA3d 1273, 1275 n2, 276 CR 627; *Gonzales v County of Los Angeles* (1988) 199 CA3d 601, 602, 245 CR 112. In a distinction that will matter only in a leap year, "one year" means 365 days. Govt C §6803.

The claim period begins when the cause of action accrues. Govt C §911.2. A cause of action against a public entity accrues on the same date the action would accrue against a private party. Govt C §901. This imports a variety of notions from the Code of Civil Procedure concerning accrual of a cause of action, summarized in §§13.57-13.58.

© The Regents of the University of California

§13.57 (1) General Rule on Cause of Action Accrual

A cause of action generally accrues when the wrongful act is done and the obligation or liability arises, whether or not the injured party has notice of his or her action. In the usual case, this is a simple matter of when the accident happened. *Loehr v Ventura County Community College Dist.* (1983) 147 CA3d 1071, 1078, 195 CR 576.

© The Regents of the University of California

§13.58 (2) When Accrual Is Delayed

A cause of action for wrongful death accrues when a person dies. Thus, for example, when a person is injured in an accident and dies sometime later, the claim period for wrongful death begins when the person dies, not on the date of the accident. *Larcher v Wanless* (1976) 18 C3d 646, 657, 135 CR 75.

Generally, indemnity causes of action (*i.e.,* express contractual indemnity) accrue when a settlement is paid or a final judgment is rendered. However, in the special case of claims for equitable indemnity or partial equitable indemnity (*American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 146 CR 182 cross-complaints), the claim accrues when the underlying complaint giving rise to such a claim is served. Govt C §901. Thus, Govt C §901 effectively requires that equitable indemnity claims and cross-complaints be prosecuted at least in tandem with the underlying action. See Govt C §911.2.

A cause of action for medical malpractice accrues when the claimant knows or should know of the malpractice. *Martinez v County of Los Angeles* (1978) 78 CA3d 242, 245, 144 CR 123; *Dujardin v Ventura County Gen. Hosp.* (1977) 69 CA3d 350, 355, 138 CR 20. Similarly, an action for fraud or mistake does not accrue until the victim has discovered the facts constituting the fraud or mistake. CCP §338(d).

In some cases, the courts will use a doctrine of belated discovery to delay accrual until the claimant reasonably should have become aware of his or her claim. *Bastian v San Luis Obispo County* (1988) 199 CA3d 520, 527, 245 CR 78. See *Shirk v Vista Unified Sch. Dist.* (2007) 42 C4th 201, 207, 64 CR3d 210.

© The Regents of the University of California

§13.59 c. Tolling of the Presentation Period

The usual tolling rules, based on minority, insanity, or imprisonment, do not apply to delay the running of the claim period. CCP §§352(b), 352.1(b). However, the statute of limitations for federal civil rights claims is tolled by the plaintiff's minority, even if the time for state tort claims is not tolled. *City of Huntington Park v Superior Court* (1995) 34 CA4th 1293, 1296, 41 CR2d 68. However, courts have devised a doctrine of equitable tolling, which is applied when "an injured person has several legal remedies and, reasonably and in good faith, pursue[s] one designed to lessen the extent of the injury or damages." *Myers v County of Orange* (1970) 6 CA3d 626, 634, 86 CR 198. See *Elkins v Derby* (1974) 12 C3d 410, 414, 115 CR 641. Equitable tolling will be employed when pursuit of the first remedy gives the entity notice, the facts are so similar that the entity's investigation of the first allows it to defend the second, and the claimant acts reasonably. *McDonald v Antelope Valley Community College Dist.* (2008) 45 C4th 88, 99, 84 CR3d 734; *Addison v State* (1978) 21 C3d 313, 319, 146 CR 224; *Collier v City of Pasadena* (1983) 142 CA3d 917, 924, 191 CR 681; *Loehr v Ventura County Community College Dist.* (1983) 147 CA3d 1071, 1085, 195 CR 576. On equitable tolling, including a discussion of the Soldiers and Sailors Relief Act of 1970 (50 USC App §525), and the effect of an administrative remedy, see California Government Tort Liability Practice §§6.25-6.28 (4th ed Cal CEB 1999).

When exhaustion of an administrative remedy is required before a court action may be initiated, the time consumed by the administrative proceeding is excluded from the computation of the claim presentation period. *Baillargeon v Department of Water & Power* (1977) 69 CA3d 670, 683, 138 CR 338 (claim for supplemental disability benefits designated to augment workers' compensation).

© The Regents of the University of California

§13.60 d. Notice of Untimely Claim

If a claim is not presented within the time allowed, the entity may return the claim without any further action, giving notice in the specified form. Govt C §911.3(a). Although permissive in language, the statute provides that failure to follow this procedure will result in waiver of any defense of untimeliness unless the claimant fails to provide an address to give notices. Govt C §911.3(b).

PRACTICE TIP: As a general rule, ignore delayed accrual and the mailbox rule for purposes of calculating whether a claim is untimely. Accepting a claim as timely is a final step in the process, which will remove an issue from any subsequent litigation. When delayed accrual is an issue, the facts are almost impossible to investigate. The mailbox rule adds uncertainty as to when a claim was presented. This issue is too important to simply trust the claimant's representations. A claim should be treated as untimely whenever the actual date of injury and the date that a claim is postmarked are further apart than the applicable claim period, because a denial of the claim on the merits will estop the entity from later claiming that the claim was untimely. See Govt C §911.3(b); *Dujardin v Ventura County Gen. Hosp.* (1977) 69 CA3d 350, 360, 138 CR 20. This rule does not apply when the claim is presented after the 1-year late claim period. *Dixon v City of Turlock* (1990) 219 CA3d 907, 912, 268 CR 510. Public entities should generally treat a claim as being untimely if it is presented on a date beyond the applicable 6-month or 1-year time period. If the claimant's stated reason for the untimely presentation is belated discovery or equitable tolling, the entity should carefully examine the circumstances before any decision is made to accept the late claim. Often, without formal discovery, it is not possible to make a determination as to whether a sufficient legal reason exists to excuse the untimely presentation. Accordingly, such claims should be returned for being untimely.

Notice of untimeliness must be given within 45 days after the claim is presented. Govt C §911.3(a). Even if notice of insufficiency has been given, notice of untimeliness must also be given. *Phillips v Desert Hosp. Dist.* (1989) 49 C3d 699, 705, 263 CR 119.

PRACTICE TIP: Sometimes a plaintiff will file a single claim based on different actions on different days, some of which are within the claim filing period and some of which are not. The government claim statutes do not address this issue. Consider sending a specially prepared notice returning the claim as untimely as to the portions that are outside the claim filing period and denying or allowing the claim as to the timely portions.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.61 e. Amendments to Claims

§13.61 e. Amendments to Claims

A claim may be amended at any time before the claim period expires or the entity takes final action on the claim, whichever is later, as long as the amended claim relates to the same transaction or occurrence that gave rise to the original claim. Govt C §910.6(a). When a claim is amended, the time for taking action on the claim is extended to 45 days after presentation of the amended claim. Govt C §912.4(a).

© The Regents of the University of California

E. Consideration of Claim

§13.62 1. Notice of Insufficiency

If the claim does not provide the required information (see §13.43), the entity may give notice of the insufficiency, stating the defects with particularity. Govt C §910.8. Although Govt C §910.8's terms sound permissive, they are mandatory in effect. If a public entity fails to give written notice of the defect or omission within 20 days after the claim is presented, it waives any defense it may have, even if a claim does not contain the required information. The only exception to the waiver is when no address is provided to which notice can be sent. Govt C §911; *Phillips v Desert Hosp. Dist.* (1989) 49 C3d 699, 705, 263 CR 119; *Watts v Valley Med. Ctr.* (1992) 8 CA4th 1050, 1055, 10 CR2d 794.

PRACTICE TIP: The word "presentation" is a technical term, meaning the date the claim was deposited in the mail. Thus, waiting until 20 days after the claim is received will be fatal, unless the claim was personally delivered. Cities should calendar the mailing of notices of insufficiency for a time that will take account of the uncertainty as to when a claim was "presented."

The entity may not take action on a claim for 15 days after sending a notice of insufficiency. Govt C §910.8.

NOTE: The effect of a notice of insufficiency on the determination of whether a claim is in substantial compliance (see §13.45) is uncertain. Logically, if a claim substantially complies with the requirements, it is sufficient to support a lawsuit whether or not a notice of insufficiency was sent. On the other hand, a notice of insufficiency constitutes an invitation to amend the claim and failure to do so should require a closer examination of the claim. The substantial compliance doctrine has resulted in vague and unspecific claims, which make the entity's task of investigating the claim more difficult.

On notice of insufficiency, see California Government Tort Liability Practice §§6.32-6.34 (4th ed Cal CEB 1999).

© The Regents of the University of California

2. Time to Act on Claim

§13.63 a. Entity Has 45 Days to Act on Claim

The Government Claims Act (Govt C §§810-998.3) provides that a public entity is allowed 45 days after the claim is presented in which to take action on it. If the claim has been amended, the time is extended until 45 days after the amended claim is presented. Govt C §912.4(a). See California Government Tort Liability Practice §§6.35-6.36 (4th ed Cal CEB 1999).

If a claim is mailed to the public agency, any period of notice and duty to respond is extended: 5 days if the place of address is in California, 10 days if it is within the United States, and 20 days if it is outside the United States. Govt C §915.2. The claimant and the entity may also extend the period by written agreement before a lawsuit has been filed or is barred. Govt C §912.4(b).

NOTE: The time for taking action is not jurisdictional, and the entity may take action after the time has expired. Govt C §913.2; *Kane v County of San Diego* (1969) 2 CA3d 550, 554, 83 CR 19.

PRACTICE TIP: Unless a proof of service affidavit is attached, the dates before which an entity must take action should be calculated from the date of the claim. The theory is that the claim could not have been mailed before that date. Staff should be instructed to save the envelope in which a claim is received. Although mail may sit for days in a mailbox, a postmark is some indication of when it was mailed and the date on which the claim has been presented.

© The Regents of the University of California

§13.64 b. Failure to Timely Act Is Rejection by Operation of Law

If the entity fails to take action on a claim within the period allowed by statute or as extended by agreement, the claim is deemed rejected on the last day of the period. Govt C §912.4(b)-(c). Once the claim is deemed rejected, the claimant may file suit. If written notice is not given that the claim was rejected or deemed rejected, a 2-year statute of limitations applies to the claim, running from the accrual of the cause of action. See Govt C §945.6(a)(2). However, an entity is permitted to take action on a claim after the expiration of the time to act, and the entity may still send a notice of rejection to trigger a shorter 6-month limitations period. Govt C §945.6(a)(1); *Glorietta Foods, Inc. v City of San Jose* (1983) 147 CA3d 835, 838, 195 CR 355.

PRACTICE TIP: Public entities should promptly investigate and evaluate all timely claims. A decision should normally be made within the 45-day statutory time period to either settle or reject the claim. If it decides to reject the claim, it should send a timely written rejection notice to the claimant. As an option, however, if the claim is timely filed, the entity may consider taking no action so that the longer period in which claimant can file a lawsuit is available. This may minimize litigation costs and may allow a claimant's medical condition to stabilize, if applicable, and the parties to engage in settlement discussions. If this strategy is not successful, a notice of rejection can then be sent to trigger the 6-month statutory limitations period in which the claimant must bring a lawsuit and thereby move the claim forward.

© The Regents of the University of California

§13.65 3. Types of Entity Action on Claim

An entity can either reject or allow a claim. Govt C §912.6(a)(1)-(2). Rejection of a claim is not subject to review by mandate. *Teresi v State* (1986) 180 CA3d 239, 245, 225 CR 517.

If the entity determines that the claim is a proper one, but in an excessive amount, it can either reject the claim in total or allow it in part and reject it as to the balance. If there is a dispute over liability or the amount of the claim, the entity can compromise it. Govt C §912.6(a)(4). If the claim is allowed in whole or in part, or if the entity offers to compromise the claim and the compromise is accepted, a local public entity may require the claimant to accept the amount in full settlement of the claim. Govt C §912.6(b). If the claimant accepts the amount, the claimant cannot then bring suit on the claim. Govt C §946(c).

PRACTICE TIP 1: Allowance of a claim is a frequently overlooked option. Occasionally a claim will be presented, usually by an unrepresented claimant, seeking only repayment of medical bills or property repair. If investigation indicates a reasonable basis for doing so, the claim should be allowed. Reflexive rejection of a claim in such circumstances may drive a claimant to an attorney, leading to greater expense.

PRACTICE TIP 2: In the notice rejecting a claim in whole or in part, the city might consider including an advisement stating, under CCP §§128.7 and 1038, that the city reserves the right to seek recovery of all costs of defense, including attorney fees, if an action is filed and it is determined that the action was not brought in good faith or with reasonable cause. This may cause a claimant to think twice before filing a frivolous lawsuit.

© The Regents of the University of California

§13.66 4. Notice of Entity Action on Claim

If the city decides to provide written notice of rejection of the claim, the content of the notice is specified by the Government Claims Act. Govt C §913(a). If the claim is rejected in whole or in part, the notice must warn the claimant of the 6-month statute of limitations in which to bring a lawsuit. Govt C §913(b). The entity must use the specified language, or its substantial equivalent, and a defective notice will be treated as no notice at all. *Scott v Los Angeles* (1977) 73 CA3d 476, 482, 140 CR 785.

PRACTICE TIP: The rejection notice should include more than just the precise language set out in the statute. The warning should indicate that it applies only to state actions. Moreover, unless expressly stated otherwise in the notice of rejection, a plaintiff's compliance with filing the action within 6 months from the date the claim is rejected will exempt the plaintiff from the applicable statute of limitations in the Code of Civil Procedure. *Schmidt v Southern Cal. Rapid Transit Dist.* (1993) 14 CA4th 23, 30, 17 CR2d 340.

On notice of action, including a sample form, see California Government Tort Liability Practice §§6.39-6.41 (4th ed Cal CEB 1999).

© The Regents of the University of California

F. Statute of Limitations for Filing Action on Claims

§13.67 1. Actions in Which Claim Is Required

Unless expressly stated to the contrary, the statute of limitations in actions for which a claim is required is governed entirely by the Government Claims Act (Govt C §§810-998.3), *i.e.,* the provisions of the Code of Civil Procedure do not apply. *Massa v Southern Cal. Rapid Transit Dist.* (1996) 43 CA4th 1217, 1221, 51 CR2d 164; *Schmidt v Southern Cal. Rapid Transit Dist.* (1993) 14 CA4th 23, 30, 17 CR2d 340.

The statute of limitations for actions in which a timely claim was presented is dependent on whether notice of rejection is given. If notice of rejection on the claim is given, the claimant has 6 months from the date the notice is personally delivered to the claimant or deposited in the mail to file suit. An entity can start the 6-month statute of limitations at any time by giving notice that the claim has been rejected. The statute of limitations is not extended for 5 days when notice is mailed, but runs from the date of deposit in the mail. *Cole v Los Angeles Unified Sch. Dist.* (1986) 177 CA3d 1, 4, 222 CR 426; *Smith v City and Count of San Francisco* (1977) 68 CA3d 227, 231, 137 CR 146. If no notice of denial is given, the claimant has 2 years from the date the cause of action accrues in which to bring an action. Govt C §945.6(a); *Glorietta Foods, Inc. v City of San Jose* (1983) 147 CA3d 835, 836, 195 CR 355.

In the special case of police officer conduct, the statute of limitations to bring an action in superior court is tolled while criminal charges are pending against a claimant. *Damjanovic v Ambrose* (1992) 3 CA4th 503, 509, 4 CR2d 560. However, this tolling does not relieve the criminal defendant from the obligation to file a claim, nor does it extend the 6-month claim period. Govt C §945.3. See *McMartin v County of Los Angeles* (1988) 202 CA3d 848, 855, 249 CR 53; *Mohlmann v City of Burbank* (1986) 179 CA3d 1037, 1043, 225 CR 109.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.68 2. Actions in Which No Claim Is Required

§13.68 2. Actions in Which No Claim Is Required

When no claim is required, either by the Government Claims Act, local ordinance, or contract, the statute of limitations is what would be applicable to an action against a private party. Govt C §945.8.

PRACTICE TIP: The running of the statute of limitations is governed by the mailbox rule, and hence the date of mailing is crucial. Standard practice when sending such notices is to prepare a proof of service by mail form. *Dowell v County of Contra Costa* (1985) 173 CA3d 896, 898, 219 CR 341.

© The Regents of the University of California

§13.69 3. Avoiding Waiver of Statute of Limitations

In a personal injury action not involving the negligence of a health care provider, compliance with the Government Claims Act (*i.e.,* filing a lawsuit within 6 months of the claim's rejection) will exempt the claimant from CCP §340, unless the claimant is expressly informed otherwise. *Massa v Southern Cal. Rapid Transit Dist.* (1996) 43 CA4th 1217, 1221, 51 CR2d 164; *Schmidt v Southern Cal. Rapid Transit Dist.* (1993) 14 CA4th 23, 30, 17 CR2d 340. A federal district court held that a public entity waived the statute of limitations for a federal civil rights claim by using the state statutory language and advising plaintiff that she had 6 months to file suit, even though the limitations period for her federal civil rights action otherwise expired sooner than 6 months from the notice. *Halus v San Diego County Assessment Appeals Bd.* (SD Cal 1992) 789 F Supp 327, 329. The notice of time to file suit should indicate that the limits described for bringing suit apply only to state actions. But see *Javor v Taggart* (2002) 98 CA4th 795, 806, 120 CR2d 174 (finding *Halus* implicitly overruled by *Silva v Crain* (9th Cir 1999) 169 F3d 608 and finding no waiver of statute of limitations for federal civil rights suit).

Public agencies must differentiate between claims and applications. To ensure that the 6-month statute of limitations for bringing suit applies, a public entity must give notice that the claim is rejected, not merely that the application for leave to present a late claim is denied. *Jenkins v County of Contra Costa* (1985) 167 CA3d 152, 156, 213 CR 126. Acts that imply that an application has been granted will prevent a public entity from contending that the application was denied. For example, when an application for leave to present a late claim is presented and a public entity only gives notice that the claim was denied, the entity will be estopped from contending that the application was denied for the purpose of requiring the claimant to petition the court to be relieved from the claim presentation requirements before bringing suit. *Dujardin v Ventura County Gen. Hosp.* (1977) 69 CA3d 350, 360, 138 CR 20; *McLaughlin v Superior Court* (1972) 29 CA3d 35, 38, 105 CR 384.

On the other hand, only giving notice that the application was denied estops an entity from contending that written notice of rejection of the claim was given. *Jenkins v County of Contra Costa, supra; Wheeler v County of San Bernardino* (1978) 76 CA3d 841, 848, 143 CR 295. Denying both the application and the claim will not lead to estoppel. *El Dorado Irrig. Dist. v Superior Court* (1979) 98 CA3d 57, 60, 159 CR 267.

© The Regents of the University of California

§13.70 G. Late Claim Procedures

If the claim is not presented in a timely manner, the claimant must present an application for leave to present a late claim before commencing a lawsuit. Govt C §§945.4, 946.6. Presentation of such an application does not estop a claimant from contending that the claim was timely. *Jenkins v County of Contra Costa* (1985) 167 CA3d 152, 156, 213 CR 126.

NOTE: The late claim procedure applies only to claims that are subject to the 6-month presentation requirement. It cannot be invoked for claims that are made under the 1-year rule. *Wheeler v County of San Bernardino* (1978) 76 CA3d 841, 845, 143 CR 295. See §13.55.

On late claims, see California Government Tort Liability Practice, chap 7 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.71 1. Time Limit

An application for leave to present a late claim must be presented within a reasonable period not to exceed 1 year. In calculating the 1-year period, time during which the claimant is a minor is counted, but time during which the claimant is mentally incapacitated and does not have a guardian or conservator is not. The tolling applies even if a mentally incapacitated claimant has a conservator when the conservator does not know and could not have known of the claim. *Favorite v County of Los Angeles* (1998) 68 CA4th 835, 837, 80 CR2d 656.

NOTE: The tolling provision applies only to mentally incapacitated *adults* without a guardian or conservator. As a result, an application by a mentally incapacitated *minor* presented after the 1-year period is too late. *Hernandez v County of Los Angeles* (1986) 42 C3d 1020, 1025, 232 CR 519; *Reyes v County of Los Angeles* (1988) 197 CA3d 584, 592, 243 CR 35.

© The Regents of the University of California

§13.72 2. Grounds for Relief

An application for leave to present a late claim must state the reason for the delay in presenting the claim and attach the proposed claim. Govt C §911.4(b). The public entity *must* grant the application when one or more of the following is applicable (Govt C §§911.6(b), 946.6):

- Claim was not presented in a timely fashion because of mistake, inadvertence, surprise, or excusable neglect, but only if the public entity would not be prejudiced in its defense by the failure to have presented a timely claim;
- Claimant was a minor throughout the claim period;
- Claimant was physically or mentally incapacitated throughout the claim period and failed to present a claim because of that disability;
- Claimant died before the expiration of the claims period.

NOTE: These are the same grounds on which a petition to be relieved from the claims requirement can be granted. Govt C §§911.6, 946.6(c).

The burden is on the claimant to establish the grounds for relief by a preponderance of the evidence. *El Dorado Irrig. Dist. v Superior Court* (1979) 98 CA3d 57, 62, 159 CR 267; *Toscano v County of Los Angeles* (1979) 92 CA3d 775, 784, 155 CR 146. Even if a claimant shows sufficient excuse, the claimant must also show reasonable diligence in proceeding with the late claim application. *Greene v State* (1990) 222 CA3d 117, 121, 272 CR 52; *Dunston v State* (1984) 161 CA3d 79, 84, 207 CR 196; *DeYoung v Del Mar Thoroughbred Club* (1984) 159 CA3d 858, 864, 206 CR 28.

© The Regents of the University of California

§13.73 a. Standard for Excusable Neglect

A late claim is excused when the delay was due to "mistake, inadvertence, surprise or excusable neglect" and the public entity will not be prejudiced in its defense of the claim by this delay. Govt C §911.6(b)(1).

NOTE: Prejudice to the public entity is not an issue unless the claimant establishes excusable neglect. In other words, prejudice is an additional reason to deny an application, but lack of prejudice is not a reason to grant a petition. *Rojes v Riverside Gen. Hosp.* (1988) 203 CA3d 1151, 1163, 250 CR 435, overruled on other grounds in *Passavanti v Williams* (1990) 225 CA3d 1602, 275 CR 887; *Shank v County of Los Angeles* (1983) 139 CA3d 152, 158, 188 CR 644; *Hasty v County of Los Angeles* (1976) 61 CA3d 623, 627, 131 CR 347.

The standard for showing mistake, inadvertence, surprise, or excusable neglect is the same standard as under CCP §473. *City of Fresno v Superior Court* (1980) 104 CA3d 25, 32, 163 CR 807. A mistake must be reasonable to justify delay. The California Supreme Court has defined "excusable neglect" as "neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances." *Ebersol v Cowan* (1983) 35 C3d 427, 435, 197 CR 601. Thus, when an attorney had a police report clearly identifying a roadway as a state highway, a mistaken belief that it was a city street was not reasonable. *Greene v State* (1990) 222 CA3d 117, 120, 272 CR 52. See also *Department of Water & Power v Superior Court* (2000) 82 CA4th 1288, 1296, 99 CR2d 173; *Spencer v Merced County Office of Educ.* (1997) 59 CA4th 1429, 1438, 69 CR2d 750. On the other hand, a calendaring error by a legal secretary is "excusable neglect" that will support leave to file a late claim unless the public entity can demonstrate prejudice. *Renteria v Juvenile Justice, Dep't of Corrections & Rehabilitation* (2006) 135 CA4th 903, 911, 37 CR3d 777.

The claimant's ignorance of the claims filing requirement, standing alone, does not constitute excusable neglect. *El Dorado Irrig. Dist. v Superior Court* (1979) 98 CA3d 57, 62, 159 CR 267. In addition, the failure of a claimant or claimant's attorney to identify the owner of a government facility is not excusable neglect. See *Lutz v Tri-City Hosp.* (1986) 179 CA3d 807, 810, 224 CR 787 (failure to identify owner of hospital as County of San Diego). The trauma of a loved one's death is also usually insufficient to show excusable neglect in failing to file a timely claim. See *People ex rel Dep't of Transp. v Superior Court (Isenhower)* (2003) 105 CA4th 39, 46, 129 CR2d 60.

Making a claim against the wrong public entity is generally not found to constitute excusable neglect (see, *e.g., Shank v County of Los Angeles* (1983) 139 CA3d 152, 158, 188 CR 644), but relief has been granted when the claimant exercised reasonable diligence to determine the correct entity. *Lawrence v State* (1985) 171 CA3d 242, 245, 217 CR 200.

© The Regents of the University of California

§13.74 b. Minors

Minors must present an application for leave to present a late claim within 1 year, provided that they were minors during the entire 6-month period. *Hernandez v County of Los Angeles* (1986) 42 C3d 1020, 1027, 232 CR 519. The minority of a claimant constitutes a separate and distinct ground for relief from late claims. Thus, prejudice to a public entity has been held irrelevant as to this specific basis of relief. *Wozniak v Peninsula Hosp.* (1969) 1 CA3d 716, 723, 82 CR 84. Delay by the minor's parents or attorney is not attributable to the minor. The only question is whether the minor acted diligently in presenting the application. *Tammen v County of San Diego* (1967) 66 C2d 468, 480, 58 CR 249. Minors must show that any delay in presenting the application was clearly not attributable to themselves. *McMartin v County of Los Angeles* (1988) 202 CA3d 848, 861, 249 CR 53.

PRACTICE TIP: Minority can be a complex issue and care should be taken in analyzing a minor's late claim. See *Rousseau v City of San Carlos* (1987) 192 CA3d 498, 501, 236 CR 373.

If certain conditions are met, the 1-year period is tolled during the period when the claimant is detained or adjudged to be a dependent child of the juvenile court. Govt C §911.4(c)(2)-(3).

© The Regents of the University of California

§13.75 c. Incapacitated Adults

The claimant must show that the physical or mental incapacity existed during the entire claim period that caused the delay. An excuse based on mental or physical incapacity during the claim period must show sufficient incapacity during the entire period and generally will not apply when the claimant is well enough to contact a lawyer and delegate prosecution of the claim. *Harrison v County of Del Norte* (1985) 168 CA3d 1, 8, 213 CR 658; *Martin v City of Madera* (1968) 265 CA2d 76, 80, 70 CR 908. But see *Draper v City of Los Angeles* (1990) 52 C3d 502, 508, 276 CR 864 (incapacity shown as cause of delay).

The trauma of a loved one's death is usually insufficient to show incapacity. See *People ex rel Dep't of Transp. v Superior Court (Isenhower)* (2003) 105 CA4th 39, 46, 129 CR2d 60.

© The Regents of the University of California

§13.76 d. Equitable Estoppel

Equitable estoppel is an excuse from timely compliance with the claims requirements. *John R. v Oakland Unified Sch. Dist.* (1989) 48 C3d 438, 444, 256 CR 766. It will be applied when agents or employees of the entity have prevented or deterred the filing of a timely claim by some affirmative act. *Ovando v City of Los Angeles* (CD Cal 2000) 92 F Supp 2d 1011, 1024; *Christopher P. v Mojave Unified Sch. Dist.* (1993) 19 CA4th 165, 170, 23 CR2d 353.

© The Regents of the University of California

§13.77 3. Evaluation of Late Claim Applications

In evaluating late claim applications, the presumption should be that the application will be denied. Granting an application is a final step, amounting to a waiver of any defense that the claim was untimely.

The time for action on an application allows for only a limited investigation. Most of the facts relevant to the application are under the control of the claimant. Discovery at the application stage is restricted by the fact that no action is pending; although if the application is denied and the claimant files a petition, all the usual mechanisms for discovery are available. See CCP §2019.010.

A counter-consideration is the expense of denying a claim. As a general rule, the chances of success with respect to a minor claimant generally do not justify the expense. The same point is probably true when the claimant died during the claims period. When the claimant claims excusable neglect or mental or physical incapacity, however, the expense is frequently justified by the prospect of totally disposing of the action.

© The Regents of the University of California

§13.78 4. Action on Late Claim Applications

The entity has 45 days after presentation of an application to file a late claim to grant or deny the application. Govt C §911.6(a). This period may be extended by written agreement made before the period expires. Govt C §911.6(a). If the application is granted, the claim is deemed to be presented on the date the application is granted. Govt C §912.2. At this point, the claim is handled just as if a timely claim were presented.

PRACTICE TIP: Although Govt C §911.6 provides that an entity "shall" grant the application if grounds for relief exist, some reasonably argue it is directory only. There are no reported cases in which a writ of mandate was granted to compel an entity to grant an application. See *Royal Convalescent Hosp. v State Bd. of Control* (1979) 99 CA3d 788, 794, 160 CR 458. However, a petition for mandate is an alternate remedy to a tort action under Govt C §815.6 relative to the failure to discharge a mandatory duty. The more conservative practice is to read "shall" in Govt C §911.6 as mandatory if the agency determines that the statutory grounds for relief are met. Moreover, Govt C §946.6 also provides that a court "shall" grant a petition under the same grounds.

The entity must give written notice of its action on the application. If the application is denied, the claimant must be warned of the necessity to petition the court for relief within 6 months. Govt C §911.8.

© The Regents of the University of California

§13.79 H. Petition to Be Relieved From Claims Requirement

If the application to file a late claim is denied, the claimant may file a petition to be relieved from the claims requirement. Govt C §946.6(a). The petition procedure is not a review of the entity's action on the application, but a de novo proceeding. Govt C §946.6(e). See California Government Tort Liability Practice §7.40 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.80 1. Time Limit

A petition to be relieved from the claims requirement must be filed within 6 months after the time an application is denied or deemed denied. Govt C §946.6(b). The Government Claims Act (Govt C §§810-998.3) has no provision for extending the time in which to file a petition if no notice of action on the application is given, in contrast to the claims procedure. The reference to "deemed denied" in Govt C §946.6(b) and the absence of a notice concerning "deemed denial" in Govt C §911.8 suggests that a petition may be time-barred even if the claimant receives no notice.

PRACTICE TIP: The notice of action on an application to file a late claim should include the date the application was granted or denied.

© The Regents of the University of California

§13.81 2. Grounds for Relief

The grounds for relief are the same on a petition to be relieved from the claims requirement as on an application to file a late claim (see §§13.72-13.76), but it appears that the claimant may present entirely different grounds in the petition, although such grounds might be subject to a defense of waiver. The petitioner bears the burden of proof. *Santee v Santa Clara County Office of Educ.* (1990) 220 CA3d 702, 717, 269 CR 605.

PRACTICE TIP: If the key evidence is not available without additional time, ask the court for a continuance. Some courts may order the claimant's deposition to explore issues relevant to the petition.

© The Regents of the University of California

§13.82 3. Statute of Limitations If Petition Granted

If the petition is granted, the claimant must commence an action within 30 days. Govt C §946.6(f). This deadline is a statute of limitations. *Mandjik v Eden Township Hosp. Dist.* (1992) 4 CA4th 1488, 1498, 6 CR2d 582. However, it is sufficient if the plaintiff files a complaint before the petition is granted. *Black v Los Angeles County* (1976) 55 CA3d 920, 930, 127 CR 916.

© The Regents of the University of California

§13.83 4. Review of Determination

Review of an order on a petition is for abuse of discretion. *Harrison v County of Del Norte* (1985) 168 CA3d 1, 6, 213 CR 658; *Tsingaris v State* (1979) 91 CA3d 312, 314, 154 CR 135.

© The Regents of the University of California

§13.84 a. If Petition Is Granted

An order granting a petition is interlocutory and thus not appealable. *Church v County of Humboldt* (1967) 248 CA2d 855, 857, 57 CR 79. An order granting a petition can be reviewed by a petition for writ of mandate. See *State v Superior Court of Sacramento County* (1978) 86 CA3d 475, 150 CR 308, overruled on other grounds in *Hernandez v County of Los Angeles* (1986) 42 C3d 1020, 232 CR 519.

© The Regents of the University of California

§13.85 b. If Petition Is Denied

An order denying a petition is an appealable order. *Moore v Morhar* (1977) 65 CA3d 896, 903 n8, 135 CR 626. Appellate courts will more closely scrutinize denial of a petition than its granting. *Toscano v County of Los Angeles* (1979) 92 CA3d 775, 782, 155 CR 146; *Williams v Mariposa Unified Sch. Dist.* (1978) 82 CA3d 843, 848, 147 CR 452.

© The Regents of the University of California

IV. INDEMNIFICATION OF PUBLIC EMPLOYEES AND OFFICERS

A. General Obligations

§13.86 1. Duty to Defend

Public entities must provide for the defense of civil actions brought against an employee or former employee if (Govt C §§995, 995.2):

- Employee's act or omission was within the scope of his or her employment;
- Employee did not act with actual fraud, corruption, or actual malice; and
- Defense of the action would not create a specific conflict of interest between the entity and the employee.

See *Stewart v City of Pismo Beach* (1995) 35 CA4th 1600, 1605, 42 CR2d 382. The public entity is required to inform the employee within 20 days whether it will or will not provide a defense, and the reason for a refusal to provide a defense. Govt C §995.2(b).

Public entities are not required to provide a separate defense when a potential conflict of interest exists. *City of Huntington Beach v Petersen Law Firm* (2002) 95 CA4th 562, 567, 115 CR2d 568.

On the duty to defend, see California Government Tort Liability Practice §§4.1-4.13 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.87 2. Duty to Indemnify

Public entities must indemnify an employee or former employee for a judgment of compensatory damages when (Govt C §825(a)):

- Employee or former employee requests in writing, not less than 10 days before the day of trial, that the public entity defend him or her;
- Employee acted within the scope of his or her employment;
- Entity conducted the employee's defense; and
- Employee cooperated in good faith in the defense of the action.

See *Rivas v City of Kerman* (1992) 10 CA4th 1110, 1116, 13 CR2d 147. The primary purpose of the indemnification statute is to avoid "dampen[ing] the ardor" of employees who might otherwise be inhibited by the possibility of having to personally finance and pay large judgments in tort suits arising from the performance of their duties. *Johnson v State* (1968) 69 C2d 782, 790, 73 CR 240. The duty to indemnify public employees also applies to civil rights claims arising under the federal Civil Rights Act (42 USC §1983). *Williams v Horvath* (1976) 16 C3d 834, 848, 129 CR 453.

NOTE: One notable exception to the indemnification obligation involves automobile accidents occurring when a public employee, in the scope of employment, is operating his or her own vehicle. In this instance, the employee's automobile policy fulfills the public entity's duty to indemnify. *Younker v County of San Diego* (1991) 233 CA3d 1324, 1330, 285 CR 319; *Government Employees Ins. Co. v Gibraltar Cas. Co.* (1986) 184 CA3d 163, 229 CR 57. If the employee is uninsured, however, the city will not be able to rely on the employee's insurance, and the city will have primary responsibility to respond.

PRACTICE TIP: The requirements for employee insurance coverage should be addressed in the agency's personnel rules.

Special rules on indemnification of elected officials who tortiously interfere in a judicial proceeding, commit an intentional tort not directly related to the official's performance of official duties, or violate specified Government Code and Penal Code sections relating to official misconduct are found in Govt C §§815.3, 825(f), and 825.6.

On indemnification of public employees and officers, see §§13.86-13.89. On the duty to indemnify, see California Government Tort Liability Practice §§4.14-4.21 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.88 B. Scope of Employment

Courts have given a broad application to the term "scope of employment." For example, the California Supreme Court found that a police officer, in uniform and in a police vehicle, was acting in the scope of his employment when he raped a detainee; the court decided on public policy grounds that the victim should be compensated. *Mary M. v City of Los Angeles* (1991) 54 C3d 202, 221, 285 CR 99. However, if the wrongful conduct did not arise out of or was not engendered by the employment, the actions are not within scope of employment. *Farmers Ins. Group v County of Santa Clara* (1995) 11 C4th 992, 1019, 47 CR2d 478 (acts of sexual harassment by deputy sheriff outside scope of employment). See also *John R. v Oakland Unified Sch. Dist.* (1989) 48 C3d 438, 447, 256 CR 766 (sexual assault by teacher held outside scope of employment as matter of law); *Hoblitzell v City of Ione* (2003) 110 CA4th 675, 683, 2 CR3d 8 (building inspector acting outside of official duties and outside of public entity's jurisdiction not acting within scope of employment); *K.G. v County of Riverside* (2003) 106 CA4th 1374, 1382, 131 CR2d 762 (sexual assault by police officer against stepdaughter outside scope of employment); *Zamudio v State* (1998) 62 CA4th 673, 73 CR2d 79 (alleged sex discrimination in contract between union and state outside scope of employment of state correctional officer who also served as union representative); *Thorn v City of Glendale* (1994) 28 CA4th 1379, 35 CR2d 1 (fire marshal's burning of building held outside scope of employment).

PRACTICE TIP: An employee sometimes requests that a public entity provide a defense when the question of scope of employment is a close one. This is especially true in cases involving actions taken by "off-duty" police officers. The factual circumstances should be carefully reviewed to determine whether the employee acted within the scope of his/her employment. Additional factors to consider in deciding whether to provide a defense for the employee are: (1) the impact on employee morale if a decision is made to decline representation; and (2) the fact that if the entity declines representation, it would be obligated to indemnify the employee for all of his/her costs (including attorney fees) and the amount of any judgment or settlement if it is later determined by the court or a jury that the employee did indeed act within the scope of his or her employment and that he or she did not act with actual fraud, corruption, or actual malice. Govt C §§825.2, 996.4.

If there is an issue as to whether an employee was acting outside the scope of employment, the public entity must still provide for the defense of the employee, but it may do so under a reservation of rights. If there is no reservation, the public entity generally forfeits any right to recover from the employee money paid by the public entity in defense or settlement of the claim. Govt C §825.6(a).

The public entity may deny a defense based on lack of scope of employment and/or a conflict of interest between the entity and the employee, but the public entity will then be liable for the employee's defense costs and the amount of any judgment if it is later determined that the employee was acting within the scope of his or her employment. The employee also may petition for a writ of mandate or seek declaratory relief in an attempt to show scope of employment. See Govt C §996.4. For a comprehensive discussion of reservation of rights and the indemnification statutes, see California Government Tort Liability Practice, chap 4 (4th ed Cal CEB 1999). See also *Rivas v City of Kerman* (1992) 10 CA4th 1110, 1116, 13 CR2d 147.

PRACTICE TIP: If there is any question as to scope of employment, the public entity should consider providing representation under a reservation of rights rather than face the prospect of having to pay a judgment after having no say in the litigation. The reservation of rights should be in writing, and a receipt signed by the employee should be kept in the public agency's files. In cases of joint representation of the employee and the entity by entity counsel, consideration must also be given to Cal Rules Prof Cond 3-600 and 3-310. Although these rules allow dual representation of the employee and the entity, the employee should be informed in writing of the entity's counsel's primary client and both the impact and use of confidential information. Consider obtaining a written waiver from the employee.

© The Regents of the University of California

§13.89 C. Punitive Damages

A public entity is authorized, but not required, to pay punitive damages on behalf of an employee. See Govt C §825. Government Code §825(b)(3) provides that a city is authorized to pay a "claim or judgment" for punitive damages if it determines, in its sole discretion, that such payment is in its "best interests." This determination should be made on a case-by-case basis and is most commonly made after trial and a resulting award of punitive damages. See *Trevino v Gates* (9th Cir 1994) 23 F3d 1480, 1481, cert denied (1994) 513 US 932 ("blanket" policy of paying punitive damages may result in loss of absolute legislative immunity in excessive force cases). But see *Trevino v Gates* (9th Cir 1996) 99 F3d 911, 918 (qualified immunity applies to decisions by council members to pay punitive damages, provided that decision is discretionary, made on case-by-case basis, and complies in good faith with requirements of Govt C §825(b)). See also *Cornwell v City of Riverside* (9th Cir 1990) 896 F2d 398, 399 (federal law does not prohibit indemnification for punitive damages). An allegation and prayer for punitive damages does not necessarily create a conflict of interest requiring the public entity to provide independent counsel for the employee. *Laws v County of San Diego* (1990) 219 CA3d 189, 199, 267 CR 921. On the duty of an entity to provide independent counsel in conflict situations, see California Government Tort Liability Practice §2.47 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.90 V. MUNICIPAL LIABILITY

Municipal liability is principally based in torts, constitutional and statutory (state and federal) violations, and breach of contract. Sections 13.91-13.172 discuss the activities for which municipalities and their employees have immunity and for which municipalities and their employees may be found liable under California and federal law. See California Government Tort Liability Practice, chaps 10-11 (4th ed Cal CEB 1999); California Tort Guide, chap 8 (4th ed Cal CEB 2009); 5 Levy, California Torts, chaps 60-61; 5 Witkin, Summary of California Law, *Torts* §§203-380 (10th ed 2005).

© The Regents of the University of California

§13.91 A. Principles of Immunity

A municipality has certain immunities and defenses that would be available if it were a private person, such as comparative negligence or assumption of risk. 5 Witkin, Summary of California Law, *Torts* §227 (10th ed 2005).

The doctrine of governmental immunity applies primarily to torts. The doctrine does not apply to public contracts and will not protect a municipality from liability arising out of a contract. Municipalities are liable for breach of contract to the same extent as private citizens. The doctrine does not apply to equitable remedies such as injunctions, writs of mandate, and declaratory relief. For example, an individual may obtain an injunction against a municipality to prevent the construction of a project that could violate the individual's rights. Govt C §814 (permitting forms of relief besides money or damages against public employer or public entity).

PRACTICE TIP: When presented with potential tort liability, a city attorney should review all immunities (see §§13.92-13.93), research how immunity has been applied to determine whether it is applicable in a particular case, and recognize immunity rules, *e.g.,* if there is no statute imposing liability, an entity is not liable (Govt C §815(a)). A specific immunity will ordinarily prevail over statutory liabilities (Govt C §§815(b), 815.2(b)); for exceptions to this rule, see California Government Tort Liability Practice §§1.18-1.19 (4th ed Cal CEB 1999). When the entity is immune, but the employee is not, the entity usually has the authority, and may have a duty to indemnify the employee (see Govt C §854.8(d); California Government Tort Liability Practice §4.14 (4th ed Cal CEB 1999).

See California Government Tort Liability Practice, chaps 1, 10-11 (4th ed Cal CEB 1999) for a more complete listing of immunities and a more detailed discussion of the specific statutory and common law immunities.

© The Regents of the University of California

§13.92 1. Tort Immunities Generally

The Government Claims Act (formerly known as the Tort Claims Act) (Govt C §§810-998.3) limits municipal liability by providing that liability is subject to any public entity immunities provided by statute. Govt C §815(b). These include statutory immunities existing either within or outside of the Government Claims Act. See, *e.g.,* Veh C §17004. Similarly, liabilities created by statutes outside the Government Claims Act are subject to Government Claims Act immunities. See 5 Witkin, Summary of California Law, *Torts* §§222-236, 272-285 (10th ed 2005).

One primary defense to tort claims is that the acts complained of were the result of the exercise of discretion by the employee. Govt C §§815.6, 820.2. In addition, except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity when the employee is immune from liability. Govt C §815.2(b). Liability is limited further by Govt C §818, which provides that municipalities are not liable for punitive damages. On public entities' authority to pay punitive damages, see §13.89.

On immunities, see California Government Tort Liability Practice, chap 11 (4th ed Cal CEB 1999).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.93 2. Specific Immunities Under Government Claims Act

§13.93 2. Specific Immunities Under Government Claims Act

Public entity immunities specified in the Government Claims Act include:

- Adoption/failure to adopt or enactment/failure to enact a law. Govt C §818.2.
- Issuance, denial, suspension, revocation, or denial of a permit or license. Govt C §818.4; *Cancun Homeowners Ass'n v City of San Juan Capistrano* (1989) 215 CA3d 1352, 1357, 264 CR 288.
- Failure to inspect non-municipal property for health and safety violations. Govt C §818.6; *Stevenson v San Francisco Hous. Auth.* (1994) 24 CA4th 269, 29 CR2d 398.
- Publication for educational use of records on persons convicted of controlled substance violations. Govt C §818.7.
- Employee's misrepresentation. Govt C §818.8.
- Advice to small claims litigants. Govt C §818.9.
- Public improvement design or plans. Govt C §830.6. See *Compton v City of Santee* (1993) 12 CA4th 591, 15 CR2d 660.
- Failure to provide traffic devices. Govt C §§830.4, 830.8. See *Weinstein v Department of Transp.* (2006) 139 CA4th 52, 61, 42 CR3d 417.
- Traffic signals controlled by emergency vehicles. Govt C §830.9.
- Weather conditions on streets and highways. Govt C §831.
- Failure to restrict use of fuel tank vehicles. Govt C §821.5.
- Injuries arising out of hazardous recreational activities. Govt C §831.7. See *Perry v East Bay Reg. Park Dist.* (2006) 141 CA4th 1, 11, 45 CR3d 477 (park district immune for death of teenager swimming in lake without lifeguards); *Yarber v Oakland Unified Sch. Dist.* (1992) 4 CA4th 1516, 6 CR2d 437 (school district immune for injuries sustained in adult basketball game); *Berry v State* (1992) 2 CA4th 688, 691, 3 CR2d 382 (state immune for injuries suffered when claimant dove from tree stump). See also Health & S C §115800 (skateboarding as hazardous recreational activity). But see *Avila v Citrus Community College Dist.* (2006) 38 C4th 148, 160, 41 CR3d 299 (immunity does not apply to school sports activities).
- Natural condition of unimproved public property. Govt C §§831.2, 831.25; *Knight v City of Capitola* (1992) 4 CA4th 918, 927, 6 CR2d 874 (city immune for injuries sustained by bodysurfer on city beach).
- Roadway repairs. Govt C §831.3.
- Condition or use of trails and unpaved roads. Govt C §831.4(a)-(b); *Astenius v State* (2005) 126 CA4th 472, 23 CR3d 877; *Giannuzzi v State* (1993) 17 CA4th 462, 21 CR2d 335. See *Carroll v County of Los Angeles* (1997) 60 CA4th 606, 609, 70 CR2d 504 (bike paths, whether paved or not, are "trails" and fall under this immunity).
- Condition of paved walkways. Govt C §831.4(c); *Giannuzzi v State, supra*.
- Condition of reservoirs. Govt C §831.8.
- Dangerous condition of public property. Govt C §835.4; *Kuhns v State* (1992) 8 CA4th 982, 990, 10 CR2d 773.
- Injuries by or to prisoners. Govt C §844.6.
- Failure to provide police protection. Govt C §845; *Davidson v City of Westminster* (1982) 32 C3d 197, 185 CR 252 (finding no "special relationship" between officers and victim and thus not reaching issue of statutory immunity). But see *Carpenter v City of Los Angeles* (1991) 230 CA3d 923, 934, 281 CR 500 (finding "special relationship" and thus duty to warn witness of threat to his life).
- Failure to provide prisons or prison equipment. Govt C §845.2.
- Interference with prisoner's rights and failure to provide prisoner medical care. Govt C §§845.4, 845.6.
- Prisoner parole decisions (Govt C §845.8(a); *Perez-Torres v State* (2007) 42 C4th 136, 64 CR3d 155) and injuries caused by escaped prisoners/arrestees. Govt C §845.8(b).
- Failure to make arrest. Govt C §846.
- Failure to provide fire protection (Govt C §§850, 850.2), injuries caused in fighting fires (Govt C §850.4), and acts of mutual aid firefighting services (Govt C §850.6).

- Transportation of injured persons. Govt C §850.8.
- Tax collection. Govt C §860.2.
- Acts taken to stop gradual earth movement. Govt C §866. See also Govt C §831.2.
- National Guard activities. Govt C §816.
- Public medical facilities and institutions. Govt C §§854-856.6; *Brookhouser v State* (1992) 10 CA4th 1665, 13 CR2d 658.

For a thorough discussion of immunities in specific functional areas, see California Government Tort Liability Practice, chap 11, §§12.66-12.101 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.94 B. Municipal Tort Liability Generally

Before adoption of legislation in 1893, California public entities were immune from tort liability under the doctrine of sovereign immunity. Today, cities and other public entities are subject to liability based on the California Government Claims Act (formerly known as the Tort Claims Act) (Govt C §§810-998.3).

The Government Claims Act provides that a public entity is not liable for an injury arising out of an act or omission of the public entity or public employee or any other person except as otherwise provided by statute (*i.e.,* a California statute or the federal or state constitution). Govt C §815. See *Eastburn v Regional Fire Protection Auth.* (2003) 31 C4th 1175, 1179, 7 CR3d 552; *Zelig v County of Los Angeles* (2002) 27 C4th 1112, 1127, 119 CR2d 709.

NOTE: "Public entity" is defined to include officers and employees of the public entity, whether or not compensated; "employee" does not include independent contractors. Govt C §810.2. See Govt C §815.4 (imposing liability on public entities for tortious acts or omissions of independent contractors).

By requiring liability to be based on statute, the Government Claims Act abolished all common law or judicially declared liabilities. 5 Witkin, Summary of California Law*, Torts* §§222-224 (10th ed 2005).

NOTE: There continues to be debate as to whether in governmental tort cases the rule is liability and the exception is immunity, or whether the Government Claims Act was intended to make immunity the rule and liability only if provided by statute. See *Thompson v City of Lake Elsinore* (1993) 18 CA4th 49, 63, 22 CR2d 344.

© The Regents of the University of California

§13.95 1. Discretionary Acts

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from an act or omission that was the result of the exercise of the discretion vested in the employee, whether or not such discretion was abused by the employee. Govt C §820.2. A public entity is not liable for an employee's torts when the employee is immune from liability. Govt C §815.2(b).

On discretionary acts and omissions, see California Government Tort Liability Practice §§10.6-10.32 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.96 a. Discretionary Versus Ministerial Acts

Early cases failed to establish a clear method or test for determining whether an act is discretionary or ministerial. In *Johnson v State* (1968) 69 C2d 782, 73 CR 240, many believe the supreme court created a test based on the separation of basic policy decisions (*i.e.,* discretionary) and implementation of the decisions (*i.e.,* ministerial). See, *e.g., Connelly v State* (1970) 3 CA3d 744, 751, 84 CR 257, ("the determination to issue flood forecasts is a policy-making function, a discretionary activity within the scope of governmental immunity, while gathering, evaluating and disseminating flood forecast information are administrative or ministerial activities outside the scope of governmental immunity"). See also California Government Tort Liability Practice §§10.21-10.29 (4th ed Cal CEB 1999) (examples of acts or omissions deemed to be discretionary or ministerial).

© The Regents of the University of California

§13.97 b. Employee Immunity

The discretionary immunity established by Govt C §820.2 extends to any public employee who, in the course of performing official duties, exercises discretionary authority. Discretionary immunity is not directly related to an employee's position or title. However, courts have generally denied immunity to public employees who make determinations "at the lowest ministerial rung of official action." *Johnson v State* (1968) 69 C2d 782, 795, 73 CR 240. The immunity has generally been granted to employees in high-ranking positions who are more likely to make decisions that require a judgment based on an analysis of the competing risks and advantages. *Johnson v State, supra*. But see *Customer Co. v City of Sacramento* (1995) 10 C4th 368, 41 CR2d 658 (means to carry out arrest vested police officer with immunity). Such officials can include city council members, city attorneys, city managers, and police chiefs. See *Caldwell v Montoya* (1995) 10 C4th 972, 42 CR2d 842 (members of school board immune from liability for decision not to renew school superintendent's contract). Public employees who have been denied the immunity include building inspectors, police officers, jailers, and county clerks. California Government Tort Liability Practice §10.22 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.98 c. Mandatory Duties

A public entity is liable for its failure to discharge a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, unless the entity can show it exercised reasonable diligence to discharge the duty. Govt C §815.6; *Johnson v Mead* (1987) 191 CA3d 156, 158, 236 CR 277; *Young v City of Inglewood* (1979) 92 CA3d 437, 439, 154 CR 724. An enactment is a constitutional provision, statute, charter provision, ordinance, or authorized rule or regulation having the force of law. Govt C §§810.6, 811.6.

PRACTICE TIP: To protect a city from liability for failure to carry out self-imposed mandatory duties, the city should adopt an ordinance that clearly states that by the use of such words as "shall" and "must" in any ordinance, resolution, code, regulation, motion, or policy, the city council does not impose a mandatory duty.

On mandatory duty liability, see California Government Tort Liability Practice §§9.25-9.47 (4th ed Cal CEB 1999)

© The Regents of the University of California

§13.99 2. Dangerous Condition of Public Property

Government Code §§830-840.6 are the sole authority under which an individual may sue a public entity for injuries resulting from a "dangerous condition" of public property. "Negligence" of an employee of the public entity is not enough to impose liability. *Peterson v San Francisco Community College Dist.* (1984) 36 C3d 799, 809, 205 CR 842.

A plaintiff must prove each of the following to establish dangerous condition liability (Govt C §835):

- Public entity owned or controlled the property at the time of the incident;
- Property was in a dangerous condition at the time of the incident;
- Plaintiff's injuries were proximately caused by the dangerous condition;
- Accident was a reasonably foreseeable consequence of the condition; and
- Public entity negligently created the condition or had actual or constructive notice of it before the incident.

Brown v Poway Unified Sch. Dist. (1993) 4 C4th 820, 838, 15 CR2d 679 (res ipsa loquitur presumption does not satisfy requirements for holding public entity liable under Govt C §835(a)); *Mathews v City of Cerritos* (1992) 2 CA4th 1380, 1384, 4 CR2d 16.

For further discussion of public entity liability for dangerous condition of public property, see California Government Tort Liability Practice, chap 12 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.100 a. What Constitutes "Owned or Controlled" Property

For liability to be imposed, the public entity must be in a position to protect against or warn of the hazard, whether or not it owns the property. The critical inquiry is whether the public entity had the power to prevent, remedy, or guard against a dangerous condition. *Tolan v State ex rel Dep't of Transp.* (1979) 100 CA3d 980, 984, 161 CR 307; *Low v City of Sacramento* (1970) 7 CA3d 826, 833, 87 CR 173. Streets are not public property until "accepted" by the entity into its street system. See Str & HC §§1801, 1806; *Copeland v City of Oakland* (1993) 19 CA4th 717, 23 CR2d 719. However, an entity may be liable for streets if a plaintiff can show that the entity "controlled" the property in question. See Govt C §830(c). "Public property" does not include "easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity." Govt C §830(c).

On owned or controlled property, see California Government Tort Liability Practice §§12.9-12.12 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.101 b. What Constitutes a "Dangerous Condition"

A dangerous condition is "a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Govt C §830(a); CACI 1102; *Callahan v City & County of San Francisco* (1967) 249 CA2d 696, 703, 57 CR 639 (must examine risk of injury to members of general public who are using property). A plaintiff is only required to establish that "the ..., condition creates a substantial risk of harm when used with due care by the public generally, as distinguished from the particular person charged as concurrent tortfeasor." *Mathews v State ex rel Dep't of Transp.* (1978) 82 CA3d 116, 121, 145 CR 443 (lack of due care by plaintiff at time of accident is not issue, but rather careful use in abstract). When the danger is only to careless users, no dangerous condition exists. See *Mathews v City of Cerritos* (1992) 2 CA4th 1380, 1384, 4 CR2d 16; *Dominguez v Solano Irrig. Dist.* (1991) 228 CA3d 1098, 1105, 279 CR 470.

Any defect must be substantial. Possible risks are not sufficient to impose liability. *Alexander v State ex rel Dep't of Transp.* (1984) 159 CA3d 890, 897, 205 CR 758. The defect must also present a substantial risk of injury to the general public when used with due care in a foreseeable manner. *Mathews v State ex rel Dep't of Transp.* (1978) 82 CA3d 116, 121, 145 CR 443. Liability may be imposed only when there is a substantial danger that is not apparent to those using the property in a reasonably foreseeable manner with due care. *Fredette v City of Long Beach* (1986) 187 CA3d 122, 131, 231 CR 598 (danger of diving obvious, warning unnecessary).

NOTE: The absence of prior accidents is admissible to prove that the site is not dangerous, but it "is not proof per se that no dangerous condition existed." *Beauchamp v Los Gatos Golf Course* (1969) 273 CA2d 20, 38, 77 CR 914. See also *Antenor v City of Los Angeles* (1985) 174 CA3d 477, 483, 220 CR 181; *McKray v State* (1977) 74 CA3d 59, 62, 141 CR 280;.

On what constitutes a dangerous condition, see California Government Tort Liability Practice §§12.15-12.35 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.102 (1) Dangerous Condition on Adjacent Property

The dangerous condition can be created by adjacent property, *e.g.,* when an adjacent landowner's sign obstructs the view down a city street. *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 841, 206 CR 136. A condition on city property may also make adjacent property dangerous. See *Milligan v City of Laguna Beach* (1983) 34 C3d 829, 834, 196 CR 38. A dangerous condition can be created by a combination of foreseeable third party conduct and a condition of property. *Peterson v San Francisco Community College Dist.* (1984) 36 C3d 799, 812, 205 CR 842.

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.103 (2) Trivial Defect on Property

§13.103 (2) Trivial Defect on Property

When determining whether a defect on the surfaces of streets or sidewalks is trivial, courts have rejected a rigid application of a "tape measure" test and will examine whether there existed aggravating factors such as lighting, debris, or a history of similar accidents. *Fielder v City of Glendale* (1977) 71 CA3d 719, 729, 139 CR 876 (¾-inch sidewalk depression, absent aggravating factors, was trivial as matter of law). Government Code §830.2 suggests that a court should look carefully to see whether a risk is trivial before submitting a question to the jury. The issue of whether a defect is trivial under Govt C §830.2 may be decided by the court as a matter of law. *Sambrano v City of San Diego* (2001) 94 CA4th 225, 233, 114 CR2d 151.

NOTE: A city can require adjacent property owners to repair sidewalks. Str & H C §5610. By ordinance, a city may also shift liability to adjacent landowners for injuries to pedestrians resulting from a dangerous condition on public sidewalks. *Gonzales v City of San Jose* (2004) 125 CA4th 1127, 23 CR3d 178. See *Alpert v Villa Ramano Homeowners' Ass'n* (2000) 81 CA4th 1320, 96 CR2d 364 (condominium homeowners' association (HOA) potentially liable for slip-and-fall on sidewalk buckled by HOA-maintained trees). But see *Williams v Foster* (1989) 216 CA3d 510, 521, 265 CR 15 (finding city's ordinance did not specifically shift liability to adjacent property owners). See generally *Jones v Deeter* (1984) 152 CA3d 798, 805, 199 CR 825 (discussing bases of liability against municipality and abutting property owners in absence of liability-shifting ordinance).

PRACTICE TIP: Sidewalk displacement cases pose particularly difficulty issues for cities. To the extent possible, there may be a benefit to having a court, rather than a jury, decide issues of potential liability.

© The Regents of the University of California

§13.104 c. What Constitutes "Legal Cause" of Injury

"Legal cause" means a substantial factor in bringing about an injury. *Whiteley v Philip Morris, Inc.* (2004) 117 CA4th 635, 11 CR3d 807. Although Govt C §835 still uses the phrase "proximate cause," its use in negligence actions has been criticized. See *Mitchell v Gonzales* (1991) 54 C3d 1041, 1049, 1 CR2d 913. See also CACI 400 (jury instruction providing that the causation element for negligence is whether the defendant was a "substantial factor in causing" plaintiff's harm, rather than using proximate cause terminology). However, courts often refer to "proximate or legal cause." See, *e.g., Ladd v County of San Mateo* (1996) 12 C4th 913, 917, 50 CR2d 309; CACI 400, Sources and Authority (continuing to cite to cases using proximate cause terminology).

It is error for a court to give the "proximate cause" instruction when several concurring causes of an injury exist. *Mitchell v Gonzales, supra*.

When injury could be prevented by a physical device (*e.g.,* lock, fence), the failure to provide such a device can be a legal cause even if the injury was inflicted by a third party's negligence or criminal act. *Nola M. v University of S. Cal.* (1993) 16 CA4th 421, 436, 20 CR2d 97.

On causation, see California Government Tort Liability Practice §§12.36-12.40 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.105 d. What Constitutes Notice of Dangerous Condition

A required element of proving a dangerous condition is that the public entity either negligently created the dangerous condition or had "actual" or "constructive" notice of the dangerous condition. See *Brown v Poway Unified Sch. Dist.* (1993) 4 C4th 820, 836, 15 CR2d 679. "Actual notice" means that the public entity actually knew of the condition and knew or should have known of its dangerous character. Govt C §835.2(a). "Constructive notice" means that "the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." Govt C §835.2(b).

On notice, see California Government Tort Liability Practice §§12.46-12.51 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.106 e. Affirmative Defenses to Action for Dangerous Condition of Property

When faced with an action based on the dangerous condition of public property, a public entity may raise one or more of the following affirmative defenses (some of which are immunities discussed §13.93):

- **Comparative negligence.** If the defect was open and obvious, principles of comparative negligence may apply given the plaintiff's failure to observe and avoid it. Comparative negligence of others will also reduce liability for damages under Proposition 51. See CC §§1431-1432.
- **No time to take protective measures.** If it did not create the condition, the public entity is not liable if it did not have sufficient time to protect the public from the danger. Govt C §835(b); CACI 1103 (jury may consider whether "the condition had existed for enough time before the incident and was so obvious that the defendant reasonably should have discovered the condition and known that it was dangerous").
- **Dangerous condition created by reasonable act.** The public entity is not liable if the act or omission of its employee creating the condition was reasonable. See Govt C §835.4(a); CACI 1111 (jury may weigh foreseeability of injury against practicability and cost of alternative actions).
- **Reasonable action to protect against dangerous condition.** The public entity is not liable if its failure to remedy the condition was reasonable. See Govt C §835.4(b); CACI 1112 (jury may weigh time and opportunity available to entity to have alleviated condition, and cost of doing so, against foreseeability of injury).
- **Design immunity.** The public entity is not liable for injuries caused by a dangerous condition of its property when the plan or design creating that condition was reasonably approved before construction. Govt C §830.6. See *Cornette v Department of Transp.* (2001) 26 C4th 63, 69, 109 CR2d 1 (when triable issues of material fact are presented, plaintiff has right to jury trial as to issues involved in loss of design immunity). Design immunity does not apply to a failure to warn claim when a warning is necessary for a design condition not reasonably apparent to a careful user. *Anderson v City of Thousand Oaks* (1976) 65 CA3d 82, 93, 135 CR 127. To establish design immunity, the entity must establish each of the following elements: (1) a causal relationship between the plan and the accident; (2) discretionary approval of the plan before construction; and (3) substantial evidence supporting the reasonableness of the design. *Ramirez v City of Redondo Beach* (1987) 192 CA3d 515, 525, 237 CR 505 (immunity applies even if reasonable minds differ concerning whether design should have been approved). See Govt C §830.6. Design immunity does not apply to a condition that is not part of the design as approved. *Cameron v State* (1972) 7 C3d 318, 326, 102 CR 305. But see *Ramirez v City of Redondo Beach, supra* (placement of stop limit line found to be covered by design immunity, when placement was made according to verbal instructions of employee with discretionary authority). Design immunity may be lost if the design has become dangerous because of a change in physical conditions. See Govt C §830.6; *Cornette v Department of Transp.* (2001) 26 C4th 63, 72, 109 CR2d 1. However, design immunity will not be lost as a result of changed conditions that were contemplated when the original design was approved. See *Alvis v County of Ventura* (2009) 178 CA4th 536, 554, 100 CR3d 494.

PRACTICE TIP: For projects not requiring city council approval, vest authority in the city manager or public works director to approve designs. The imposition of certification requirements on plaintiff's counsel in certain actions may make it desirable to have designs approved by a professional engineer. See CCP §411.35.

NOTE: Under CCP §411.35, in every action arising out of the alleged professional negligence of a person holding a valid architect, professional engineer, or surveyor's license or certificate, the plaintiff's attorney must file a certificate of review and consultation before the complaint is served. The certificate must contain a declaration that the attorney has (1) reviewed the facts of the case; (2) consulted with and received an opinion from at least one qualified architect, professional engineer, or land surveyor; and (3) concluded on the basis of the review and consultation that the action is meritorious. See CCP §411.35(b).

- **No liability for failure to provide regulatory traffic signs and signals.** A condition is not dangerous merely

because of the failure to provide regulatory traffic control signals or signs or roadway markings. Govt C §830.4; *Frazier v County of Sonoma* (1990) 218 CA3d 454, 458, 267 CR 39. When the dangerous condition exists for reasons other than, or in addition to, the mere failure to provide such controls, this immunity does not apply. See Govt C §830.4; *Washington v City & County of San Francisco* (1990) 219 CA3d 1531, 1534, 269 CR 58.

PRACTICE TIP: If the public entity installs signs, signals, or roadway markings, it must maintain them. Section 830.4 does not preclude liability based on failure to maintain such regulatory devices. Thus, when a public entity exercises its discretion to install traffic signs or regulatory signals, and thereby invites the public reliance on them, the public entity may become liable for creating a dangerous condition if the signs or signals fail to function as intended. *Teall v City of Cudahy* (1963) 60 C2d 431, 434, 34 CR 869. But see *City of South Lake Tahoe v Superior Court* (1998) 62 CA4th 971, 978, 73 CR2d 146 (failure to replace stop sign did not give rise to dangerous condition).

- **No liability for failure to provide traffic warning signs or signals.** A public entity is not liable for any injury caused by the failure to provide traffic or warning signals or signs. Govt C §830.8. This immunity applies to detour signs, pedestrian-crossing prohibition signs, railroad warning signs, road work warning signs, and school crossing signs. It applies unless such signs were necessary to warn of a dangerous condition that endangered the safe movement of traffic and would not be reasonably apparent to a person exercising due care. Govt C §830.8; *Foremost Dairies, Inc. v State* (1986) 190 CA3d 361, 367, 232 CR 70 (city not liable for injuries caused by dangerous condition if it provides "adequate warning" or if it fails to warn of condition of which plaintiff is fully aware).

PRACTICE TIP: Complaints for failure to provide a warning sign must be carefully analyzed because the plaintiff must affirmatively claim that any warning signs were inadequate. *Hefner v County of Sacramento* (1988) 197 CA3d 1007, 1018, 243 CR 291, abrogated on other grounds by *Cornette v Department of Transp.* (2001) 26 C4th 63, 109 CR2d 1.

- **No liability for effects of weather conditions on streets and highways.** A public entity is not liable for injuries caused by the effects on streets and highways of weather conditions such as fog, wind, rain, and ice, which are reasonably apparent to persons using due care. See Govt C §831. But see *Erfurt v State* (1983) 141 CA3d 837, 846, 190 CR 569 (no weather immunity for state when motorist struck guardrail after being blinded by sun as she reached crest of hill).
- **No liability for natural conditions of unimproved public property.** See Govt C §831.2. See *Tessier v City of Newport Beach* (1990) 219 CA3d 310, 314, 268 CR 233 (natural conditions may include some human alterations that "merely duplicate models common in nature"). Public beaches are considered natural, despite the provision of services. See Govt C §831.21. Certain recreational access roads and trails are also covered by an immunity. See Govt C §831.4.

NOTE: The immunity provided by Govt C §831.2 is inapplicable to actions against public entities for injuries to people on adjacent property if the injuries were caused by natural conditions on the unimproved public property. *Milligan v City of Laguna Beach* (1983) 34 C3d 829, 835, 196 CR 38. However, Govt C §831.25 provides immunity for damage to adjacent property caused by landslides and other earth movements caused by the natural condition of unimproved public property.

- **No liability for hazardous recreational activities on public property.** See Govt C §831.7; *Yarber v Oakland Unified Sch. Dist.* (1992) 4 CA4th 1516, 1519, 6 CR2d 437 (basketball). See Govt C §831.7 for many exceptions to this rule.

On statutory defenses and immunities, see §§13.91-13.93; California Government Tort Liability Practice §§12.56-12.101 (4th ed Cal CEB 1999).

© The Regents of the University of California

3. Checklist for Approaching Tort Liability

§13.107 a. Before Lawsuit Is Filed

- **Consider enacting an ordinance to impose liability for injuries to passersby on adjacent property owners who fix sidewalks.** See Str & H C §5610; *Gonzales v City of San Jose* (2004) 125 CA4th 1127, 23 CR3d 178. See also §13.103. Consider the policy and political implications of enacting such an ordinance.
- **Be aware of which procedure manuals, guidelines, or policies are "mandatory," as opposed to "advisory" in nature.** When deviations from guidelines are necessary, city employees should clearly document the reasons for taking such actions.
- **Inspection manuals used by the city should explain that significant discretion is vested in the inspector.** Any manual or guidebook created by the city for the use of its employees should have a disclaimer at the beginning stating that such guidelines or "goals" are not intended to be a legal standard, but are merely intended to serve as a reference source for the employees.
- **Establish design immunity** (see §13.106) **when undertaking improvements and modifications.** When a public improvement is constructed or modified, ensure that each document is created and maintained by the city employees to help establish the "design immunity." Any deviation from the plans made at the construction site or elsewhere should be documented and approved in writing before construction.
- **Create and maintain an adequate recordkeeping system.** Store records in a manner that ensures easy and reliable access.
- **Obtain defense, indemnity, and hold-harmless agreements and insurance.** Hold-harmless agreements should be obtained from each and every possible source for any work or project the city undertakes and should contain an obligation to defend the city.
- **Follow-up on notices to repair.** If an adjacent property owner is given a notice to repair the owner's sidewalk, the city should follow up the notice in a timely manner to make certain that the repairs are made. If an adjacent property owner fails to make timely repairs, the city should perform the work and place a lien on the property for the cost of repairs. The city does not escape liability simply by issuing a notice to repair. The city normally remains ultimately liable for the condition of its sidewalks.
- **Monitor problem areas.** Inspect areas that have been brought to the attention of the city as "trouble spots" on a timely basis and document each inspection. It is difficult to defend the city when an injury occurs in an area that has been brought to the city's attention. If a condition is repaired, it should be checked at a later date to make sure it has not deteriorated. For example, if it is known that street lights are vandalized at a particular location, the city must be able to document that it has taken reasonable actions to ensure that the lights remain functioning.
- **Inspect for proper visibility of signs and warnings.** Visibility problems are a source of alleged liability. Red zones for parked cars and notices to property owners to eliminate obstructions such as overgrown shrubbery are ways to promote visibility.
- **Inspect crosswalks and signal devices located near schools.** Children being struck by vehicles near schools are a source of claims and litigation.
- **Immediately investigate and film all serious and fatal accident scenes.** Preserve any and all evidence that could be used in the city's defense. Photograph all relevant approaches to the accident scene from sufficient distance to address visibility and related considerations. Critical evidence may be lost as a result of photographs limited to the accident scene itself.
- **Retain investigative photographs, including digital data or negatives.** These should be held until the statute of limitations has run in all cases with potential exposure to the city. Important details lost in poor copies of photographs may jeopardize the ability to perform "photogrametry" or various other accident reconstruction techniques.
- **Maintain accident history request forms.** These forms should be printed and used so that the city and its defense counsel know who requested what information and when, and especially what information and documents were given out in response to the request. Placement of the form in the appropriate file facilitates

this purpose.

© The Regents of the University of California

§13.108 b. After Lawsuit Is Filed

- **Require the plaintiff to state fully at the outset of the lawsuit every aspect of the property that was allegedly in a dangerous condition.** If the complaint contains vague or conclusory allegations, consider filing a demurrer. This will help prevent the plaintiff from "fishing" during discovery for defects that were never considered at the time of the incident. The plaintiff must state facts in the complaint sufficiently detailed and specific to support an inference that each of the statutory elements is satisfied. *People ex rel Dep't of Transp. v Superior Court* (1992) (Verdeja) 5 CA4th 1480, 1486, 7 CR2d 498; *Mittenhuber v City of Redondo Beach* (1983) 142 CA3d 1, 5, 190 CR 694. Consider propounding discovery requests to pin down the plaintiff early in the litigation. Forcing specific allegations will also set up a potential summary judgment motion.
- **Compare the allegations of the complaint to the claim.** If the plaintiff seeks to introduce allegations concerning the dangerous nature of the property beyond the scope of the claim, consider filing a demurrer. *Turner v State* (1991) 232 CA3d 883, 888, 284 CR 349; *Nelson v State* (1982) 139 CA3d 72, 79, 188 CR 479.
- **Do not allow documents that are the subject of litigation to be released without the city attorney's knowledge.** These documents may be sought either through a Public Records Act (Govt C §§6250-6276.48) request or discovery procedures in the litigation. Plaintiff attorneys and their investigators frequently contact city employees directly and request information that is the subject of a lawsuit. Instruct city employees to obtain any investigator's name, business card, and the name of the case under investigation. Implement a reliable procedure to notify the city attorney of document requests. Discovery rules, evidentiary privileges, and exceptions to the Public Records Act may or may not limit documents subject to disclosure. For example, the Public Records Act pending litigation exemption applies only to documents prepared for use in litigation. See *Fairley v Superior Court* (1998) 66 CA4th 1414, 1420, 78 CR2d 648. Consequently, it is crucial that the city attorney determine which documents are subject to disclosure and be aware of all documents that are released to a plaintiff. See also §§2.218-2.269 (on Public Records Act).
- **If any possibility of insurance coverage exists, immediately tender defense to the carrier.** Review all possible policies to determine extent of coverage and insurer obligations and procedures.

© The Regents of the University of California

§13.109 C. Municipal Liability for Intentional Torts

Government Code §820 codifies the common law rule that public employees, and thus public entities, are liable for intentional or negligent wrongs. Section 820 imposes liability on public employees to the same extent as a private person. However, any such liability of the public entity or public employee is subject to specified defenses and immunities. California Government Tort Liability Practice §§9.3-9.4 (4th ed Cal CEB 1999); 5 Witkin, Summary of California Law, *Torts* §346 (10th ed 2005).

Public entities sometimes attempt to avoid liability on the grounds that an employee acted outside the scope of employment when he or she intentionally injured the plaintiff. However, the mere fact a public employee intentionally committed a tort does not establish that the act was committed outside the scope of employment. See *Mary M. v City of Los Angeles* (1991) 54 C3d 202, 221, 285 CR 99 (woman raped by on-duty police sergeant can recover from municipality). See also *Ruppe v City of Los Angeles* (1921) 186 C 400, 401, 199 P 496 (meter reader's assault on householder within scope of employment). But see *Duffy v City of Oceanside* (1986) 179 CA3d 666, 224 CR 879 (city not liable under respondeat superior for murder of city employee); *Alma W. v Oakland Unified Sch. Dist.* (1981) 123 CA3d 133, 176 CR 287 (as matter of law, school janitor was not acting within scope of employment when he sexually assaulted student on school premises).

Whether an intentional tort occurred within the scope of employment will ordinarily be a question of fact. *Mary M.,* 54 C3d at 213. However, acts or omissions constituting sexual harassment cannot be deemed to be within the scope of employment of an elected official. Govt C §815.3(b). When an elected official is convicted of certain felonies, the official forfeits any rights to defense or indemnification under Govt C §825 for damages arising from the felony act or omission. See Govt C §825.6(b).

PRACTICE TIP: There may be times when the entity may want to provide an employee with the defense costs for criminal charges. See Govt C §995.8 (authorizing, but not requiring, defense). See also California Government Tort Liability Practice §4.12 (4th ed Cal CEB 1999). On employee defense and indemnification, see §§13.86-13.89.

© The Regents of the University of California

D. Municipal Liability for Libel and Slander

§13.110 1. Legislative or Other Official Proceeding

To promote the utmost freedom of communication on subjects of public interest, public entities are absolutely immune from liability with respect to all "publications" made in the course of a legislative, quasi-legislative, or administrative board proceeding. CC §47(b); *Susan A. v County of Sonoma* (1991) 2 CA4th 88, 93, 3 CR2d 27. There is also immunity under Govt C §821.6 for statements made in the course of prosecuting a crime or initiating an administrative proceeding. Government entities also have immunity under the anti-SLAPP suit statute. CCP §425.16; *Bradbury v Superior Court* (1996) 49 CA4th 1108, 1111, 57 CR2d 207.

NOTE: "Publications" in this context includes both verbal and written statements publicly presented during a legislative hearing or meeting. *Silberg v Anderson* (1990) 50 C3d 205, 212, 266 CR 638. In some contexts, the immunity may apply to statements made outside a public meeting, but within a "political/legislative" process. *Cayley v Nunn* (1987) 190 CA3d 300, 235 CR 385 (gathering signatures for petition to city council). See 5 Witkin, Summary of California Law, *Torts* §§564-583 (10th ed 2005).

For a publication to be absolutely immune, the statement must "have some connection or logical relation to [an official] proceeding." *Royer v Steinberg* (1979) 90 CA3d 490, 503, 153 CR 499 (test easily met when publications made at board of education meeting held to respond to school superintendent's allegation that board could not prove charges of misconduct). See *Frisk v Merrihew* (1974) 42 CA3d 319, 325, 116 CR 781 (reversing directed verdict for defendant when school superintendent accused speaker at school board budget hearing of being incompetent lawyer and teacher). The immunity applies to statements made while circulating a petition to be presented at the hearing. *Cayley v Nunn* (1987) 190 CA3d 300, 303, 235 CR 385. Doubts as to whether a statement bears a logical relation to an official proceeding are resolved in favor of a finding of privilege. *Twyford v Twyford* (1976) 63 CA3d 916, 926, 134 CR 145.

The immunity is unaffected by the existence of malice in the communicator's mind. *Royer,* 90 CA3d at 500. See also *Scott v McDonnell Douglas Corp.* (1974) 37 CA3d 277, 285, 112 CR 609 (letters read at public council session by council members strongly criticizing city manager); *Harnish v Smith* (1956) 138 CA2d 307, 308, 291 P2d 532 (council member accused local newspaperman at regular council session of following Communist Party line).

© The Regents of the University of California

§13.111 2. Discharge of Official Duty

Public officials are absolutely immune for statements made in carrying out their official duties. CC §47(a). The purpose of this immunity is to "'insure efficiency in government by encouraging policy-making officials to exercise their best judgment in the performance of their duties free from fear of general tort liability.'" *Royer v Steinberg* (1979) 90 CA3d 490, 500, 153 CR 499 (quoting *Sanborn v Chronicle Publ'g Co.* (1976) 18 C3d 406, 413, 134 CR 402). The immunity extends to local officials engaged in the policy-making process. *Royer*, 90 CA3d at 501 (court dismissed suit alleging school board members defamed school superintendent by adopting motion at public hearing critical of superintendent). See *McQuirk v Donnelley* (9th Cir 1999) 189 F3d 793, 800 (defamatory statements made by sheriff when providing reference for former employee to another law enforcement agency not policy-making and thus not privileged). Courts also have granted members of the public absolute immunity against defamation for statements made in an open meeting that were critical of public employees. See *Baca v Moreno Valley Unified Sch. Dist.* (CD Cal 1996) 936 F Supp 719, 731.

© The Regents of the University of California

§13.112 3. Civil Rights Liability for Defamation

Injury to reputation alone is not actionable under federal civil rights laws. *Paul v Davis* (1976) 424 US 693, 701, 47 L Ed 2d 405, 96 S Ct 1155 (police officers did not violate plaintiff's civil rights by distributing flyer to merchants that included plaintiff's photograph and identified him as shoplifter). To state a claim for defamation under 42 USC §1983, a plaintiff must allege damage to reputation plus denial of a right expressly protected by the constitution or the denial of a recognizable property or liberty interest. *Cooper v Dupnik* (9th Cir 1991) 924 F2d 1520, 1532 (denying qualified immunity when alleged defamation occurred in connection with unconstitutional arrest). On causes of action under 42 USC §1983, see §§13.115-13.122.

© The Regents of the University of California

§13.113 E. Municipal Liability for Constitutional Claims

Both the United States and California constitutions provide bases for potential municipal liability. Virtually every provision in the Bill of Rights has been used as the basis for municipal liability. Although the most common mechanism for bringing constitutional claims against municipalities is through 42 USC §1983 (see §§13.114-13.139), §1983 is not the only mechanism. For example, the United States Constitution may provide a basis for a direct claim, at least against federal agents when no statute specifically creates a remedy. *Bivens v Six Unknown Named Agents of Fed. Bureau of Narcotics* (1971) 403 US 388, 395, 29 L Ed 2d 619, 91 S Ct 1999. However, using *Bivens* as a basis for municipal liability is questionable because the United States Supreme Court has declined to create a *Bivens* remedy when Congress has provided what it considers adequate remedial mechanisms for constitutional violations, such as 42 USC §1983. See *Martinez v City of Los Angeles* (9th Cir 1998) 141 F3d 1373, 1382; *Ward v Caulk* (9th Cir 1981) 650 F2d 1144, 1148 (Fourteenth Amendment *Bivens*-type actions for damages against county defendants precluded by availability of §1983 action). Similarly, a *Bivens* remedy does not exist if the public entity would not be liable under a 42 USC §1983 action. See *Molina v Richardson* (9th Cir 1978) 578 F2d 846, 847 (no city liability directly under Fourteenth Amendment and thus no *Bivens* action when city could not be liable under §1983 based on respondeat superior).

© The Regents of the University of California

§13.114 F. Municipal Liability for Civil Rights/42 USC §1983 Claims

United States Code title 42, §1983 was adopted by Congress on April 20, 1871. It provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Section 1983 was known as the Ku Klux Klan Act and was enacted in the wake of the Civil War to allow for the redress of constitutional violations either performed by or with the acquiescence of state and local governments. However, the statute was rarely used until the latter part of the 20th century.

In 1961, the United States Supreme Court held that: (1) every violation of the Fourteenth Amendment by state and local government employees, and officials could serve as the basis for a damage suit under §1983; (2) §1983 liability would be similar to tort liability; (3) a §1983 action for federal violations would exist even if an alternative state law violation could be asserted instead; and (4) local government units were not "persons" and thus not subject to suit. *Monroe v Pape* (1961) 365 US 167, 5 L Ed 2d 492, 81 S Ct 473.

In 1976, Congress passed the Civil Rights Attorney's Fees Awards Act, which provides for the award of attorney fees to the prevailing party in §1983 suits. Under this statute, attorney fees could be awarded outside of and in addition to other damages. See 42 USC §1988. See §13.149.

In 1978, the United States Supreme Court overruled *Monroe* on the question of whether local governments were persons and ruled that local governments are "persons" and are subject to suit under §1983. The Court held that: (1) a local government is a "person" under §1983 and thus may be sued for either legal or equitable relief under that statute; (2) a local government may be held liable under §1983 only for unconstitutional actions that implement or execute its official policies as reflected in an ordinance, regulation, decision, policy statement, custom, or usage; (3) no liability may be imposed directly on a local government under §1983 on the theory of respondeat superior solely because an officer or employee has committed a tort in the course of employment; and (4) government immunities created or recognized by state law cannot override liabilities created by §1983. *Monell v Department of Soc. Servs.* (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018.

PRACTICE TIP: For more information on §1983 claims, see Weinstein, The Basic Framework of Section 1983 Law (League of California Cities City Attorneys Continuing Education Seminar, *Emerging Trends in 1983 Liability,* 1990) (much of the discussion on §1983 in this section comes from this excellent paper); California Government Tort Liability Practice, chap 13 (4th ed Cal CEB 1999); 8 Witkin, Summary of California Law, *Constitutional Law* §§814-845 (10th ed 2005); Nahmod, Civil Rights and Civil Liberties Litigation (West, 4th ed 1997); Schwartz, Kirklin & Pratt, Section 1983 Litigation (Aspen Publishers, 2d-4th ed); Smolla, Federal Civil Rights Acts (West, 3d ed); Sobieski & Cook, Civil Rights Actions (Matthew Bender); Avery, Blum & Rudovsky, Police Misconduct Law and Litigation (West, 3d ed); Law Enforcement Liability Reporter (monthly newsletter published by Americans for Effective Law Enforcement, a defense-oriented group in Chicago, available at www.aele.org/law).

© The Regents of the University of California

§13.115 1. Scope of §1983

United States Code title 42, §1983 is a remedial statute. It creates an action for damages and injunctive relief against an individual or local government, or both, who deprive a plaintiff of rights, privileges, and immunities secured by the United States Constitution or federal law. See *Smith v Wade* (1983) 461 US 30, 56, 75 L Ed 2d 632, 103 S Ct 1625.

The concept of what constitutes a "federal right" for purposes of stating a §1983 claim is constantly evolving. However, the constitutional or statutory claim underlying a §1983 action must create a private right of action or corresponding remedy. See, *e.g., Cornejo v County of San Diego* (9th Cir 2007) 504 F3d 853, 860 (plaintiffs cannot bring §1983 claims based on Article 36 of the Vienna Convention on Consular Relations because Article 36 creates no private rights of action or corresponding remedies).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.116 a. Constitutional Rights

§13.116 a. Constitutional Rights

The most straightforward federal rights are those secured by the United States Constitution. The Fourteenth Amendment due process clause subjects local public entities to most constitutional provisions and constitutes the major constitutional foundation for §1983 claims. Cases have arisen under virtually all of the provisions of the Bill of Rights:

- **First Amendment establishment, free exercise, and free speech clauses**. *Inouye v Kemna* (9th Cir 2007) 504 F3d 705, 712 (parole officer liable under §1983 because requirement that parolees attend faith-based treatment program violated establishment clause); *Lambert v Richard* (9th Cir 1995) 59 F3d 134, 136, cert denied (1995) 516 US 1028 (library employee's critical remarks about her boss held subject to First Amendment protection); *Sloman v Tadlock* (9th Cir 1994) 21 F3d 1462, 1469 (police officer liable for violating First Amendment rights of supporter of ballot measure). See also *McCreary County v American Civil Liberties Union* (2005) 545 US 844, 162 L Ed 2d 729, 125 S Ct 2722 (discussion of establishment clause in context of Ten Commandments displays); *Van Orden v Perry* (2005) 545 US 677, 162 L Ed 2d 607, 125 S Ct 2854. But see *Garcetti v Ceballos* (2006) 547 US 410, 164 L Ed 2d 689, 126 S Ct 1951 (First Amendment does not protect government employees when they are speaking under their official duties); *Menotti v City of Seattle* (9th Cir 2005) 409 F3d 1113, 1142 (emergency order prohibiting access to portions of city during 1999 WTO Conference was constitutional); *Nelson v Pima Community College* (9th Cir 1996) 83 F3d 1075, 1080 (government can curtail speech of public employees that is disruptive to efficiency of public services it performs, subject to state whistleblower statutes). The First Amendment rights of a public employee depend on whether the expression deals with a "matter of public concern," *i.e.,* it must encompass an issue of "political, social, or other concern to the community." *Brewster v Lynwood Unified Sch. Dist.* (9th Cir 1998) 149 F3d 971, 978, cert denied (1999) 526 US 1018. Nevertheless, the public entity may curtail protected speech if necessary to prevent workplace disruption. *Brewster v Lynwood Unified Sch. Dist., supra*. See *City of San Diego v Roe* (2004) 543 US 77, 84, 160 L Ed 2d 410, 125 S Ct 521 (police officer's speech—selling sexual videos of himself off-duty in unidentified uniform—was not matter of public concern, but police department demonstrated legitimate and substantial interests that were compromised by police officer's speech). A teacher's free speech rights may be limited by the establishment clause. *Peloza v Capistrano Unified Sch. Dist.* (9th Cir 1994) 37 F3d 517, 522 (district's interest in avoiding establishment clause violation justifies curtailing teacher's discussion of religion with students). It is not a civil rights violation to fire a policy-maker for political reasons. *Branti v Finkel* (1980) 445 US 507, 517, 63 L Ed 2d 574, 100 S Ct 1287; *Elrod v Burns* (1976) 427 US 347, 367, 49 L Ed 2d 547, 96 S Ct 2673. See also *Biggs v Best, Best & Krieger* (9th Cir 1999) 189 F3d 989, 995 (city attorneys are "policymaking officials" under *Elrod/Branti* rule); *Fazio v City & County of San Francisco* (9th Cir 1997) 125 F3d 1328, 1334 (assistant district attorney is "policymaking" position falling under *Elrod/Branti* rule). It is not a violation of the First Amendment to remove persons from city council meetings for disruptive conduct. See Pen C §403 (willful disturbance of public meeting is misdemeanor); Govt C §36813 (authorizing city council to establish rules for conduct of meetings); *Kindt v Santa Monica Rent Control Bd.* (9th Cir 1995) 67 F3d 266, 269 (presiding officers at meeting may enforce reasonable rules for orderly conduct); *White v City of Norwalk* (9th Cir 1990) 900 F2d 1421 (city may establish rules of decorum at council meetings to preclude disruptive conduct); *McMahon v Albany Unified Sch. Dist.* (2002) 104 CA4th 1275, 1285, 129 CR2d 184, cert denied (2003) 540 US 824 (individual who dumped substantial amount of trash in school board's meeting room during meeting was lawfully arrested).

NOTE: If a person's exercise of First Amendment rights is a "substantial factor" in a public entity's action against that person (*e.g.,* termination of employment), there may be liability for a First Amendment violation. 5 USC §1221; See *Mt. Healthy Sch. Dist. Bd. of Educ. v Doyle* (1977) 429 US 274, 286, 50 L Ed 2d 471, 97 S Ct 568. However, the public entity may escape liability if it shows it would have taken the same action even absent the protected activity. *Mt. Healthy Sch. Dist. Bd. of Educ. v Doyle, supra*.

PRACTICE TIP: If a public entity takes action against a person that could implicate his or her First Amendment rights,

the public entity should document the reasons for its actions.

- **Fourth Amendment prohibition against unreasonable search or seizure**. The Fourth Amendment does not prohibit all searches and seizures, only those that are unreasonable. *Brigham City v Stuart* (2006) 547 US 398, 403, 164 L Ed 2d 650, 126 S Ct 1943 (application of Emergency Doctrine to allow warrantless search of residence); *U.S. v Brooks* (9th Cir 2004) 367 F3d 1128, 1135 (warrantless search of residence requires both probable cause and exigent circumstances). But see *Georgia v Randolph* (2006) 547 US 103, 106, 164 L Ed 2d 208, 126 S Ct 1515 (if both occupants of residence are present, there is no valid consent to enter without warrant if one occupant objects to search); *Wilson v Layne* (1999) 526 US 603, 614, 143 L Ed 2d 818, 119 S Ct 1692 (third parties accompanying federal and county officers during attempt to execute arrest warrant in home violates Fourth Amendment when presence of third parties in home is not in aid of execution of warrant); *Graham v Connor* (1989) 490 US 386, 388, 104 L Ed 2d 443, 109 S Ct 1865 (claims of police misconduct/excessive force are analyzed under Fourteenth Amendment); *Terry v Ohio* (1968) 392 US 1, 27, 20 L Ed 2d 889, 88 S Ct 1868 (police may stop person for investigatory purposes when police have only reasonable suspicion that individual may be involved in criminal activity); *Smith v City of Hemet* (9th Cir 2005) 394 F3d 689, 706 (new definition of what constitutes "deadly force"); *People v Thompson* (2006) 38 C4th 811, 825, 43 CR3d 750 (California Supreme Court distinguished prior United States Supreme Court ruling and held that, under circumstances at issue, officers could enter residence to arrest DUI suspect without warrant to prevent imminent destruction of evidence though body's ability to metabolize alcohol). See also *Albright v Oliver* (1994) 510 US 266, 270, 127 L Ed 2d 114, 114 S Ct 807 (malicious prosecution claim analyzed solely under Fourth Amendment).
- **Fifth Amendment right to remain silent**. *Chavez v Martinez* (2003) 538 US 760, 766, 155 L Ed 2d 984, 123 S Ct 1994 (no Fifth Amendment violation for self-incriminating statements compelled by police interrogation until statements are used in criminal case).
- **Sixth Amendment right to counsel.** *Cinelli v City of Revere* (1st Cir 1987) 820 F2d 474, 476 (interference in criminal suspect's right to counsel).
- **Eighth Amendment prohibition against cruel and unusual punishment.** *Estelle v Gamble* (1976) 429 US 97, 103, 50 L Ed 2d 251, 97 S Ct 285 (deliberate indifference to medical needs of prisoners).
- **Fourteenth Amendment due process clause.** *Town of Castle Rock v Gonzales* (2005) 545 US 748, 766, 162 L Ed 2d 658, 125 S Ct 2796 (private citizen lacks judicially cognizable property interest in police enforcement of restraining order); *City of W. Covina v Perkins* (1999) 525 US 234, 142 L Ed 2d 636, 119 S Ct 678 (due process required officers to give individualized notice that they had taken property but not of available state law remedies found in public sources, including statutes and case law); *Kennedy v City of Ridgefield* (9th Cir 2006) 439 F3d 1055, 1067 (no qualified immunity when police officer's actions affirmatively placed plaintiff in danger); *Redman v County of San Diego* (9th Cir 1991) 942 F2d 1435, 1449, cert denied (1992) 502 US 1074 (pretrial detainee has right to personal security under due process clause); *Schneider v County of San Diego* (9th Cir 1994) 28 F3d 89, 92, cert denied (1995) 513 US 1155 (violation of due process when public entity only gave notice of intention to remove property but instead destroyed property).
- **Fourteenth Amendment equal protection clause.** *Squaw Valley Dev. Co. v Goldberg* (9th Cir 2004) 375 F3d 936, overruled in part on other grounds in *Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd.* (9th Cir 2007) 509 F3d 1020 (equal protection clause protects not only groups, but individuals who constitute "class of one," and when claim is based on selective enforcement of valid laws, rational basis for selectively enforcing law may not be pretext for impermissible motive, *e.g.,* state action that is malicious, irrational, or plainly arbitrary); *Balistreri v Pacifica Police Dep't* (9th Cir 1990) 901 F2d 696, 699 (alleged discriminatory police protection practices against female domestic abuse victims); *Church of Scientology v Commissioner of Internal Revenuer* (9th Cir 1987) 823 F.2d 1310, 1320 (to prevail on claim of violation of equal protection for selective or discriminatory enforcement or prosecution, plaintiff must prove that (1) others generally are not prosecuted for same conduct; and (2) decision to prosecute was based on impermissible grounds such as race, religion, or exercise of constitutional rights).
- **Commerce clause.** *Dennis v Higgins* (1991) 498 US 439, 440, 112 L Ed 2d 969, 111 S Ct 865 (state tax on instate motor vehicles registered out of state).

© The Regents of the University of California

§13.117 b. Other Rights/Interests

A particular interest or "right" may or may not rise to the level of a constitutional violation for purposes of 42 USC §1983. Following are examples of cases in which the right or interest was not found to rise to the level of a constitutional violation. See, *e.g., DeShaney v Winnebago County Dep't of Soc. Servs.* (1989) 489 US 189, 201, 103 L Ed 2d 249, 109 S Ct 998 (claimed special relationship creating "duty to protect" did not rise to level of potential §1983 violation); *Daniels v Williams* (1986) 474 US 327, 330, 88 L Ed 2d 662, 106 S Ct 662 (no §1983 claim arises from negligent act of official causing unintended loss or injury; mere lack of due care does not deprive one of life, liberty, or property); *Baker v McCollan* (1979) 443 US 137, 145, 61 L Ed 2d 433, 99 S Ct 2689 (arrest of wrong man due to mistaken identity did not state claim under §1983); *Paul v Davis* (1976) 424 US 693, 711, 47 L Ed 2d 405, 96 S Ct 1155 (reputational interests akin to tort of defamation are not sufficient basis for §1983 claim).

© The Regents of the University of California

§13.118 c. Property Interests

A "property" interest may deserve protection under 42 USC §1983, but only if there is a reasonable claim of entitlement. *Board of Regents of State Colleges v Roth* (1972) 408 US 564, 577, 33 L Ed 2d 548, 92 S Ct 2701. See, *e.g., Yee v City of Escondido* (1992) 503 US 519, 530, 118 L Ed 2d 153, 112 S Ct 1522 (mobile home rent control ordinance did not amount to physical taking); *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304, 322, 96 L Ed 2d 250, 107 S Ct 2378 (temporary taking of right to use property); *Loretto v Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 426, 73 L Ed 2d 868, 102 S Ct 3164 (permanent physical occupation taking); *Perry v Sindermann* (1972) 408 US 593, 602, 33 L Ed 2d 570, 92 S Ct 2694 (college professor with claim to tenure protected by due process clause). But see *Bishop v Wood* (1976) 426 US 341, 344, 48 L Ed 2d 684, 96 S Ct 2074 (state-created "right" subject to change or discretion, for example at-will employment, is not protectable interest); *Nunez v City of Los Angeles* (9th Cir 1998) 147 F3d 867, 871 (no property interest in promotion to lieutenant); *Duke v Langdon* (9th Cir 1983) 701 F2d 768, 769 (probationary employee has no entitlement to continued employment and thus no property interest).

NOTE: If a property right exists, the state cannot take that right away without providing adequate due process. Whether the government has provided adequate due process is basically a question of fairness to be decided on a case-by-case basis. *Mathews v Eldridge* (1976) 424 US 319, 343, 47 L Ed 2d 18, 96 S Ct 893.

© The Regents of the University of California

§13.119 d. Liberty Interests

Liberty interests may be subject to constitutional protection. *Board of Pardons v Allen* (1987) 482 US 369, 377, 96 L Ed 2d 303, 107 S Ct 2415 (state statute providing for conditional parole creates protectable liberty interest); *Rosenstein v City of Dallas* (5th Cir 1989) 876 F2d 392, 395 (denial of name-clearing hearing deprives discharged officer of protected liberty interest).

© The Regents of the University of California

§13.120 e. Violation of Federal Laws

A violation of a federal statute may provide a basis for suit under 42 USC §1983. *Maine v Thiboutot* (1980) 448 US 1, 4, 65 L Ed 2d 555, 100 S Ct 2502. If a plaintiff has a right protected by federal law and Congress did not foreclose the remedy of a §1983 enforcement action, then a suit under §1983 may proceed. *Franklin v Gwinnette County Public Sch.* (1992) 503 US 60, 65, 117 L Ed 2d 208, 112 S Ct 1028 (Title IX of the Civil Rights Act of 1964 provides private right of action); *Golden State Transit Corp. v City of Los Angeles* (1989) 493 US 103, 108, 107 L Ed 2d 420, 110 S Ct 444 (suit by plaintiff against city for violation of National Labor Relations Act). However, if the federal statute itself includes a remedial scheme sufficiently comprehensive to demonstrate that Congress did not intend for enforcement under §1983, then a civil rights action may not proceed. *Middlesex County Sewerage Auth. v National Sea Clammers Ass'n* (1981) 453 US 1, 20, 69 L Ed 2d 435, 101 S Ct 2615 (no private cause of action under §1983 for violation of federal water pollution laws).

© The Regents of the University of California

§13.121 f. Wrongful Death

Civil rights cases asserting wrongful death typically arise from actions of law enforcement officers. Surviving parents, spouse, and children may assert a 42 USC §1983 claim based on violation of their due process rights to society and companionship by the actions causing the death. *Smith v City of Fontana* (9th Cir 1987) 818 F2d 1411, cert denied (1987) 484 US 935, overruled in part on other grounds in *Hodgers-Durgin v De La Vina* (9th Cir 1999) 199 F3d 1037, 1041 n1; *Irwin v City of Hemet* (1994) 22 CA4th 507, 517, 27 CR2d 433. Survivors might not be able to raise constitutional claims for rights personal to the decedent (*e.g.,* Fourth Amendment rights). See *Robertson v Hecksel* (11th Cir 2005) 420 F3d 1254, 1261; *Crumpton v Gates* (9th Cir 1991) 947 F2d 1418, 1420; *Jaco v Bloechle* (6th Cir 1984) 739 F2d 239, 242.

© The Regents of the University of California

§13.122 g. Section 1983 Actions in State Court

State courts have concurrent jurisdiction over 42 USC §1983 actions. *Williams v Horvath* (1976) 16 C3d 834, 129 CR 453. See California Government Tort Liability Practice §13.8 (4th ed Cal CEB 1999).

© The Regents of the University of California

2. Immunities Under §1983

§13.123 a. No Immunity Under §1983 for Local Governments

A local government is liable under 42 USC §1983 for violations caused by an official policy or custom even when the governmental official responsible for that policy or custom is immune. *Owen v City of Independence* (1980) 445 US 622, 639, 63 L Ed 2d 673, 100 S Ct 1398. State law immunities do not apply to §1983 actions. *Howlett v Rose* (1990) 496 US 356, 375, 110 L Ed 2d 332, 110 S Ct 2430. However, a local government is absolutely immune from punitive damages (*Cook County v U.S.* (2003) 538 US 119, 129, 155 L Ed 2d 247, 123 S Ct 1239; *City of Newport v Fact Concerts, Inc.* (1981) 453 US 247, 271, 69 L Ed 2d 616, 101 S Ct 2748) even though public employees are not. *Smith v Wade* (1983) 461 US 30, 35, 75 L Ed 2d 632, 103 S Ct 1625. On punitive damages, see §13.147.

An agency may be shielded from §1983 liability if other statutory grounds immunize the entity for the underlying cause of action. *Amberger-Warren v City of Piedmont* (2006) 143 CA4th 1074, 1078, 49 CR3d 631 (city immune from liability based on personal injuries to plaintiff on trail because Govt C §831.4(a) precludes liability arising from use of recreational trails). Under certain circumstances, a public agency may also be protected from §1983 liability under a contractual waiver of such liability by the plaintiff. *Nilsson v City of Mesa* (9th Cir 2007) 503 F3d 947, 952.

© The Regents of the University of California

§13.124 b. Individual Immunities

Immunity for individuals exists in the form of either absolute immunity or qualified immunity. *Harlow v Fitzgerald* (1982) 457 US 800, 807, 73 L Ed 2d 396, 102 S Ct 2727; *Supreme Court of Virginia v Consumers Union* (1980) 446 US 719, 64 L Ed 2d 641, 100 S Ct 1967.

The following six factors, among others, are characteristic of the judicial process and are to be considered in determining whether absolute, as opposed to qualified, immunity applies (*Cleavinger v Saxner* (1985) 474 US 193, 202, 88 L Ed 2d 507, 106 S Ct 496):

(1) The need to ensure that the individual can perform his or her functions without harassment or intimidation;

(2) The presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;

(3) The insulation from political influence;

(4) The importance of precedent;

(5) The adversarial nature of the process; and

(6) The correctability of error on appeal.

© The Regents of the University of California

§13.125 (1) Absolute Immunity

Legislators acting within the traditional legislative capacity, judges acting judicially within or in excess of jurisdiction but not in clear absence of all jurisdiction, and prosecutors acting as advocates in the criminal process are *absolutely* immune from liability for damages under 42 USC §1983. See *Briscoe v LaHue* (1983) 460 US 325, 334, 75 L Ed 2d 96, 103 S Ct 1108 (police officer as trial witness); *Lake Country Estates, Inc. v Tahoe Reg'l Planning Agency* (1979) 440 US 391, 403, 59 L Ed 2d 401, 99 S Ct 1171 (regional planning agency members); *Stump v Sparkman* (1978) 435 US 349, 359, 55 L Ed 2d 331, 98 S Ct 1099 (state court judge); *Imbler v Pachtman* (1976) 424 US 409, 427, 47 L Ed 2d 128, 96 S Ct 984 (public prosecutor); *Tenney v Brandhove* (1951) 341 US 367, 95 L Ed 1019, 71 S Ct 783 (state legislators). Municipal legislators are also entitled to absolute immunity when acting within traditional legislative capacity. Several circuits have conferred absolute immunity for local legislative acts and also on city executives when acting in a legislative capacity:

- Local zoning commissions (*Bass v Attardi* (3d Cir 1989) 868 F2d 45, 50; *Kuzinich v County of Santa Clara* (9th Cir 1982) 689 F2d 1345, 1349);
- City councils (See Govt C §§818.2, 820.2, 821, 821.2; *Aitchison v Raffiani* (3d Cir 1983) 708 F2d 96, 99. See also *Trevino v Gates* (9th Cir 1994) 23 F3d 1480, 1482, cert denied (1994) 513 US 932 (city council members not entitled to absolute immunity from suit based on their decision to indemnify police officers who violated rights of citizens); and
- Local legislators (*Bogan v Scott-Harris* (1998) 523 US 44, 49, 140 L Ed 2d 79, 118 S Ct 966 (local legislators entitled to absolute immunity from §1983 actions for their legislative activities)).

Officials performing prosecutorial functions are entitled to absolute immunity from damages liability because their function is integral to the judicial process. *Imbler v Pachtman* (1976) 424 US 409, 430, 47 L Ed 2d 128, 96 S Ct 984. The immunity does not extend, however, to suits for injunctive or declaratory relief. *Supreme Court of Virginia v Consumers Union* (1980) 446 US 719, 736, 64 L Ed 2d 641, 100 S Ct 1967. Prosecutorial immunity does not apply to nonprosecutorial functions such as police or investigative work. *Buckley v Fitzsimmons* (1993) 509 US 259, 275, 125 L Ed 2d 209, 113 S Ct 2606 (inapplicable to alleged fabrication of evidence and making false statements at press conference); *Burns v Reed* (1991) 500 US 478, 492, 114 L Ed 2d 547, 111 S Ct 1934 (inapplicable to legal advice given to police); *Mitchell v Forsyth* (1985) 472 US 511, 520, 86 L Ed 2d 411, 105 S Ct 2806 (issuing wiretap); *Ogborn v City of Lancaster* (2002) 101 CA4th 448, 459, 124 CR2d 238 (court reached distinct result on city's, director's, and code enforcement officers' role in abatement). The prosecutorial function must closely parallel the judicial process for the immunity to apply.

© The Regents of the University of California

§13.126 (2) Qualified Immunity

Government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v Fitzgerald* (1982) 457 US 800, 818, 73 L Ed 2d 396, 102 S Ct 2727. Qualified immunity shields officials "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v Creighton* (1987) 483 US 635, 638, 97 L Ed 2d 523, 107 S Ct 3034. An official can reasonably act unreasonably. See *Saucier v Katz* (2001) 533 US 194, 208, 150 L Ed 2d 272, 121 S Ct 2151, overruled on other grounds in *Pearson v Callahan* (2009) ___ US ___, 172 L Ed 2d 565, 129 S Ct 808 (qualified immunity is available in excessive force cases when it would not be clear to reasonable officer that actions were unlawful in situation confronted by officer); *Graham v Connor* (1989) 490 US 386, 399 n12, 104 L Ed 2d 443, 109 S Ct 1865 (in excessive force claim, court recognized that qualified immunity could still apply to excessive force claims arising under this standard); *Anderson v Creighton*, 483 US at 641 (rejecting argument that official cannot reasonably act and finding that qualified immunity applied to officials alleged to have violated Fourth Amendment); *Brewster v Lynwood Unified Sch. Dist.* (9th Cir 1998) 149 F3d 971, 983, cert denied (1999) 526 US 1018 (qualified immunity will generally apply to any right that is subject to balancing test; something subject to balancing test will rarely be "clearly established"); *Lowe v Aldridge* (11th Cir 1992) 958 F2d 1565, 1570 (qualified immunity applies to false arrest when official had reasonable but mistaken belief that probable cause existed; question is whether officer had "arguable probable cause"); *Fuller v M.G. Jewelry* (9th Cir 1991) 950 F2d 1437, 1451 (qualified immunity applies to mistaken but reasonable belief that body cavity search could be based only on reasonable suspicion). See also *Stevens v Corbell* (5th Cir 1987) 832 F2d 884, 890, cert denied (1988) 486 US 1033 (court appeared to disallow qualified immunity defense when elements of underlying offense (intentional discrimination) vitiated defense).

Qualified immunity is available to individual officials, but not to the city. *Brandon v Holt* (1985) 469 US 464, 83 L Ed 2d 878, 105 S Ct 873; *Owen v City of Independence* (1980) 445 US 622, 638, 63 L Ed 2d 673, 100 S Ct 1398; *Ogborn v City of Lancaster* (2002) 101 CA4th 448, 463, 124 CR2d 238. However, plaintiff must show custom or policy for the act to be attributed to the city. *Monell v Department of Soc. Servs.* (1978) 436 US 658, 690, 56 L Ed 2d 611, 98 S Ct 2018.

Qualified immunity applies when (see *Anderson v Creighton,* 483 US at 638):

- The law was not clearly established at the time of the alleged wrongful conduct; or
- If the law was clearly established, a reasonable official could have believed the conduct was lawful.

The standard is objective. *Brosseau v Haugen* (2004) 543 US 194, 197, 160 L Ed 2d 583, 125 S Ct 596 (qualified immunity inquiry must be undertaken in light of the specific facts of each case); *Harlow v Fitzgerald, supra*. Evidence of an official's subjective intent is irrelevant to the determination of whether qualified immunity attaches. *Crawford-El v Britton* (1998) 523 US 574, 588, 140 L Ed 2d 759, 118 S Ct 1584.

Whether the law was "clearly established" is determined by the law in effect at the time of the alleged offense. See *Ward v San Diego* (9th Cir 1986) 791 F2d 1329, 1332, cert denied (1987) 483 US 1020. "Clearly established" means that a reasonable official would understand that his actions are violating a person's constitutional rights. *Brewster*, 149 F3d at 977. See *Elliot-Park v Manglona* (9th Cir 2010) 592 F3d 1003 (police officers not entitled to qualified immunity for alleged failure to investigate drunk driving automobile accident based on victim's race). An official cannot be expected to anticipate changes in the law. *Harlow v Fitzgerald, supra*.

PRACTICE TIP: To determine whether the law was "clearly established," begin with United States Supreme Court decisions and decisions of the circuit in which the case is pending. If no precedent is found, decisions from other courts may be used. *Kirkpatrick v City of Los Angeles* (9th Cir 1986) 803 F2d 485, 490. See *Siegert v Gilley* (1991) 500 US 226, 231, 114 L Ed 2d 277, 111 S Ct 1789 (defamatory letter violated no clearly established federal right). The application of a given constitutional guarantee to a particular context must be "clearly established" before an official is precluded from invoking qualified immunity. See *Brewster v Lynwood Unified*

School Dist., supra. Although it will often be appropriate to conduct the qualified immunity analysis by first determining whether a constitutional violation occurred and then determining whether the constitutional right was clearly established, that ordering of analytical steps is not mandatory. *Pearson v Callahan* (2009) ___ US ___, 172 L Ed 2d 565, 129 S Ct 808.

The qualified immunity defense applies to claims for damages; it does not apply, however, to claims for injunctive or declaratory relief. See *Wood v Strickland* (1975) 420 US 308, 321, 43 L Ed 2d 214, 95 S Ct 992, overruled in part on other grounds in *Harlow v Fitzgerald, supra*.

Because qualified immunity provides "immunity from suit rather than a mere defense to liability," a trial court's denial of qualified immunity is immediately appealable. *Mitchell v Forsyth* (1985) 472 US 511, 526, 86 L Ed 2d 411, 105 S Ct 2806. But see *Johnson v Jones* (1995) 515 US 304, 313, 132 L Ed 2d 238, 115 S Ct 2151 (no interlocutory appeal regarding factual issues). See also *Trevino v Gates* (9th Cir 1996) 99 F3d 911, 917 (qualified immunity found on grounds that law is not clearly established that policy of indemnifying punitive damage awards violates constitutional rights).

PRACTICE TIP: The application of qualified immunity should be determined if possible before discovery commences. It is proper to determine its applicability on the pleadings or on motion for summary judgment. *Harlow v Fitzgerald* (1982) 457 US 800, 818, 73 L Ed 2d 396, 102 S Ct 2727. The reasonableness of an official's belief is a question of law that ordinarily should be determined long before trial. *Hunter v Bryant* (1991) 502 US 224, 228, 116 L Ed 2d 589, 112 S Ct 534. In light of the Supreme Court ruling in *Hunter,* a motion for summary judgment should be considered standard procedure for adjudicating the issue of qualified immunity. See also *Act Up!/Portland v Bagley* (9th Cir 1993) 988 F2d 868, 873. The court may determine the existence of qualified immunity as a matter of law, at least in cases in which there is no genuine issue of disputed material facts. *Washington v Lambert* (9th Cir 1996) 98 F3d 1181, 1192. If immunity exists, it is typically advantageous to obtain a ruling on this issue and terminate litigation as early as possible.

© The Regents of the University of California

§13.127 c. Immunity for States

States and their agencies may not be sued for damages or for declaratory or injunctive relief by virtue of the Eleventh Amendment. *Pennhurst State Sch. & Hosp. v Halderman* (1984) 465 US 89, 100, 79 L Ed 2d 67, 104 S Ct 900; *Quern v Jordan* (1979) 440 US 332, 338, 59 L Ed 2d 358, 99 S Ct 1139. See California Government Tort Liability Practice §13.19 (4th ed Cal CEB 1999). However, the rule may be the exception. See *Ex Parte Young* (1908) 209 US 123, 150, 52 L Ed 714, 28 S Ct 441 (Eleventh Amendment will not be applied in way that defeats federal courts' authority to enforce 42 USC §1983 action). See also *Hafer v Melo* (1991) 502 US 21, 25, 116 L Ed 2d 301, 112 S Ct 358 (government official in role of personal capacity defendant is "person" subject to §1983 for actions taken in official capacity); *Gen-Probe, Inc. v Amoco Corp.* (SD Cal 1996) 926 F Supp 948, 953 (Eleventh Amendment immunity may not apply when another entity must pay judgment on claim because of indemnification agreement).

© The Regents of the University of California

§13.128 d. Collateral Estoppel

Prior criminal or administrative proceedings can provide a collateral estoppel against litigating issues in a 42 USC §1983 action. *Allen v McCurry* (1980) 449 US 90, 103, 66 L Ed 2d 308, 101 S Ct 411 (denial of suppression motion binding in subsequent §1983 action); *Ayers v City of Richmond* (9th Cir 1990) 895 F2d 1267, 1272 (not applicable to excessive force claim not litigated in suppression motion); *Heath v Cast* (9th Cir 1987) 813 F2d 254, 258 (superior court's order granting motion to suppress evidence in criminal matter is not considered final judgment on merits for purposes of collateral estoppel). See *Heck v Humphrey* (1994) 512 US 477, 486, 129 L Ed 2d 383, 114 S Ct 2364 (§1983 claim relating to allegedly unconstitutional conviction is not cognizable until plaintiff proves that conviction was previously invalidated); *Nuno v County of San Bernardino* (CD Cal 1999) 58 F Supp 2d 1127, 1135 (nolo plea in prior criminal proceeding can provide collateral estoppel against litigating probable cause in §1983 action). But see *Venegas v County of Los Angeles* (2007) 153 CA4th 1230, 1243, 63 CR3d 741 (qualified immunity under §1983 as established in prior case did not establish qualified immunity in subsequent action under CC §52.1).

© The Regents of the University of California

§13.129 3. Prima Facie Case for §1983 Claim

To state a 42 USC §1983 claim against a city, the plaintiff must establish that (*Monell v Department of Soc. Servs.* (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018):

- There was an underlying violation of a federally protected right; and
- The right was violated as a result of a policy or custom adopted or ratified by a municipal policy-maker.

NOTE: If the city prevails on the issue of the lack of existence of an unlawful municipal custom or policy under *Monell*, it has succeeded in showing lack of causation. See *City of Los Angeles v Heller* (1986) 475 US 796, 799, 89 L Ed 2d 806, 106 S Ct 1571. If there is no unlawful municipal policy, then the municipality did not cause the event about which the plaintiff is complaining. *McDade v West* (9th Cir 2000) 223 F3d 1135, 1141 (plaintiff cannot demonstrate existence of municipal policy or custom based solely on single occurrence of unconstitutional action by non-policy-making employee). On causation, see §13.133. Similarly, if the employee did not violate the plaintiff's rights, the issue of custom or policy becomes moot. See *City of Los Angeles v Heller, supra* (holding policy officer did not violate plaintiff's constitutional rights and thus avoiding issue of custom or policy).

Exhaustion of administrative remedies is not a condition precedent to filing a §1983 action. *Patsy v Florida Bd. of Regents* (1982) 457 US 496, 516, 73 L Ed 2d 172, 102 S Ct 2557. However, when a plaintiff seeks primarily money damages under state law and includes a §1983 claim, the plaintiff may be required to comply with California's government claims requirements for the state claim. *Lozada v City & County of San Francisco* (2006) 145 CA4th 1139, 1159, 52 CR3d 209 (government claim required as prerequisite to employee complaint for violation of Public Safety Officers Procedural Bill of Rights Act (Govt C §§3300-3313) and under §1983).

© The Regents of the University of California

§13.130 a. Required Allegations

Two fundamental allegations are required to state a 42 USC §1983 claim for relief (*Gomez v Toledo* (1980) 446 US 635, 640, 64 L Ed 2d 572, 100 S Ct 1920):

- Plaintiff was deprived of a right protected under the United States Constitution or federal law; and
- Deprivation of that right was caused by a "person" acting under color of state law.

See also, *Monell v Department of Soc. Servs.* (1978) 436 US 658, 694, 56 L Ed 2d 611, 98 S Ct 2018 (to state §1983 claim against city, plaintiff must establish (1) underlying violation of federally protected right; (2) right was violated as result of policy of custom adopted or ratified by municipal policymaker).

© The Regents of the University of California

§13.131 (1) Deprivation of Federally Protected Right

A federally protected right must have been violated. *Monell v Department of Soc. Servs.* (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018. For example, the fact that a departmental regulation might have authorized the use of constitutionally excessive force is beside the point if a person did not suffer an injury in violation of federal law at the hands of an individual police officer. *City of Los Angeles v Heller* (1986) 475 US 796, 799, 89 L Ed 2d 806, 106 S Ct 1571. But see *Chew v Gates* (9th Cir 1994) 27 F3d 1432, 1438, cert denied (1994) 513 US 1148 (supervisorial liability may be imposed under 42 USC §1983 notwithstanding exoneration of police officer whose actions are immediate or precipitating cause of constitutional injury).

© The Regents of the University of California

§13.132 (2) Action Under Color of State Law

The challenged conduct must be by a state or local government actor as distinguished from purely private conduct. Stating a general "color of law" rule is difficult. "State action" and "color of law" may be generally viewed as interchangeable, but not always. *Lugar v Edmondson Oil Co.* (1982) 457 US 922, 929, 73 L Ed 2d 482, 102 S Ct 2744 (private party invoking state prejudgment attachment procedures acts under color of law, but when he abuses or misuses them, he does not). A person acts under color of law while acting in an official capacity or while exercising responsibilities under state law. The person must be exercising authority "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v Atkins* (1988) 487 US 42, 49, 101 L Ed 2d 40, 108 S Ct 2250, quoting *U.S. v Classic* (1941) 313 US 299, 326, 85 L Ed 1368, 61 S Ct 1031. Compare *Stengel v Belcher* (6th Cir 1975) 522 F2d 438, 440, cert granted (1975) 425 US 910, cert dismissed (1975) 429 US 118 (off-duty police officer who intervened in café fight, who would have been subject to discipline had he not intervened and who was paid workers' compensation benefits for his own injuries, acted under color of law), with *Bonsignore v City of New York* (2d Cir 1982) 683 F2d 635, 638 (off-duty officer who shot his wife as result of "personal matters" was not acting under color of law). See also *Delcambre v Delcambre* (5th Cir 1981) 635 F2d 407, 408 (family dispute involving police chief not acting under color of law); *Traver v Meshriy* (9th Cir 1980) 627 F2d 934, 938 (off-duty officer acting as bank teller who makes arrest was acting under color of law).

NOTE: "Color of law" and "scope of employment" are not necessarily synonymous. See *Dang Vang v Toyed* (9th Cir 1991) 944 F2d 476, 480 (rape by public employee of person with whom employee came into contact amounted to abuse of authority under color of law). A public employee arguably could act under color of law for purposes of 42 USC §1983, but outside of the employee's scope of employment for purposes of municipal liability. See, *e.g., Farmers Ins. Group v County of Santa Clara* (1995) 11 C4th 992, 1019, 47 CR2d 478 (sexual harassment by deputy sheriff); *Mary M. v City of Los Angeles* (1991) 54 C3d 202, 285 CR 99 (rape by police officer); *K.G. v County of Riverside* (2003) 106 CA4th 1374, 1382, 131 CR2d 762 (sexual assault by police officer); *Thorn v City of Glendale* (1994) 28 CA4th 1379, 1383, 35 CR2d 1 (burning of building by fire marshal); *White v County of Orange* (1985) 166 CA3d 566, 212 CR 493 (false imprisonment and assault by police officer); *Alma W. v Oakland Unified Sch. Dist.* (1981) 123 CA3d 133, 176 CR 287 (rape by school custodian).

© The Regents of the University of California

§13.133 b. Required Causation

Conduct by the actor under color of law must cause the deprivation of a federal right. In some cases, the conduct by the government actor is considered too remote from the alleged result to have caused it. See, *e.g., Martinez v California* (1980) 444 US 277, 285, 62 L Ed 2d 481, 100 S Ct 553 (action of parole board in releasing inmate not cause of later crime and resulting injury); *Johnson v City of Seattle* (9th Cir 2007) 474 F3d 634, 639 (city's failure to prevent violence during celebration did not cause injuries by third party malfeasants). An intervening act may "cut off" potential liability. See, *e.g., Smiddy v Varney* (9th Cir 1986) 803 F2d 1469, 1473 (decision by prosecutor to file criminal charges may cut off liability of officers for false arrest). But see *White v Frank* (2d Cir 1988) 855 F2d 956, 961 (grand jury indictment may be prima facie evidence of probable cause to defeat subsequent action for malicious prosecution, but is not controlling).

Because there is no respondeat superior liability under 42 USC §1983 (*i.e.,* a city is not liable simply because an official commits a tort in the course of employment), a city is liable only if it "causes" the violation of plaintiff's rights. A city is not liable simply because it employs a tortfeasor. *Monell v Department of Soc. Servs.* (1978) 436 US 658, 691, 56 L Ed 2d 611, 98 S Ct 2018. See *City of Canton v Harris* (1989) 489 US 378, 385, 103 L Ed 2d 412, 109 S Ct 1197. Similarly, a public official is not liable for action taken by a city unless that public official caused the city to take the action that allegedly caused the plaintiff's constitutional injury. *Arnold v IBM* (9th Cir 1981) 637 F2d 1350; *Johnson v Duffy* (9th Cir 1978) 588 F2d 740, 743. The mere "failure to act" by a city may not support a §1983 claim, particularly when claimed injuries are caused by third party conduct. *Johnson v City of Seattle* (9th Cir 2007) 474 F3d 634, 639 (city's failure to provide extra police protection and protect citizens from third party harm during city-wide celebration did not violate due process clause).

© The Regents of the University of California

§13.134 c. Municipal Policy or Custom

The violation must have been caused by a municipal policy or custom. This may be an official policy (see *Monell v Department of Soc. Servs.* (1978) 436 US 658, 690, 56 L Ed 2d 611, 98 S Ct 2018 (referring to "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers")), or a policy of inaction (see *Oviatt By & Through Waugh v Pearce* (9th Cir 1992) 954 F2d 1470, 1474 (inaction must amount to failure to protect constitutional right)). Because a single decision of an employee usually will not create liability, municipalities generally will not be liable for failing to have adopted a policy on a particular topic. *Davis v City of Ellensburg* (9th Cir 1989) 869 F2d 1230, 1233 (city not liable for failure to have written policy on use of force in making misdemeanor arrests). However, an adequate policy adopted by the city may shield it from liability. *Alcala v City of Corcoran* (2007) 147 CA4th 666, 678, 53 CR3d 908 (police vehicular pursuit policy shielded city from 42 USC §1983 liability when it complied with Veh C §17004.7 and was properly adopted by city). But see *Berman v City of Daly City* (1993) 21 CA4th 276, 285, 26 CR2d 493 (city's vehicular pursuit policy did not provide minimum guidelines statutorily required to qualify for immunity).

PRACTICE TIP: Vehicle Code §17004.7 only immunizes a city from liability for incidences arising out of vehicle pursuits if the adopted policy conforms with all the minimum standards set out in that section. Cities should review and update, as necessary, their pursuit policies for conformance with this statute.

Action and practices of city officials, even if not taken under an official written law or policy, could still be so permanent and well settled as to constitute a "custom or usage" to establish municipal liability. *Monell,* 436 US at 691.

© The Regents of the University of California

§13.135 (1) Liability May Arise From Acts of Lower-Level Employees

City liability may arise from acts of lower-level employees who lack final policy-making authority, when those acts establish a municipal "custom or policy" or a failure to train or supervise. A series of acts or omissions by a lower-level employee may constitute an official "custom or usage" when the acts or omissions are persistent and widespread, and the policy-maker fails to take corrective action. *City of St. Louis v Praprotnik* (1988) 485 US 112, 127, 99 L Ed 2d 107, 108 S Ct 915; *City of Oklahoma City v Tuttle* (1985) 471 US 808, 85 L Ed 2d 791, 105 S Ct 2427; *Monell v Department of Soc. Servs.* (1978) 436 US 658, 691, 56 L Ed 2d 611, 98 S Ct 2018; *Adickes v S.H. Kress & Co.* (1970) 398 US 144, 167, 26 L Ed 2d 142, 90 S Ct 1598. A single act or omission by a lower-level employee generally is not enough to establish a custom or policy. See *City of Oklahoma City v Tuttle* (1985) 471 US 808, 823, 85 L Ed 2d 791, 105 S Ct 2427. But see *Pembaur v City of Cincinnati* (1986) 475 US 469, 480, 89 L Ed 2d 452, 106 S Ct 1292 (single act or decision by policy-makers may be sufficient to establish liability).

© The Regents of the University of California

§13.136 (2) Liability May Arise From a Pattern of Inadequate Training

A pattern of inadequate training may give rise to liability when the failure to train amounts to deliberate indifference to the rights of persons with whom the inadequately trained employee comes into contact. *City of Canton v Harris* (1989) 489 US 378, 388, 103 L Ed 2d 412, 109 S Ct 1197. The same standard applies to liability arising from a pattern of inadequate supervision. *Davis v City of Ellensburg* (9th Cir 1989) 869 F2d 1230, 1235. But see *Collins v City of Harker Heights* (1992) 503 US 115, 126, 117 L Ed 2d 261, 112 S Ct 1061 (due process clause imposes no substantive duty to train employees to particular level). To be classified as a "pattern" of inadequate training, the deficient training must be program-wide (and not only with respect to a single officer/employee) (*Alexander v City & County of San Francisco* (9th Cir 1994) 29 F3d 1355, 1367), or a single incident under rare circumstances. *Merritt v County of Los Angeles* (9th Cir 1989) 875 F2d 765, 771.

© The Regents of the University of California

§13.137 (3) Policy of Custom Must Be Attributable to a Policy-Maker

To establish liability, the policy or custom must be attributable to a municipal policy-maker. A policy-maker has final, non-appealable authority to establish municipal policy. *City of St. Louis v Praprotnik* (1988) 485 US 112, 123, 99 L Ed 2d 107, 108 S Ct 915; *Pembaur v City of Cincinnati* (1986) 475 US 469, 482, 89 L Ed 2d 452, 106 S Ct 1292. See *Bach v County of Butte* (1983) 147 CA3d 554, 569, 195 CR 268 (act of deputy prosecutor not considered to be that of final policy-making official sufficient to hold city liable under 42 USC §1983). Whether an official has final policy-making authority is a question of state and local law. *Jett v Dallas Indep. Sch. Dist.* (1989) 491 US 701, 105 L Ed 2d 598, 109 S Ct 2702; *City of St. Louis v Praprotnik* (1988) 485 US 112, 124, 99 L Ed 2d 107, 108 S Ct 915; *Pembaur*, 475 US at 483.

NOTE: The fact that a public employee may have final decision-making authority is not sufficient to find the custom or policy element of city liability if that employee is not establishing municipal policy or custom. See *Auriemma v Rice* (7th Cir 1992) 957 F2d 397, 399 (discussing distinction between establishing and implementing municipal policy).

The mere fact that a policy-maker defers to the discretionary decision of a subordinate does not turn the discretionary decision into official policy. *City of St. Louis*, 485 US at 130. However, a series of discretionary decisions by lower level employees may manifest a "custom or usage" giving rise to municipal liability. 485 US at 130. If a lower-level employee's decision actually is ratified by a policy-maker, the decision may be attributable to the city, thereby creating city liability. "[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." 485 US at 127.

© The Regents of the University of California

§13.138 (4) Violation Must Be Caused by Policy or Custom

The municipal policy or custom must have caused, or have been the "moving force behind," the constitutional violation. *Polk County v Dodson* (1981) 454 US 312, 326, 70 L Ed 2d 509, 102 S Ct 445. There must be an "affirmative link" between the policy and the particular constitutional violation alleged. *City of Oklahoma City v Tuttle* (1985) 471 US 808, 809, 85 L Ed 2d 791, 105 S Ct 2427. "Thus, our first inquiry in any case alleging municipal liability under section 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." *City of Canton v Harris* (1989) 489 US 378, 385, 103 L Ed 2d 412, 109 S Ct 1197. A plaintiff has a particularly heavy burden of establishing causation in *Monell* cases (see *Monell v Department of Soc. Servs.* (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018). See *City of Canton v Harris, supra*.

NOTE: Liability requires an action taken under the wrongful policy. "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *City of St. Louis v Praprotnik* (1988) 485 US 112, 127, 99 L Ed 2d 107, 108 S Ct 915. Thus, an employee who has the discretion to act under an otherwise valid policy and who exercises that discretion in an unconstitutional manner, will not create *Monell* liability because the exercise of discretion, not the municipal policy, caused the constitutional violation. *Pembaur v City of Cincinnati* (1986) 475 US 469, 481, 89 L Ed 2d 452, 106 S Ct 1292.

© The Regents of the University of California

§13.139 d. Defendant's State of Mind: Specific Intent Is Not Required

Under 42 USC §1983, there is "no state of mind requirement independent of that necessary to state a violation of [an] underlying constitutional right." *Daniels v Williams* (1986) 474 US 327, 330, 88 L Ed 2d 662, 106 S Ct 662; *Caballero v City of Concord* (9th Cir 1992) 956 F2d 204, 206 (error to instruct that officer must have intent to violate rights in false arrest claim). A defendant's state of mind may be relevant to the underlying constitutional or statutory violation. For example, a claim of violation of the equal protection clause involves willful discrimination. *Village of Willowbrook v Olech* (2000) 528 US 562, 564, 145 L Ed 2d 1060, 120 S Ct 1073 (Fourteenth Amendment violation requires intentional and arbitrary discrimination); *Squaw Valley Dev. Co. v Goldberg* (9th Cir 2004) 375 F3d 936, overruled in part on other grounds in *Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd.* (9th Cir 2007) 509 F3d 1020, 1025). A violation of the Eighth Amendment requires deliberate indifference. *Wilson v Seiter* (1991) 501 US 294, 302, 115 L Ed 2d 271, 111 S Ct 2321 (intent requirement in conditions of confinement suit); *Redman v County of San Diego* (9th Cir 1991) 942 F2d 1435, 1443, cert denied (1992) 502 US 1074 (heightened pleading requirement of deliberate indifference for claim that jail officials did not respond to assault on prisoner). But see *Leatherman v Tarrant County Narcotics Intelligence & Coordination Unit* (1993) 507 US 163, 167, 122 L Ed 2d 517, 113 S Ct 1160 (no heightened pleading standard in cases alleging municipal liability).

Liability is not imposed for negligent breach of a duty of care arising under general tort law, but for denying claimant of rights secured by the constitution or other federal laws. *Daniels v Williams* (1986) 474 US 327, 330, 88 L Ed 2d 662, 106 S Ct 662 (negligence is not actionable under due process clause; overruling *Parratt v Taylor* (1981) 451 US 527, 68 L Ed 2d 420, 101 S Ct 1908, to extent it stated mere negligence could constitute deprivation under Fourteenth Amendment); *Davidson v Cannon* (1986) 474 US 344, 347, 88 L Ed 2d 677, 106 S Ct 668 (simple lack of due care does not approach sort of abusive government conduct due process clause was designed to protect). See California Government Tort Liability Practice §13.38 (4th ed Cal CEB 1999) (on effect of gross negligence or recklessness).

Summary judgment is appropriate when the plaintiff offers no direct or circumstantial evidence of the relevant state of mind. *Lindsey v Shalmy* (9th Cir 1994) 29 F3d 1382, 1385 (conclusory allegations of discriminatory animus is not enough to avoid summary judgment). State of mind is not relevant to the determination of whether qualified immunity applies. *Crawford-El v Britton* (1998) 523 US 574, 588, 140 L Ed 2d 759, 118 S Ct 1584. See *Jones & Matson v Hall* (2007) 155 CA4th 1596, 1605, 66 CR3d 872 (plaintiffs could not establish claim for retaliation for their protected speech when there was no evidence that defendant agency had knowledge of plaintiffs' speech activities).

© The Regents of the University of California

§13.140 4. Availability of Remedies Under State Law

If, under state law, an adequate pre- or post-deprivation remedy exists, this "available" procedural due process may defeat or mitigate a 42 USC §1983 claim brought on the basis of a procedural due process violation. *Zinermon v Burch* (1990) 494 US 113, 129, 108 L Ed 2d 100, 110 S Ct 975; *Parratt v Taylor* (1981) 451 US 527, 68 L Ed 2d 420, 101 S Ct 1908, overruled in part on other grounds in *Daniels v Williams* (1986) 474 US 327. Post-deprivation procedures may provide adequate due process for "random and unauthorized acts" of public employees that effect a deprivation of liberty or property. *Parratt,* 451 US at 541. This principle applies even if the deprivation was intentional. *Hudson v Palmer* (1984) 468 US 517, 533, 82 L Ed 2d 393, 104 S Ct 3194. Adequate post-deprivation remedies will not defeat a substantive due process claim, however. *Smith v City of Fontana* (9th Cir 1987) 818 F2d 1411, cert denied (1987) 484 US 935, overruled in part on other grounds in *Hodgers-Durgin v De La Vina* (9th Cir 1999) 199 F3d 1037. Adequate post-deprivation remedies also will not defeat a procedural due process claim that challenges the state procedure itself as inadequate. *Logan v Zimmerman Brush Co.* (1982) 455 US 422, 436, 71 L Ed 2d 265, 102 S Ct 1148; *Turpen v City of Corvallis* (9th Cir 1994) 26 F3d 978, 979, cert denied (1994) 513 US 963.

© The Regents of the University of California

§13.141 5. Naming Defendants Under §1983

For 42 USC §1983 damages actions against city officials, there is an important distinction between an action against a city official in his or her *official* capacity (which is an action against the city itself, to which qualified immunity is inapplicable) and a §1983 damages action against that official in his or her *individual* capacity (which is an action against the official personally, to which qualified immunity is applicable). To avoid unnecessary litigation revolving around this issue, the relevant individuals and/or the city should be sued explicitly. If the lawyer desires to sue defendants in their individual or personal capacities for damages, then the complaint should say so. When that is done, for example, then the possible applicability of qualified immunity and liability for punitive damages arises. Conversely, if the lawyer wants to sue a city, then the complaint should identify the city as a party defendant and properly allege an actionable official policy or custom. When that is done, then qualified immunity and liability for punitive damages are inapplicable. *Romano v Bible* (9th Cir 1999) 169 F3d 1182, 1186, cert denied (1999) 528 US 816 (officials are presumed to be sued in their personal capacities, even if complaint does not explicitly mention capacity in which they are sued); *Miller v Smith* (7th Cir 2000) 220 F3d 491, 494 ("Where the plaintiff seeks injunctive relief from official policies or customs, the defendant has been sued in her official capacity; where the plaintiff alleges tortious conduct of an individual acting under color of state law, the defendant has been sued in her individual capacity."). A city is a "person" for purposes of §1983 liability. *Monell v Department of Soc. Servs.* (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018.

NOTE: Naming a city official in his or her official capacity does not avoid the official policy or custom requirement of *Monell*. See *Brandon v Holt* (1985) 469 US 464, 83 L Ed 2d 878, 105 S Ct 873.

© The Regents of the University of California

§13.142 6. Liability for Causing the Acts of Others

A supervisor or other person who indirectly causes a deprivation of plaintiff's rights may be liable under 42 USC §1983. A supervisor may be liable for the act of a subordinate if there is a sufficient causal connection between the supervisor's own wrongful conduct and the act causing the violation. This causal link may occur in several ways, including:

- **Participation.** The supervisor may be liable for directly participating in the activity that inflicts the constitutional injury or setting into motion a series of acts by others that the supervisor knows or reasonably should know would cause others to inflict the constitutional injury. *Johnson v Duffy* (9th Cir 1978) 588 F2d 740, 743. See also *Larez v City of Los Angeles* (9th Cir 1991) 946 F2d 630, 645 (on proof of causation); *Fundiller v City of Cooper City* (11th Cir 1985) 777 F2d 1436, 1443 (causal link may be established "when a history of widespread abuse puts the responsible supervisor on notice of the need for improved training or supervision and the official fails to take corrective action").
- **Failure to prevent.** A supervisor may be liable if the supervisor knew of the wrongful act and failed to prevent it. *Taylor v List* (9th Cir 1989) 880 F2d 1040, 1045.
- **Implementation of deficient policy.** A supervisor may be liable, without personal participation in the offensive act, if he or she "implement[s] a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Hansen v Black* (9th Cir 1989) 885 F2d 642, 646.
- **Failure to train.** A supervisor may be liable for failing to train or supervise a subordinate properly. *Ybarra v Reno Thunderbird Mobile Home Village* (9th Cir 1984) 723 F2d 675, 680; *McClelland v Facteau* (10th Cir 1979) 610 F2d 693, 696. However, inadequate screening of applicants will impose liability only if the public entity's hiring decision is causally linked to the particular injury alleged. *Board of County Comm'rs v Brown* (1997) 520 US 397, 403, 137 L Ed 2d 626, 117 S Ct 1382.
- **Deliberate indifference.** A supervisor probably may be held liable for a subordinate's act if plaintiff can prove that the supervisor was deliberately indifferent to the subordinate's conduct. See *City of Canton v Harris* (1989) 489 US 378, 388, 103 L Ed 2d 412, 109 S Ct 1197.
- **Failure to intervene.** A supervisor (or any individual) may be liable if he or she knows of another's wrongful conduct, has an opportunity to intervene to stop the conduct, fails to so intervene, and as a proximate result causes the §1983 violation. *Byrd v Brishke* (7th Cir 1972) 466 F2d 6, 11. But see *Meehan v County of Los Angeles* (9th Cir 1988) 856 F2d 102, 106 (alleged police beatings liability requires evidence beyond mere presence at scene).

Individual supervisory liability for deficient policies, training, and supervision closely parallels municipal liability under *Monell v Department of Soc. Servs.* (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018. Accordingly, supervisory liability cases should be subjected to a *Monell* analysis.

PRACTICE TIP 1: The inclusion of a *Monell* claim in a case that also involves causes of action other than §1983 claims can hurt the defense at trial. A municipal policy or custom can be proved by evidence of widespread wrongful conduct by city employees. This evidence would generally be inadmissible to prove that an individual defendant violated plaintiff's rights. See Evid C §1101; Fed R Evid 404. Accordingly, counsel generally should attempt to dismiss *Monell* claims before trial when possible. Consider moving to bifurcate the issues to try "custom or policy" separately.

PRACTICE TIP 2: Causation is an especially important defense for a public employee or official involved in the processing of an application for a permit or other entitlement that was ultimately denied by the city council. Typically, an aggrieved party will name everyone involved in the process as a defendant. Defense counsel should attempt to have the action dismissed as to those defendants who processed the application before trial by way of motion for summary judgment or motion in limine on the ground that they did not cause the city council to

exercise its discretion in a particular matter. A similar argument may be made when individual council members are named. Because the city can only act through a majority of its council, one could contend that individual council members who voted against the action taken could not have caused the injury. Govt C §54952.6 ("action" of city council requires collective decision made by majority of city council). Likewise, in circumstances in which the city has been dismissed as a defendant, those council members who voted in favor of the action could not have caused the injury because their vote alone is insufficient to authorize the action that allegedly caused the injury. Govt C §54952.6. Dismissal of individual defendants eliminates the city's exposure for punitive damages. Govt C §818 (public entity is not liable for punitive damages).

© The Regents of the University of California

§13.143 7. Duty to Provide Defense in §1983 Suits

On the request of an employee, a public entity must provide a defense in a civil action brought against that employee, whether in his official or individual capacity, on account of an act or omission in the scope of employment as an employee of that public entity. Govt C §§825, 995-996.6; *DeGrassi v City of Glendora* (9th Cir 2000) 207 F3d 636, 641 (city satisfied its obligation under Government Claims Act (Govt C §§810-998.3) when it offered to provide defense subject to reservation of rights and under condition that it control litigation and any settlement thereof).

The public entity may refuse to defend an employee if it determines that any of the following exist (Govt C §995.2(a)):

- The act or omission was outside the scope of employment;
- The employee acted because of actual fraud, corruption, or actual malice; or
- The defense by the public entity would create a "specific conflict of interest" between the public entity and the employee.

If the entity refuses to defend, the employee is entitled to be reimbursed for the reasonable cost of his or her defense if the conditions in Govt C §996.4 are met.

Public entities may, but are not required to, provide for defense under other code sections. See Govt C §§825.6(b) ("employee" is elected official or former elected official convicted of certain felonies), 995.4 (on disciplinary proceedings), 995.6 (on administrative proceedings), 995.8 (defense in criminal proceedings). See also California Government Tort Liability Practice §§4.8-4.12 (4th ed Cal CEB 1999) (exceptions to public entity's duty to defend).

If an "actual and specific conflict of interest" becomes apparent after the entity undertakes the defense, the entity may (subject to ethical rules) withdraw from the defense and must inform the employee of the reason for withdrawing. Govt C §995.2(c). The conflict issue may arise in the context of a punitive damages claim against the employee, which the entity is not required to pay. See Govt C §825. The question arises whether joint representation of the entity and employee creates a conflict of interest requiring the entity to pay for independent counsel to represent the employee. In *Laws v County of San Diego* (1990) 219 CA3d 189, 199, 267 CR 921, San Diego County was not required to provide separate counsel to police officers sued for punitive damages in a 42 USC §1983 action. The court rejected the officers' argument that the county was required to provide *Cumis* counsel (*San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 208 CR 494) in accordance with the rules governing the duty to defend arising out of liability insurance policies.

PRACTICE TIP: Attorneys representing public entities and employees in suits seeking punitive damages should always disclose in writing that the employee may be exposed to punitive damages. The disclosure should indicate that such damages will not be paid by the entity. Attorneys should then obtain that employee's written consent to joint representation. In addition, attorneys should review the provisions of Govt C §825(b). See California Government Tort Liability Practice §§4.14-4.21 (4th ed Cal CEB 1999) (on indemnification of employee by public entity).

On indemnification of public employees, see §§13.86-13.89.

© The Regents of the University of California

8. Remedies Under §1983

§13.144 a. Damages

Damages can be nominal, compensatory, or punitive. As a rule, general principles of damages apply to 42 USC §1983 claims. *Zarcone v Perry* (2d Cir 1978) 572 F2d 52, 55.

© The Regents of the University of California

§13.145 (1) Nominal Damages

If the deprivation of a federal right is not proven to have damaged the plaintiff, only nominal damages may be awarded. Such damages, for example, may be only $1. *Carey v Piphus* (1978) 435 US 247, 266, 55 L Ed 2d 252, 98 S Ct 1042 (no showing suspension caused by lack of due process). However, an award of only nominal damages may not be sufficient to support an award of attorney fees. *Farrar v Hobby* (1992) 506 US 103, 115, 121 L Ed 2d 494, 113 S Ct 566 (although plaintiff recovering nominal damages may be "prevailing party," reasonable attorney fee is usually no attorney fee); *Benton v Oregon Student Assistance Comm'n* (9th Cir 2005) 421 F3d 901, 904 (award of nominal damages by itself is not enough to justify award of attorney fees under 42 USC §1988). See also *Tutor-Saliba Corp. v City of Hailey* (9th Cir 2006) 452 F3d 1055, 1064 (42 USC §1983 defendants entitled to attorney fees when action was presented for both frivolous and non-frivolous claims, and such claims were distinct from one another

© The Regents of the University of California

§13.146 (2) Compensatory Damages/

Compensatory damages ordinarily include both "special" (out-of-pocket) damages and "general" (pain and suffering, emotional distress) damages calculated in the same manner as in any tort suit. *Memphis Community Sch. Dist. v Stachura* (1986) 477 US 299, 307, 91 L Ed 2d 249, 106 S Ct 2537. See, *e.g., Walters v City of Atlanta* (11th Cir 1986) 803 F2d 1135, 1146 ($150,000 for mental distress caused by racial discrimination). But see *Carlsbad Aquafarm, Inc. v Department of Health Servs.* (2000) 83 CA4th 809, 817, 100 CR2d 87 (no claim for damages recognized for violation of state constitution's due process clause); *Gates v Superior Court* (1995) 32 CA4th 481, 519, 38 CR2d 489 (no claim for damages recognized for violation of state constitution's equal protection clause.). State law provides the guide to what damages are recoverable, so long as it is not inconsistent with the Constitution or federal law. *Robertson v Wegmann* (1978) 436 US 584, 590, 56 L Ed 2d 554, 98 S Ct 1991.

Federal and state courts in California have split on what damages are recoverable in a 42 USC §1983 survival action. Two district courts have ruled that California's survivorship law, which allows punitive damages but excludes damages for the decedent's pain and suffering, is inconsistent with §1983's remedial purpose and have allowed recovery for pain and suffering. *Garcia v Whitehead* (CD Cal 1997) 961 F Supp 230, 233; *Williams v City of Oakland* (ND Cal 1996) 915 F Supp 1074, 1076. See also CCP §377.34. However, some courts have disagreed, finding that the availability of wrongful death actions and of punitive damages in survival actions rendered California law consistent with §1983 policy. *County of Los Angeles v Superior Court* (1999) 21 C4th 292, 308, 87 CR2d 441; *Garcia v Superior Court* (1996) 42 CA4th 177, 49 CR2d 580; *Venerable v City of Sacramento* (ED Cal 2002) 185 F Supp 2d 1128, 1133.

Presumed damages are inappropriate in procedural due process claims and in substantive due process claims when general and special damages are capable of proof. *Memphis Community Sch. Dist.,* 477 US at 310 (jury cannot award damages based on its evaluation of "value" of constitutional right).

© The Regents of the University of California

§13.147 (3) Punitive Damages

Punitive damages may be awarded under 42 USC §1983 against individual defendants, but may not be awarded against a city. Govt C §818 (municipalities not liable for punitive damages); *City of Newport v Fact Concerts, Inc.* (1981) 453 US 247, 271, 69 L Ed 2d 616, 101 S Ct 2748. Punitive damages serve the same purposes and are calculated in the same manner as under state law. *Smith v Wade* (1983) 461 US 30, 34, 75 L Ed 2d 632, 103 S Ct 1625 (deliberate indifference/failure to protect juvenile jail detainee).

The standard for a punitive damages award is (*Smith v Wade* (1983) 461 US 30, 50, 75 L Ed 2d 632, 103 S Ct 1625):

- willful or malicious conduct,
- intentional act in gross disregard for a person's federal rights, or
- conduct evidencing a reckless disregard for a person's rights.

A public entity may choose to indemnify an employee against whom an award of punitive damages is made. Govt C §825(b). One relevant question is when the governing body should consider such indemnification. The wealth of an individual defendant is admissible as to the appropriate amount of punitive damages, and plaintiffs will claim that the wealth of the party actually paying any punitive award is relevant. See*, e.g., Perrin v Anderson* (10th Cir 1986) 784 F2d 1040, 1047 (source of payment of punitive damages admissible); *City of Greenville v W.R. Grace & Co.* (D SC 1986) 640 F Supp 559, 571. If the city has made an indemnification decision before trial, it might try to rely on the non-admissibility provisions of Govt C §825(b)(3) to keep the city's assets and financial condition out of evidence. However, it is not clear that a federal court would be bound by the restrictions of Govt C §825(b)(3). But see *Larez v Holcomb* (9th Cir 1994) 16 F3d 1513, 1521 (informing jury of indemnification would provide windfall to plaintiffs at taxpayers' expense, with little appreciable increase in deterrence of wrongful behavior). See also CC §3295 (on bifurcation on defendant's request to keep information regarding wealth out until jury decides punitive damages should be awarded).

PRACTICE TIP: From the public entity's point of view, it may be more prudent to defer indemnification decisions until after an award of punitive damages is made. This will undoubtedly affect the level of tension felt by the public employee during the course of the litigation. However, it may be necessary to wait until after trial for the city to determine whether the facts justify such payment.

© The Regents of the University of California

§13.148 b. Injunctions

Injunctive relief is ordinarily available under 42 USC §1983 whenever the usual prerequisites for equitable relief can be satisfied. See, *e.g., Los Angeles Mem. Coliseum Comm. v National Football League* (9th Cir 1980) 634 F2d 1197, 1200; *William Inglis & Sons Baking Co. v ITT Continental Baking Co.* (9th Cir 1975) 526 F2d 86, 87 (in determining whether to grant injunctive relief, court must examine whether plaintiff will suffer irreparable injury, likelihood of success on merits, balance of hardships, and public interest).

Whether a court will enjoin a city will often turn on whether the conduct complained of proceeds from a municipal custom or policy under *Monell v Department of Soc. Servs.* (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018. If a policy is established, then an injunction may be appropriate. If the conduct was a random or unauthorized event, presumably no injunctive relief would be necessary. Compare *Williams v Alioto* (9th Cir 1977) 549 F2d 136, 143 (when police department expressly authorized wide-ranging program that resulted in hundreds of black males being stopped and frisked, initial injunctive relief was warranted), with *Rizzo v Goode* (1976) 423 US 362, 375, 46 L Ed 2d 561, 96 S Ct 598 (when "pattern and practice" is not sufficiently established nor conduct complained of affirmatively linked to municipal policy makers, then injunctive relief will not be available). See also *Lewis v Hyland* (3d Cir 1977) 554 F2d 93, 104, cert denied (1977) 434 US 931 (no pattern or practice of state police harassing "hippies" established, thus no injunctive relief warranted). Also, standing requirements under federal law require the plaintiff to show that he or she is sufficiently likely to be subjected to deprivation in the future so that a real controversy exists. *City of Los Angeles v Lyons* (1983) 461 US 95, 111, 75 L Ed 2d 675, 103 S Ct 1660. However, even if the plaintiff lacks standing in federal court, the plaintiff may have standing under more lenient state court rules. *City of Los Angeles v Lyons, supra* (plaintiff seeking injunctive relief).

As the conduct giving rise to the §1983 claim moves away from "authorized" towards "unauthorized" behavior, issuance of an injunction becomes less likely. When the conduct is determined to have proceeded from municipal inaction (*i.e.,* total failure to train or inadequate policy), then an injunction is more likely to issue to compel the government entity to remedy the situation before it recurs. See *City of Canton v Harris* (1989) 489 US 378, 388, 103 L Ed 2d 412, 109 S Ct 1197.

© The Regents of the University of California

§13.149 c. Attorney Fees and Costs

Attorney fees may be available to a successful 42 USC §1983 plaintiff under 42 USC §1988. The court may, in its discretion, include expert fees as part of any attorney fees award. 42 USC §1988(c). On municipal liability for attorney fees generally, see §§13.157-13.165. Costs of suit are recoverable by a successful §1983 plaintiff. 42 USC §1988.

© The Regents of the University of California

§13.150 d. Civil Penalties

Up to $25,000 in civil penalties may be obtained for civil rights violations in actions brought on behalf of an aggrieved individual by the Attorney General, district attorney, or city attorney. See CC §§52(b)(2), 52.1(a).

© The Regents of the University of California

§13.151 9. Forum Considerations: State Versus Federal Court

State and federal courts have concurrent jurisdiction over 42 USC §1983 suits. See *Williams v Horvath* (1976) 16 C3d 834, 837, 129 CR 453. A §1983 suit filed in state court may be removed to federal court by the defendant. See 28 USC §1446(b) (suit must be removed "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which the suit is based"). A case may not be removed unless all defendants agree to the removal. *Hewitt v City of Stanton* (9th Cir 1986) 798 F2d 1230, 1232.

PRACTICE TIP: It is easy to miss the 30-day deadline for removal in 28 USC §1446(b). The 30 days runs from receipt of the initial pleading (usually the complaint), not from actual service of process. Thus, if plaintiff sends a "courtesy copy" of the complaint, the 30 days begins to run. Moreover, when several defendants are named in the suit, the 30 days begins to run as to all of the defendants from the time the first defendant receives the complaint. *Transport Indem. Co. v Financial Trust Co.* (CD Cal 1972) 339 F Supp 405, 409. If a plaintiff sends a "courtesy copy" of the complaint to the home of a defendant employee who ignores it, the time to remove could expire as to all of the defendants.

In choosing between state and federal court, counsel should consider the following:

- **Federal judges are generally more familiar with 42 USC §1983 law.** This familiarity can be helpful to a defendant in disposing of part or all of the case on a motion to dismiss or for summary judgment. Although suits against public entities often include "mixed" federal and state causes of action, federal courts frequently dismiss specious state claims.
- **Federal courts usually assign one judge to case**. It may be helpful to have a single judge familiar with the case (or harmful, if the case is assigned to the "wrong" judge). In state court, the trial judge may not be known until the time of trial, and a different judge may decide pretrial motions.
- **Time to trial is traditionally shorter in federal court**. However, this can vary depending on the court, so it is important to research potential venues and judges. The state's "fast track" system means pretrial paperwork and "surprise prevention" may be about the same in both systems.
- **Plaintiff may be entitled to more expansive discovery in federal court.** This discovery advantage is because federal courts are not required to apply state privileges (*e.g.,* the privilege against disclosure of police personnel files). If damaging documents exist that would not be discoverable in state court, defense counsel may not wish to remove. See *Kelly v City of San Jose* (ND Cal 1987) 114 FRD 653, 655. Federal discovery rules generally require that discovery occur earlier in the litigation process, and mandatory disclosure requirements will govern the action. See Fed R Civ P 26.
- **Federal court jury pool may be more favorable than a state court pool, or vice versa.** A federal court is likely to draw from a geographically broader jury pool. A federal court requires a unanimous vote of six jurors, rather than the state's nine out of twelve.
- **Summary judgment motions may be granted more often in federal court.** Also, under the federal single assignment system, the judge hearing the motion will also be the trial judge. This may lead to a more aggressive disposition of unmeritorious claims in federal court.

© The Regents of the University of California

§13.152 10. Statute of Limitations for §1983 Claims

The statutes governing the filing of actions against public entities (see Govt C §§945-945.6) do not apply to 42 USC §1983 actions. *Williams v Horvath* (1976) 16 C3d 834, 838, 129 CR 453. However, they do apply to pendent state claims joined with a §1983 action. *Karim-Panahi v Los Angeles Police Dep't* (9th Cir 1988) 839 F2d 621, 627. Claim filing requirements apply to both tort and breach of contract actions. See *Baines Pickwick Ltd. v City of Los Angeles* (1999) 72 CA4th 298, 303, 85 CR2d 74; *Alliance Fin. v City & County of San Francisco* (1998) 64 CA4th 635, 641, 75 CR2d 341.

In a §1983 action, the statute of limitations applicable to personal injury actions in the state where the action arose applies. *Wilson v Garcia* (1985) 471 US 261, 268, 85 L Ed 2d 254, 268, 105 S Ct 1938; *Canatella v Van De Kamp* (9th Cir 2007) 486 F3d 1128, 1132. State tolling statutes and equitable tolling may also apply, unless they defeat the goals of the federal statute at issue. *Hardin v Straub* (1989) 490 US 536, 538, 104 L Ed 2d 582, 109 S Ct 1998. A 2-year statute of limitations for personal injury applies to §1983 claims in California. See CCP §335.1. Federal law applies to determine when the statute of limitations starts to run. *Wallace v Kato* (2007) 549 US 384, 388, 166 L Ed 2d 973, 127 S Ct 1091; *Felder v Casey* (1988) 487 US 131, 101 L Ed 2d 123, 108 S Ct 2302. Generally, it starts to run when the plaintiff is aware of his or her constitutional injury. *Chardon v Fernandez* (1981) 454 US 6, 70 L Ed 2d 6, 102 S Ct 28. But see *Wallace v Kato* (2007) 549 US 384, 397, 166 L Ed 2d 973, 127 S Ct 1091 (cause of action for false arrest under §1983 accrues after confinement without legal process has ended). When a city ordinance is challenged, the statute begins to run from passage of the ordinance. *De Anza Properties X, Ltd. v County of Santa Cruz* (9th Cir 1991) 936 F2d 1084, 1086. The 2-year limitations period applies to federal inverse condemnation and takings actions brought under §1983 in California. *Hacienda Valley Mobile Estates v City of Morgan Hill* (9th Cir 2003) 353 F3d 651, 655 (federal takings claims must be brought under §1983 and are subject of California's statute of limitations).

NOTE: In certain instances, a city can exercise its police power to adopt local statutes of limitations for claims of money damages that are excepted by the Government Claims Act and that are not governed by any other statute or regulation. See *Pasadena Hotel Dev. Venture v City of Pasadena* (1981) 119 CA3d 412, 415, 174 CR 52 (holding that city's 1-year statute of limitations for taxpayer's claim for refund was valid requirement authorized by Govt C §935).

PRACTICE TIP: If a local public entity adopts rules and regulations governing claims, it should consider including limitations periods in the enactment to the extent such limitations are not governed or preempted by state or federal law.

© The Regents of the University of California

§13.153 G. Municipal Antitrust Liability

Cities (and counties) are entitled to broad immunity from the antitrust laws. *Town of Hallie v City of Eau Claire* (1985) 471 US 34, 38, 85 L Ed 2d 24, 105 S Ct 1713; *Golden State Transit Corp. v City of Los Angeles* (9th Cir 1984) 726 F2d 1430, 1434, rev'd on other grounds (1986) 475 US 608, 89 L Ed 2d 616, 106 S Ct 1395. This immunity is commonly referred to as "state action immunity." See *Traweek v City & County of San Francisco* (9th Cir 1990) 920 F2d 589, 591 (state action immunity protects city with respect to antitrust challenge to condominium conversion ordinance). If the activities of a public agency are generally authorized by state statute, public agencies may engage in activities that would otherwise be deemed anticompetitive. *City of Lafayette v Louisiana Power & Light Co.* (1978) 435 US 389, 413, 55 L Ed 2d 364, 98 S Ct 1123; *Parker v Brown* (1943) 317 US 341, 87 L Ed 315, 63 S Ct 307; *Springs Ambulance Serv. v City of Rancho Mirage* (9th Cir 1984) 745 F2d 1270, 1272 (relying on Govt C §38794 to provide city with state action immunity in its ambulance services). This is commonly referred to as the "*Parker* exemption." State action immunity may be invoked when the action is taken "pursuant to state policy to displace competition with regulation or monopoly public service." *City of Lafayette v Louisiana Power & Light Co., supra*. See also *Community Communications Co. v City of Boulder* (1982) 455 US 40, 70 L Ed 2d 810, 102 S Ct 835 (ordinance prohibiting cable TV operator's business expansion not exempt).

The Local Government Antitrust Act of 1984 (15 USC §§34-36) addresses local antitrust liability. In *Opdyke Inv. Co. v City of Detroit* (6th Cir 1989) 883 F2d 1265, 1266, the court ruled that Congress intended to establish the "general rule that antitrust damages are not recoverable from local government." Injunctive relief is still available, however, which means that antitrust issues still arise from time to time. See *Associated Builders & Contractors, Inc. v City of Seward* (9th Cir 1992) 966 F2d 492 ("work preservation clause" requiring city contractors to have collective bargaining agreements did not offend antitrust laws); *Traweek v City & County of San Francisco, supra*.

For related material on California Public Utilities Commission jurisdiction and extraterritorial retail service, see §6.39.

© The Regents of the University of California

§13.154 H. Municipal Contract Liability

Beginning in 1894, California has noted the distinction between contract and tort government liability. See *Chapman v State* (1894) 104 C 690, 693, 38 P 457 (in absence of legislation, no tort action could be brought against state, but same was not true in contract). Government Code §814 continues the policy that traditional governmental immunity does not preclude enforcement of a city's contractual obligations. It provides: "Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee." *Souza & McCue Constr. Co. v Superior Court* (1962) 57 C2d 508, 510, 20 CR 634; California Government Tort Liability Practice §§1.12, 5.9, 9.82-9.84 (4th ed Cal CEB 1999). However, the claim presentation requirements of the Government Claims Act (Govt C §§810-998.3) apply to contract causes of action unless an exception applies. *City of Stockton v Superior Court* (2007) 42 C4th 730, 738, 68 CR3d 295. See *Arntz Builders v City of Berkeley* (2008) 166 CA4th 276, 279, 82 CR3d 605 (if claim is governed by claims procedure prescribed by contract, additional claim under Government Claims Act is not required unless expressly mandated by contract).

A city may alter liability by entering an indemnity or hold harmless agreement. *County of San Joaquin v Stockton Swim Club* (1974) 42 CA3d 968, 972, 117 CR 300 (hold harmless agreement between public entity and private swim club valid and enforceable). See also *Societa per Azioni de Navigazione Italia v City of Los Angeles* (1982) 31 C3d 446, 465, 183 CR 51, cert denied (1982) 459 US 990 (no indemnity because no proof in contract of indemnity agreement). Express indemnity is a complex area discussed more fully in §§7.298-7.309.

© The Regents of the University of California

§13.155 I. Personal Liability of Officers and Employees

Public employees can be personally liable for punitive damages. Govt C §825. An employee may be personally liable for compensatory damages when:

- The employee's act or omission occurred outside the scope of employment (Govt C §825; *Farmers Ins. Group v County of Santa Clara* (1995) 11 C4th 992, 1003, 47 CR2d 478). As used in Government Claims Act, "the phrase 'scope of his employment' is intended to make applicable the general principles that the California courts use to determine whether the particular kind of conduct is to be considered within the scope of employment in cases involving actions by third persons against the employer for torts of his employee."
- The employee's actual fraud, corruption, or actual malice caused the plaintiff's injuries (Govt C §825.6(a)).
- The employee willfully failed or refused to reasonably cooperate in the defense of the claim or action in good faith (Govt C §825.6(a)).

The Government Code does not define the terms "actual fraud," "corruption," or "actual malice." See Govt C §§815.3, 825(f), 825.6(b) (expanding liability of elected officials for their intentional torts and defining duty of public entity to provide defense and pay any judgment); *Los Angeles Police Protective League v City of Los Angeles* (1994) 27 CA4th 168, 32 CR2d 574; California Government Tort Liability Practice §§1.29-1.34, 4.40-4.48, 9.3-9.16 (4th ed Cal CEB 1999).

© The Regents of the University of California

§13.156 J. No Municipal Liability for Punitive Damages

A public entity cannot be held liable for punitive damages. Govt C §818; *City of Newport v Fact Concerts, Inc.* (1981) 453 US 247, 271, 69 L Ed 2d 616, 101 S Ct 2748 (punitive damages in 42 USC §1983 suit not recoverable against municipality). But see *Los Angeles County Metro. Transp. Auth. v Superior Court* (2004) 123 CA4th 261, 271, 20 CR3d 92 (statutory civil penalty of $25,000 against public entity for violating Unruh Act (CC §§51-51.13) is permissible and is not barred by Govt C §818).

However, a public entity, other than the state, is authorized to pay that part of a judgment against a public employee that is for punitive damages if the governing body of the public entity finds, in its sole discretion, each of the following (Govt C §825):

- The judgment is based on an act or omission of an employee or former employee acting within the course and scope of employment;
- At the time of the act giving rise to liability, the employee or former employee acted, or failed to act, in good faith, without actual malice, and in the apparent best interests of the public entity; and
- Payment of the claim or judgment would be in the best interests of the public entity.

But see *Trevino v Gates* (9th Cir 1996) 99 F3d 911, 918 (qualified immunity applies to decision by council member to pay punitive damages provided that decision is discretionary, made on case-by-case basis, and complies in good faith with requirements of Govt C §825(b)); *Trevino v Gates* (9th Cir 1994) 23 F3d 1480, 1481, cert denied (1994) 513 US 932 (in §1983 action, court denied absolute immunity to city council that approved payment of punitive damages assessed against city police officers). Public entities are not barred from pursuing claims for punitive damages. CC §3294; *City of Glendale v Superior Court* (2002) 95 CA4th 1266, 1270, 116 CR2d 16.

PRACTICE TIP: In defending suits seeking punitive damages, counsel should always disclose in writing that the employee may be personally liable for punitive damages. The agency may also consider obtaining the employee's written consent to joint representation when punitive damages are claimed. There is a heightened possibility of conflict in the defense of elected officials. Govt C §§815.3, 825(f), 825.6(b).

© The Regents of the University of California

K. Municipal Liability for Attorney Fees

§13.157 1. Arbitrary or Capricious Administrative Actions

A public agency may be required to pay a successful plaintiff's attorney fees up to the amount of $7500 computed at $100 per hour when the administrative action of the agency carried out under the Government Code or other provision of state law was the result of arbitrary or capricious action or conduct. Govt C §800(a). This statute is ancillary only and does not create a new cause of action.

Whether action is arbitrary and capricious is a fact to be determined by the trial court. *Kreutzer v County of San Diego* (1984) 153 CA3d 62, 78, 200 CR 322. Arbitrary and capricious action is conduct not supported by a fair or substantial reason. *Madonna v County of San Luis Obispo* (1974) 39 CA3d 57, 62, 113 CR 916. Two examples of arbitrary and capricious conduct are a stubborn insistence on following an unauthorized course of action (*Midstate Theaters, Inc. v Board of Supervisors of Stanislaus County* (1975) 46 CA3d 204, 211, 119 CR 894), and bad faith exhibited by officials in a legal dispute (*Von Durjais v Board of Trustees* (1978) 83 CA3d 681, 688, 148 CR 192; *Healdsburg Police Officers Ass'n v City of Healdsburg* (1976) 57 CA3d 444, 129 CR 216, overruled on other grounds in *Palma v U.S. Indus. Fasteners* (1984) 36 C3d 171, 203 CR 626). See generally *Campbell v Residential Rent Stabilization & Arbitration Bd.* (1983) 142 CA3d 123, 190 CR 829 (general analysis of term "arbitrary and capricious"). An error by an official, even if clearly erroneous, does not rise to the level of arbitrary and capricious conduct. *American President Lines, Ltd. v Zolin* (1995) 38 CA4th 910, 934, 45 CR2d 370.

The issue of arbitrary action must be brought before the trial court during trial. *Plumbing, Heating & Piping Employers Council v Quillin* (1976) 64 CA3d 215, 220, 134 CR 332. It should be argued that Govt C §800 requires affirmative evidence produced specifically on the issue. When only issues of law have been determined at trial, the factual finding required by §800 has not been made regardless of the allegations of the complaint.

PRACTICE TIP 1: Analyze the type of action at issue in the complaint.. Although it can be argued that everything done by a public agency is by definition "administrative," a good argument can be made that the term "administrative" in Govt C §800 refers to quasi-judicial actions. The language of the statute refers to "award, finding or other determination of any administrative proceeding," which sounds quasi-judicial rather than legislative. For example, the court in *Traverso v People ex rel Dep't of Transp.* (1996) 46 CA4th 1197, 1211, 54 CR2d 434, held that the denial of a permit was not administrative within the meaning of Govt C §800 because there was no hearing involved. The court in *Gustafson v Zolin* (1997) 57 CA4th 1361, 1363, 67 CR2d 645, held that a letter from a Department of Motor Vehicle's safety officer did not constitute an administrative proceeding.

PRACTICE TIP 2: Analyze whether or not the proceeding is brought under the Government Code or other provision of state law. In *Olson v Hickman* (1972) 25 CA3d 920, 923, 102 CR 248, the court found that a proceeding under a provision of the charter of Sacramento County was "under state law" for the purposes of Govt C §800. Although the court cited several authorities for this proposition, it may have stretched the intent of the language; thus, despite *Hickman*, counsel may want to argue the "state law" requirement, particularly when the case arises from proceedings under a charter or internal personnel rule in a general law city.

© The Regents of the University of California

§13.158 2. Attorney Fees in Civil Rights Actions

A successful party to a 42 USC §1983 claim is ordinarily entitled to recover reasonable attorney fees. 42 USC §1988. See §13.149. California statutes also provide for reasonable attorney fees incurred in vindicating civil rights protected under federal or state law. CC §52.1(h). See also CCP §1021.5 (authorizing fees under private attorney general doctrine).

NOTE: Although §1988 speaks in terms of the "prevailing party," a prevailing defendant can secure an award of its fees only if the plaintiff's action was frivolous, unreasonable, or without foundation. See, *e.g., Hughes v Rowe* (1980) 449 US 5, 14, 66 L Ed 2d 163, 101 S Ct 173 (applying same standard under §1988); *Christiansburg Garment Co. v EEOC* (1978) 434 US 412, 421, 54 L Ed 2d 648, 98 S Ct 694 (Title VII). Bad faith on the part of the plaintiff is not a prerequisite to award of attorney fees in favor of the prevailing defendant. *Puglisi v Underhill Park Taxpayer Ass'n* (SDNY 1997) 964 F Supp 811, 815. However, CCP §1021.7 permits an award of reasonable attorney fees to a defendant peace officer for an action not filed or maintained in good faith.

© The Regents of the University of California

§13.159 a. What Constitutes Successful Party

To be entitled to fees, the "success" need not be complete; a "partial" victory is enough to trigger a fee award. See, *e.g., Hensley v Eckerhart* (1983) 461 US 424, 436, 76 L Ed 2d 40, 103 S Ct 1933. The California rule may be broader than the federal rule. See *Harbor v Deukmejian* (1987) 43 C3d 1078, 1103, 240 CR 569. However, "nominal" success ($1) may be insufficient to warrant an award under 42 USC §1988. *Farrar v Hobby* (1992) 506 US 103, 114, 121 L Ed 2d 494, 113 S Ct 566 (when plaintiff recovers only nominal damages, reasonable attorney fee is usually no attorney fee); *Romberg v Nichols* (9th Cir 1995) 48 F3d 453, 455, cert denied (1995) 516 US 943.

Under the doctrine of supplemental jurisdiction, a federal court with jurisdiction over a federal claim may exercise jurisdiction over a related state law claim. *United Mine Workers v Gibbs* (1966) 383 US 715, 725, 16 L Ed 2d 218, 86 S Ct 1130, superseded by statute as stated in *Grube v Miller* (ED Mich 2009) 2009 US Dist Lexis 117907. If the plaintiff prevails on a supplemental state claim that shares a nucleus of operative facts with a §1983 claim, an award of attorney fees under §1988 may be appropriate. Compare *Carreras v City of Anaheim* (9th Cir 1985) 768 F2d 1039 (fees awarded), with *Rinker v County of Napa* (9th Cir 1987) 831 F2d 829 (fees denied).

An unadjudicated fee-supporting claim supports an award for attorney fees under §1983 if: (1) the fee-supporting claim is not "wholly insubstantial"; and (2) the fee-supporting claim arises from a common nucleus of facts as a successful adjudicated claim. *Gerling Global Reinsurance Corp. v Garamendi* (2005) 400 F3d 803, 808.

PRACTICE TIP 1: A plaintiff who loses on all federal claims is not eligible for an attorney fee award. See *Bogan v Sandoval County Planning & Zoning Comm'n* (1994) 119 NM 334, 335, 890 P2d 395.

PRACTICE TIP 2: In defending a federal claim, particularly a First Amendment challenge to an ordinance, or challenges to an ordinance under federal law, if you believe the plaintiff's claims have merit, consider amending the ordinance early on in the litigation to "fix" the invalidity, thereby making the matter moot, obtaining a dismissal of the action, and cutting off, or even eliminating, attorney fees that might otherwise be awarded. See *Buckhannon Bd. & Care Home, Inc. v West Virginia Dep't of Health & Human Servs.* (2001) 532 US 598, 603, 149 L Ed 2d 855, 121 S Ct 1835 ("prevailing party" is one who has been awarded some relief by court; defendant's voluntary change in conduct, although perhaps accomplishing what plaintiff sought to achieve by suit, lacks necessary judicial imprimatur on change to make petitioner "prevailing party," and thus entitled to award of attorney fees).

© The Regents of the University of California

Source: General Interest/The California Municipal Law Handbook/13 Liability and Litigation/§13.160 b. Calculating Attorney Fees Awards

§13.160 b. Calculating Attorney Fees Awards

The attorney fees are typically based on the reasonable number of hours spent multiplied by the reasonable hourly rate. *Pennsylvania v Delaware Valley Citizens' Council for Clean Air* (1986) 478 US 546, 565, 92 L Ed 2d 439, 106 S Ct 3088. This calculation is commonly known as the "lodestar" figure.

Courts also consider the reasonableness of the award. Relevant factors include (*Blanchard v Bergeron* (1989) 489 US 87, 92 n5, 103 L Ed 2d 67, 109 S Ct 939):

- Time and labor required,
- Novelty and difficulty of the questions,
- Skill requisite to perform the legal service properly,
- Preclusion of other employment by the attorney due to accepting the case,
- Customary fee,
- Whether the fee is fixed or contingent,
- Time limitations imposed by the client or other circumstances,
- Amount involved and the results obtained,
- Experience, reputation, and ability of the attorneys,
- "Undesirability" of the case,
- Nature and length of the professional relationship with the client, and
- Awards in similar cases.

In an appropriate case, a lodestar fee can be adjusted upward by a multiplier or fee enhancement. However, such an adjustment is unusual and should not be granted easily. See *Delaware Valley Citizens' Council for Clean Air,* 478 US at 565 (strong presumption against lodestar enhancement); *Hensley v Eckerhart* (1983) 461 US 424, 434, 76 L Ed 2d 40, 103 S Ct 1933 (lodestar ordinarily suffices). Fee enhancements are available only in "rare" cases based on "unusual" success. See *Blum v Stenson* (1984) 465 US 886, 899, 79 L Ed 2d 891, 104 S Ct 1541. Multipliers are generally not available simply to offset the contingent risk of losing. *City of Burlington v Dague* (1992) 505 US 557, 566, 120 L Ed 2d 449, 112 S Ct 2638. But see *Guam Soc'y of Obstetricians & Gynecologists v Ada* (9th Cir 1996) 100 F3d 691, 697, cert denied (1996) 522 US 949 (successful constitutional challenge to Guam's antiabortion statute; multiplier of 2.0 upheld given extreme undesirability of case, likelihood that no other attorney in jurisdiction would have accepted it, and its rare and exceptional nature).

In making a fee award, courts may consider proportionality, *i.e.,* whether the fees awarded bear some relationship to the monetary relief obtained. *Farrar v Hobby* (1992) 506 US 103, 121 L Ed 2d 494, 113 S Ct 566 (one dollar nominal damages awarded did not support attorney fee award). However, there is no per se rule. See *City of Riverside v Rivera* (1986) 477 US 561, 574, 91 L Ed 2d 466, 106 S Ct 2686 (damages of $33,000 do not limit fee award in excess of $245,000).

NOTE: Section 1988 (42 USC §1988) does not invalidate contingent-fee contracts that require a prevailing plaintiff to pay his or her attorney more than the statutory award. *Venegas v Mitchell* (1990) 495 US 82, 90, 109 L Ed 2d 74, 110 S Ct 1679.

On challenging the amount claimed, see *Hensley v Eckerhart* (1983) 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933; *Harman v City & County of San Francisco* (2006) 136 CA4th 1279, 1313, 39 CR3d 589 (fees should be adjusted to reflect plaintiff's limited success in litigation); *Harris v McCarthy* (9th Cir 1986) 790 F2d 753 (hourly rate); *Calhoun v Acme Cleveland Corp.* (1st Cir 1986) 801 F2d 558 (billing records); *Copeland v Marshall* (Copeland III) (DC Cir 1980) 641 F2d 880.

PRACTICE TIP 1: When faced with an attorney fee claim, it is important to review all billing records and statements to make sure such fees and costs are properly recoverable, were properly billed in the pending action, and were reasonable in amount. It may be necessary to conduct additional discovery as to the amount billed and the

reasonableness of any billing. It may also be necessary to retain an outside expert or consultant regarding reasonableness, standard practices, and standard rates within the jurisdiction. This expert or consultant can submit a declaration to the court in support of any challenge to the fees or costs. Additionally, if fees or costs are challenged, it is important that any objections be as specific as possible.

PRACTICE TIP 2: There is no prohibition against negotiating both the merits and attorney fees at the same time, and a party may condition one on the other, or interrelate them. *Evans v Jeff D.* (1986) 475 US 717, 89 L Ed 2d 747, 106 S Ct 1531.

PRACTICE TIP 3: Be sure to settle the merits and the fees. Do not let one dangle behind. See *Willard v City of Los Angeles* (9th Cir 1986) 803 F2d 526, 527 (settlement of both damages and fees is binding). It is important to avoid the possibility of settling the merits only to face a large fee claim.

PRACTICE TIP 4: Consider an offer of judgment under Fed R Civ P 68 (federal court) or CCP §998 (state court). An offer of judgment that includes attorney fees and costs may limit or cut off entitlement to attorney fees incurred after the date of the offer if the eventual recovery is less than the offer. *Marek v Chesny* (1985) 473 US 1, 11, 87 L Ed 2d 1, 105 S Ct 3012; *Erdman v Cochise County* (9th Cir 1991) 926 F2d 877, 879 (defendant unsuccessfully argued that Rule 68 offer of $7500 "with costs now accrued" did not include attorney fees). Further, a prevailing civil rights plaintiff must pay the opponent's costs and attorney fees after refusing to accept a pretrial offer of judgment that exceeds the amount ultimately recovered at trial. *O'Brien v City of Greers Ferry* (9th Cir 1989) 873 F2d 1115, 1118; *Crossman v Marcoccio* (1st Cir 1986) 806 F2d 329, 333.

© The Regents of the University of California

§13.161 3. Attorney Fees in Eminent Domain, Inverse Condemnation, and Mandamus Actions

Code of Civil Procedure §1250.410 permits a property owner to seek recovery of litigation expenses, including costs, attorney fees, and expert witness fees, following the entry of judgment in an eminent domain action. The court may award reasonable litigation expenses if it finds that the settlement offer of the public entity "was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding." CCP §1250.410(b). The court's analysis is based on the final offer and final demand that the parties must file at least 20 days prior to trial on issues relating to compensation. CCP §1250.410(a), (d). Owners cannot recover litigation expenses if they fail to file a timely final demand. Section 1250.410 does not allow the public entity to recover any of its litigation expenses. *Redevelopment Agency v Salvation Army* (2002) 103 CA4th 755, 773, 127 CR2d 30.

Under the provisions of CCP §1036 on inverse condemnation proceedings,

> the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of the proceeding, shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding.

On attorney fees in mandamus actions, see generally Govt C §800; *Ellerbroek v Saddleback Valley Unified Sch. Dist.* (1981) 125 CA3d 348, 358, 177 CR 910. Attorney fees may be awardable in some mandamus actions under the private attorney general doctrine and CCP §1021.5. See §§13.163-13.165.

© The Regents of the University of California

§13.162 4. Attorney Fees in Other Actions

Attorney fees are also provided for in certain other actions, including:

- **Low- and moderate-income housing.** Action undertaken against a public entity for the primary purpose of delaying a low- or moderate-income housing project may subject a non-prevailing plaintiff to a claim for attorney fees. Govt C §65914.
- **Frivolous appeals.** Taking an appeal when a reasonable attorney would agree that the appeal is totally and completely without merit may create a claim for attorney fees by the opposing party. See *Maple Props. v Harris* (1984) 158 CA3d 997, 1008, 205 CR 532, cert denied (1985) 470 US 1054.
- **Political Reform Act.** On recovering costs of litigation to compel compliance with the Political Reform Act (Govt C §91003), see *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 993, 242 CR 272; chap 2.
- **The Ralph M. Brown Act and California Public Records Act.** Attorney fees may also be awarded in cases alleging violations of the Ralph M. Brown Act (Govt C §54960.5) and/or the California Public Records Act (Govt C §6259(d)). See also *Galbiso v Orosi Pub. Util. Dist.* (2008) 167 CA4th 1063, 1084, 84 CR3d 788; chap 2.
- **Contract claims.** A prevailing party may recover attorney fees for actions on a contract, if the contract provides for recovery of fees. CC §1717.

PRACTICE TIP: California is one of the most liberal states in enacting statutes authorizing attorney fees awards. On California fee-shifting statutes, see California Attorney Fee Awards, chap 3 (3d ed Cal CEB 2010). In addition, most federal civil rights acts now contain attorney fees provisions.

© The Regents of the University of California

§13.163 5. Private Attorney General Doctrine/CCP §1021.5

On a motion, a court may award attorney fees to a successful party in any action that has resulted in the enforcement of an important right affecting the public interest if:

- A significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons,
- The necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, make the award appropriate, and
- Such fees should not, in the interest of justice, be paid out of any recovery.

CCP §1021.5. See *Woodland Hills Residents Ass'n. v City Council* (1979) 23 C3d 917, 935, 154 CR 503; *Beach Colony II Ltd. v California Coastal Comm'n* (1985) 166 CA3d 106, 110, 212 CR 485. See also *Grimsley v Board of Supervisors of San Benito* (1985) 169 CA3d 960, 966, 213 CR 108 (suggesting that to be entitled to attorney fee award under §1021.5, plaintiff must first have asked public entity to take appropriate action before filing action).

With respect to public agencies, CCP §1021.5 applies "to allowances against, but not in favor of, public entities," and generally no claim may be required to be filed for such fees. However, §1021.5 may allow a public entity to recover attorney fees in an action against another public entity, including a successful action under the California Environmental Quality Act (CEQA) (Pub Res C §§21000-21177), if §1021.5's conditions are satisfied. See, *e.g., County of Colusa v California Wildlife Conserv. Bd.* (2006) 145 CA4th 637, 647, 52 CR3d 1.

A party seeking fees under §1021.5 must file a motion in compliance with the timing requirements of Cal Rules of Ct 3.1702.

NOTE: Attorney fees also may be available under the common fund and substantial benefit rules, which are nonstatutory equitable bases for an award of attorney fees. *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 994, 165 CR 514. For a thorough description of both theories, see *Abouab v City & County of San Francisco* (2006) 141 CA4th 643, 46 CR3d 206.

For discussion of the private attorney general statute, see California Attorney Fee Awards, chap 3 (3d ed Cal CEB 2010).

© The Regents of the University of California

§13.164 a. What Constitutes Prevailing or Successful Party

To claim fees under the private attorney general statute (CCP §1021.5), one must be a successful or prevailing party. *Bowman v City of Petaluma* (1986) 185 CA3d 1065, 1085, 230 CR 413. The focus is on the impact of the action in achieving the desired result, not on the manner of its resolution. See *Sagaser v McCarthy* (1986) 176 CA3d 288, 315, 221 CR 746 (attorney fees awarded even though case dismissed as moot, when desired result of litigation achieved by other means, *e.g.,* legislative change); *Coalition for Economic Survival v Deukmejian* (1985) 171 CA3d 954, 961, 217 CR 621. See also *Graham v DaimlerChrysler Corp.* (2004) 34 C4th 553, 560, 21 CR3d 331 (plaintiff may be awarded attorney fees when case dismissed as moot if defendant substantially changed its behavior because of, and in manner sought by, litigation, as long as lawsuit had some merit and plaintiff engaged in reasonable attempt to settle before litigation).

NOTE: Defendant may be awarded fees under CCP §1021.5 if the fees meet the requirements of the private attorney general statute. See, *e.g., County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 866 n11, 223 CR 846.

© The Regents of the University of California

§13.165 b. How to Calculate Amount of Award

Computation of the amount of the award under CCP §1021.5 is within the sound discretion of the trial court and will not be disturbed on appeal unless there is an abuse of discretion; the award must be clearly wrong because the experienced trial judge can best determine the value of the professional services provided in that judge's court. *Downey Cares v Downey Community Dev. Comm'n* (1987) 196 CA3d 983, 993, 242 CR 272.

In determining a fee award under CCP §1021.5, the trial court must first determine a touchstone or lodestar amount based on the time spent and the reasonable hourly compensation for each attorney. *Californians for Responsible Toxics Mgmt. v Kizer* (1989) 211 CA3d 961, 970, 259 CR 599. Next, the trial court has discretion to increase or reduce the lodestar by applying a positive or negative multiplier based on numerous factors or circumstances. These include (*Lucchesi v City of San Jose* (1980) 104 CA3d 323, 336, 163 CR 700):

(1) the novelty and difficulty of the questions involved and the skill displayed in presenting them;

(2) the extent to which the nature of the litigation precluded other employment by the attorneys;

(3) the contingent nature of fee awards;

(4) the fact that the award against a city could ultimately fall on taxpayers;

(5) the fact that the attorneys did not receive public or charitable funding for the purpose of bringing the action; and

(6) the fact that the award would inure to the benefit of the attorneys involved.

Attorney fees awarded to a public entity under CCP §1021.5 cannot be increased or decreased by a multiplier based on extrinsic circumstances. See CCP §1021.5, second paragraph (citing *Serrano v Priest (Serrano III)* (1977) 20 C3d 25, 141 CR 315, which discussed history of traditional bases for fee-shifting—common fund, substantial benefit, and private attorney general—that ultimately resulted in adoption of CCP §1021.5).

NOTE: California follows an independent state rule with respect to the award of attorney fees. Federal cases are referred to for "analogous precedential value." *Serrano v Unruh* (1982) 32 C3d 621, 639 n29, 186 CR 754. California law with respect to the award of attorney fees under CCP §1021.5 is based on pre-*Alyeska* federal case law (referring to *Alyeska Pipeline Serv. Co. v Wilderness Soc'y* (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612). *Woodland Hills Residents Ass'n v City Council* (1979) 23 C3d 917, 934, 154 CR 503; *Beasley v Wells Fargo Bank* (1991) 235 CA3d 1407, 1420, 1 CR2d 459, overruled on other grounds in *Olsen v Auto. Club of S. Cal.* (2008) 42 C4th 1142, 74 CR3d 81. Many of the principles involved in the entitlement to attorney fees under CCP §1021.5 and 42 USC §1988 are interchangeable, and one should be familiar with the principles under both theories. *Folsom v Butte County Ass'n of Governments* (1982) 32 C3d 668, 679, 186 CR 589. On fees awarded under §1988, see §§13.158-13.160.

© The Regents of the University of California

L. Right of Municipality to Recover Attorney Fees

§13.166 1. Motion for Costs and Attorney Fees Under CCP §1038

A city may recover its costs and attorney fees against a plaintiff who has brought an action in bad faith or maintained a frivolous action. CCP §1038; *Kobzoff v Los Angeles County Harbor/UCLA Med. Ctr.* (1998) 19 C4th 851, 856, 80 CR2d 803; *Knight v City of Capitola* (1992) 4 CA4th 918, 931, 6 CR2d 874. To be entitled to relief under CCP §1038, the city must have made and been granted a motion for summary judgment, judgment under CCP §631.8, or directed verdict or non-suit. CCP §1038(a).

PRACTICE TIP: The city might consider routinely seeking CCP §1038 attorney fees and costs whenever possible. The possibility that the city may seek such recovery should be noted on the city's claims rejection notices.

© The Regents of the University of California

§13.167 a. Criteria for Granting Motion

In deciding a motion for costs and attorney fees under CCP §1038, the court must determine whether the action was brought or maintained with "reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint." If the court determines that the action was brought in bad faith, the city may recover "reasonable attorneys' fees, expert witness fees, the expense of services of experts, advisers and consultants in defense of the proceeding, and where reasonably and necessarily incurred in defending the proceeding." CCP §1038(a)-(b); *Ramsey v City of Lake Elsinore* (1990) 220 CA3d 1530, 1540, 270 CR 198 (failure to dismiss after evidence showed that city did not own intersection).

© The Regents of the University of California

§13.168 b. Timing of Motion

A motion for costs and attorney fees under CCP §1038 must be made before discharge of the jury or entry of judgment. CCP §1038(c).

PRACTICE TIP: By making a motion under this section, the city waives any rights to seek damages for malicious prosecution. CCP §1038(c). This could potentially lead to a conflict in the representation of both the city and a public employee should the employee desire to pursue a malicious prosecution action and the city desire to recover its costs of defense. Presumably, however, a separate motion for costs could be made on behalf of the city, leaving the employee's right to a malicious prosecution action intact.

© The Regents of the University of California

§13.169 2. Motion for Sanctions Under CCP §128.5

A city may avail itself of CCP §128.7 and seek to recover sanctions, including attorney fees and other expenses, if an action or motion is brought for an improper purpose, is frivolous, or lacks evidentiary support. CCP §128.7. For federal actions, Fed R Civ P 11 contains similar sanction provisions.

PRACTICE TIP: Both CCP §128.7 and Fed R Civ P 11 contain special notice and filing requirements that must be consulted and strictly observed. These include providing the offending party with notice and an opportunity to correct any defect. See CCP §128.7 (c), Fed R Civ P 11(c).

© The Regents of the University of California

§13.170 3. Discovery Costs

Under the Civil Discovery Act (CCP §§2016.010-2036.050), the court must impose sanctions against the losing party to a discovery motion unless the losing party can show that it acted with substantial justification or that the circumstances make the imposition of sanctions unjust. See, *e.g.,* CCP §2031.310(h). The sanctions may equal the attorney fees spent in successfully bringing or opposing the discovery motion.

PRACTICE TIP: Most discovery provisions require parties to meet and confer prior to bringing a motion to compel; failure to do so may result in sanctions. CCP §2023.020. Although the meet and confer requirement may not apply if a party fails to provide any response or objection to a discovery request (see, *e.g.,* CCP §2031.300(b)), a letter or telephone call is often advisable to avoid having to make an unnecessary motion.

© The Regents of the University of California

§13.171 4. Implied Indemnity

A city that prevails on a claim for implied indemnity may, under specific conditions, be entitled to an award of attorney fees. CCP §1021.6. On implied indemnity, see §§7.310-7.311.

© The Regents of the University of California

§13.172 5. Contract Claims

A prevailing city may recover attorney fees for actions on a contract if the contract provides for recovery of fees. CC §1717. See, *e.g.*, *Carr Bus. Enters. Inc. v City of Chowchilla* (2008) 166 CA4th 14, 82 CR3d 128.

© The Regents of the University of California

VI. ACTIONS BROUGHT BY MUNICIPALITY

§13.173 A. Municipality As Plaintiff

Cities "may sue and be sued." Govt C §34501. "Plaintiff" is defined as "a person who files a complaint or cross-complaint." CCP §481.180. "A person" includes a public entity. CCP §481.170. See *City of Sanger v Superior Court* (1992) 8 CA4th 444, 448, 10 CR2d 436 (holding that city is "a person" who can sue for punitive damages). But compare *City of Los Angeles v Shpegel-Dimsey, Inc.* (1988) 198 CA3d 1009, 1025, 244 CR 507 (holding to contrary), with *City of Glendale v Superior Court* (2002) 95 CA4th 1266, 1270, 116 CR2d 16 (same appellate district expressing disagreement with and limiting *City of Los Angeles* bar against punitive damages to facts in which city could have imposed criminal sanctions for same behavior).

© The Regents of the University of California

§13.174 B. Equitable Estoppel Defense as Applied to Municipalities

The equitable defense of estoppel is sometimes asserted by a defendant against a city plaintiff when the defendant claims detrimental reliance on actions or representations by the city. Estoppel may be "invoked against a government entity in 'exceptional cases' when 'justice and right require it.' " *Goodwill Indus. v County of Los Angeles* (1953) 117 CA2d 19, 26, 254 P2d 877. See *City of Long Beach v Mansell* (1970) 3 C3d 462, 501, 91 CR 23. In the land use context, in the absence of exceptional circumstances, estoppel will not apply to circumvent land use restrictions even when the landowner relies on the public agency's express representation that the landowner's plans comply with the agency's requirements or when the agency simply fails to take early action to warn the landowner that the plans violate land use requirements. *Golden Gate Water Ski Club v County of Contra Costa* (2008) 165 CA4th 249, 262, 80 CR3d 876.

Actions taken by a public agency or officer without authority are invalid and cannot be the subject of ratification or estoppel. *City of Pasadena v Estrin* (1931) 212 C 231, 236, 298 P 14; *Foxen v City of Santa Barbara* (1913) 166 C 77, 82, 134 P 1142. See *South Bay Senior Hous. Corp. v City of Hawthorne* (1997) 56 CA4th 1231, 1235, 66 CR2d 99 (contract void when city lacked authority to enter into it; city can have no liability on void contract). See also *Landberg v Landberg* (1972) 24 CA3d 742, 758, 101 CR 335 (estoppel "is not favored by the courts, and it is incumbent upon one who advances it to prove its dominant essentials, leaving nothing to surmise or questionable inference").

© The Regents of the University of California

§13.175 1. General Elements of Estoppel

The general elements of estoppel are as follows (*City of Long Beach v Mansell* (1970) 3 C3d 462, 489, 91 CR 23):

- The party to be estopped must be apprised of the facts;
- The party to be estopped must intend that its conduct will be acted on or must act so that the party asserting estoppel had a right to believe it was so intended;
- The party asserting estoppel must be ignorant of the true state of facts; and
- The party asserting estoppel must rely on the conduct to its injury.

PRACTICE TIP: Applicable elements of estoppel should be analyzed on a case-by-case basis. For example, in *Mansell* it was noted that an estoppel with respect to the title of property requires that the party pressing the estoppel was not only destitute of all knowledge of the true state of the title, but also of the means of acquiring such knowledge. 3 C3d at 490.

© The Regents of the University of California

§13.176 2. Application of Estoppel Defense Against Cities Depends on Two Additional Factors

In addition to the four traditional elements of estoppel (see §13.175), courts are to consider two policy factors in determining whether to apply estoppel against a public entity (*City of Long Beach v Mansell* (1970) 3 C3d 462, 493, 91 CR 23):

(1) Whether "justice and right" compel the application of estoppel; and

(2) Whether the application of estoppel would nullify a strong rule of policy adopted for the public benefit.

See *City of South San Francisco v Cypress Lawn Cemetery Ass'n* (1992) 11 CA4th 916, 923, 14 CR2d 323; *Penn-Co v Board of Supervisors* (1984) 158 CA3d 1072, 1080, 205 CR 298.

© The Regents of the University of California

§13.177 3. Cases Considering Application of Estoppel Defense to Municipalities

Cases in which courts have found that equitable estoppel does not apply to a municipality include:

- *Golden Gate Water Ski Club v County of Contra Costa* (2008) 165 CA4th 249, 262, 80 CR3d 876 (estoppel did not bar county from compelling property owner to remove structures constructed without permit).
- *Poway Royal Mobilehome Owners Ass'n v City of Poway* (2007) 149 CA4th 1460, 1471, 58 CR3d 153 (promissory estoppel unavailable to compel sale of mobile home park to owners' association and tenants based on alleged promise to sell).
- *Smith v County of Santa Barbara* (1992) 7 CA4th 770, 774, 9 CR2d 120 (county not estopped from revoking erroneously issued permit for construction of telephone microwave station).
- *Chaplis v County of Monterey* (1979) 97 CA3d 249, 260, 158 CR 395 (estoppel did not operate to allow developer to proceed on invalid and erroneously issued septic permit).
- *Pettitt v City of Fresno* (1973) 34 CA3d 813, 819, 110 CR 262 (city not estopped to deny validity of building permit that violated zoning code, even though applicant spent considerable funds in reliance on erroneously issued building permit).

Cases in which courts have applied equitable estoppel to a municipality include:

- *Ocean Servs. Corp. v Ventura Port Dist.* (1993) 15 CA4th 1762, 1776, 19 CR2d 750 (correspondence and verbal assurances estopped entity from raising defense of untimeliness of government claim).
- *Wilson v City of Laguna Beach* (1992) 6 CA4th 543, 558, 7 CR2d 848 (when state and local policy pronouncements concerning second units conflicted, court looked to state law policy of encouraging such residential units, despite city's contrary policy pronouncements).
- *Anderson v City of La Mesa* (1981) 118 CA3d 657, 660, 173 CR 572 (house built in good faith reliance on building permit, but having 2½-foot encroachment into setback justified estoppel against city from denying zoning variance).

For a compilation of cases applying the estoppel doctrine to government in various factual situations, see Jenkins & Wiener, A Compilation of Recent Cases Applying the Estoppel Doctrine to Government (presented at City Attorney's Department, League of California Cities, Fall Annual Conference, 1988).

© The Regents of the University of California

§13.178 C. Application of Claims Statute to Suit by One City Against Another Public Entity

Generally, a city is exempt from the claims-filing requirement for suits against another local public entity. Govt C §905(i). However, there is no express exemption for city claims against the State of California, and the safer and more conservative practice is to submit a claim. Compare Govt Code §905(i) ("Claims *by* the state or by a state department or *by* another local public entity" and "*against* local public entities" (emphasis added) are exempt from the claims statute) with Govt Code §905.2 (claim against state must be filed for claim for "money or damages on express contract, or for an injury for which the state is liable" and containing no express exemption for claims by public agencies). Additionally, Govt C §935 authorizes the adoption of local claim procedures. Thus, it is risky for a city to simply assume that it need not comply with any claim requirement when suing another public entity. The charters, ordinances, and administrative regulations of the other agency must be reviewed. See *City of Ontario v Superior Court* (1993) 12 CA4th 894, 898, 16 CR2d 32. On local claims requirements, see §§13.39-13.41.

© The Regents of the University of California

§13.179 D. Indemnity Actions by Municipalities

For a discussion of the relationship between the right to indemnity under an agreement and indemnity under the doctrine of equitable indemnification, see *County of Riverside v Loma Linda Univ.* (1981) 118 CA3d 300, 314, 173 CR 371.

© The Regents of the University of California

§13.180 1. Express (Contractual) Indemnification

The rules and limitations governing express indemnity are contractual. The parties have freedom to establish the indemnity arrangement, but the contractual language is subject to established rules of construction. See, *e.g., E.L. White, Inc. v City of Huntington Beach* (1978) 21 C3d 497, 507, 146 CR 614. For a case of particular interest to cities involving a contractual indemnity provision, see *City of Los Angeles v Japan Air Lines Co.* (1974) 41 CA3d 416, 116 CR 69 (discussion of scope of contractual indemnity clauses in government contracts). On the factors affecting the interaction between an express indemnity granted by a city and the constitutional debt limitation provisions of Cal Const art XVI, §18, see 19 Ops Cal Atty Gen 21 (1950). See also *Doland v Clark* (1904) 143 C 176, 76 P 958 (discussion of debt limitation and contingent future liability). On the duty to indemnify, see §13.87.

Contractual indemnity for design professionals, however, is limited by statute. Civil Code §2782.8 provides that, for any contract entered into on or after January 1, 2007, with a public agency for design professional services, provisions for indemnity and defense are "unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional."

© The Regents of the University of California

§13.181 2. Joint Powers Agreements

For specific provisions dealing with tort liability between public agencies when they have entered into a joint powers agreement, see Govt C §§895-895.8. See also California Government Tort Liability Practice §4.56 (4th ed Cal CEB 1999).

The general rule is that members of a joint powers authority are jointly and severally liable for injuries arising out of the authority's activities. Govt C §895.2. See also Govt C §6508.1 (allowing agreement creating authority to specify whether agency's debts, liabilities, and obligations will be debts, liabilities, and obligations of members of agreement).

© The Regents of the University of California

§13.182 3. Equitable Indemnity

"An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several." CC §1431. However, "[i]n any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint." CC §1431.2(a).

Pre-Proposition 51 (CC §1431.2) principles continue to apply to the apportionment of economic damages. See *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 586, 146 CR 182. Liability may be apportioned between a strictly liable defendant and a negligent defendant as well as between multiple negligent defendants. *Safeway Stores, Inc. v Nest-Kart* (1978) 21 C3d 322, 327, 146 CR 550. Liability may be apportioned between negligent and intentional tortfeasors. *Weidenfeller v Star & Garter* (1991) 1 CA4th 1, 6, 2 CR2d 14. A post-judgment claim for contribution is unaffected by an unsuccessful attempt to establish a right to comparative or equitable indemnification. *Coca-Cola Bottling Co. v Lucky Stores, Inc.* (1992) 11 CA4th 1372, 1379, 14 CR2d 673.

A municipality's indemnification rights are also subject to CCP §877, which provides that a good faith settlement exonerates the settling defendant from any liability to indemnify non-settling parties. *City of Sacramento v Gemsch Inv. Co.* (1981) 115 CA3d 869, 873, 171 CR 764. But see *Kantor v Housing Auth. of Fresno County* (1992) 8 CA4th 424, 429, 10 CR2d 695 (good faith settlement of personal injury action did not resolve indemnity claim on contract or statute). See also *Espinoza v Machonga* (1992) 9 CA4th 268, 276, 11 CR2d 498 (after Proposition 51 (CC §1431.2), portion of settlement attributable to non-economic damages is not subject to set-off against non-economic damages attributable to non-settling defendant).

A city that has been sued for inverse condemnation may cross-complain against a third party (including a public agency) for equitable indemnity. *County of San Mateo v Berney* (1988) 199 CA3d 1489, 1494, 245 CR 738.

© The Regents of the University of California

§13.183 E. Subrogation Actions by Municipalities

The principles applicable to subrogation actions are generally the same for indemnity actions (see §§13.179-13.182). In most instances, a city held liable for an employee's tort is precluded by statute to seek indemnification from the culpable employee or the employee's insurer. Govt C §825.4; *Pacific Indem. Co. v American Mut. Ins. Co.* (1972) 28 C3d 983, 990, 105 CR 295. Exceptions exist when (Govt C §825.6):

- Insurance policies held by an employer and employee both provide for contribution; or
- Employee's tort was caused by fraud, corruption or malice, willful failure to cooperate in the defense of the claim, or an act outside the scope of his or her employment.

See also Govt C §§815.3 (on intentional torts of elected officials), 825, 825.6 (on recovery from elected officials); *Henriksen v City of Rialto* (1993) 20 CA4th 1612, 1632 n6, 25 CR2d 308 (Timlin, J., dissenting).

© The Regents of the University of California

F. Validation Actions Brought by Municipalities

§13.184 1. When Validation Action Is Used

Cities may bring actions to determine the validity of certain matters, including contracts, agreements, warrants, evidence of debt, and other obligations. See CCP §§860-870.5. Specific situations in which a validation action may be brought include:

- Mello-Roos Act bond issuance (see Govt C §53312.5);
- Validity of annexations (see *Hills for Everyone v Local Agency Formation Comm'n* (1980) 105 CA3d 461, 466, 164 CR 420);
- Redevelopment agency agreements (see *Graydon v Pasadena Redev. Agency* (1980) 104 CA3d 631, 645, 164 CR 56, cert denied (1980) 449 US 983; *Regus v City of Baldwin Park* (1977) 70 CA3d 968, 972, 139 CR 196. But see *Fontana Redev. Agency v Torres* (2007) 153 CA4th 902, 911, 62 CR3d 875 (holding settlement agreement that required agency to contribute redevelopment revenue to affordable housing fund was not subject to validation action);
- Community facilities bonds (see Health & S C §4624);
- Redevelopment bonds (see Health & S C §33501);
- Special district reorganizations (see Govt C §§56103, 58200);
- Municipal improvements (see Str & H C §10601); and
- Certain types of fees, capacity charges, or service charges (see Govt C §66022).

A validation action may be brought by a public agency as well as against a public agency (to challenge a governmental action). CCP §863.

NOTE: A validation action is an in rem proceeding; a judgment, if no appeal is taken or if an appeal is taken and the judgment is affirmed, is conclusive and binding against all persons. See CCP §§860, 870.

© The Regents of the University of California

§13.185 2. Validation Procedures

Validation procedures must be carefully adhered to, especially those dealing with jurisdiction, service, and publication of summons. CCP §§861-861.1, 862. See also *Environmental Coalition of Orange County v Local Agency Formation Comm'n* (1980) 110 CA3d 164, 172, 167 CR 735.

© The Regents of the University of California

§13.186 3. Legislative Validation Actions

Validating acts are adopted by the state legislature each year. See, *e.g.,* Stats 2009, ch 2 (SB 101); Stats 2009, ch 163 (SB 102); Stats 2009, ch 164 (SB 103) (First, Second, and Third Validating Acts of 2009). These acts are uncodified, two of which are typically urgency measures that validate the organization, boundaries, acts, proceedings, and bonds of the state and counties, cities, and specified districts, agencies and entities. These measures may be used to cut off challenges to local legislative acts and to establish a presumption of validity. See *Miller v McKenna* (1944) 23 C2d 774, 781, 147 P2d 531 (validity of tax proceedings; effective date of validating act); *People ex rel Amestoy Estate Co. v Van Nuys Lighting Dist.* (1916) 173 C 792, 797, 162 P 97.

© The Regents of the University of California

§13.187 4. Available Remedies

The following are remedies available in connection with the enforcement of ordinances:

- Criminal prosecutions (see §12.28-12.65);
- Misdemeanors and infractions (see §§12.28, 12.31);
- Civil injunctions (see §12.16; *IT Corp. v County of Imperial* (1983) 35 C3d 63, 196 CR 715);
- Administrative abatement proceedings (see §§12.66-12.83); and
- Civil penalties (see §§12.19-12.25).

On intergovernmental immunity (see §§1.102-1.105).

© The Regents of the University of California

List of Abbreviations

ACM	Asbestos Containing Material
ADA	Americans with Disabilities Act
ADAAG	Americans with Disabilities Act Accessibility Guidelines
ADEA	Age Discrimination in Employment Act
ALJ	Administrative Law Judge
ALUC	Airport Land Use Commission
ALUP	Airport Land Use Plan
AME	Agreed Medical Examiner
APCD	Air Pollution Control Districts
AQMD	Air Quality Management Districts
AQMP	Air Quality Maintenance Plan
ARB	Air Resources Board
BACT	Best Available Control Technology
BFOQ	Bona Fide Occupational Qualification
C&R	Compromise and Release
JPRMA	California Joint Powers Risk Management Authority
CBSC	California Building Standards Commission
CCA	Community Choice Aggregators
CDBG	Community Development Block Grants
CDWR	California Department of Water Resources
CEB	Continuing Education of the Bar
CEC	California Energy Commission
CEQA	California Environmental Quality Act
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
CERES	California Environmental Resources Evaluation System
CESA	California Endangered Species Act
CHP	California Highway Patrol
CIWMB	California Integrated Waste Management Board
CMP	Congestion Management Plan
COG	Council of Governments
COP	Certificates of Participation
COPA	Child Online Protection Act
CPCN	Certificate of Public Convenience and Necessity
CPI	Consumer Price Index

CPUC	California Public Utilities Commission
CRL	Community Redevelopment Law
CSLB	Contractors State License Board
CTO	Compensatory Time Off
CUP	Conditional Use Permit
CUPA	Certified Unified Program Agency
CVRA	California Voting Rights Act
DDA	Disposition and Development Agreement
DFEH	Department of Fair Employment and Housing
DFG	Department of Fish and Game
DHS	Department of Health Services
DIR	Department of Industrial Relations
DMV	Department of Motor Vehicles
DOL	United States Department of Labor
DOT	Department of Transportation
DTSC	Department of Toxic Substances Control
DWR	Department of Water Resources
EEOC	Equal Employment Opportunity Commission
EER	Employer-Employee Relations
EIR	Environmental Impact Report
EIS	Environmental Impact Statement (federal)
EMF	Electromagnetic Fields
ENA	Exclusive Negotiation Agreement
EPA	Environmental Protection Agency
ERISA	Employee Retirement Income Security Act
ESA	Endangered Species Act (federal)
FAA	Federal Aviation Administration
FBO	Fixed-Base Operators
FBOR	Firefighters Procedural Bill of Rights Act
FCC	Federal Communications Commission
FEHA	California Fair Employment and Housing Act
FERC	Federal Energy Regulatory Commission
FET	Federal Excise Tax
FIP	Federal Implementation Plan
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
FOIA	Freedom of Information Act
FONSI	Finding of No Significant Impact
FOS	Final Official Statement

FPPC	Fair Political Practices Commission
FVRA	Federal Voting Rights Act
FWS	United States Fish and Wildlife Service
GHG	Greenhouse Gases
GINA	Genetic Information Non-Discrimination Act
HAP	Hazardous Air Pollutants
HAVA	Help America Vote Act
HCD	Department of Housing and Community Development
HCP	Habitat Conservation Plan
HHWE	Household Hazardous Waste Element
HMF	Habitat Maintenance Funding
HWCA	Hazardous Waste Control Act
ICBO	International Conference of Building Officials
IGRA	Indian Gaming Regulatory Act
IRCA	Immigration Reform and Control Act
ISO	Independent System Operator
ISTEA	Intermodal Surface Transportation Efficiency Act
IWMA	Integrated Waste Management Act
IWMP	Integrated Waste Management Plan
JPA	Joint Powers Agency
LAFCO	Local Agency Formation Commission
LAIF	Local Agency Investment Funds
LCP	Local Coastal Program
LUP	Land Use Plan
MBE	Minority Business Enterprise
MEP	Maximum Extent Possible
MMBA	Meyers-Milias-Brown Act
MMI	Maximum Medical Improvement
MOU	Memorandum of Understanding
MS4	Municipal Separate Storm Sewer System
MTSA	Mobile Telecommunications Sourcing Act of 2000
NAAQS	National Ambient Air Quality Standards
NCCP	Natural Community Conservation Planning (or Plans)
NDFE	Nondisposal Facility Element
NEPA	National Environmental Policy Act
NESHAP	National Emission Standards for Hazardous Air Pollutants
NIGC	National Indian Gaming Commission
NLRA	National Labor Relations Act

NMFS	National Marine Fisheries Service
NOI	Notice of Intent; Net Operating Income
NPDES	National Pollution Discharge Elimination System
NSPS	New Source Performance Standards
NSR	New Source Review
NSRO	Nationally-recognized Statistical Rating Organization
NVRA	National Voter Registration Act
OMR	Office of Mine Reclamation
ONC	Office of Noise Control
OPA	Ownership Participation Agreements
OPR	Office of Planning and Research
PAC	Project Area Committee
PARMA	Public Agency Risk Managers Association
PERB	Public Employment Relations Board
PERS	Public Employees' Retirement System
POBR	Public Safety Officers Procedural Bill of Rights Act
POS	Preliminary Official Statement
POST	Peace Officer Standards and Training
POTW	Publicly-Owned Treatment Works
PRA	Political Reform Act
PSA	Permit Streamlining Act
PRIMA	Public Risk and Insurance Management Association
PURPA	Public Utilities Regulatory Policy Act
QME	Qualified Medical Examiner
RCRA	Resource Conservation and Recovery Act
RFP	Requests for Proposals
RFQ	Requests for Qualifications
RFRA	Religious Freedom Restoration Act
RHA	Rivers and Harbors Act (federal)
RHNA	Regional Housing Needs Allocation
RIF	Reductions in Force
RLUIPA	Religious Land Use and Institutionalized Persons Act
RMPP	Risk Management Prevention Plan
ROWD	Report of Waste Discharge
RWQCB	Regional Water Quality Control Boards
SARA	Superfund Amendments and Reauthorization Act
SCAQMD	South Coast Air Quality Management District
SEC	Securities and Exchange Commission
SEMS	Standardized Emergency Management System

SIP	State Implementation Plan
SIR	Self-Insured Retention
SMARA	Surface Mining and Reclamation Act
SRRE	Source Reduction and Recycling Element
SWP	State Water Project
SWRCB	State Water Resources Control Board
TCM	Transportation Control Measures
TMDL	Total Maximum Daily Load
TPA	Third Party Administrator
TSA	Transportation Security Administration
TTD	Temporarily Totally Disabled
UFAS	Uniform Federal Accessibility Standards
UST	Underground Storage Tanks
UWMP	Urban Water Management Plan
WBE	Women's Business Enterprise
WCAB	Workers' Compensation Appeals Board
WDR	Waste Discharge Requirements
WRR	Water Recycling Requirements
WSA	Water Supply Assessment

© The Regents of the University of California

The California Municipal Law Handbook
Reader Suggestion Form

Do you have a practice tip you want to share?

Do you disagree with the interpretation of a rule in this handbook?

Have you found a typographical error or bad cite?

Is there something you would like to add to the handbook?

Can you help improve the index?

Tell the League! As the Acknowledgments section indicates, this handbook is the product of more than 300 municipal attorneys' efforts. Help the League make future editions of this guide more helpful by providing your input and comments below.

.. ..

My comment relates to section _____, page _____
(please provide section number as well as page number).

Please mail this form to:

League of California Cities
ATTN: Municipal Law Handbook
1400 K Street, Suite 400
Sacramento, CA 95814

Your input will be greatly appreciated.

© The Regents of the University of California

Table of Statutes, Regulations, and Rules

CALIFORNIA

Constitution

Art I
§1: §§1.59, 4.99, 10.199
§2: §1.59
§3: §2.218
§3(b)(1): §2.36
§3(b)(2): §2.36
§4: §1.59
§7: §§1.69, 5.90, 9.81, 10.362, 10.407, 10.419, 10.431, 13.24-13.25
§8: §§1.251, 4.164
§15: §1.69
§17: §12.25
§19: §§1.22, 5.354, 8.1, 8.31, 10.362-10.363
§25: §10.345
§31: §§1.57, 4.164, 7.29
§31(a): §§4.8, 4.185, 7.28, 7.32
§31(e): §§1.96, 4.8, 7.32
§31(f): §7.32
Art II
§2: §§3.34-3.35, 3.62
§3: §3.62
§4: §3.64
§7: §5.182
§§8-9: §5.120
§§8-11: §3.80
§8(a): §3.80
§8(b): §5.120
§8(d): §3.103
§9(a): §§3.80, 3.105
§11(a): §3.80
§11(b)-(c): §3.80
§12: §3.104
§13: §3.149
§19: §3.149
Art IV: §2.223
§16: §§1.1, 1.4-1.5
§17: §§5.279-5.280
§19(c): §9.27
§19(e): §9.30
§19(f): §9.30
Art VI
§21: §7.113
Art IX
§8: §§1.59, 1.63
Art X
§2: §11.87
§§3-4: §§6.163, 10.334
§4: §10.341
Art XI: §7.170
§1(a): §1.2
§2: §§1.1, 1.3
§2(a): §§1.9, 3.149
§3: §§3.102, 8.115
: §4.34
§3(a): §1.13

§5: §§1.3, 1.28-1.29, 1.185, 5.5, 5.16, 5.35, 5.47, 5.58, 5.60-5.62, 5.266, 7.84, 7.170, 8.77, 8.80, 8.102, 8.115, 9.47, 9.65
§5(a): §1.13
§5(b): §§1.13, 3.1, 4.27
§5(b)(4): §1.209
§7: §§1.1, 1.3-1.4, 1.12, 1.15-1.17, 1.27, 1.36, 1.99, 1.230, 5.3, 5.7, 5.159, 5.297, 6.147, 9.23, 9.65, 9.71, 9.94, 9.107, 9.113, 9.157, 10.1, 10.156, 10.213, 10.232, 12.1, 12.66
§8: §7.179
§9: §§1.23, 1.25, 5.4, 5.169, 6.2, 6.120, 9.23, 10.214
§9(a): §§1.24, 6.17, 6.39
§9(b): §§1.24, 6.91
§10: §1.45
§10(a): §§4.29, 5.279-5.280, 7.250
§10(b): §4.5
§11: §1.6
§11(a): §§1.4, 5.14
§15: §5.7
§15(a): §5.7
Art XII: §6.35
§§1-9: §1.98
§3: §9.2
§7: §1.194
§8: §§1.99, 6.52
Art XIII: §§1.56, 5.7, 5.150
§1: §§5.18, 5.21
§3(a): §§5.22, 5.101
§3(b): §§5.22, 5.101
§3(d): §§5.22, 5.101
§3(d)-(e): §§5.22, 5.101
§3(f): §§5.22, 5.101
§11: §§5.22, 5.24, 5.101
§24: §§1.19-1.20, 5.6, 5.16
§25: §5.215
§25.5: §5.26
§26: §§1.56, 9.5
§26(d): §9.27
§27: §§1.56, 5.103
§28: §§1.56, 5.102, 9.5
§29: §5.30
§32: §5.56
§35: §5.29
Art XIIIA: §§1.51-1.53, 1.72, 5.8, 5.16, 5.19, 5.25, 5.60, 5.68, 5.98, 5.287, 10.221
§1: §§5.8, 5.59, 5.63, 5.98, 5.289
§1(a): §§1.52, 5.19
§1(b): §§5.8, 5.20, 5.221
§§1-4: §5.98
§2: §5.19
§4: §§5.8, 5.63, 5.69, 5.98, 5.100, 5.108, 5.119, 6.43
Art XIIIB: §§1.51, 1.53, 1.72, 1.139, 5.247, 5.281, 5.283, 5.287, 10.253
§1: §§1.53, 5.11
§2(b): §1.53
§3(b): §5.283
§3(c)(1): §1.53
§4: §§1.139, 5.283
§6: §§1.97, 5.246-5.248, 5.250, 5.256, 5.284
§6(a): §5.251
§6(b): §5.246
§8(b): §1.53
§8(c): §§1.53, 5.11, 5.282
§8(h): §1.53
Art XIIIC: 1.51, 1.54, 1.72, 3.105, 5.10, 5.16, 5.51, 5.69, 5.105, 5.110, 5.114, 5.138, 5.140, 5.143–**5.144**, 5.146-5.147, 5.149, 5.398, 6.42, 10.221
§1(a): §§5.16, 5.71, 5.111
§1(d): §§5.71, 5.73, 5.91, 5.111
§2(b): §§3.91, 5.16, 5.116
§2(c): §5.112

§2(d): §§3.92, 5.69, 5.88, 5.119
§3: §§3.91, 5.120, 5.157
Art XIIID: §§1.25, 1.51, 1.55, 5.10, 5.16, 5.51, 5.69, 5.105, 5.110, 5.114, 5.120, 5.124, 5.128, 5.137-5.138, 5.140, 5.143–**5.144**, 5.146-5.147, 5.148-5.149, 5.154, 5.162, 5.174-5.175, 5.398, 6.16, 6.42, 6.96, 10.221
§1(b): §§5.163, 5.185, 10.221
§2(b): §5.73
§2(e): §§5.174-5.175
§2(g): §5.175
§2(h): §5.175
§3: §§5.21, 5.62, 5.113
§3(a): §5.73
§3(a)(2): §5.63
§3(b): §5.186
§4: §§5.153, 5.156
§4(a): §§5.145, 5.150, 5.176
§4(b): §5.138
§4(c)-(e): §§5.140, 5.146
§4(f): §§5.74, 5.145, 5.151, 5.181, 13.6
§5: §§5.146, 5.153, 5.156
§5(a): §5.153
§5(b): §5.153
§5(c): §5.153
§5(d): §5.153
§6: §§5.175, 6.42
§6(a): §5.181, 5.183
§6(a)(1): §5.178
§6(a)(2): §5.179
§6(b): §§5.176, 5.178, 5.183
§6(b)(3): §5.176
§6(b)(4): §5.176
§6(b)(5): §§5.174-5.177, 13.6
§6(c): §§5.175, 5.180-5.183, 6.16
§6(d): §§5.176, 5.183
Art XV
§§2-3: §6.163
Art XVI
§5: §§1.59, 1.63
§6: §§1.42, 1.209, 4.33, 5.13, 5.277-5.278, 6.182, 8.40, 8.111
§16: §§1.70, 5.302, 5.394
§18: §§1.46, 5.12, 5.221, 5.264, 5.289, 5.294, 8.75, 8.77, 13.180
§19: §5.121
Art XX
§3: §1.187
§22: §§1.17, 5.34, 9.5, 9.17
Art XXXIV: §10.164

Statutes

BUSINESS AND PROFESSIONS CODE
4600-4620: §9.35
5200-5486: §§8.33, 9.141-9.142, 12.73
5230-5231: §9.141
5412: §8.33
5412.1-5412.3: §9.142
5490-5499: §12.73
5491-5493: §9.142
5491.1: §9.142
5495-5497: §9.142
5496: §9.142
5499: §9.142
5499.9: §12.22
5616: §7.194
6000-6238: §2.190
6068: §2.203
6068(e)(2): §§2.193, 2.203

6076: §2.190
7028.15(a): §7.37
7028.15(c): §7.37
7028.15(e): §7.38
7028.15(g): §7.38
7029.1: §7.37
7030.5: §7.36
7059(b): §7.36
7582: §9.37
7582-7582.28: §9.38
7582.05: §9.37
7582.1: §9.37
7582.5: §9.38
7582.5(a): §9.38
7582.5(b): §9.38
7582.5(c): §9.38
7583-7583.46: §9.39
7583.38: §9.39
11000-11200: §11.105
11010(b)(6): §11.105
16000: §§5.38, 9.2
16000-16004: §5.35
16000(b): §9.5
16000.5: §9.5
16000.7: §9.5
16001: §9.5
16001.5: §9.5
16002: §9.5
16002.1: §9.5
16002.2: §9.5
16600: §6.39
16700-17365: §6.39
16720-16770: §7.42
17000-17101: §6.39
17043: §6.39
17200: §10.112
17200-17210: §§12.10-12.12
17203: §12.12
17204: §12.11
17206: §§12.12, 12.21
17206(c): §12.21
17207: §12.12
17208: §12.11
17209: §12.12
17510.3: §9.124f
17510.7: §9.124
17800: §12.15
17800(a): §12.15
17800(b): §12.15
19800-19987: §9.29
19960-19962: §9.29
19965: §9.29
21606-21609.5: §9.46
21638: §9.36
22435-22435.13: §9.40
23300-25762: §5.214
23790: §§9.18, 10.138
23790.5: §9.20
23958: §9.21
23958.4: §9.21
24200: §9.79
25620: §9.19

CIVIL CODE
10: §3.15

44-45: §9.136
47(4)(c): §4.209
47(a): §13.111
47(b): §13.110
51: §4.168
51-51.13: §13.156
51.3: §10.176
51.7: §4.168
51.12: §10.176
52: §4.168
52(b)(2): §13.150
52.1: §13.128
52.1(a): §13.150
52.1(h): §13.158
54-54.3: §9.182
54.1-54.3: §9.182
54.1(b)(6)(A): §9.182
54.1(b)(6)(C): §9.182
56.10: §4.114
56.10(c)(8)(B): §4.114
56.20: §4.114
655: §9.158
656: §9.179
718: §6.165
718-719: §8.115
798-798.14: §9.59
798.7: §§9.52, 9.59
798.17: §§9.52, 9.59
798.21: §9.52
798.30: §9.59
798.31: §9.55
798.31-798.38: §9.59
798.33-798.37: §9.55
798.39: §9.59
798.41: §9.59
798.41-798.44: §9.55
798.44: §9.59
798.45: §§9.52, 9.59
798.49: §§9.55, 9.59
798.56: §9.59
798.70-798.83: §9.60
800-800.306: §6.173
813: §8.72
827: §9.58
831: §8.139
980: §2.256
987: §7.233
1007: §§8.70, 8.114
1008: §8.70
1009: §§8.72-8.74
1009(b): §§8.72-8.73
1009(c): §8.65
1009(d): §8.72
1009(e)-(f): §8.72
1093: §10.160
1105: §§8.139-8.140
1159-1165: §9.58
1351: §10.174
1431: §13.182
1431-1432: §13.106
1431.2: §13.182
1431.2(a): §13.182
1635: §7.200
1636-1663: §7.200
1668: §7.308

1670: §§7.68, 7.110
1714.9: §4.397
1717: §§13.162, 13.172
1785.1-1785.22: §4.216
1812.600-1812.609: §9.26
1812.600(a): §9.26
1812.600(b): §9.26
1812.604: §9.26
1816: §9.181
1942: §9.58
1945: §9.58
1947: §9.58
1947.7-1947.8: §9.58
1950.5: §9.58
1954.25-1954.31: §9.47
1954.52: §9.47
1954.52-1954.53: §9.52
1981: §9.181
2080-2080.10: §8.79
2080.4: §8.79
2100: §6.121
2168: §6.121
2773: §7.309
2774: §7.309
2775: §7.221
2778: §§7.221, 7.298, 7.306
2778(1): §7.305
2778(2): §7.305
2778(4): §7.306
2778(6): §7.305
2782: §7.313
§2782.1: §7.223
§2782.2: §7.223
§2782.5: §7.223
§2782.6: §7.223
2782(a): §§7.69, 7.223
2782(a)-(b): §§7.223, 7.300
2782(b): §§7.69, 7.223
2782.5: §7.226
2782.6: §7.313
2782.6(f): §§7.223, 7.313
2782.8: §§7.300, 7.313, 13.180
2782.96: §7.272
2783: §7.223
2784.5: §§7.224, 7.300
2807: §7.96
2808: §7.97
2819: §7.98
2929.3: §§12.74, 12.76
2929.3(a): §12.74
2929.3(a)(2): §12.75
2929.3(b): §12.74
2929.3(c): §12.75
2929.3(d): §12.75
2929.3(e): §12.76
2929.3(f): §12.76
3086: §7.119
3092: §7.119
3093: §7.119
3098: §7.118
3100: §7.2
3179-3214: §7.117
3183: §7.118
3184(a): §7.119
3184(b): §7.119

3185: §7.123
3186: §§7.121-7.122
3186-3187: §7.122
3187: §7.121
3190: §7.121
3193: §7.122
3196: §§7.121, 7.124
3197: §7.126
3198-3205: §7.126
3210: §7.127
3225: §7.98
3247: §7.59
3247-3252: §7.95
3248: §7.59
3248(d): §7.103
3249: §7.97
3262: §7.64
3263: §7.120
3263(b): §7.120
3294: §13.156
3295: §13.147
3342.5: §9.168
3369: §12.10
3426-3426.11: §2.255
3426.7(c): §2.255
3479: §§8.120, 9.114, 9.160
3479-3480: §12.3
3480: §9.115
3481: §9.116
3493: §9.115
3496: §§12.13-12.14, 12.22

CODE OF CIVIL PROCEDURE
128.7: §§13.65, 13.169
318-319: §8.70
319: §10.380
321-322: §8.70
325: §8.70
329.5: §5.152
335.1: §§4.154, 13.152
337(1): §7.307
338(a): §13.14
338(d): §13.58
340: §13.69
352(b): §13.59
352.1(b): §13.59
377.34: §13.146
382: §4.88
394(a): §7.74
411.35: §13.106
411.35(b): §13.106
425.16: §13.110
473: §§11.72, 13.73
481.170: §13.173
481.180: §13.173
631.8: §13.166
638-645.2: §7.113
731: §12.4
731-736: §8.120
803-811: §§1.188, 1.200
860: §§5.152, 13.184
860-870: §5.341
860-870.5: §§1.129, 13.184
861-861.1: §13.185
862: §13.185

863: §13.184
869: §5.341
870: §13.184
877: §13.182
877.6: §7.311
904.1: §2.262
917.8(d): §12.16
995.120: §7.103
995.120(a): §7.100
995.120(b): §7.100
995.311: §§7.99-7.101, 7.278
995.510-995.520: §7.102
995.610-995.670: §7.102
995.660: §§7.102, 7.216
995.670: §§7.102, 7.216
995.710: §7.102
998: §13.160
1021: §7.242
1021.5: §§13.158, 13.161, 13.163-13.165
1021.6: §13.171
1021.7: §13.158
1036: §13.161
1038: §§13.65, 13.166-13.168
1038(a): §13.166
1038(a)-(b): §13.167
1038(c): §13.168
1060: §13.32
1085: §§1.129, 11.75, 11.153, 13.3, 13.14
1086: §11.64
1094: §13.10
1094.5: §§1.82, 3.108, 9.56-9.57, 10.322, 11.75, 11.134, 11.153, 11.219, 13.16, 13.19, 13.23
1094.5(a): §13.16
1094.5(b): §13.17
1094.5(b)-(c): §13.18
1094.5(c): §13.20
1094.5(e): §13.21
1094.6: §13.23
1094.6(b): §13.23
1094.6(e): §13.23
1094.6(f): §13.23
1094.6(g): §13.23
1094.8: §§9.12, 9.128, 10.111, 13.23
1218: §12.17
1230.010-1273.050: §§5.354, 6.41, 8.1, 8.37
1235.130: §8.63
1240.030: §§8.41-8.42
1240.130: §8.1
1240.610: §1.106
1240.650: §6.41
1245.010-1245.060: §8.12
1245.060: §13.32
1245.230(c)(1)-(4): §8.44
1245.235: §§8.41-8.42
1245.235(b)(3): §8.41
1245.240: §§2.2, 8.43
1245.250: §§6.41, 8.42
1245.260: §8.45
1245.260(a): §8.53
1250.010-1250.310: §8.45
1250.410: §§8.60, 13.161
1250.410(a): §13.161
1250.410(b): §13.161
1250.410(d): §13.161
1250.420: §8.55
1250.430: §8.55

1255.010: §§8.46, 8.52
1255.010(b)(A)-(B): §8.46
1255.010(b)(C): §8.46
1255.030: §8.46
1255.070: §§8.46, 8.52
1255.210-1255.280: §8.48
1255.230: §8.49
1255.260: §8.50
1255.280: §8.63
1255.410: §8.47
1255.410(a): §8.54
1255.410(b): §8.54
1255.410(d)(1): §8.54
1255.410(d)(2): §8.54
1255.450: §8.53
1258.210-1258.300: §8.58
1258.210(a): §8.56
1258.210(b)(2): §8.56
1258.220: §§8.58-8.59
1258.260(a)(9): §8.46
1258.300: §8.56
1260.040: §8.61
1260.210(b): §8.62
1260.220: §8.62
1263.010-1263.770: §§8.8, 8.36
1263.025(a): §§8.8, 8.36
1263.025(b): §8.8
1263.110-1263.150: §8.47
1263.205: §8.29
1263.205-1263.270: §8.62
1263.210: §8.29
1263.310: §8.62
1263.320: §8.62
1263.410: §8.62
1263.510: §§8.14, 8.38, 8.62
1268.010: §8.63
1268.030(c): §8.64
1268.150: §8.52
1268.310: §8.51
1268.320: §8.51
1268.330(a): §8.51
1268.350: §8.51
1299.4(d): §4.348
1299.7: §§4.324, 4.342
1299.9: §§4.324, 4.342
1500-1582: §8.79
1510: §8.79
1822.50-1822.57: §12.67
1985: §4.130
1985.3-1985.4: §4.130
1985.6: §4.130
2016.010-2036.050: §13.170
2018.030: §2.254
2019.010: §13.77
2023.020: §13.170
2025.570: §2.245
2031.280: §2.229
2031.300(b): §13.170
2031.310(h): §13.170

CORPORATIONS CODE

5000-10841: §1.84
5065: §1.84
5120: §1.84
5140: §1.84

7140: §1.84
9140: §1.84
10700-10703: §6.178
14502: §9.174
14502(h)(i)(1): §9.174
14502(h)(i)(1)(A): §9.174
14503: §9.174

EDUCATION CODE
18010-18032: §5.92
81951: §10.136

ELECTIONS CODE
Div 10: §3.169
9: §3.152
100-106: §§3.84, 3.97, 3.156
102: §§3.95-3.96
103: §3.162
103-104: §3.162
104: §§3.84, 3.95, 3.156
105: §§3.85, 3.164
201: §3.33
300: §3.6
306: §3.14
320: §3.2
321: §§1.184, 3.34-3.35
324(a)(1): §5.112
334: §3.46
335.5: §3.21
348: §3.3
349: §3.33
349(a): §3.63
349(b): §3.63
353.5: §3.21
359: §§3.34-3.35
1000: §3.4
1002: §3.5
1003: §3.5
1130: §3.162
1301: §3.7
1404(a)(1): §3.90
1405: §§3.90-3.91
1405(a)(2): §3.90
1500: §§3.59, 3.61
2020-2035: §3.63
2021: §1.191
2031: §1.191
2194: §2.243
2201(c): §3.64
3017: §3.60
4000: §§3.59, 5.110, 5.116, 5.119, 5.149
4000(c)(9): §5.181
4004: §3.60
9022: §3.84
9051: §3.50
9111: §3.121
9200-9226: §3.81
9200-9247: §3.6
9201: §3.82
9202: §3.83
9203: §§2.216, 3.83
9204: §3.83
9205: §3.83
9207: §3.84
9207-9209: §3.84

9208: §3.85
9209: §§3.84, 3.96
9210: §3.85
9212: §§3.88, 3.121
9214: §§3.90, 5.120
9214-9215: §3.86
9215: §3.91
9215(b): §3.90
9217: §§1.242, 3.92
9217-9225: §3.100
9218: §3.103
9221: §3.93
9222: §3.86
9235: §3.101
9235-9247: §3.94
9237: §3.97
9238: §3.95
9238(c): §§3.84, 3.96
9239-9240: §3.97
9241: §§3.98-3.100
9242: §3.97
9243: §3.100
9247: §3.102
9255: §§3.91, 3.102
9280: §§2.216, 3.53, 3.87, 3.223
9281: §3.54
9282: §3.54
9283: §§3.54-3.55
9285: §3.56
9286: §3.54
9287: §3.55
9295(a): §3.57
9295(b)(1): §3.57
9295(b)(2): §3.57
9602: §3.84
9603: §3.14
10000-10734: §3.169
10002: §§3.2, 3.169
10100-10312: §§3.6, 3.169
10101-10312: §3.1
10103: §3.24
10201: §3.90
10202: §3.189
10220: §§3.15-3.16, 3.18
10221-10228: §§3.15, 3.18
10225: §3.15
10228: §3.17
10229: §3.12
10240: §3.19
10242: §3.20
10243: §3.20
10260: §3.22
10262: §3.26
10263-10264: §3.26
10264: §3.27
10265: §3.27
10400-10418: §3.8
10403.5(b): §3.7
11000: §3.149
11000-11007: §1.195
11000-11386: §§3.6, 3.149
11006: §3.150
11007(a): §3.150
11007(b): §3.150
11007(c): §3.150

11020: §3.152
11020(c): §3.152
11021: §§3.151, 3.153
11022: §3.154
11023: §3.152
11023(a): §3.155
11023(b): §3.155
11024: §§3.152, 3.155
11041: §3.156
11041(a): §3.156
11041(a)(2): §3.152
11042: §§3.157-3.159
11042(b): §3.154
11043: §3.156
11043.5: §3.156
11044: §3.156
11045: §3.156
11046: §3.156
11102: §3.174
11220: §§3.160, 3.163
11221: §3.161
11222: §§3.163, 3.175
11222(a): §3.163
11222(b): §3.163
11224: §3.165
11224(a): §3.164
11224(b): §3.164
11225(a): §3.164
11225(b): §3.164
11225(d): §3.164
11226: §3.165
11227: §3.165
11240: §§3.166, 3.173
11241: §3.166
11242: §3.166
11300: §3.165
11301: §3.165
11302: §3.175
11303: §3.162
11320: §3.167
11322: §3.167
11324: §3.168
11325: §3.168
11327: §3.168
11328: §§3.169, 3.173
11329: §3.169
11381: §3.171
11381(c): §3.171
11384: §3.170
11385: §§3.170, 3.172
11386: §3.173
12001: §3.5
12101: §§3.9, 3.11
12101(a): §3.10
12102: §3.10
12105: §3.13
12105.5: §3.13
12109: §3.22
12109-12110: §3.169
12110: §3.12
12111: §3.14
12286(a): §3.19
12302-12304: §3.19
13000-13317: §3.6
13103: §3.37

13104: §3.40
13105: §3.46
13107: §3.42
13107.5: §3.42
13109: §3.44
13111: §3.44
13112-13114: §3.44
13116: §3.44
13118(a): §3.41
13118(b): §3.41
13118(d): §3.41
13119: §3.50
13120: §3.50
13203: §3.38
13204: §3.43
13209: §3.45
13210: §3.43
13211: §3.39
13212: §3.47
13215: §3.48
13215-13219: §3.38
13216: §3.43
13219: §3.48
13220: §§3.38, 3.49
13247: §3.50
13303: §3.58
13307: §§3.52, 3.57, 3.168
13307-13312: §3.52
13308: §3.52
13311: §3.52
13313: §§3.52, 3.57
13313(a): §3.57
13313(b)(1): §3.57
13313(b)(2): §3.57
14000: §4.175
14000-14003: §3.6
14025-14032: §§3.74-3.75
14026(a): §3.74
14026(d): §3.75
14026(e): §§3.75-3.76
14027: §§3.74-3.75
14028(a): §3.75
14028(a)-(b): §3.76
14028(c): §§3.76-3.77
14028(d): §3.76
14028(e): §3.76
14029: §3.77
14030: §3.77
14031: §3.74
14032: §3.77
14100-14113: §3.19
14210-14443: §3.20
14310: §3.25
14310(c): §3.25
14310(d): §3.25
15000-15702: §3.21
15100-15376: §3.23
15150-15290: §3.22
15340-15342: §3.24
15360: §3.28
15600-15640: §3.28
15627: §3.28
16000-16940: §§3.6, 3.124
16100: §§3.125-3.126
16101: §3.138

16201-16202: §3.134
16203: §3.134
16204: §§3.126, 3.134
16300: §3.139
16400: §3.127
16401: §§3.127-3.128
16401(a): §3.128
16401(b): §3.128
16401(d): §3.128
16402: §3.127
16402.5: §§3.126, 3.134
16403: §3.127
16404: §3.138
16420: §3.138
16421: §3.138
16440: §3.146
16442: §3.147
16443: §3.147
16444: §3.147
16460-16467: §3.141
16461: §3.142
16462: §3.142
16464: §3.142
16465: §3.143
16466: §3.143
16467: §3.143
16500: §3.130
16501: §3.130
16502: §3.133
16503: §3.135
16520: §3.147
16521: §3.147
16540: §3.142
16600: §3.132
16601: §3.132
16602: §§3.132-3.133
16603: §3.134
16620: §3.148
16640-16641: §3.144
16642-16643: §3.144
16700: §3.134
16701: §3.134
16702: §3.136
16703: §3.134
16720: §3.148
16740: §3.144
16741-16742: §3.145
16800: §3.135
16801: §3.135
16802: §3.135
16803: §3.140
16900: §§3.136, 3.145
16920: §3.148
16940: §3.145
17100: §2.243
17200: §3.80
18000-18700: §§3.126, 3.128, 3.138, 3.146
18600: §§3.84-3.85, 3.95
18620: §3.84
18630: §3.84
18631: §3.84
20115 (former): §3.145
27310 (former): §3.167

EVIDENCE CODE

450-460: §13.9
664: §13.12
669.5: §§3.122, 10.207
669.5(b): §10.207
915(a)-(b): §2.261
915(b): §2.261
952: §2.254
954: §§2.203, 2.254
1043: §§2.230, 2.247
1045: §2.230
1046: §2.247
1060-1063: §2.255
1101: §13.142
1551: §2.269
1552: §2.254

FINANCIAL CODE
21300: §9.36

FISH AND GAME CODE
86: §11.294
200: §10.348
711.4: §§10.348-10.349, 11.54
711.4(c): §11.59
1601: §10.350
1603: §10.350
1603(f): §10.350
2050-2115.5: §§11.256-11.257, 11.288-11.289, 11.291, 11.294
2062: §11.289
2067: §11.289
2068: §11.290
2070-2079: §11.291
2071: §11.291
2073.5: §11.291
2074.2: §11.291
2074.6: §11.291
2075.5: §11.291
2076.5: §11.291
2080: §11.294
2080-2085: §11.294
2080.1(c): §11.295
2081(b): §11.295
2085: §11.290
2116: §9.178
2156: §9.177
2800-2835: §11.296
2801: §11.296
2835: §11.296
2900-2901: §11.296
5650: §11.113
5653: §10.351
5943: §10.346
12000: §11.296

FOOD AND AGRICULTURAL CODE
30501: §9.161
30501-30504: §9.162
30501-31683: §9.163
30501(a): §9.161
30501(b): §9.162
30503: §9.176
30522: §9.176
30801-30807: §9.162
30801(b): §9.162
30804.7: §9.163

30850: §9.182
30852: §9.182
30954: §9.163
30955: §9.169
31102: §9.169
31102-31103: §9.169
31103: §9.169
31104: §9.169
31105(a): §9.163
31105(b): §9.163
31106: §9.163
31107: §9.163
31108: §9.163
31108.5: §9.172
31108.5(b): §9.172
31109: §9.169
31251: §9.163
31252: §9.163
31253: §9.163
31254: §9.163
31401-31402: §9.161
31501-31508: §9.169
31602-31603: §9.164
31621: §9.165
31622: §9.165
31625: §§9.165-9.166
31645: §9.165
31646: §9.166
31683: §9.165
31751: §9.170
31751-31754: §§9.162, 9.170
31751.3: §9.176
31751.7: §9.170
31752: §§9.170, 9.172
31752.2: §9.172
31752.5: §9.170
31753: §9.171
31754: §9.172
31762: §9.176
32001: §9.175
32003: §9.175

GOVERNMENT CODE
20: §1.12
109: §2.167
244: §1.191
501(c)(3): §2.155
800: §§13.157, 13.161
800(a): §13.157
810-998.3: §§2.94, 6.138, 13.28-13.29, 13.31-13.32, 13.63, 13.67, 13.80, 13.92, 13.94, 13.143, 13.154
810.2: §13.94
810.6: §13.98
810.8: §13.32
811.6: §13.98
814: §§13.91, 13.154
815: §13.94
815(a): §13.91
815(b): §§13.91-13.92
815.2(b): §§13.91-13.92, 13.95
815.3: §§13.87, 13.155-13.156, 13.183
815.3(b): §13.109
815.4: §§7.209, 7.218, 13.94
815.6: §§7.101, 13.78, 13.92, 13.98
816: §13.93
818: §§4.266-4.267, 13.92, 13.142, 13.147, 13.156

818.2: §§13.93, 13.125
818.4: §13.93
818.6: §13.93
818.7: §13.93
818.8: §13.93
818.9: §13.93
820: §13.109
820.2: §§13.92, 13.95, 13.97, 13.125
821: §13.125
821.2: §13.125
821.5: §13.93
821.6: §13.110
825: §§13.89, 13.109, 13.143, 13.155-13.156, 13.183
825(a): §13.87
825(b): §§13.89, 13.143, 13.147, 13.156
825(b)(3): §§13.89, 13.147
825(f): §§13.87, 13.155-13.156
825.2: §13.88
825.4: §13.183
825.6: §§13.87, 13.183
825.6(a): §§13.88, 13.155
825.6(b): §§13.109, 13.143, 13.155-13.156
830-840.6: §13.99
830(a): §13.101
830(c): §13.100
830.2: §13.103
830.4: §§13.93, 13.106
830.6: §§13.93, 13.106
830.8: §§13.93, 13.106
830.9: §13.93
831: §§13.93, 13.106
831.2: §§13.93, 13.106
831.3: §13.93
831.4: §13.106
831.4(a): §13.123
831.4(a)-(b): §13.93
831.4(c): §13.93
831.7: §§13.93, 13.106
831.8: §13.93
831.21: §13.106
831.25: §§13.93, 13.106
835: §§13.99, 13.104
835(a): §13.99
835(b): §13.106
835.2(a): §13.105
835.2(b): §13.105
835.4: §13.93
835.4(a): §13.106
835.4(b): §13.106
844.6: §13.93
845: §13.93
845.2: §13.93
845.4: §13.93
845.6: §13.93
845.8(a): §13.93
845.8(b): §13.93
846: §13.93
850: §13.93
850.2: §13.93
850.4: §13.93
850.6: §13.93
850.8: §13.93
854-856.6: §13.93
854.8(d): §13.91
860.2: §13.93

866: §13.93
895-895.8: §13.181
895.2: §13.181
901: §§13.29, 13.39, 13.56, 13.58
905: §§5.93, 7.48, 13.28-13.29, 13.31-13.32, 13.40
905(a): §13.31
905(b): §13.31
905(c)-(d): §13.31
905(e): §13.31
905(f): §13.31
905(g): §13.31
905(h): §13.31
905(i): §§13.31, 13.178
905(j): §13.31
905(k): §13.31
905(l): §13.31
905.1: §13.32
905.2: §13.178
907: §5.216
910: §§5.93, 7.48, 13.43-13.44
910.2: §§13.43-13.44
910.4: §13.44
910.6(a): §13.61
910.8: §§13.42, 13.62
911: §§13.42, 13.62
911.2: §§13.56, 13.58
911.2(a): §13.55
911.3(a): §13.60
911.3(b): §13.60
911.4(b): §13.72
911.4(c)(2)-(3): §13.74
911.6: §§13.72, 13.78
911.6(a): §13.78
911.6(b): §13.72
911.6(b)(1): §13.73
911.8: §§13.78, 13.80
912.2: §13.78
912.4(a): §§13.61, 13.63
912.4(b): §13.63
912.4(b)-(c): §13.64
912.6(a)(1)-(2): §13.65
912.6(a)(4): §13.65
912.6(b): §13.65
913(a): §13.66
913(b): §13.66
913.2: §13.63
915: §§13.42, 13.46
915.2: §§13.49, 13.63
930-935.8: §7.48
930.2: §13.41
930.4: §13.41
930.6: §13.41
935: §§13.28, 13.31, 13.39-13.40, 13.152, 13.178
945-945.6: §13.152
945.3: §13.67
945.4: §13.70
945.6(a): §13.67
945.6(a)(1): §13.64
945.6(a)(2): §13.64
945.8: §13.68
946(c): §13.65
946.4(a): §§13.36-13.37
946.4(a)(1): §13.34
946.6: §§13.70, 13.72, 13.78
946.6(a): §13.79

946.6(b): §13.80
946.6(c): §13.72
946.6(c)(2): §13.29
946.6(e): §13.79
946.6(f): §13.82
950.2: §13.29
950.4: §13.29
989-991.2: §7.210
990-990.8: §7.262
990(c): §7.210
990.8: §7.262
990.8(c): §7.262
995: §§2.195, 5.291, 13.86
995-996.6: §13.143
995.2: §13.86
995.2(a): §13.143
995.2(b): §13.86
995.2(c): §13.143
995.4: §13.143
995.6: §§2.210, 13.143
995.8: §§13.109, 13.143
996: §5.291
996.4: §§13.88, 13.143
1021: §1.196
1031: §4.18
1090: §§2.162-2.165, 2.167-2.168, 2.170-2.173, 2.203, 2.209, 7.232, 7.236, 8.113
1091.1-1091.4: §2.167
1091.5: §2.167
1091.5(a)(4): §2.167
1091.5(a)(9): §2.169
1092: §§2.163, 2.172
1092(b): §2.173
1095: §2.172
1096: §2.203
1097: §§2.162, 2.172
1099: §§1.193, 2.176
1099(c): §2.177
1099(c)-(d): §2.177
1126: §2.184
1126-1127: §1.193
1126(a)-(b): §2.175
1126(c): §2.175
1223: §1.218
1360: §1.187
1750(e): §1.190
1752: §1.198
1752(a)-(b): §1.203
1770: §§1.188-1.189, 1.192
1770(c): §1.190
1770(e): §1.191
1770(g): §1.192
1770(h): §1.196
1770.2: §1.196
1777: §1.199
3060-3-74: §2.174
3100-3109: §6.199
3201-3209: §4.136
3202.5: §4.327
3250-3262: §§4.311-4.314, 4.317-4.319
3251(a): §4.312
3252: §4.311
3253(a): §4.315
3253(b): §4.315
3253(b)-(c): §4.315
3253(d): §4.315

3253(e)(1): §4.316
3253(g): §4.315
3253(i): §4.315
3254(b): §4.318
3254(c): §4.318
3254(d): §4.317
3254.5: §4.318
3255: §4.123
3255-3256: §4.313
3256: §4.123
3256.5: §4.313
3260: §4.319
3262: §4.312
3300-3313: §§4.294, 5.247, 13.129
3301: §§4.295, 4.312
3302: §4.311
3303: §4.296
3303(a): §4.300
3303(b): §4.300
3303(b)-(c): §4.300
3303(d): §4.300
3303(e): §§4.301, 4.307
3303(g): §§4.300-4.302
3303(i): §4.300
3304: §1.259
3304(b): §4.309
3304(d): §4.303
3304(d)(1): §4.303
3304(f): §4.303
3305: §§4.123, 4.298
3306: §§4.123, 4.298
3306.5: §4.299
3306.5(c): §4.299
3306.5(d): §4.299
3307: §§4.16, 4.305
3308: §4.306
3309: §4.308
3309.5: §4.310
3500: §4.320
3500-3511: §§4.28, 4.30, 4.41, 4.79, 4.113, 4.129, 4.320, 4.325-4.326, 4.349
3501(c)-(d): §4.320
3501.5: §4.320
3502: §§4.327, 4.331
3502-3503: §4.322
3502(b): §4.332
3502(d): §4.332
3502.5: §4.332
3502.5(a): §4.332
3502.5(c): §4.332
3502.5(e): §4.332
3504: §4.336
3504.5: §4.334
3505: §§4.322, 4.335
3505.1: §4.346
3505.2: §§4.343, 4.349
3505.3: §4.335
3505.4: §4.341
3506: §§4.326, 4.347
3507: §§4.321, 4.333, 4.343
3507-3507.1: §4.327
3507(a)(8): §4.129
3507.1: §4.333
3507.3: §4.330
3507.5: §4.329
3508: §4.328

3508.1: §4.271
3509: §4.323
3509(e): §4.328
3511: §4.323
3540.1(f): §4.341
3541-3541.5: §4.323
4002: §7.2
4004: §§7.61, 7.73
4005: §7.73
4007: §§7.61, 7.73
4215: §7.60
4216-4216.9: §7.60
4217.12: §7.178
4217.15: §7.178
4300-4305: §7.199
4330-4334: §7.199
4420: §§7.70, 7.272
4500: §6.125
4500(a): §6.125
4500(b): §6.125
4525(c): §7.194
4526: §§7.7, 7.9, 7.194
5501: §5.275
5854: §5.144
6060-6061: §3.154
6066: §§1.240, 8.115
6091: §2.75
6250: §2.219
6250-6252: §4.127
6250-6268: §4.127
6250-6270: §1.218
6250-6276.48: §§1.73, 2.1, 2.36, 2.218-2.219, 2.240, 2.250, 2.162, 2.261, 8.34, 13.108
6250-6277: §§2.241, 2.245, 2.257
6252(a): §2.223
6252(e): §§2.229, 2.265
6252(f): §2.223
6252(g): §§2.224, 2.229
6252.2(b)(1): §2.54
6253: §2.232
6253(a): §§2.222, 2.230, 2.237
6253(b): §§2.231, 2.234
6253(c): §2.235
6253(d): §2.236
6253(e): §2.239
6253.1: §2.231
6253.1(a)(1): §2.232
6253.1(a)(2): §2.232
6253.1(a)(3): §2.232
6253.1(b): §2.232
6253.1(d): §2.232
6253.3: §2.230
6253.5: §§2.227, 3.80, 3.152, 3.165
6253.5-6253.6: §2.242
6253.9: §2.238
6253.9(a): §2.238
6253.9(b): §2.238
6253.9(e): §2.238
6254: §2.232
6254-6254.1: §2.242
6254(a): §2.244
6254(aa): §6.196
6254(b): §2.245
6254(c): §§2.246, 4.127
6254(f): §§2.220, 2.230, 2.251
6254(f)(3): §2.249

6254(h): §8.34
6254(k): §§2.247, 2.254-2.255
6254(n): §2.248
6254(u): §2.253
6254(u)(2)-(3): §2.257
6254.2: §2.255
6254.3-6254.4: §2.242
6254.4: §§2.243, 2.257
6254.6-6254.7: §2.242
6254.7: §2.225
6254.7(c): §2.226
6254.7(d)-(e): §2.255
6254.8: §§2.246, 4.127
6254.9: §2.246
6254.9-6254.11: §2.242
6254.16: §§2.252, 2.257
6254.21: §§2.250, 2.257
6255: §§2.240-2.241, 2.250, 2.257
6255(b): §2.236
6256: §2.231
6258: §§2.258-2.259
6258-6259: §2.258
6259: §2.261
6259(a): §2.260
6259(b): §2.261
6259(c): §2.262
6259(d): §§2.263, 13.162
6275: §2.254
6275-6276.48: §§2.221, 2.254
6276.44: §2.255
6500-6536: §§1.76, 1.80, 6.199, 7.262, 11.8
6502: §1.77
6502.7: §11.8
6503.5: §§1.76, 1.78
6508.1: §13.181
6524-6525: §1.76
6546: §1.78
6547: §6.106
6584-6599.3: §§1.78, 5.237
6586.5(b): §§1.77, 5.237
6596: §10.236
6599.01-6599.10: §7.262
6800: §3.15
6803: §13.56
6804: §13.56
7050: §8.65
7060-7060.7: §9.58
7060.2(a)-(b): §9.58
7060.2(b): §9.58
7073: §8.90
7260-7277: §§5.356, 8.1, 8.3, 8.14, 8.30
7260(c): §8.16
7260(c)(1)(A)(ii): §8.14
7260(c)(2): §5.356
7260(i): §8.21
7261: §8.16
7261(c)(4): §8.21
7261.5: §8.16
7262: §8.14
7262-7265.4: §8.22
7262(a): §8.22
7262(c): §8.22
7264.5: §§8.21, 8.54
7266: §8.25
7267: §§8.8, 8.33, 8.37

7267-7267.1: §§8.9, 8.40
7267.1(b): §8.8
7267.2: §§8.28, 8.30, 8.33, 8.36-8.38, 8.41
7267.2(a): §8.26
7267.2(a)(2): §8.36
7267.2(b): §§8.27, 8.36
7267.2(b)(3): §8.38
7267.2(c): §§8.27, 8.34, 8.36
7267.2(d): §5.353
7267.8: §§8.14, 8.39
7267.8(b): §8.14
7274: §8.3
7900-7914: §§1.139, 5.283
7901(i): §5.283
7902: §5.283
7910: §5.283
8314: §2.157
8350-8357: §4.119
8355: §4.119
8356: §4.119
8357: §4.119
8550-8668: §§6.1, 6.183, 6.187, 6.195
8558: §6.183
8560: §6.195
8568: §6.183
8571: §6.183
8572: §6.183
8585-8589.7: §6.183
8598: §6.185
8607: §6.195
8610: §6.185
8611: §6.189
8615-8619: §6.189
8630: §6.184
8631: §7.188
8633: §6.185
8634: §§6.186, 9.71
8635-8641: §6.187
8642-8643: §6.188
8644: §6.187
8653: §6.190
8654: §6.189
8655: §6.191
8656: §6.192
8657: §6.192
8658: §6.193
8659: §6.194
8670.1-8670.73: §6.177
8680-8692: §6.199
8698-8698.2: §6.199
8698.1: §6.199
8956: §2.161
9027-9031: §2.118
11120-11132: §§2.118, 11.146
11135: §§4.169, 5.217
11340-11359: §7.85
11340-11529: §§10.282, 11.128
11349.1: §11.146
11353: §11.128
11353(b)(4): §11.146
11425.60: §7.85
11430.10: §4.288
11430.50: §4.288
11500-11529: §§4.39, 4.318
12012.45(b)(1)(C): §11.21

12012.85: §9.32
12651-12656: §7.114
12710-12718: §9.32
12900-12996: §§4.21, 4.121, 4.165-4.166, 4.180, 4.226, 4.231, 4.353, 4.380, 4.399, 13.32
12920-12927: §4.165
12926: §4.176
12926(d): §4.165
12926(i): §4.121
12926(i)(1): §4.221
12926(i)(1)(A)-(B): §4.223
12926(i)(A): §4.224
12926(k): §4.121
12926(k)(1): §4.221
12926(k)(1)(B)(i): §4.223
12926(k)(B)(i): §4.224
12926.1(a): §4.221
12926.1(c): §4.223
12926.1(d): §4.226
12930(g): §4.254
12940: §§4.4, 4.121, 4.181, 4.239
12940-12948: §4.165
12940(a): §4.175
12940(a)(1): §4.233
12940(e): §§4.121, 4.216
12940(e)(3): §4.235
12940(f): §4.180
12940(f)(2): §4.236
12940(h): §4.190
12940(j): §§4.186, 4.203, 4.207
12940(j)(1): §§4.201-4.202
12940(j)(3): §4.205
12940(j)(i): §4.202
12940(l): §4.175
12940(m): §4.120
12940(n): §§4.232, 4.353, 4.365, 4.370
12945: §4.165
12945(a): §4.174
12945.2: §§4.162, 4.172
12946: §4.123
12949: §4.176
12950: §§4.207, 4.211
12950.1: §§4.206, 4.208, 4.212
12960: §§4.252-4.253
12960-12976: §4.251
12963-12963.5: §4.254
12963.7: §4.254
12964: §4.254
12965(a): §4.255
12965(b): §§4.248, 4.256-4.257, 4.267
12965(d)(2): §4.257
12965(e)(2): §4.257
12967-12970: §4.255
12970: §4.266
12990: §4.7
16140-16154: §5.215
16366.1-16367.8: §1.95
16429: §8.52
16429.1-16429.4: §§5.267-5.268
17500: §§5.247, 5.256
17500-17630: §5.247
17510-17524: §5.247
17514: §5.247
17521: §5.257
17525: §5.256
17525-17533: §5.247

17527: §5.256
17550: §5.256
17550-17571: §5.247
17550-17617: §5.259
17551: §§5.255, 5.257
17552: §5.259
17553: §5.257
17553-17571: §5.257
17556: §5.251
17558: §5.258
17559: §5.260
17560: §5.255
17561(a): §5.247
17572-17574.5: §§5.256, 5.259
17574.5: §5.256
17575: §5.252
17575-17581: §5.247
17576-17577: §5.253
17579: §§5.254-5.255
17581: §§1.97, 5.255, 5.257
17600-17617: §5.247
17612: §5.261
17615-17617: §§1.97, 5.247, 5.258
19230-19237: §4.170
19574: §4.281
19590: §4.281
19700-19706: §4.170
19702.3: §4.172
20000-21703: §4.34
20001: §4.32
20090-20099: §4.40
20250-20255: §4.39
21154-21176: §4.39
21156: §4.39
21156-21158: §4.39
21166: §§4.39, 4.395
21450-21465: §4.35
23002: §1.2
25373: §10.129
25550.7: §8.100
25690: §6.5
25690-25699: §6.2
25696: §6.3
25840: §9.96
26290-26293.4: §5.28
26620-26624: §6.199
27281: §8.76
30052: §5.29
30056: §5.29
34090: §§1.12, 2.264, 2.268
34090-34090.8: §2.264
34090.5: §2.269
34090.6: §2.268
34090.7: §2.268
34100-34102: §1.11
34102: §1.12
34450: §1.12
34450-34462: §1.179
34501: §§1.1, 13.173
34502-34504: §1.12
34851-34859: §§1.180, 1.255
34851-34906: §1.12
34852: §1.181
34856: §§1.255, 1.257-1.260
34871: §§1.12, 1.179, 1.184, 1.186, 3.30-3.32

34871(a)-(d): §1.186
34882: §§1.186, 1.191, 3.33
34900-34906: §§1.202-1.203
34901: §1.203
34902: §1.203
34902(a): §§1.197, 1.203
34902(b): §1.203
34903: §1.204
34904: §§1.202, 3.34
34905: §1.207
34906: §1.203
36501: §§1.12, 1.179
36502: §§1.12, 1.222, 1.257-1.258, 3.35
36502(a): §§1.184, 1.189, 1.191
36502(b): §3.36
36503: §3.7
36505: §§1.256, 1.259-1.260
36506: §§1.252-1.253, 1.255, 4.1
36508-36510: §§1.257-1.258
36512: §§1.197, 3.175
36512(a)-(b): §3.174
36512(c): §1.197
36512(c)(3): §3.175
36512(d)(1): §1.198
36513: §§1.189, 1.192
36514.5: §§1.208, 1.215
36515: §1.211
36516: §§1.211, 1.213
36516(a): §1.211
36516(b): §1.211
36516(c): §1.212
36516(d): §1.213
36516(e): §1.219
36516.1: §§1.205, 1.211
36516.5: §1.212
36801: §§1.202, 1.207
36802: §2.7
36803: §2.8
36810: §2.2
36812: §1.183
36812.5: §3.126
36813: §§1.224-1.225, 2.2, 2.4, 2.15, 2.30, 13.116
36814: §2.6
36900: §§1.241, 2.211, 12.32
36900-36901: §1.229
36900(a): §12.28
36901: §§12.25, 12.65-12.66
36931: §1.235
36932: §1.235
36933: §1.239
36933(c): §1.239
36933(d): §1.239
36934: §§1.236, 1.238, 3.105
36935: §1.245
36936: §§1.236, 1.245-1.246, 2.2
36936.1: §1.245
36937: §§1.237-1.238, 2.2, 3.105, 5.116
37100: §§1.230, 8.152
37100: §8.165
37100.5: §§1.20, 5.6, 5.16, 5.34, 5.47, 5.58, 5.60-5.62, 5.68
37101: §§5.35, 9.2
37103: §7.175
37111-37111.1: §8.95
37111.1: §8.98
37112: §§5.159, 10.215

37202: §§7.246, 7.248
37203: §7.246
37206: §4.27
37208(b): §7.246
37209: §7.246
37350: §§8.1, 8.77, 8.80, 8.115
37350-37351: §8.102
37350.5: §8.1
37351: §8.77
37354: §§5.218, 8.65-8.66
37355: §§5.218, 8.66
37358: §6.163
37361: §10.129
37380: §§8.115-8.116
37380-37396: §5.263
37380(a): §8.115
37380(b): §8.115
37382-37383: §8.116
37382-37396: §8.116
37384: §6.165
37384-37387: §8.116
37385: §§6.165-6.166
37385-37387: §6.165
37386: §6.167
37387: §6.167
37388: §8.116
37389: §8.116
37390: §8.116
37391: §8.116
37392: §8.116
37392.1: §8.116
37392.2: §8.116
37393: §8.118
37394: §8.116
37395: §§8.115-8.116
37396: §8.116
37420-37430: §8.81
37421: §8.81
37422: §8.82
37423: §8.83
37425: §8.84
37606: §2.73
37624.3: §2.73
37901-37935: §7.171
38400-38418: §8.96
38407: §8.96
38409: §8.96
38414: §8.96
38440: §8.97
38440-38462: §8.97
38441: §8.97
38444: §8.97
38450: §8.97
38501-38510: §8.99
38502: §8.99
38611: §1.260
38630: §1.259
38638: §2.9
38730-38745: §6.2
38771: §§8.120, 9.117, 12.4, 12.66
38771-38775: §12.71
38772: §§9.93, 12.5
38772-38773: §9.86
38773-38773.5: §12.23
38773.1: §12.23

38773.1-38773.2: §9.93
38773.5: §§9.86, 9.93, 12.23
38773.5(a): §§12.23, 12.66
38773.5(b): §12.23
38773.5(c): §12.23
38773.5(e): §12.82
38773.6: §12.22
38773.7: §§12.5, 12.26
38775: §8.119
38791: §6.199
38792: §9.162
38794: §§7.178, 9.22, 9.24, 13.153
38900-38901: §§6.11, 11.162
39560-39588: §12.22
39731.1: §7.178
39732: §§1.25, 6.17
39900-39965: §6.159
39901: §6.158
39931-39938: §6.175
39933: §§6.169, 10.344
39934: §6.169
40401: §5.298
40404: §6.162
40601-40604: §1.204
40602: §7.244
40605: §§1.206, 1.250
40801-40814: §1.257
41001-41007: §1.258
41003: §7.246
41601: §6.199
41601-41612: §1.259
41801-41805: §1.256
41802: §1.235
41805: §2.214
43401: §5.29
43450-43455: §6.161
43600-43638: §§5.221, 5.295
43614: §5.221
45000-45210: §4.3
45008: §7.178
45100: §4.41
50020: §1.228
50022.1-50022.10: §1.240
50022.2: §1.240
50022.4: §1.240
50022.7: §1.240
50023: §§2.185, 3.217
50026: §5.34
50030: §6.91
50050-50057: §8.79
50075: §§5.58, 5.60-5.61, 5.69
50075-5077.5: §6.161
50075.1-50075.5: §5.75
50076: §§5.72, 5.160, 5.162, 10.221
50077: §5.118
50330-50335: §8.112
50470-50478: §6.139
50474: §7.178
50485-50485.14: §10.260
50569: §§8.80, 8.85
50570: §8.88
50572: §8.88
50655.5(f)(2): §5.222
50665.1-50670.4: §§5.29, 5.222
50701: §6.161

50701-50798.4: §6.161
50798.4: §6.161
51030-51034: §9.35
51031: §9.35
51032(a): §9.35
51032(b): §9.35
51200-51297.4: §§10.140, 11.9
51205: §11.9
51230: §10.140
51231: §§10.140-10.141
51235: §10.140
51240: §10.141
51242: §10.141
51243.5: §10.141
51244: §10.141
51245: §10.142
51246: §10.142
51281: §10.143
51282: §10.143
51283: §10.143
51284: §10.143
51292-51293: §10.144
51293: §10.144
51296.3: §1.115
51296.4: §1.115
51300: §7.180
51300-51308: §7.179
51301: §7.180
51302: §7.180
51303: §7.180
51305-51308: §7.180
51330: §7.181
51330-51331: §7.181
51334: §7.181
51335: §7.181
51350: §7.189
51540: §7.182
51562: §7.182
53019-53023: §6.199
53050: §13.35
53050-53051: §1.76
53051: §§13.35-13.36
53060: §§7.8, 7.175
53066(c): §§5.193, 6.61
53066(d): §6.61
53066(e): §6.60
53066.01: §6.61
53066.2: §6.62
53066.2(c): §6.62
53066.3: §6.63
53066.3(d): §6.63
53068: §7.10
53069.3: §§9.86-9.87, 9.91, 9.93
53069.4: §§1.241, 9.86, 12.25
53069.5: §9.86
53069.85: §§7.2, 7.66, 7.204
53071: §9.96
53071.5: §9.96
53075.5: §§6.137, 9.2, 9.43
53075.8-53075.9: §9.42
53078: §7.249
53080: §10.157
53084: §§5.299, 5.371
53084(b)(1): §5.299
53084.5: §§5.298-5.299

53084.5(a)(2): §5.299
53088.7: §6.64
53090-53097.5: §1.105
53090(a): §1.105
53094: §10.136
53094(b): §1.105
53096: §1.105
53130-53138: §7.249
53150-53159: §5.167
53200-53210: §§1.219, 4.30
53208.5: §1.219
53212-53214.5: §4.30
53232.1(b): §1.214
53232.1(c): §1.214
53232.2(b): §1.215
53232.3: §1.218
53234-53235: §§1.210, 1.215, 2.161
53234-53235.2: §2.3
53235: §2.161
53235.1(b): §2.161
53260-53264: §4.289
53311-53317.5: §5.229
53311-53368.3: §§5.65, 5.76, 5.81-5.84, 5.87, 5.117, 5.229, 5.395
53312.5: §13.184
53313: §§5.79, 5.86
53313-53365.7: §5.81
53313(b): §9.22
53313.5: §5.78
53316.2: §5.80
53317(b): §5.77
53317.3: §5.84
53326(b): §5.77
53326(d): §5.77
53328.3: §5.81
53330-53338.5: §5.85
53340: §§5.82-5.83
53340(c): §5.84
53341: §5.87
53345-53365.7: §5.86
53356.1-53356.6: §5.83
53359: §5.87
53600.3: §5.268
53601: §§5.265, 5.268-5.269
53607: §5.269
53630-53683: §1.258
53630-53692: §5.273
53632: §5.273
53635: §§5.265, 5.270
53635.7: §5.245
53646: §5.272
53646(a)(2): §5.270
53646(g): §5.270
53651: §5.265
53701-53702: §7.129
53717: §5.92
53717.2: §5.92
53720: §5.105
53720-53730: §§5.9, 5.16, 5.69, 5.105, 10.221
53722: §§3.92, 5.119
53723: §5.116
53724: §5.16
53724(a): §§5.106, 5.115, 5.118
53724(b): §5.115
53725: §§5.68, 5.108
53727(b): §5.107

53728: §5.109
53734: §5.264
53739: §§5.110, 5.114-5.115, 5.118, 5.147
53750: §§5.110, 5.183
53750-53756: §5.128
53750(h): §§5.51, 5.114, 5.146, 5.180
53750(h)(2): §5.180
53750(h)(2)(A): §5.114
53750(i)-(j): §5.178
53753: §§5.110, 5.140, 5.146-5.147, 5.156
53753(a): §5.128
53753(b): §5.147
53753(c): §5.148
53753(d): §5.147
53753(e): §5.148
53753(e)(4): §5.149
53753.5: §§5.110, 5.156
53753.5(b)(1): §5.156
53753.5(b)(2): §5.156
53753.5(b)(4): §5.156
53755-53756: §5.179
53755(a): §5.178
53755(b): §§5.179, 5.182
53760: §5.443
53901: §5.264
53910: §5.276
53910-53914: §5.275
53911: §5.275
53935: §12.23
53970: §5.88
53978: §§5.88, 5.91
53978(b): §5.89
53978(c): §5.90
53978(d): §5.90
53997: §7.178
54201-54205: §7.195
54202: §7.197
54202-54203: §7.197
54222: §8.86
54222-54223: §8.88
54222(a): §8.87
54222(b): §8.89
54222(c): §8.91
54222(d): §8.90
54222(f): §8.93
54222.3: §8.86
54223: §8.94
54226: §8.86
54230.5: §8.86
54300-54700: §§5.169, 5.226, 6.106
54309: §5.226
54309.1, §54310: §5.226
54314: §5.158
54342: §5.168
54344: §§5.166, 5.168
54345: §5.171
54346: §5.171
54346.1: §5.171
54347: §5.171
54348: §5.171
54354.5: §5.169
54420: §5.226
54425: §5.226
54425-54426: §5.226
54519: §5.226

54703-54720: §5.135
54725-54739: §6.12
54725-54740.6: §11.162
54739: §6.107
54950-54963: §§1.73, 2.1, 2.3-2.5, 2.16, 2.25, 2.32, 2.35-2.37, 2.39-2.42, 2.47, 2.52, 2.66, 2.97-2.98, 2.109, 2.111, 2.113-2.114, 2.116, 5.315, 5.388, 6.196-6.197, 10.409, 10.414
54951: §2.37
54952: §2.5
54952(a): §2.37
54952(a)-(b): §2.37
54952(b): §§2.37-2.38
54952(c): §2.37
54952(c)-(d): §2.223
54952.1: §2.39
54952.2: §§2.40, 10.414
54952.2(a): §2.40
54952.2(b): §§2.46, 2.54
54952.2(b)(1): §§2.40-2.41, 2.54
54952.2(b)(1)-(3): §2.66
54952.2(b)(2): §§2.40, 2.54
54952.2(c)(1): §2.41
54952.2(c)(2): §2.42
54952.2(c)(3): §2.43
54952.2(c)(4): §2.44
54952.2(c)(5): §2.45
54952.2(c)(6): §2.46
54952.6: §13.142
54952.7: §2.3
54953(a): §2.36
54953(b): §2.52
54953(b)-(c): §2.52
54953(b)(2): §2.72
54953(b)(3): §§2.52, 2.72
54953.3: §2.74
54953.5: §2.75
54953.5(b): §§2.78, 2.228
54953.6: §2.75
54954: §2.35
54954(a): §2.47
54954(b)(1): §2.53
54954(b)(2): §2.53
54954(b)(3): §2.53
54954(b)(4): §2.53
54954(b)(5): §2.53
54954(b)(6): §2.53
54954(b)(7): §2.53
54954.1: §2.57
54954.2: §§2.73, 2.83
54954.2(a): §§2.55-2.56, 2.58, 2.60, 2.73
54954.2(a)-(b): §2.59
54954.2(a)(1): §2.56
54954.2(b)(1): §2.61
54954.2(b)(2): §2.62
54954.2(b)(3): §2.63
54954.3: §§2.21, 2.23, 2.25, 2.67, 2.80
54954.3(a): §§2.16, 2.32, 2.64, 2.80
54954.3(b): §§2.19, 2.74, 2.80
54954.3(c): §§1.224, 2.15, 2.64, 2.80
54954.5: §§2.56, 2.73, 2.83
54954.6: §§5.110, 5.130, 5.140, 5.146
54954.6(h): §§5.130, 5.146-5.147
54955: §§2.50, 2.70-2.71
54955-54955.1: §2.51
54955.1: §2.71
54956: §§2.48, 2.65-2.66, 2.70, 2.83

54956.5: §§2.49, 2.61, 2.82, 6.180, 6.196-6.198
54956.5(b)(1): §2.68
54956.5(b)(2): §§2.68, 6.197
54956.5(c): §2.69
54956.5(d): §§2.68, 6.197
54956.5(e): §2.68
54956.7: §§2.73, 2.99
54956.8: §§2.73, 2.86, 2.90, 2.93, 8.34
54956.9: §§2.53, 2.73, 2.85, 2.87, 2.92-2.93, 2.109, 8.34
54956.9(a): §§2.87, 2.93
54956.9(b)(1): §2.93
54956.9(b)(2): §2.93
54956.9(b)(3): §2.94
54956.9(b)(3)(A): §2.94
54956.9(b)(3)(A)-(B): §2.73
54956.9(b)(3)(B): §2.94
54956.9(b)(3)(C): §2.94
54956.9(b)(3)(C): §2.73
54956.9(b)(3)(D): §2.94
54956.9(b)(3)(E): §2.94
54956.9(c): §2.93
54956.75: §2.73
54956.86: §2.73
54956.95: §2.73
54956.96: §2.73
54957: §§1.250, 2.36, 2.73, 2.84, 2.88, 2.96-2.97, 2.99
54957(a): §2.69
54957(b)(1): §§2.95, 2.97
54957(b)(2): §§2.98, 2.115
54957(b)(4): §§2.96-2.97
54957.1: §§2.100-2.101
54957.1(a)(1): §2.102
54957.1(a)(1)(A): §2.102
54957.1(a)(1)(B): §2.102
54957.1(a)(2): §§2.103-2.104
54957.1(a)(3): §2.105
54957.1(a)(3)(A): §2.105
54957.1(a)(3)(B): §2.105
54957.1(a)(4): §2.106
54957.1(a)(5): §2.107
54957.1(a)(6): §2.108
54957.1(b): §2.100
54957.2: §§2.92, 2.104
54957.2(a): §2.110
54957.5: §§2.56, 2.73, 2.76, 2.94
54957.5(a): §2.76
54957.5(b): §2.77
54957.5(b)(1): §2.76
54957.5(c): §2.76
54957.6: §§2.73, 2.89, 2.91, 2.97
54957.7: §2.100
54957.7(a): §§2.85, 2.89
54957.7(b): §2.100
54957.7(c): §2.85
54957.8: §2.73
54957.9: §§1.225, 2.9, 2.15, 2.27-2.29, 2.81
54959: §2.112
54960: §§2.39, 2.113
54960-54960.1: §10.409
54960(a): §2.113
54960(c): §2.113
54960.1: §§2.113-2.114
54960.1(b): §2.115
54960.1(c)(1): §2.115
54960.1(e): §2.115

54960.5: §§2.116, 10.409, 13.162
54962: §2.85
54963(a): §2.117
54963(c): §2.117
54964: §§2.157, 3.211-3.212
54964(b)(1): §3.212
54964(b)(3): §3.212
54964(c): §3.212
54970-54975: §1.250
54980-54983: §7.183
54980(c): §§7.183, 9.24
54984-54984.9: §5.168
54988: §12.24
55002: §7.185
55300-55310: §7.186
55304: §7.186
55500: §7.187
55603: §7.184
55603.5: §7.184
55631-55634: §7.183
55700-55707: §5.30
56000-57550: §§1.3, 1.10, 1.72, 1.74, 1.108, 1.112, 1.114, 1.116, 1.128, 1.135, 1.143, 1.149-1.150, 1.154, 1.168, 3.1, 5.123
56017: §1.149
56021: §§1.109, 1.135, 1.149, 1.168
56030: §1.168
56031: §1.124
56033: §1.149
56034: §1.168
56035: §§1.74, 1.114, 1.168
56036: §1.117
56036(a): §1.72
56036(a)(1): §1.72
56037: §1.131
56044: §1.75
56050: §1.75
56054: §1.117
56066: §1.130
56069: §1.109
56072: §1.75
56073: §1.109
56075.5: §§1.109, 1.136, 1.154
56076: §1.117
56078: §§1.70, 1.131
56100: §§1.74, 1.112, 1.114, 1.135
56103: §§1.129, 13.184
56106: §1.128
56107: §§1.127, 1.129, 13.6
56119: §1.124
56123: §1.130
56124: §1.130
56133: §§1.113, 1.121
56133-56434: §1.113
56300: §§1.108-1.109
56300(f): §1.109
56301: §1.108
56325: §§1.107, 1.110
56325.1: §1.110
56326-56328.5: §1.110
56329: §1.110
56375: §§1.109, 1.113, 1.127
56375(a): §§1.109, 1.113-1.114, 1.123, 1.132
56375(a)(4): §1.125
56375(d): §1.151
56375(g)-(h): §1.109
56375(m): §1.124

56375.5: §1.117
56376: §1.123
56376.5: §1.123
56377: §1.108
56378: §1.119
56381: §1.111
56383(a)(3): §1.120
56387: §1.130
56388: §1.130
56425: §§1.113, 1.120
56425(a): §1.117
56425(b): §1.118
56425(e): §1.118
56425(g): §1.120
56425(h): §1.117
56426: §1.120
56426.5: §1.120
56427-56428: §1.120
56428(e): §1.120
56428(f): §1.120
56430: §§1.113, 1.119-1.120
56430(a): §1.120
56430(b): §1.119
56650-56898: §1.126
56651: §1.136
56652: §1.137
56652-56654: §1.132
56654(a): §§1.150, 1.154
56658: §1.152
56658(i): §§1.128, 1.137
56663: §§1.155, 5.123
56665: §1.137
56666: §§1.127, 1.137
56668: §§1.127, 1.138
56668.3: §§1.127, 1.156
56700: §1.136
56700.4: §1.136
56705(a): §1.136
56705(b)(2): §1.136
56706: §1.136
56709: §1.136
56720: §1.140
56720(b): §1.117
56722: §1.136
56723: §1.136
56724: §1.140
56734: §§1.154, 1.167
56738: §1.150
56740: §1.124
56741: §1.124
56742: §1.151
56742-56747: §1.124
56744: §1.124
56749: §1.115
56752: §1.150
56759: §1.157
56764: §1.136
56767: §1.150
56768: §1.154
56800: §1.137
56801: §1.137
56803: §1.140
56810: §1.138
56812: §1.139
56812(a): §1.139

56812(b): §1.139
56812(c): §1.139
56815: §§1.124, 1.138
56815(b): §1.138
56815(c): §1.138
56815.2: §1.135
56853: §1.168
56854: §1.133
56854(a): §1.133
56854(b): §1.133
56856.5(c): §1.115
56866: §1.132
56866(a): §1.132
56866(b): §1.132
56880: §§1.127, 1.140
56881: §1.140
56884(a): §1.140
56884(b): §1.140
56885.5: §1.116
56886: §§1.113, 1.116, 1.123
56886(v): §1.116
56887: §1.116
56895: §1.141
56895(a): §1.141
56895(b): §1.128
56895(d): §1.141
57000: §1.142
57001: §1.142
57002: §1.133
57002(a): §1.142
57003: §1.142
57050: §1.142
57075: §1.156
57075.5: §1.156
57076: §§1.142, 1.156
57077: §1.133
57077-57078: §1.133
57077(a)(1): §1.133
57077(a)(2): §1.133
57078: §1.142
57078(a): §1.156
57087.3: §1.134
57090: §1.133
57100: §1.142
57113: §1.114
57115-57116: §1.142
57118: §§1.143, 1.157
57119: §§1.143, 1.154, 1.157
57120: §§1.139, 1.142
57125: §1.143
57125-57150: §1.143
57125(a)(2): §1.143
57132.5: §§1.154, 1.157
57133-57135: §1.143
57144: §1.143
57145-57148: §1.143
57145(b): §1.143
57148(a)(1): §1.143
57176: §1.143
57176.1: §§1.143, 1.154, 1.157
57178: §1.143
57179: §1.143
57300: §1.116
57302: §1.116
57325: §1.158

57326: §1.159
57327: §1.160
57328: §1.161
57329: §1.162
57330: §1.163
57350: §1.164
57351: §1.165
57352: §1.166
57353: §1.166
57354: §1.165
57375: §1.144
57376: §1.145
57377: §1.146
57379: §§1.139, 1.146
57380: §1.135
57382: §1.147
57384: §1.148
57385: §1.147
57400: §1.174
57401: §1.177
57402: §1.175
57403: §1.177
57404: §1.175
57405: §1.175
57407: §1.175
57408: §1.175
57409-57410: §1.175
57413: §1.175
57415-57416: §1.176
57417: §1.176
57419: §1.175
57450: §1.174
57451: §1.174
57452: §1.176
57453: §1.174
57454: §1.175
57455: §1.176
57456-57457: §1.176
57458: §1.176
57459-57461: §1.175
57462-57463: §1.176
57475: §1.169
57476: §1.171
57477: §1.171
57478: §1.172
57479: §1.172
57481: §1.173
57482: §1.173
57500: §1.170
57501: §1.171
57502: §1.171
57550: §1.178
58200: §13.184
59125: §5.443
65000-66499.58: §10.2
65007: §10.22
65008: §§10.86, 10.161-10.162, 10.443
65008(a)(1)(B): §10.161
65008(b)(1)(D): §10.161
65008(e)(2): §10.161
65009: §§10.81, 10.380, 13.6, 13.23
65009(c): §10.81
65009(c)(1): §§10.83, 10.98, 13.14
65009(c)(1)(D): §10.127
65009(c)(2): §10.405

65009(h): §10.81
65010: §10.410
65025-65054.5: §1.101
65040-65040.6: §10.250
65080: §11.235
65080-65086.5: §10.252
65080(a): §10.251
65088-65089.10: §§10.253, 11.191
65088.4: §8.92
65089: §10.253
65089.5: §10.253
65090-65091: §10.9
65090-65096: §10.410
65090(a): §5.377
65091: §§10.6, 10.118
65093: §10.410
65094: §10.7
65100: §1.249
65100-65101: §1.243
65100-65106: §§10.3-10.4
65104: §10.215
65300: §10.16
65300.5: §§10.17, 10.19
65302: §§10.21, 11.92
65302-65303: §10.17
65302(a): §10.18
65302(a)(1): §10.22
65302(a)(2): §10.23
65302(b)(1): §10.25
65302(b)(2): §10.25
65302(d): §§10.54-10.56, 11.92
65302(e): §10.57
65302(f): §§10.61, 10.63
65302(g): §§10.64, 11.92
65302(g)(2): §10.64
65302.2: §10.56
65302.3: §10.61
65302.4: §10.24
65302.5: §10.66
65302.8: §§10.96, 10.205
65350: §10.80
65350-65358: §10.410
65350-65362: §§10.9, 10.70
65352: §10.70
65352(a)(6): §10.70
65352(a)(9): §10.70
65352(a)(10): §10.70
65352.2: §10.70
65352.3: §10.70
65352.5: §§10.70, 11.92
65358(b): §10.80
65358(c)-(d): §10.80
65359: §10.68
65360: §10.70
65361: §10.74
65361(b): §10.77
65361(d): §10.78
65361(e): §10.75
65400: §§5.417, 10.67
65400(a): §10.67
65400(a)(2): §10.67
65400(b): §10.67
65401-65402: §10.68
65402: §§1.105, 8.4, 8.127, 8.149
65402(a): §8.80

65403: §§10.68-10.69
65450: §10.83
65451: §§10.83, 10.154
65453: §§10.9, 10.83, 10.410
65454: §§10.68, 10.83
65456: §10.215
65460-65460.11: §8.92
65560: §10.60
65560-65570: §10.57
65563-65564: §§10.58, 10.60
65580: §10.162
65580-65589.8: §1.101
65580(d)-(e): §10.275
65580(e): §10.28
65581(a): §10.27
65582: §10.163
65582(b): §1.80
65583-65583.2: §10.26
65583-65584: §10.31
65583(a): §10.29
65583(a)(3): §10.30
65583(a)(4): §10.32
65583(a)(7): §10.33
65583(a)(8): §10.34
65583(a)(9): §10.35
65583(b): §10.36
65583(c): §10.37
65583(c)(1): §§10.30, 10.38, 10.43
65583(c)(1)(A): §10.36
65583(c)(3): §10.40
65583(c)(4): §10.39
65583(c)(5): §10.42
65583(c)(7): §10.41
65583.2: §10.38
65583.2(h): §§10.30, 10.36
65584: §10.204
65584(b): §10.44
65584.01: §§1.81, 10.44
65584.03: §10.45
65584.04: §10.46
65584.04-65584.05: §10.44
65584.05: §10.47
65584.05(b): §1.82
65584.05(c): §1.82
65584.05(g): §1.82
65584.06: §10.47
65584.06(d)(2): §1.82
65584.07: §1.83
65584.08: §10.45
65585: §§10.49, 10.72
65585(a): §10.48
65585(f): §§10.49-10.50
65585(h): §10.49
65587(a): §10.77
65588: §10.51
65588(d): §10.53
65588(e): §10.51
65589.3: §10.50
65589.4(a): §§10.193, 10.196
65589.4(a)(1): §10.197
65589.4(a)(2): §§10.192, 10.194-10.195
65589.4(a)(2)(B): §10.197
65589.4(a)(2)(E): §10.196
65589.4(a)(2)(E): §10.195
65589.4(a)(2)(F): §10.194

65589.4(b): §§10.193, 10.197
65589.4(c): §10.197
65589.4(e): §10.197
65589.4(h): §10.192
65589.5: §§5.412, 10.96, 10.163, 10.184
65590: §10.308
65590-65590.1: §10.53
65590(b): §10.198
65590(c): §10.198
65700: §8.80
65700(a): §10.80
65750-65763: §13.6
65800: §10.1
65803: §§10.2, 10.16
65804: §§2.78, 10.94, 10.410
65850.2: §10.11
65850.2(a)(1): §11.204
65850.2(c): §11.204
65852.2: §10.166
65852.2(a)(1): §10.167
65852.2(b): §10.171
65852.2(c): §10.167
65852.2(d): §10.168
65852.2(e): §10.169
65852.2(g): §10.170
65852.2(h)(4): §10.192
65853: §10.9
65854: §10.94
65856: §10.94
65858: §§1.238, 2.2, 3.105, 10.92-10.93, 10.209
65860: §10.87
65860(a): §10.87
65860(d): §§10.16, 10.88
65860.1: §10.22
65863(b): §10.165
65863(c): §10.165
65863(f): §10.165
65863.6: §§3.122, 10.96, 10.205
65863.7-65863.13: §9.59
65864: §3.107
65864-65869.5: §10.430
65865.3: §10.430
65866: §10.127
65867.5: §§3.107, 10.68
65867.5(c): §11.105
65900: §10.102
65900-65902: §10.101
65901: §10.105
65903: §10.102
65904: §10.102
65905: §10.118
65905(a): §10.103
65905(b): §10.118
65906: §§10.113-10.115, 10.120
65906.5: §10.116
65909: §§10.109, 10.236
65910: §10.59
65913: §10.162
65913.2: §10.158
65914: §13.162
65915: §§10.162, 10.172-10.173
65915(a): §10.172
65915(b): §§10.174, 10.176
65915(c)(1): §10.188
65915(c)(2): §10.189

65915(d)(1): §10.184
65915(d)(2): §10.183
65915(e): §10.185
65915(f): §10.178
65915(f)-(g): §§10.179-10.180
65915(f)(5): §10.187
65915(g): §10.175
65915(h): §10.177
65915(i): §10.190
65915(j): §10.187
65915(k): §10.182
65915(n): §§10.172, 10.181
65915(o)(2): §10.178
65915(p): §10.186
65920-65964: §§10.10, 10.151, 10.155, 11.58, 11.230
65922: §10.15
65927-65928: §5.412
65931: §5.412
65934: §11.230
65943: §§10.11, 11.58
65943(a): §10.11
65945.7: §2.34
65950: §10.10
65950(a)(1)-(2): §11.58
65950(a)(3)-(4): §11.58
65950.1: §11.58
65956: §§10.14, 10.155
65956(b): §10.10
65957: §§10.10, 11.58
65961: §10.236
65961(e): §10.236
65962.5: §11.253
65962.5(f): §§10.11, 11.253
65970-65981: §10.215
65995: §§10.157, 10.215-10.216
65995-65996: §10.216
66000: §5.185
66000-66008: §§5.60, 5.185, 10.222, 10.393
66000(b): §§10.211, 10.228
66001: §§10.220, 10.223-10.224, 10.230
66001(d): §10.224
66001(e)-(f): §10.224
66005(a): §10.225
66010: §5.163
66013: §6.43
66013-66014: §5.164
66016: §5.165
66016-66018.5: §10.226
66016(a): §10.225
66017: §§5.165, 10.227
66018: §5.165
66020: §10.229
66020-66024: §10.226
66020(d)(1): §§10.226, 10.230
66020(d)(2): §10.229
66022: §§10.229, 13.184
66410-66499.37: §§8.71, 8.80, 10.148, 10.152, 10.304, 10.380, 10.407, 10.411, 11.123
66411: §10.148
66412(d): §10.151
66412.6-66412.7: §10.160
66415: §10.153
66426: §10.149
66427.4: §9.59
66427.5: §9.59
66451-66472.1: §10.411

66451.10: §10.160
66452.1-66452.4: §10.10
66452.4: §10.155
66452.6(a): §10.159
66452.6(b)-(c): §10.159
66452.11: §10.159
66452.13: §10.159
66452.21: §10.159
66452.22: §§10.159, 10.236
66462.5: §10.157
66463: §8.147
66463.5: §10.159
66463.5(c): §10.159
66473: §§10.154, 10.156
66473.1: §10.154
66473.5: §10.68
66473.7: §§10.156, 11.105, 11.108
66473.7(a)(2): §11.106
66473.7(b)(1): §11.105
66473.7(b)(2): §11.108
66473.7(b)(3): §11.107
66473.7(c): §11.106
66473.7(d)(1)-(4): §11.107
66473.7(h): §11.106
66473.7(i): §11.105
66474: §10.68
66474(a): §10.154
66474(b): §10.154
66474(c): §10.154
66474(d): §10.154
66474(e): §10.154
66474(f): §10.154
66474(g): §10.154
66474.2: §§10.156, 10.430
66474.5: §10.154
66475: §§8.147, 10.157
66475-66489: §10.157
66477: §10.157
66477.2: §8.147
66477.2(c): §8.147
66477.5(c): §8.80
66478: §10.157
66478.1-66478.13: §10.342
66479-66482: §10.157
66483: §10.215
66484: §10.215
66484.5: §11.123
66498.1: §10.150
66498.1-66498.9: §10.430
66498.1(b): §10.126
66499.30(d): §10.160
66499.37: §10.380
66600-66682: §6.179
71380: §5.199
76000: §§5.197, 5.213
76000(b): §5.213
81000-91014: §§1.73, 2.1, 2.119, 2.127, 2.129, 2.131, 2.149, 2.155, 2.172, 2.174, 2.209, 2.235, 2.237, 3.186-3.188, 3.190, 3.194, 5.433
81000-91014: §§2.126, 2.140, 5.387
81001: §3.208
81002: §3.190
81004: §2.149
81008: §§2.234-2.235
81009: §2.150
81013: §§2.162, 3.189, 3.209

82005: §2.130
82015: §§2.157, 3.194
82015(b)(2)(B)(iii): §2.159
82018: §3.199
82019: §2.142
82025: §3.194
82028: §§2.125, 2.134, 2.155
82028(b)(2): §2.155
82029: §2.135
82030: §§2.123, 2.132
82030(b): §2.132
82030(b)(1): §§2.123, 2.151
82030(b)(2): §2.123
82031: §§2.157, 3.196
82033: §§2.122, 2.131
82034: §2.130
82035: §§2.122, 2.130-2.131
82036: §3.195
82038.5: §3.218
82041.5: §§2.157, 3.200
82048: §2.119
82048(a): §2.127
83112: §3.187
83114: §2.160
83115-83124: §2.160
83116: §§2.160, 3.206
83116.5: §2.160
83314: §2.119
84100-84511: §3.190
84200: §§3.194, 3.197
84200.5: §3.197
84200.7-84200.8: §3.197
84203: §3.195
84203.5: §§3.196, 3.211
84204: §3.196
84206: §3.194
84211: §§3.198-3.199
84305: §§2.157, 3.200
84305.5: §3.200
84308: §§2.151-2.152, 3.203, 10.416
84308(a)(1): §2.152
84308(a)(2): §2.152
84308(a)(3)-(4): §2.152
84308(a)(5): §2.152
84308(b): §2.152
84308(b)-(c): §2.152
84308(c): §2.153
84308(d): §§2.152-2.153
84503-84511: §3.201
84511: §3.202
85206: §3.210
85300: §3.210
85312: §3.209
85501: §3.183
85703: §3.209
86100-86300: §3.218
86103: §2.161
86106: §2.161
86115-86116: §2.186
86116.5: §2.186
87100: §§2.120, 2.127-2.128, 2.141
87101: §2.140
87103: §§2.120, 2.129-2.131, 2.136-2.137, 2.141, 2.144
87103(a): §2.130
87103(a)-(e): §2.129

87103(b): §2.131
87103(c): §2.132
87103(d): §2.133
87105: §§2.2, 2.141
87105(a)(3): §2.140
87200: §§2.143, 2.146, 2.148
87202: §2.146
87202-87203: §2.143
87203: §§2.144, 2.147
87204: §2.148
87206-87207: §2.144
87207: §2.155
87300-87313: §2.142
87302: §§2.142-2.143, 2.146
87306: §2.142
87306.5: §2.142
87406.3: §2.158
87406.3(c): §2.158
87460: §2.156
87461: §2.156
87462: §2.156
89001: §2.157
89501(a): §2.154
89501(b)(1): §2.154
89501(b)(2): §2.154
89502: §2.154
89503: §2.155
89503(f): §§2.125, 2.134, 2.155
89521: §2.160
91000: §§2.160, 3.204
91000-91014: §2.160
91000(c): §2.160
91000.5: §2.160
91001: §3.204
91001(b): §3.205
91001(c): §2.160
91001.5: §§3.204-3.205
91002: §§2.160, 3.204
91003: §13.162
91003-91005: §2.160
91003(a): §3.207
91004: §§2.160, 3.205
91005(a): §3.205
91005.5: §3.205
91007: §3.205
91011(b): §2.160
91012: §2.160
91500-91574: §§1.70, 6.106

HARBORS AND NAVIGATION CODE

30-40: §6.157
34: §6.156
50-77.1: §10.361
293-294: §6.177
650-774.4: §§6.171, 10.361
660: §§6.171-6.172, 6.199
660(c): §6.171
782: §6.172
4000-4017: §6.160
5800-5956: §6.160
5904: §6.161
6000-6110: §6.160
6092.5: §6.161
6094: §6.161
6200-6372: §6.160

6364: §6.161
6365: §6.161
6800-6963: §6.160
6944: §6.161
7000-7340: §6.160
7152: §6.175
7266: §6.161

HEALTH AND SAFETY CODE
Div 26: §11.185
1366.20-1366.28: §4.289
1461: §2.73
1523.1(1): §9.5
1523.1(3): §9.5
1566.2: §9.5
1568.05(b): §9.5
1569.185(a): §9.5
1596.803(a)(3): §9.5
1597.45(b): §9.5
1797.201: §§7.178, 9.22, 9.25
1797.224: §9.25
1798-1798.6: §9.25
4600-4650: §§6.11, 11.162
4624: §13.184
4700-4858: §§6.11, 11.162
4860-4927: §§6.11, 11.162
4955: §5.158
5470-5474.10: §§5.166, 6.12, 11.162
5471: §5.166
6400-6982: §§6.11, 11.162
11000-1651: §12.66
11000-11651: §1.37
11014.5: §9.79
11364.7: §9.79
11570: §12.14
11570-11587: §§9.78, 12.14, 12.16
11571: §§9.78, 12.14
11573: §12.14
11573.5(b): §12.14
11579: §12.14
11580: §§12.14, 12.17
11581: §12.14
11581(b): §12.14
11587: §12.14
11590: §4.22
13800-13970: §1.73
17910-17998.3: §§12.1, 12.5-12.6, 12.20
17920.3: §12.6
17921: §10.237
17922: §§1.240, 10.237
17958: §§10.238, 12.71
17958.5: §1.240
17958.7: §§1.240, 10.238
17960-17967: §12.6
17975-17975.10: §12.8
17980: §§12.26, 12.70-12.71
17980-17982: §12.6
17980-17992: §10.249
17980(b): §12.70
17980.6: §12.71
17980.6-17980.7: §§12.6, 12.27
17980.6-17980.7(b): §12.7
17980.7(b): §12.20
17980.7(c): §12.9
17980.7(c)(11): §12.20

17980.7(d)(1): §12.20
17980.7(d)(3): §12.8
17980.7(d)(5): §12.8
17984: §12.20
17995: §12.37
17995-17995.5: §12.20
17995.1: §12.37
17995.3: §12.37
17995.3(a)-(g): §12.37
18000-18700: §9.59
18200-18700: §12.10
19825-19826: §10.235
19829: §§10.242-10.243
19850-19853: §§2.221, 2.256
19851(c): §2.256
25100-25257.1: §§11.113, 11.240
25117: §11.241
25135.1(d): §11.242
25135.3: §11.242
25135.6-25135.7: §11.242
25135.7(c): §11.244
25141: §11.241
25149: §11.244
25155.10: §11.249
25159.10-25159.25: §11.113
25187: §11.170
25189.5: §11.113
25192: §11.113
25199.5: §11.246
25199.6: §11.246
25199.7: §11.245
25199.7(d): §11.245
25199.10: §11.247
25199.11: §11.247
25204.5: §11.248
25208-25208.17: §11.113
25218.3: §11.241
25249.5-25249.13: §11.113
25280-25299.8: §11.113
25297.1-25299.81: §11.170
25300-25395.45: §11.113
25359.7: §11.252
25360-25367: §8.13
25401-25402.3: §11.254
25404-25404.9: §§6.199, 11.170, 11.243
25404(c): §11.170
32000-32492: §1.73
32106: §2.73
32121(p): §2.37
32155: §2.73
33000-33855: §§1.70, 5.302-5.303, 5.347, 5.351, 5.359, 8.80
33002: §5.306
33010: §5.301
33020-33021: §§5.301, 5.314
33030: §5.319
33030-33031: §5.302
33030-33039: §5.319
33031(a): §5.319
33031(b): §5.319
33037: §5.304
33080: §5.399
33080.1: §5.399
33080.5: §5.399
33100: §5.306
33100-33105: §5.305

33110: §5.307
33111: §5.435
33114: §§1.213, 1.215
33114.5: §1.213
33126: §5.313
33128: §5.314
33130: §§2.181, 5.434
33130(a): §2.181
33130(b): §2.181
33130.5: §§2.181, 5.434
33132: §5.367
33200: §§5.308-5.309
33201: §§2.182, 5.311
33201(b)(1): §2.181
33202: §5.311
33210: §5.339
33211: §5.339
33213: §5.340
33214-33216: §5.437
33220: §5.367
33310: §5.317
33310-33312: §5.317
33311: §5.317
33312: §5.317
33320.1: §5.319
33320.1(a)(2): §§5.319-5.320
33320.2: §5.320
33321: §5.320
33321.5: §5.320
33322: §§5.321, 5.374, 5.376
33324: §5.321
33325: §5.321
33327-33328.1: §5.322
33328: §§5.322-5.323
33331: §10.68
33333.2(a)(2): §5.354
33333.2(a)(3)-(a)(4): §5.354
33333.2(g)(2): §5.354
33333.4(a): §5.427
33333.4(c): §5.427
33333.6: §5.436
33333.6(b): §5.354
33333.10: §§5.344, 5.409
33334.2: §§5.314, 5.368
33334.2-33334.3: §5.428
33334.2(a): §5.417
33334.2(a)(1)-(2): §5.417
33334.2(a)(1)(A): §5.418
33334.2(a)(1)(B): §5.419
33334.2(a)(1)(C): §5.420
33334.2(b): §5.422
33334.2(e): §10.189
33334.2(g): §§5.314, 5.430
33334.2(i): §5.417
33334.3(e): §5.429
33334.3(f)(1): §5.431
33334.3(i): §5.421
33334.4: §5.368
33334.5(a): §5.336
33334.6: §§5.368, 5.427
33334.6(b): §5.417
33334.6(c): §§5.417-5.423
33334.6(d): §§5.423, 5.425
33334.6(f): §5.424
33334.6(g): §§5.426-5.427

33334.12: §5.432
33334.14: §5.431
33339: §5.346
33339.5: §§5.346, 5.351
33342.5: §5.354
33342.5(a): §5.336
33342.5(b): §5.336
33342.7: §§5.336, 5.354
33344.5-33344.6: §5.324
33346: §5.330
33347: §5.330
33347.5: §§5.330, 5.386, 5.390
33348: §5.331
33349: §5.332
33349(a): §5.332
33350: §5.332
33351: §5.335
33352: §§5.319, 5.325, 5.329, 5.343
33352(c): §5.368
33352(f): §8.20
33354.6: §5.343
33355: §5.331
33357: §5.335
33360: §5.331
33360.5: §5.331
33362-33363: §5.334
33363: §5.334
33363.5: §5.333
33364: §5.334
33365: §5.335
33366: §§5.337, 5.390
33367: §§5.335, 5.343, 10.68
33372: §5.338
33373: §5.338
33375: §5.338
33385: §§5.374, 5.382, 5.384
33385(b): §5.375
33385(b)(2): §5.376
33385(b)(3): §5.377
33385(b)(4): §5.378
33385(b)(4)(A): §5.375
33385(c): §5.389
33385(c)-(d): §5.380
33385(d): §§5.374, 5.381
33385(d)(2): §5.375
33385(f): §5.382
33385(g): §5.382
33385(h): §5.388
33385(i): §5.378
33385.3(a)(1): §5.384
33385.3(a)(2): §5.384
33385.5: §§5.384, 5.386, 5.391
33386: §§5.383, 5.385
33388: §5.389
33391: §§5.304, 5.314, 5.352, 5.354
33392: §5.352
33393: §§2.183, 5.353
33394: §5.354
33395: §§1.106, 5.354
33399: §5.355
33399(a): §5.355
33400: §5.314
33402: §5.314
33410-33418: §5.420
33411.2(a): §5.404

33411.2(b): §5.404
33411.2(d): §5.404
33411.3: §5.405
33411.4: §5.406
33412: §5.407
33412(b)(2)(A)(iii): §5.412
33413: §§5.368, 5.415, 5.430
33413(a): §§5.401-5.403
33413(b)(1): §5.410
33413(b)(1)-(2): §5.412
33413(b)(2): §5.411
33413(b)(2)(A)(iv): §5.412
33413(b)(2)(A)(v): §5.414
33413(b)(2)(B): §5.413
33413(b)(2)(C): §5.413
33413(b)(4): §5.415
33413(c)(2): §5.416
33413(d)(1): §§5.400, 5.409
33413.5: §5.408
33415: §5.356
33417.5: §8.25
33420.2: §9.91
33426.5: §5.370
33426.5(b)(1): §5.370
33426.7: §5.299
33426.7(b)(1): §5.299
33430: §8.107
33430-33433: §5.314
33431: §§5.361, 5.365, 8.108
33433: §§5.361-5.362, 5.365
33433(a)(1): §8.108
33433(a)(2): §8.109
33435-33436: §§5.362, 8.110
33437: §§5.362, 5.366, 8.110
33438: §§5.362, 8.110
33439: §§5.362, 5.366, 8.110
33440: §5.314
33444.5: §5.372
33444.6(a): §5.372
33444.6(b): §5.372
33445: §§5.314, 5.367, 5.369
33445(g): §5.367
33445.1: §§5.314, 5.367, 5.369
33450: §5.342
33450-33458: §5.343
33456: §5.345
33457.1: §5.343
33459: §5.314
33459-33459.8: §11.254
33485-33489: §5.436
33490: §5.415
33490(a): §5.368
33490(a)(2)-(4): §5.415
33490(b): §5.368
33492.3: §5.319
33492.10: §5.302
33492.40: §5.319
33500: §5.341
33501: §§5.341, 13.184
33600-33601: §5.396
33600-33689: §5.394
33601: §5.314
33603: §5.314
33607.5: §§5.326-5.327
33607.5(a): §5.326

33607.5(a)(2): §5.326
33607.5(b): §5.326
33607.5(c): §5.326
33607.5(d): §5.326
33607.5(e): §5.326
33607.5(f)(1)(B): §5.325
33607.7: §5.327
33610-33615: §5.397
33612: §5.397
33620-33626: §5.397
33640: §5.396
33641(d): §5.398
33670: §§5.367, 5.392
33675: §5.394
33676: §5.328
33676(b): §5.327
33676(b)(1)(A)-(B): §5.327
33676(b)(4): §5.327
33676(c): §5.328
33740: §5.314
33750: §5.314
33760: §5.314
33777.5: §5.314
34000: §5.302
34000-34008: §5.314
34110: §5.310
34112: §5.310
34115: §5.310
34115.5: §5.310
34120: §5.310
34120(b): §5.310
34120.5: §5.312
34130: §5.310
34130.5: §1.213
34200-34380: §1.70
34326: §10.68
37000-37002: §10.164
37001: §10.164
37001.5: §10.164
37910-37964: §5.292
38040-38041: §7.249
38500-38599: §§6.22, 11.38, 11.235
38550: §6.22
38562: §6.22
39000-44474: §11.185
39002: §§11.186, 11.202-11.203
39003: §11.186
39013: §11.226
39047: §11.215
39053.6: §11.229
39510: §11.208
39510(a)-(b): §11.208
39510(c): §11.208
39606: §11.186
39606(a)(2): §11.206
39608: §§11.186, 11.206
39616: §11.229
39650-39675: §11.207
39660: §11.186
39667: §11.186
40000: §11.186
40001: §§11.188, 11.191
40002: §11.187
40100.5: §11.187
40200-40276: §1.79

40400-40540: §1.79
40460(d): §11.189
40500.5: §11.229
40702: §11.188
40709.6: §11.227
40714.5: §11.229
40716(a): §11.191
40716(b): §§11.192-11.193
40717: §11.191
40717(g): §11.191
40717.6: §11.194
40717.9(a): §11.194
40725-40730: §11.198
40725(c): §11.199
40726: §11.200
40727(a): §11.201
40727.2: §11.201
40728: §11.201
40728.5: §11.201
40752: §11.188
40800: §11.216
40807: §11.217
40823-40826: §11.216
40828-40829: §11.217
40828(a): §11.217
40864: §11.219
40864(a): §11.219
40910-40930: §§11.188-11.189
40914: §11.190
40914(b): §11.190
40918-40920: §11.191
40918-40920.5: §11.191
40918(a)(3): §11.191
40919(a)(1): §11.191
40920(a): §11.191
40920.5: §11.191
40920.5(a): §11.191
40923: §11.207
40925: §11.189
40930: §11.195
41015: §§11.192-11.193
41503.1: §11.190
41508: §11.202
41513: §11.215
41700-41701: §11.220
41701: §§11.216-11.217
41712: §11.186
41805.5: §6.108
42300: §11.193
42300-42316: §§11.188, 11.225
42300(b): §11.228
42301: §§11.225-11.226
42301(e): §11.228
42301.6: §11.205
42302: §11.232
42302.1: §11.234
42309(a): §11.232
42311: §11.231
42350: §11.216
42352: §§11.216-11.217
42353-42354: §11.218
42359: §11.216
42400-42410: §§11.188, 11.215
42401: §11.222
42402.3(a): §11.215

42450: §11.220
42450-42454: §11.215
42452: §11.221
42454: §11.222
43000-44299.91: §11.206
43013: §11.186
44000-44126: §11.207
44223: §11.191
44225: §11.191
44229: §11.191
44236: §11.191
44237: §11.191
44300-44394: §11.207
46010-46080: §9.107
50052.5: §§8.88, 10.184
50052.5(b): §5.404
50074: §8.87
50079: §8.87
50079.5: §§10.163, 10.174
50093: §§5.404, 10.163, 10.174
50105: §§5.404, 10.174
50459: §10.48
50517.5: §1.95
57008-57010: §11.254
101075-101095: §6.199
113709: §8.161
114259.5: §9.182
114315: §8.161
115800: §13.93
115825-115830: §10.346
116410: §6.10
116550(a): §6.10
120980: §§4.132, 4.171
120980(f): §4.24
121575-121710: §9.183
121595: §9.183
121600: §9.183
121605: §9.183
121690(a): §9.183
121690(e): §9.183
121690(f): §9.183
121690(g): §9.183
121695: §9.183
122331(a): §9.167
122331(b): §9.167

INSURANCE CODE
384: §7.284
1063-1063.17: §7.278
11580.04: §§7.281, 7.300
11580.2: §7.253

LABOR CODE
98.6: §§4.133, 4.180
132a: §§4.379-4.380
139.5: §4.372
230(a)-(b): §4.175
230(c)-(d): §4.175
230.3: §4.175
230.8: §4.175
233: §4.173
432: §4.125
432.2: §4.16
432.7: §§4.22, 4.104
1025-1028: §4.120

1101-1102: §4.136
1102.5: §4.134
1174: §2.266
1174(c): §4.123
1182.12: §4.67
1197.5: §§2.266, 4.167
1198.5: §§4.125, 4.270
1720: §§5.300, 5.363, 7.85, 7.89
1720-1720.3: §7.82
1720-1743: §§7.2, 7.51
1720-1815: §5.300
1720(b): §§7.83, 7.85-7.86
1720(c)(1): §7.87
1720(c)(2): §§5.300, 7.87
1720(c)(3): §7.87
1720(c)(4)-(5): §7.86
1720(c)(4)-(c)(6): §5.300
1720(c)(6): §7.87
1720(d): §5.300
1720.2: §7.88
1720.3: §7.85
1720.4: §7.94
1726: §§5.300, 7.91
1750: §7.57
1770-1781: §7.84
1771: §§7.51, 7.82-7.83, 7.89, 7.173
1771.5: §§7.52, 7.82
1771.5(b): §7.89
1773.2: §§7.51, 7.82
1775: §§7.53, 7.90
1776: §§7.54, 7.82
1776(a): §7.92
1776(b): §7.93
1776(e): §7.93
1777.1: §§7.41, 7.77
1777.5: §7.55
1777.7: §§7.41, 7.77
1781: §§7.53, 7.91
1810: §7.56
1813: §7.53
1860: §7.57
1861: §7.57
1960-1964: §4.328
1962: §4.348
2807: §4.289
2808: §4.289
2810: §7.58
2810(b): §7.58
3200-3604: §4.350
3202: §4.355
3208: §4.354
3208.1-3208.2: §4.354
3208.3: §§4.354, 4.357
3211.92-3219: §6.199
3212-3213.2: §4.356
3351: §4.358
3352.94: §6.199
3363.5: §4.358
3600: §§4.354, 4.359
3602(a): §4.352
3602(b): §4.352
3700: §7.57
3761(b): §4.387
3762(c): §4.384
3800: §10.235

3850: §4.397
4056: §4.364
4062.9 (former): §4.384
4351-4355: §6.199
4453(a)(10): §4.367
4551: §4.378
4553: §4.377
4600: §§4.361-4.362
4600-4601: §4.363
4600.3: §4.363
4604.5: §4.361
4616: §4.363
4616(e): §4.361
4620-4621: §4.384
4646 (former): §4.388
4650-4664: §4.365
4650(d): §4.376
4652: §4.366
4653: §4.367
4656: §4.366
4658: §4.370
4658.5: §4.372
4659(c): §4.370
4660: §4.369
4660(a): §4.369
4663-4664: §4.368
4700-4709: §4.373
4702: §4.373
4850: §§4.367, 4.396
5000-5006: §4.388
5100.6 (former): §4.388
5300: §4.382
5400-5401: §4.385
5400-5413: §4.392
5402(a): §4.385
5402(b): §4.386
5402(c): §4.361
5705: §4.355
5814: §4.374
5814(c): §4.391
6300-9104: §2.266
6308-6327.5: §4.138
6400-6413.5: §4.137
6401.7: §4.137
6423-6436: §4.138
6705: §7.43

MILITARY AND VETERANS CODE
394-395.10: §4.175
395.01: §4.163
395.8: §1.189

PENAL CODE
16: §2.211
17(d): §12.34
17(d)(1): §12.34
19: §§1.241, 12.18, 12.31
19.6: §12.31
19.7: §12.31
20: §12.45
70(d): §7.191
166(a)(4): §12.18
186.20-186.33: §9.80
186.22a: §9.80
186.25: §9.80

245: §9.168
266h-266i: §12.72
290: §4.22
313-313.5: §9.129
313(c): §9.13
313.1: §9.13
313.1(c): §9.14
313.1(d): §9.14
326.5: §9.27
330: §§9.29, 9.85
350(a)(2): §12.15
365.5: §9.182
365.7: §9.182
370: §§8.120, 9.114-9.115
372: §12.38
373a: §§12.30, 12.38
374.3(h): §12.72
399: §9.168
399.5: §9.168
403: §§1.225, 2.9, 2.15, 13.116
409.5: §6.186
409.5(d): §6.186
415: §9.107
417.27(d): §9.182
422.56: §4.176
424: §§2.157, 5.48, 5.55
426: §3.210
487(d)(1): §9.158
491: §9.158
594: §9.88
594(c): §9.92
594(e): §9.87
594(f): §9.92
594.1(a): §9.89
594.1(b): §9.89
594.1(d): §9.89
594.1(e): §9.89
594.1(f): §9.89
594.5: §12.25
594.05-640.6: §9.86
596-600.5: §9.180
597f: §9.180
597.1: §9.180
600.2: §9.182
600.5: §9.182
602(k): §9.156
602(m): §§9.154-9.155
637.3: §4.17
640.5: §§9.87-9.88
647: §9.102
647(b): §12.72
647(c): §9.124
647(d): §9.102
647(e): §§9.19, 9.102
653w: §12.15
801: §2.173
803(c): §2.173
814: §12.50
816: §12.50
825: §12.50
830.1: §4.323
830.1-830.5: §4.295
830.9: §9.174
830.31-830.33: §4.295
830.34-830.35: §4.295

830.36-830.38: §4.295
832: §§9.174, 12.48
832.5(b): §2.266
832.7: §§2.246-2.247, 4.127, 4.131
836: §9.174
836.5: §§12.47-12.48
836.5-853.6: §12.47
836.5(c): §12.47
853.5: §12.47
853.6: §§12.39, 12.47
853.6(e)(3): §12.35
853.7: §12.48
853.8: §12.48
948-949: §12.49
950: §§12.39, 12.49
978.5(4): §12.39
988: §12.40
1054-1054.10: §12.40
1202.4: §5.197
1202.4(a)(1): §9.92
1202.4(k)(5): §9.92
1203(a): §§5.200, 12.54-12.55
1203(a)-(b): §12.57
1203(d): §§12.55-12.56
1203a: §§12.54, 12.60
1203.05: §2.221
1203.1: §5.200
1203.1(k): §5.200
1203.2: §12.64
1203.2(a): §12.58
1205(d): §5.199
1269b(b): §5.197
1269b(c): §12.35
1306: §5.201
1382(a)(3): §12.41
1390-1397: §12.53
1427: §§12.48, 12.50, 12.53
1462.5: §5.199
1463: §5.196
1463.001: §5.201
1463.001-1463.002: §§5.196, 5.198
1463.001(b)(3): §5.196
1463.002: §5.196
1463.009: §5.201
1463.14: §5.198
1463.16: §5.198
1463.18: §5.198
1463.25: §5.198
1464: §5.197
1523: §9.174
1530: §9.174
1534: §2.221
11105.3: §4.25
11200: §9.18
11200-11201: §9.18
11225: §12.13
11225-11226: §§9.27-9.28, 9.35
11225-11235: §§9.15, 12.13-12.16
11226: §§12.13, 12.15
11229: §12.13
11230: §§12.13, 12.15
11233: §12.13
12020: §9.96
12021.3(b)(1)-(2): §9.99
12026(b): §9.96

12028.5: §§9.97-9.98
12071: §9.96
12304: §9.96
12321: §9.96
13326: §4.23

PROBATE CODE
6102: §8.65

PUBLIC CONTRACT CODE
1-84: §6.160
1-88: §6.160
1100.7: §§7.3, 7.9, 7.170
1101: §§7.2, 7.82, 7.85, 7.99
1102: §7.6
1103: §7.19
1104: §7.71
1601: §7.14
2000: §7.29
3300: §7.36
3400: §7.63
3400(a): §7.63
4100-4114: §§7.75, 7.81
4101: §7.76
4104: §§7.39-7.40
4104(a): §7.75
4104(b): §7.75
4104.5: §§7.10-7.11
4107: §7.77
4107(a): §§7.75, 7.77-7.78
4107.5: §§7.22, 7.79
4109: §7.80
4110: §7.81
4111: §7.81
5101: §7.22
5101(a): §§7.23-7.24
5102: §7.24
5103: §7.23
5105: §7.25
5110: §7.245
6109: §7.41
6610: §7.12
7100: §7.64
7102: §7.66
7103.5: §7.42
7104: §7.43, §7.108
7105: §7.67
7105(d)(2): §7.62
7106: §7.44
7107: §§7.45, 7.122, 7.125
7107(c): §7.125
9201: §7.294
9201(b): §7.65
9203: §7.45
10115-10115.15: §7.29
10163: §7.27
10240-10240.13: §§7.111-7.112
10299: §7.196
12100-12113: §7.196
20100-20929: §6.199
20101: §7.27
20101(a): §7.27
20102: §7.21
20103.5: §§7.36-7.38
20103.8: §7.17

20103.8(a): §7.17
20104: §7.47
20104-20104.6: §§7.111, 13.41
20104(a)(1): §7.47
20104.2: §7.47
20104.4: §7.47
20104.50: §7.72
20104.50(f): §7.72
20161: §§7.2, 7.4, 7.82, 7.85
20161-20175.2: §7.171
20162: §§7.3, 7.15, 7.193
20163: §7.3
20164: §7.10
20166: §§7.16, 7.21
20167: §7.21
20168: §§6.199, 7.6
20170: §7.103
20170-20171: §§7.13, 7.49
20172-20174: §7.13
20175.2: §7.9
20175.2(a)(2): §7.9
20175.2(c): §7.9
20175.2(c)(1): §7.9
20175.2(d): §7.9
20193-20195: §7.9
20685.5: §7.49
20688.2: §§5.314, 7.3
20690-20696: §6.160
20710: §6.160
20720-20724: §6.160
20730-20737: §6.160
20750-20753: §6.160
20760-20764: §6.160
22000-22003: §7.3
22002: §7.2
22032: §7.3
22050: §§6.199, 7.6
22200: §7.2
22201: §7.112
22300: §7.46

PUBLIC RESOURCES CODE
2710-2796.5: §1.101
3220: §11.174
3228-3229: §11.174
3740: §11.174
5096.151: §1.95
5096.225-5096.267: §8.106
5096.237: §8.106
5164: §4.25
5400-5409: §8.101
5527.1: §1.170
6101-6111: §§1.101, 10.360
6204: §10.360
6210.4: §10.345
6216: §10.360
6301: §10.360
13015: §5.158
14500-14599: §6.118
14501(e): §6.118
14549.6: §6.118
21000-21001: §11.11
21000-21177: §§1.122, 5.316, 5.338, 5.361, 5.364, 6.91, 6.155, 8.1, 8.6, 8.32, 8.76, 8.115, 9.49, 10.13, 10.70, 10.162, 10.191, 10.230-10.231, 10.288, 10.313, 10.348, 10.412, 11.10, 11.93, 11.230, 11.296, 13.163
21000-21178: §3.121

21000-21777: §10.445
21000(g): §10.275
21001(d): §10.275
21002: §10.313
21005: §10.412
21005(c): §11.76
21061.3: §10.194
21064.5: §11.30
21065: §§8.6, 11.19
21066: §10.301
21067: §11.14
21069: §11.14
21071: §10.195
21072: §10.194
21080(a): §11.20
21080(b): §11.21
21080(b)(1): §11.20
21080(b)(5): §11.21
21080(c)(1): §11.30
21080(c)(2): §11.30
21080(d): §11.35
21080(e): §11.35
21080(f): §11.30
21080.01-21080.33: §11.21
21080.3: §11.33
21080.4: §11.36
21080.5: §10.313
21080.9: §10.288
21080.13: §11.21
21081: §§11.50-11.51
21081(a)(3): §§11.50-11.51
21081.5: §11.52
21081.6: §§11.30, 11.53
21081.6(a)(2): §11.47
21082: §11.13
21082.1(c)(3): §11.43
21082.2(c): §11.35
21082.2(d): §11.35
21083.05: §11.38
21083.1: §11.11
21083.3: §§11.21, 11.44
21083.5: §11.78
21083.7: §11.78
21084: §11.22
21084(b)-(c): §11.22
21084(e): §11.22
21084.1: §11.22
21089: §10.349
21089(a): §11.58
21089(b): §§11.54, 11.59
21090: §11.44
21091-21092.5: §11.33
21091(a): §11.40
21091(b): §11.33
21091(d): §11.41
21091(d)(2)(B): §11.41
21091(e): §11.33
21092-21092.6: §10.412
21092.1: §11.42
21092.3: §11.36
21092.5(a): §11.41
21093-21094: §11.44
21100: §11.38
21100(b)(2): §11.38
21151(c): §§11.34, 11.43

21151.5(a): §§11.56-11.57
21151.5(a)(4): §11.57
21151.5(b): §§11.57-11.58
21151.9: §11.99
21152: §§11.59-11.60
21156-21159.4: §11.44
21159.20(b): §10.197
21159.21: §11.21
21159.21-21159.23: §11.21
21159.21(a)-(b): §10.197
21159.22: §10.197
21159.22-21159.24: §10.162
21159.23: §10.197
21159.24: §10.197
21166: §§11.43, 11.45
21167: §§1.141, 11.43, 13.14, 13.23
21167(a): §§11.43, 11.59
21167(b): §11.59
21167(b)-(c): §11.60
21167(d): §§11.24, 11.59, 11.61
21167(f): §§11.54, 11.59
21167.4: §11.72
21167.5: §11.67
21167.6(a): §11.68
21167.6(b): §11.68
21167.6(b)(2): §11.68
21167.6(c): §11.68
21167.6(d): §§11.68-11.69
21167.6(e): §§11.47, 11.68-11.69
21167.6.5: §11.67
21167.6.5(b): §11.67
21167.6.5(c): §11.67
21167.7: §11.67
21167.8(a)-(c): §11.71
21167.8(e): §11.71
21167.8(f): §11.70
21168: §§10.412, 11.73, 11.75
21168.5: §§10.412, 11.73, 11.75, 13.6
21168.9(a): §11.76
21168.9(b): §11.76
21177: §11.62
21177(b): §11.63
25108: §6.38
25116: §6.38
25500-25543: §6.38
30000-30900: §§1.101, 6.156, 6.176, 10.198, 10.277
30001.5: §10.289
30005(b): §10.309
30007.5: §10.281
30103(a): §10.280
30106: §§10.304, 10.307
30108.6: §10.283
30109: §10.288
30111: §10.305
30119: §10.288
30121: §10.306
30150-30174: §10.280
30166.5: §10.287
30200-30265.5: §§10.198, 10.281
30200(a): §10.277
30210-30212: §§10.307, 10.343
30210-30214: §10.281
30214: §10.307
30220-30224: §10.281
30230-30237: §10.281

30233(a): §10.306
30240: §10.281
30241-30242: §10.281
30243: §10.281
30244: §10.281
30250-30255: §10.281
30260-30265.5: §10.281
30301: §§1.101, 10.278
30301.5: §§1.101, 10.278
30304: §10.278
30315: §10.279
30330: §10.278
30500(a): §§1.101, 10.283
30500(c): §§10.283-10.284
30501: §10.283
30511: §10.286
30511(c): §10.286
30512(a)(1): §10.290
30512(a)(2): §10.291
30512(a)(3): §10.291
30512(b): §§10.294-10.295
30512(c): §10.291
30512.2: §10.289
30513: §§10.296-10.298
30514(a): §10.299
30514(b): §10.299
30514(c)-(d): §10.299
30514(e): §10.299
30519: §§10.292, 10.305
30519(b): §10.303
30519.5: §10.300
30600(a): §10.301
30600(e): §10.301
30600.5: §10.293
30601: §10.293
30603: §§10.303, 10.320
30603(a)(1): §10.316
30603(a)(2): §10.317
30603(a)(4): §10.317
30603(b): §10.318
30603(d): §10.303
30604: §10.313
30604(a): §10.313
30604(f): §10.198
30607: §10.312
30607.2: §10.308
30610: §10.309
30610.1-30610.2: §§10.308-10.309
30610.1(c): §10.309
30620: §10.321
30621: §10.312
30624: §10.310
30625: §§10.303, 10.319
30625(a): §10.321
30625(b)(2): §10.321
30625(c): §10.321
30627: §10.314
30700-30900: §6.176
30801: §§10.319, 10.322
30802: §10.322
30803: §10.326
30803-30804: §10.323
30805: §10.326
30809(a): §§10.327-10.328
30809(e): §10.329

30810(a): §10.329
30810(b): §10.329
30810(c): §10.329
30811: §10.333
30820: §10.331
30821.6: §10.330
30822: §10.331
30823: §10.332
31090(f): §11.34
33000-33215: §11.7
33500-33806: §11.7
40000-49620: §§6.1, 6.93-6.95, 6.100, 6.103, 10.261
40002: §6.104
40059: §§5.166, 5.194, 6.93, 6.97
40059(a)(1): §6.94
40059(a)(2): §§6.95, 6.103
40059(b): §6.95
40059.1: §6.94
40110: §§6.109, 6.112, 6.114-6.115, 6.117
40151: §6.111
40400: §6.109
40900-41851: §6.104
40970: §6.104
40973(c): §6.115
41000-41260: §6.109
41001: §10.262
41002: §6.113
41002-41003: §10.262
41003: §6.109
41500: §§6.110, 10.263, 11.241
41510: §10.263
41702: §10.265
41710: §10.266
41711: §10.267
41730: §§6.111-6.112
41732: §6.111
41750: §§6.112, 10.261-10.262, 11.241
41750(c): §10.263
41750(e): §10.264
41751: §10.268
41760: §§6.109-6.111, 10.269, 10.271
41770: §10.272
41780: §§6.104, 6.113-6.114
41780.05: §6.114
41780.2: §6.114
41781: §§6.114, 6.116
41782: §6.115
41785: §6.104
41790: §10.269
41793: §10.270
41800: §§6.111-6.112
41813: §§6.112, 6.117, 10.274
41820: §6.104
41820.5(a): §6.115
41821: §§6.112, 10.273
41822: §6.109
41825: §§6.114, 6.117
41850: §§6.104, 6.112, 6.117
42900-42911: §6.119
42905: §6.174
42911: §6.119
42912: §6.119
44001: §6.111
47109: §5.195
49031: §5.194

49300: §§5.194, 6.94-6.95, 6.97, 7.178
49501.3: §6.97
49501.5: §6.97
49520: §6.97
49520-49521: §§6.96-6.97
49520-49523: §6.97
49524: §6.97

PUBLIC UTILITIES CODE
201-2119: §1.98
210: §5.158
218.3: §6.20
330-352.7: §6.19
330-399.20: §§6.18-6.19
331.1: §6.20
331.1(a): §6.20
366.2: §6.20
366.2(d): §6.21
379.5(b): §6.22
381: §6.22
381.1: §6.20
387: §6.22
394.25: §6.20
399: §6.22
399-399.20: §6.22
399.12(g)(2)-(3): §6.22
399.14-399.15: §6.22
454.5: §6.20
525: §6.129
529: §6.129
701: §§1.99, 6.36, 6.52
761-900: §6.36
768.5: §6.63
799: §5.48
890-900: §6.22
1001: §6.37
1011: §9.5
1403: §6.41
1411: §6.41
1759: §6.45
2902: §6.91
5327: §9.5
5371.4(g): §9.34
5513: §9.33
5800-5970: §§6.59, 6.65, 6.68
5830(s): §6.59
5840: §6.60
5840(a): §§6.59, 6.65
5840(c): §6.59
5840(j): §6.65
5840(n): §6.65
5840(o): §§6.60, 6.66
5840(q)(1): §§5.193, 6.67
5850: §6.65
5870(a): §6.67
5870(k): §6.66
5870(n): §§5.193, 6.67
5885(a): §6.91
5890: §6.68
5900: §6.84
5940: §6.68
6001: §§5.188, 6.49, 8.136, 9.5
6001-6092: §§5.188, 6.39, 6.49-6.50, 6.90
6001.5: §§5.192, 6.55, 6.57
6002: §6.52

6002-6203: §6.55
6006: §5.188
6201-6302: §§5.189, 6.39, 6.49, 6.51, 6.57
6203: §6.52
6204: §5.189
6205: §§5.190, 6.49
6205.1: §§5.192, 6.57
6231: §5.189
6231.5: §§5.192, 6.57
6231.5(e)-(f): §6.57
6264: §6.53
6265: §6.55
6296: §6.55
6297: §§6.54, 8.123
6301: §6.55
6350-6354.1: §§5.191, 6.56
7901: §§6.73, 6.90-6.91
7901.1: §6.91
8037: §6.36
8340-8341: §6.22
8341: §6.22
9600-9620: §6.19
10001-10002: §6.2
10001-10303: §1.25
10002: §6.17
10005: §6.39
10101: §8.136
11501-14403.5: §§6.11, 6.106, 11.162
12753: §6.199
13451-13691: §§6.11, 11.162
15501-18055: §11.88
21601-21690.29: §6.139
21661.5-21666: §6.150
21662.5: §6.152
21670-21679.5: §§6.149, 10.254
21670.1: §10.254
21675: §6.149
21675.1: §10.255
21675.2: §§6.149, 10.258
21676: §§6.149, 10.256, 10.259
21676.5: §10.257
21678: §10.259
21679: §10.258
21679.5: §10.258
25703: §8.124
99155: §6.129
99260-99273: §6.135
99268.17: §6.135
99288: §7.178
132350-132372.4: §1.79
170000-170084: §1.79

REVENUE AND TAXATION CODE
95-100.95: §§5.19, 5.25, 5.216
99: §§1.134, 1.152
99(b)(4): §1.152
99.01: §1.134
107: §5.23
107.6: §§5.23, 8.117
110.1: §5.328
201: §5.18
2201-2246.2: §5.247
7200: §5.216
7200-7226: §§5.6, 5.26, 5.28, 5.31
7202(c): §5.26

7202(h): §5.26
7202(h)(1): §§5.27-5.28
7203.5: §5.26
7251-7279.6: §§5.31, 5.33
7251.1: §§5.32-5.33
7261: §5.28
7261(f): §5.31
7280: §5.52
7280-7283.51: §5.52
7280(b): §5.53
7280(b)-(c): §5.53
7280(e): §5.53
7280.5: §§5.52, 5.398
7282: §1.20
7283.5: §5.54
7283.5(c): §5.54
7283.5(d)(3): §5.54
7283.51: §5.55
7284.1: §9.5
7285: §5.28
7285.9: §5.32
7285.91: §5.33
7285.92: §§5.32-5.33
7287-7287.10: §9.91
7287.2: §9.91
7287.6: §9.91
7301-8526: §5.214
10701-11006: §§5.7, 5.214
11911: §5.68
11911-11935: §5.67
11911(a): §5.67
11911(b): §5.67
11911(c): §5.67
11921-11930: §5.67
11931: §5.67
17041.5: §5.34
17274: §§12.7, 12.20
23181-23182: §5.103
23182: §§5.104, 9.5
23701-23712: §9.27
24436.5: §§12.7, 12.20
30001-30482: §5.214
32010: §5.34

STREETS AND HIGHWAYS CODE

702: §8.124
1801: §13.100
1806: §13.100
2800-3012: §5.129
3100-3124: §5.147
3110-3117.5: §§5.123, 5.127-5.128
5000-6794: §5.131-5.132
5610: §§13.103, 13.107
8300-8363: §§8.126, 8.142
8313: §8.127
8320: §§8.128-8.129
8322: §8.129
8323: §8.129
8324: §8.130
8324(b): §§8.132, 8.151
8325: §8.133
8330: §8.143
8331: §8.144
8333: §8.148
8334: §§8.145-8.146

8334.5: §8.142
8336(b): §8.150
8340(a): §8.134
8340(b): §8.135
8340(c): §8.136
8340(d): §8.137
8350: §8.138
8351: §8.139
8355: §§8.103, 8.140
8357: §§8.103, 8.140
8360: §8.141
8362: §8.141
8363: §8.141
8500-8887: §§5.132-5.134
9525: §§5.110, 5.154
10000-10706: §§5.131-5.133
10600-10706: §5.132
10601: §13.184
22500-22679: §§5.133-5.134, 5.153
22507: §5.127
27261: §8.124
32950.5: §8.124
36500-36551: §5.136
36600-36671: §5.136
36614.5: §2.223

UNEMPLOYMENT INSURANCE CODE
3300-3306: §4.172

VEHICLE CODE
21: §8.153
285: §§5.299, 5.371
1808.1: §4.26
12517: §6.128
12804.6: §6.128
13202.6: §9.90
16051-16056: §7.259
17004: §13.92
17004.7: §13.134
21100: §8.178
21100(g): §§8.178, 9.44
21100(h): §8.171
21100.4: §9.42
21101: §8.154
21101(c): §§8.167-8.168
21101(d): §8.154
21101(e): §8.154
21101(f): §8.155
21101.4: §8.154
21101.6: §8.156
21102: §8.154
21102.1: §8.154
21103-21104: §8.154
21107.7: §8.156
21112: §§8.178, 9.41
21114.5: §8.171
21115: §8.178
21207: §8.172
21210: §8.172
21212: §§8.171, 8.173-8.174
21220-21235: §8.175
21280-21282: §8.175
21967: §8.174
21968: §8.174
21969: §8.173

22455: §8.161
22503.5: §8.161
22506: §8.162
22507: §§1.245, 8.158-8.160, 8.166
22507(b): §8.163
22507.2: §8.162
22507.5: §§8.160-8.161
22507.6: §8.163
22508: §8.164
22509: §8.164
22510: §8.164
22511.7-22511.8: §8.164
22514: §8.164
22519: §8.162
22650: §8.178
22651.1: §8.178
22658(k)-(l): §8.178
22658.1: §8.178
22659.5: §12.72
22660: §12.72
22660-22661: §8.164
22661: §12.72
22671: §§8.164, 9.44
22850.5: §8.178
23536: §5.197
23645: §5.197
27007: §9.111
31614(a): §8.169
31616: §8.169
33000: §8.168
34500: §6.131
34520: §§4.116, 6.137, 9.43
34520-34520.5: §6.131
35701: §8.167
40200: §5.203
40200-40230: §5.202
40200.3: §5.204
40202: §5.202
40203.5: §5.203
40209: §5.203
40215: §§5.205-5.207
40215(b): §5.206
40220(a): §5.210
40220(b): §5.211
40220(c): §5.211
40225: §5.212
40230: §5.208
40310: §5.197
42001.5: §5.203
42001.13: §5.203
42006: §5.197

WATER CODE
Div 7, ch 7: §11.182
100-101: §11.87
174: §11.87
225-238: §11.83
275: §11.87
375-378: §6.6
375(b): §6.6
500-530: §6.4
526: §6.4
527: §6.4
528: §6.4
529: §6.4

1005.1-1005.2: §6.6
1005.1-1005.4: §11.87
1005.4: §6.6
1009: §6.6
1010: §6.7
1010-1011.5: §11.87
1011-1012: §6.6
1126: §11.153
1200-1851: §11.87
1435-1442: §11.87
1725-1745.11: §11.87
1735-1736: §6.6
1745.02: §6.6
1745.04: §6.6
1745.05(a)(1): §6.6
2000-2900: §11.87
4000-4407: §§11.85, 11.89
4999-5009: §11.87
4999-5108: §11.87
5009: §11.87
8400-8415: §10.137
8501: §10.70
10004: §§11.81, 11.124
10004.5-10005: §11.81
10530-10550: §11.110
10533-10537: §11.110
10534: §11.110
10537: §11.110
10540: §11.110
10540(b): §11.110
10540(c): §11.110
10541(f): §11.110
10610-10656: §§11.84, 11.91
10615: §11.94
10617: §§11.91, 11.93
10620: §11.93
10620-10645: §11.106
10621: §11.93
10631: §11.94
10631(a): §11.94
10631(b)-(c): §11.94
10631(c): §11.95
10631(k): §11.94
10631.1: §11.94
10631.5: §11.93
10632: §§11.93-11.94
10633: §11.94
10634: §11.94
10635: §11.94
10635(a): §11.94
10642: §11.93
10644: §§11.84, 11.93
10652: §11.93
10656: §11.93
10750-10755.4: §11.122
10750.2(b): §11.97
10750.4: §11.97
10750.6: §11.97
10750.7-10750.8: §11.97
10753: §11.97
10753.7-10753.8: §11.97
10753.7(a): §11.97
10755.3: §11.122
10795-10795.20: §11.97
10910-10915: §§10.71, 10.83

10910(b): §11.99
10910(c)(2): §11.100
10910(c)(3): §11.100
10910(f)(2): §11.100
10911(a): §11.101
10911(c): §§11.101, 11.103
10912: §11.99
10912(c): §11.91
13000: §11.129
13000-13999.19: §8.13
13000-14958: §§6.11, 11.111, 11.145, 11.162, 11.169, 11.174
13002: §11.117
13002(b): §11.118
13050(d): §§11.131, 11.180
13050(e): §§11.169, 11.171, 11.176
13050(n): §11.181
13140: §11.124
13140-13147: §11.248
13141: §11.124
13142: §§11.125, 11.169
13142.5: §11.124
13144: §11.124
13146: §11.125
13147: §11.124
13160: §11.145
13170: §11.248
13225: §11.160
13240: §11.128
13240-13247: §11.248
13241: §11.129
13245: §11.129
13260: §§11.115, 11.132, 11.171
13260-13274: §6.107
13261(b): §11.156
13261(c): §11.159
13261(d): §11.156
13263: §§11.115, 11.133-11.134, 11.171
13263(a): §§11.129, 11.135
13263(g): §11.136
13263(h): §11.183
13265(a): §11.159
13265(b)(1): §11.156
13265(d)(1): §11.156
13267: §11.160
13268: §11.160
13268(a): §11.159
13268(b)(1): §11.156
13268(d)(1): §11.156
13269: §§11.131, 11.133
13271(c): §11.159
13272(c): §11.159
13290-13291.7: §11.167
13300: §11.154
13301-13303: §11.157
13304(a): §11.158
13305: §11.158
13308: §11.154
13320: §§11.152-11.153, 11.156
13320(a): §11.152
13320(b): §11.152
13321: §11.152
13323: §11.156
13323-13327: §11.156
13323-13328: §11.154
13323(d): §11.156

13327: §11.156
13330: §11.156
13330(a)-(b): §11.153
13330(b): §11.153
13330(d): §§11.134, 11.153
13330(e): §11.153
13331: §§11.154-11.155
13331(a): §11.157
13340: §11.154
13350: §§11.154-11.155, 11.182-11.183
13350(d)(1): §11.156
13350(e)(1): §11.156
13350(f)(1): §11.156
13370: §§6.13, 11.112
13370-13389: §§6.107, 11.112, 11.130, 11.138, 11.163
13373: §11.169
13374: §11.115
13377: §11.115
13382: §11.172
13385: §§11.154-11.155
13385(c): §11.156
13385(d): §11.156
13385(e): §11.156
13387: §11.159
13396.5(e): §11.159
13500-13556: §6.8
13500-13557: §11.182
13510-13512: §11.181
13521: §6.8
13522.5: §6.9
13522.6: §11.159
13523: §11.182
13523.1: §§6.9, 11.183
13523.1(b)(3)-(5): §6.9
13525.5: §11.159
13526: §11.159
13529(f): §11.181
13550-13551: §11.181
13550-13557: §11.153
13575-13583: §6.8
13575(a)(3): §11.181
13700-13806: §11.174
13754: §11.159
13800-13801: §11.120
13801(c): §11.120
13802: §11.121
13803: §§11.120-11.121
13804: §11.121
13805: §§11.120-11.121
20500-29978: §11.88
20541: §5.158
21552.1: §1.170
30000-33249: §§6.11, 11.162
30000-33901: §11.88
34000-38501: §§11.88, 11.109
34034: §5.158
60000-60622: §11.88
71000-73001: §11.88
78500-78702: §11.93
79000-79221: §11.93
79163: §11.93
80000-80270: §6.20
App, ch 40: §11.88

WELFARE AND INSTITUTIONS CODE

5150: §9.97
8102: §§9.97-9.98
19633: §9.5

ACTS BY POPULAR NAME
Administrative Procedure Act: §§4.318, 7.85, 10.282, 11.128
Air Toxics "Hot Spots" Information and Assessment Act of 1987: §11.207
Alcohol and Drug Rehabilitation Act: §4.120
Bagley-Keene Open Meeting Act: §§2.118, 11.146
Benefit Assessment Act of 1982: §5.135
Bradley-Burns Uniform Local Sales and Use Tax Law: §§5.6, 5.16, 5.26, 5.28, 5.31
Broughton Act: §§5.188-5.190, 6.39, 6.49-6.50, 6.57, 6.90
Budget Act: §5.246
California Environmental Quality Act (CEQA): §§1.101, 1.118, 1.122, 1.141, 3.121, 5.1, 5.316, 5.338, 5.361, 5.364, 6.91, 6.155, 8.1, 8.6, 8.32, 8.76, 8.115, 9.49, 10.13, 10.70, 10.147, 10.162, 10.191, 10.197, 10.230-10.231, 10.288, 10.313, 10.348, 10.362, 10.412, 10.445, 11.10-11.13, 11.17-11.25, 11.33, 11.35, 11.38-11.40, 11.43-11.44, 11.51-11.53, 11.57-11.59, 11.61-11.63, 11.65-11.66, 11.69, 11.71-11.74, 11.76-11.79, 11.82, 11.93, 11.99, 11.102-11.103, 11.230, 11.296, 13.6, 13.14, 13.163
CEQA Guidelines
Appendix G: §§11.27, 11.296
Appendix H: §11.26
California Beverage Container Recycling and Litter Reduction Act: §6.118
California Clean Air Act: §§11.189, 11.206
California Coastal Act of 1976 (Coastal Act): §§1.101, 6.156, 6.176, 10.198, 10.277-10.278, 10.280-10.281, 10.283-10.284, 10.287-10.290, 10.299-10.300, 10.309-10.310, 10.313, 10.323, 10.326, 10.331-10.334
chap 3: §§10.291, 10.313
California Disaster Assistance Act: §6.199
California Emergency Services Act: §§6.1, 6.183, 6.187, 6.189, 6.191, 6.195
California Endangered Species Act (CESA): §§11.256-11.257, 11.275, 11.288-11.289, 11.291, 11.294, 11.296
California Family Rights Act (CFRA): §§4.162, 4.172, 4.174
California Global Warming Solutions Act of 2006: §§6.22, 11.235
California Industrial Development Financing Act: §6.106
California Integrated Waste Management Act of 1989 (IWMA): §§6.93-6.95, 6.100, 6.103-6.104, §10.261
California Land Conservation Act of 1965 (Williamson Act): §§1.115, §1.120, 1.150, 10.140-10.141, 10.143-10.144, 11.9
California Land Environmental Restoration and Reuse Act: §11.254
California Park and Recreational Facilities Act of 1984: §8.106
California Public Records Act (Public Records Act): §§1.73, 1.218, 2.1, 2.218-2.223, 2.229-2.230, 2.239-2.242, 2.245-2.247, 2.250, 2.255, 2.257-2.258, 2.260-2.263, 2.265, 4.127, 6.196, 8.34, 13.108, 13.162
California Safe Drinking Water Act: §6.10
California Solid Waste Reuse and Recycling Access Act of 1991: §6.119
California Street Terrorism Enforcement and Prevention Act: §9.80
California Tort Claims Act: §§2.94, 2.195
California Voting Rights Act (CVRA): §§3.74-3.77
Cartwright Act: §§6.39, 7.42
Childhood Lead Poisoning Prevention Act: §5.72
Civil Discovery Act: §13.170
Cobey-Alquist Flood Plain Management Act: §10.137
Community Redevelopment Law (CRL): §§5.301, 5.303, 5.308, 5.316, 5.339, 5.347, 5.351, 5.359, 8.80
Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Cortese-Knox-Hertzberg Act): §§1.10, 1.72, 1.74, 1.108, 1.112, 1.114, 1.116, 1.128, 1.135, 1.143, 1.149-1.150, 1.154, 1.168, 3.1, 5.123
§286: §1.108
Costa-Hawkins Act: §9.52
Costa-Machado Water Act of 2000: §11.93
Digital Infrastructure and Video Competition Act of 2006: §§6.59, 6.65, 6.68
District Reorganization Act of 1965: §1.108
Documentary Transfer Tax Act: §5.67
Drug House Abatement Act: §§9.78, 12.14, 12.16-12.17
Ellis Act: §9.58
Eminent Domain Law: §§5.354, 8.1, 8.36-8.37
Equal Pay Law: §4.167
Fair Employment and Housing Act (FEHA): §§4.21, 4.120-4.121, 4.165-4.166, 4.180, 4.186, 4.190, 4.194, 4.199, 4.201, 4.221, 4.223, 4.226, 4.231-4.233, 4.235-4.236, 4.239-4.240, 4.248, 4.258, 4.352-4.353, 4.365, 4.370, 4.380, 4.399, 13.32
Fee Mitigation Act: §5.185
Fire Protection District Law of 1987: §1.73
Firefighters Procedural Bill of Rights Act (FBOR): §§4.311-4.314, 4.317-4.319

First Validating Act of 2009: §13.186
Second Validating Act of 2009: §13.186
Third Validating Act of 2009: §13.186
Floating Home Residency Law: §6.173
Franchise Act of 1937: §§5.189-5.190, 6.39, 6.49, 6.51, 6.57
Gaming Control Act: §9.29
Government Claims Act: §§5.93, 6.138, 13.28-13.29, 13.31-13.32, 13.40-13.41, 13.63, 13.66-13.69, 13.80, 13.92-13.94, 13.143, 13.152, 13.154-13.155
Grumsky Burton Open Meeting Law: §2.118
Habitat Maintenance Funding Act: §11.296
Hazardous Waste Control Act of 1973 (HWCA): §11.240
Homeowners and Private Property Protection Act: §§5.354, 8.31
Humboldt Bay Harbor, Recreation, and Conservation District Act: §6.160
Improvement Act of 1911: §§5.131-5.132
Improvement Bond Act of 1915: §§5.132-5.134, 5.291
Integrated Regional Water Management Planning Act (IRWMPA): §11.110
Integrated Waste Management Act of 1989: §6.1
Joint Exercise of Powers Act: §7.262
Knox-Nisbet Act of 1963: §1.108
Landscaping and Lighting Act of 1972: §§5.133-5.134, 5.153
Local Agency Public Construction Act: §6.199
Local Groundwater Management Assistance Act of 2000: §11.97
Local Health Care District Law: §1.73
Marks-Foran Residential Rehabilitation Act of 1973: §5.292
Marks-Roos Local Bond Pooling Act of 1985: §§1.78, 5.237
McAteer-Petris Act: §6.179
Mello-Roos Community Facilities Act of 1982 (Mello-Roos): §§1.117, 5.1, 5.76, 5.81-5.84, 5.87, 5.117, 5.229, 5.395, 13.184
Meyers-Milias-Brown Act (MMBA): §§4.28, 4.30, 4.41, 4.79, 4.113, 4.129, 4.320-4.323, 4.325-4.326, 4.328, 4.331, 4.334, 4.337, 4.339, 4.341, 4.343-4.344, 4.347-4.349
Mitigation Fee Act: §§5.163, 10.224
Mobile Telecommunications Act of 2000: §5.114
Mobilehome Parks Act: §12.10
Mobilehome Residency Law: §9.59
Mobilehomes and Manufactured Housing Act of 1980: §9.59
Moore-Brown-Roberti Family Rights Act: §4.172
Municipal Improvement Act of 1913: §§5.131-5.133
Municipal Improvement Bond Act of 1901: §§5.221, 5.295
Municipal Organization Act of 1977: §1.108
Municipal Park Abandonment Law of 1939: §8.99
Municipal Utility District Act: §6.106
Natural Community Conservation Planning Act: §11.296
Noise Control Act: §9.107
Nonprofit Corporation Law: §1.84
Occupational Safety and Health Act of 1970 (OSHA): §2.266
On-Premises Advertising Act: §12.73
Outdoor Advertising Act: §§8.33, 9.141-9.142, 12.73
Parking and Business Improvement Area Law of 1989 (1989 Law): §5.136, 5.155
Permit Streamlining Act (PSA): §§10.10, 10.12-10.13, 10.15, 10.151, 10.155, 11.58, 11.230
Planning and Zoning Law: §§10.2, 10.410
Polanco Redevelopment Act: §§5.314, 11.254
Police Officers Bill of Rights: §§4.294-4.295, 4.309-4.310
Political Reform Act of 1974 (PRA): §§1.73, 2.1-2.2, 2.12, 2.119, 2.126-2.127, 2.129, 2.131, 2.140, 2.149, 2.151, 2.159-2.160, 2.162, 2.172, 2.174, 2.209, 2.234-2.235, 2.237, 2.162, 3.1, 3.186-3.190, 3.194-3.195, 3.204-3.209, 3.211, 3.218, 5.218, 5.387, 5.433-5.434, 13.162
Porter-Cologne Water Quality Control Act (Porter-Cologne Act): §§6.11, 8.13, 11.111-11.113, 11.115, 11.117-11.118, 11.124-11.125, 11.132, 11.138, 11.145, 11.152, 11.162, 11.169, 11.174, 11.176
Private Security Services Act: §9.38
Property and Business Improvement District Law of 1994: §5.136
Proposition 1A: §§5.7, 5.26
Proposition 4: §§5.281-5.282, 5.284
Proposition 13: §§1.52, 1.72, 5.8, 5.16, 5.19, 5.24, 5.60, 5.63, 5.68, 5.98-5.99, 5.108, 5.113, 5.116, 5.125, 5.282, 5.287
Proposition 34: §§3.183, 3.189, 3.202, 3.204-3.205, 3.209
Proposition 51: §§13.106, 13.182
Proposition 62: §§1.54, 5.9, 5.16, 5.68-5.69, 5.105-5.109, 5.112, 5.115-5.116, 5.118-5.119, 5.183
Proposition 63: §§5.46, 5.96

Proposition 65: §11.113
Proposition 68: §3.187
Proposition 73: §§3.187, 3.210
Proposition 99: §§5.354, 8.31
Proposition 111: §10.253
Proposition 208: §§3.180, 3.187-3.189
Proposition 209: §§4.8, 4.164, 7.28-7.29, 7.31-7.32, 7.34
Proposition 218: §§1.25, 1.145, 3.59, 3.91, 3.105, 3.211, 5.1, 5.9-5.10, 5.16, 5.21, 5.50-5.51, 5.62, 5.69, 5.71, 5.98, 5.105, 5.107-5.108, 5.110-5.112, 5.114-5.117, 5.119-5.120, 5.124-5.125, 5.128, 5.130, 5.136-5.138, 5.140, 5.143-5.152, 5.155-5.157, 5.162-5.163, 5.166, 5.170, 5.174-5.177, 5.179-5.186, 5.226, 6.42, 6.96, 10.221, 13.6, 13.10
Proposition 218 Omnibus Implementation Act: §§5.110, 5.114, 5.128
Public Safety Officers Procedural Bill of Rights Act (POBR): §§4.289, 4.294, 4.296, 4.304, 4.311-4.314, 4.317-4.319, 5.247, 13.129
Public Streets, Highways, and Service Easements Vacation Law: §§8.126, 8.142
Public Utilities Act: §6.45
Ralph Civil Rights Act: §4.168
Ralph M. Brown Act (Brown Act): §§1.73, 1.225, 1.250, 2.1, 2.3-2.5, 2.16, 2.25, 2.32, 2.35-2.37, 2.39-2.42, 2.47, 2.52, 2.54, 2.66, 2.73, 2.97-2.98, 2.109-2.114, 2.116, 2.223, 5.130, 5.146, 5.315, 5.388, 6.196-6.197, 10.409, 10.414, 13.162
Red Light Abatement Law: §§9.15, 9.27-9.28, 9.35, 12.13-12.17
Revenue Bond Law of 1941: §§5.158, 5.166, 5.168-5.169, 5.171, 5.225-5.226, 6.106
Safe, Clean, Reliable Water Supply Act: §11.93
Safe Drinking Water and Toxic Enforcement Act of 1986: §11.113
San Diego County Regional Airport Authority Act: §1.79
San Diego Regional Transportation Consolidation Act: §1.79
San Diego Unified Port District Act: §6.160
San Joaquin County Regional Justice Facility Financing Act: §5.28
Special Assessment Investigation, Limitation and Majority Protest Act of 1931 (1931 Act): §5.129
State Bar Act: §2.190
State Drug Free Workplace Act of 1990: §4.119
State Housing Law: §§12.1, 12.5-12.6, 12.20
Subdivided Lands Act: §11.105
Subdivision Map Act: §§1.41, 8.71, 8.80, 8.147, 10.148-10.149, 10.151-10.153, 10.155, 10.158-10.160, 10.304, 10.380, 10.407, 10.411, 11.123
Subletting and Subcontracting Fair Practices Act: §§7.75-7.76, 7.81
Surface Mining and Reclamation Act of 1975 (SMARA): §1.101
Tort Claims Act: §§13.92, 13.94
Transactions and Use Tax Law: §5.31, 5.33
Unclaimed Property Law: §8.79
Unfair Competition Act: §§12.10-12.12, 12.21
Unfair Trade Practices Act: §6.39
Uniform Controlled Substances Act: §12.66
Uniform Standby Charge Procedures Act: §5.168
Uniform Trade Secrets Act: §2.255
Unruh Act: §13.156
Unruh Civil Rights Act: §4.168
Urban Water Management Planning Act: §11.91
Validation Act: §5.341
Vehicle License Fee Law: §5.7
Water Measurement Law: §6.4
Williamson Act (*see* California Land Conservation Act of 1965)
Wright Act of 1887: §1.8

SESSION LAWS

Stats 2009, ch 164 (SB 103): §13.186
Stats 2009, ch 163 (SB 102): §13.186
Stats 2009, ch 2 (SB 101): §13.186
Stats 2007, ch 68: §2.173
Stats 2006, ch 167 (AB 2618): §9.58
Stats 2005, ch 254, §§1-2 (SB 274): §2.176
Stats 2004, ch 936, §4: §5.55
Stats 2004, ch 158, §3: §5.324
Stats 2002, ch 10.48: §5.363
Stats 2001, ch 938: §5.363
Stats 2001, ch 832, §1: §7.170
Stats 1997, ch 38: §5.110

Stats 1988, ch 1568: §§11.189, 11.206
Stats 1987, ch 1257: §5.28
Stats 1987, ch 927: §5.185
Stats 1986, ch 879: §5.247
Stats 1981, ch 1125, §2: §9.89
Stats 1979, ch 1207, §§1-6: §10.162
Stats 1970, ch 1283: §6.160
Stats 1962, 1st Ex Sess, ch 67 (amended Stats 1996, chaps 399, 480): §6.160
Stats 1887, ch 29: §1.8

SENATE BILLS
975 (2001): §5.363
974: §7.170
972 (2002): §5.363
610 (2001): §11.91
440: §§4.324, 4.342
402: §4.324
375: §§11.235-11.236
97: §11.38
97 (2007): §11.38
90: §5.247

ASSEMBLY BILLS
3030: §11.97
3030 (1992): §11.97
1600: §§5.60, 5.158, 5.163, 10.230
1600 (1987): §10.230
939: §5.194
32: §§11.38, 11.235
32 (2006): §§11.38, 11.235

LOCAL ORDINANCES
San Francisco Minimum Wage Ordinance: §4.67
City of Oakland Charter §305: §1.182

Regulations

CALIFORNIA CODE OF REGULATIONS
Title 2
1181-1189.61: §5.257
1184.5-1184.11: §1.97
1900-2980.9: §1.101
7286.0-7297.11: §4.165
7286.5(f): §§4.186-4.187, 4.194
7286.7(a): §4.181
7286.7(b): §4.182
7286.7(d): §4.184
7287.1-7287.6: §4.213
7287.3(b): §4.216
7287.4(e): §4.183
7287.6(b): §§4.186-4.187, 4.194
7287.6(b)(3): §4.202
7288.0: §4.208
7291.1(f)(1): §§4.186-4.187
7291.7: §4.174
7291.7(c): §4.174
7293.3: §4.175
7294(d): §4.121
7297.0(b): §4.172
7297.6(a): §4.174
7400-7467: §4.251
16001.1.1-16010.1.3: §5.273
18109-18117: §3.187
18110-18997: §2.119
18219: §§2.142-2.143

18229: §2.135
18233: §2.131
18316.5: §2.160
18329(c)(3): §2.119
18420.1: §2.157
18435: §2.157
18435(b): §2.157
18438-18438.8: §10.416
18438.1: §§2.151-2.152
18438.1-18438.8: §3.203
18438.2: §2.152
18438.3: §2.152
18438.3(b): §2.152
18438.4: §2.152
18438.5-18438.6: §2.152
18438.7: §2.152
18438.8(a): §2.153
18438.8(b): §2.153
18450.4: §3.201
18530: §3.210
18573: §3.189
18603.1: §2.161
18700: §§2.120, 2.126, 2.128, 2.141
18700(c)-(d): §2.141
18700(d)(3): §2.172
18701: §2.127
18701(a)(1): §2.127
18701(a)(1)(A)(iii): §2.127
18701(a)(2): §2.127
18702-18702.4: §§2.120, 2.128
18702.1: §5.433
18702.1(c): §2.141
18702.3: §5.433
18702.4: §2.128
18702.4(a)(1): §2.128
18702.4(a)(3): §2.128
18702.4(b)(1): §2.141
18702.5: §2.2
18702.5(b)(3): §2.140-2.141
18702.5(c): §2.141
18703-18703.5: §2.129
18703.1: §§2.121, 2.124, 2.130
18703.1(b): §2.133
18703.1(c): §2.130
18703.2: §§2.122, 2.131
18703.3: §§2.123-2.124, 2.132
18703.3(c): §2.132
18703.4: §§2.125, 2.134
18703.5: §2.135
18704: §2.137
18704-18704.5: §2.136
18704.1: §2.134
18704.2: §§2.138, 5.433
18705-18705.5: §2.137
18705(a): §2.137
18705.2: §5.433
18705.2(a): §2.138
18705.2(b): §2.138
18705.3: §2.132
18706: §2.138
18707: §§2.139-2.140
18707-18707.10: §2.139
18707(b): §2.139
18707.1: §2.139
18707.2: §2.139

18707.4: §2.139
18707.5: §2.139
18707.6: §2.139
18707.7: §2.139
18707.9: §2.139
18707.10: §2.139
18708: §2.140
18708(a): §2.140
18708(c)(3): §2.140
18708(d): §2.140
18709: §2.140
18722(a): §2.146
18722(b): §2.148
18723(b)(2): §2.147
18723(c): §2.147
18723(d): §2.148
18730: §§2.142-2.143
18730(a): §2.142
18730(b)(5.5): §2.145
18732: §2.147
18732(a): §2.147
18732(b): §2.148
18734(a): §2.143
18901: §2.157
18901(b): §2.157
18901.1: §2.157
18901.1(c): §2.157
18930-18933: §2.154
18932.5: §2.154
18933: §2.154
18940-18950.4: §2.155
18940-18961: §§2.125, 2.134
18940.2: §§2.125, 2.134, 2.155
18941(a): §2.155
18942: §2.155
18943: §2.155
18944: §2.155
18944-18944.2: §5.218
18944.1: §2.155
18944.3: §2.155
18944.4: §2.155
18945.3: §2.155
18946-18946.6: §2.155
20101-20105: §3.24

Title 8: §4.138
1509: §4.138
1512: §4.138
3203: §4.137
3220: §4.138
3221: §4.138
3400: §4.138
5097: §4.138
5157: §4.138
5194(e): §4.138
6151: §4.138
10608: §4.387
10622: §4.387
10979: §4.387
11040(1): §4.67
11040(4)(A): §4.67
16001(a): §7.85
16001(b): §7.157
16421-16439: §7.52
31001-32997: §4.323

Title 14

670.2: §§11.260, 11.292
670.5: §§11.260, 11.293
778: §10.348
13052: §10.311
13052-15170: §10.310
13053: §10.311
13057-13061: §10.312
13062-13072: §10.312
13073-13087: §10.312
13090-13095: §10.312
13096: §10.313
13100-13103: §10.310
13104-13109: §10.314
13136-13153: §10.310
13238-13238.2: §10.310
13250-13253: §10.309
13302-13303: §10.315
13537(b): §10.294
13542(b): §10.297
13573(a)-(b): §10.320
15000-15387: §§11.11-11.12
15003: §11.11
15003(i): §11.39
15004(b): §11.17
15004(b)(1): §§8.6, 8.32
15022: §11.13
15022(c): §11.13
15050(a): §11.15
15050(c): §11.16
15051: §11.15
15051(b): §11.15
15052: §11.16
15053: §11.15
15060-15061: §11.24
15060(d): §11.25
15061(b)(3): §11.23
15061(d): §11.24
15061(e): §11.24
15062: §11.24
15063: §11.25
15063(a): §11.25
15063(c): §11.25
15063(c)(2): §11.25
15063(d): §11.26
15063(f): §11.26
15063(g): §11.16
15064: §11.29
15064(b): §11.29
15064(f): §§11.29, 11.35
15064(f)(5): §11.35
15064.5: §§11.29, 11.38
15064.7: §11.29
15065: §11.29
15065(a): §11.296
15070(a): §11.30
15070(b): §11.30
15070(b)(1): §11.30
15071: §11.32
15072-15073: §11.33
15072(a): §11.16
15072(e): §11.16
15073(a): §11.33
15073.5: §11.33
15074(a): §11.34
15074(b): §§11.34, 11.48

15074(c): §11.47
15074.1: §§11.30, 11.34
15075: §11.54
15075(d): §11.54
15081.5: §11.16
15082: §11.16
15082-15083.5: §11.36
15086(a): §11.16
15088: §11.41
15088(a): §11.41
15088.5: §11.42
15090: §11.43
15090(a)(3): §11.43
15090(b): §11.43
15091: §11.50
15091(b): §11.52
15091(e): §11.47
15093: §11.51
15093(b): §11.52
15094: §§11.54, 11.59
15094(c): §11.54
15094(d): §11.54
15096(b): §11.16
15096(e): §11.16
15097: §11.53
15102: §§11.28, 11.55
15105: §§11.33, 11.40
15105(d): §11.33
15112: §11.59
15112(c)(5): §11.59
15120-15132: §11.38
15125(a): §11.37
15126: §11.38
15126.2: §11.38
15126.4: §11.53
15130: §11.38
15132: §11.43
15151: §11.39
15152: §11.44
15162: §11.45
15164: §11.46
15165-15179.5: §11.44
15170: §11.78
15180: §5.364
15183: §11.44
15191-15196: §10.162
15191(e): §10.194
15191(m): §10.195
15205(b): §§11.33, 11.40
15206: §11.296
15220-15229: §11.78
15251: §10.313
15251(f): §10.288
15260-15285: §11.21
15265: §10.288
15265(b): §10.288
15270: §11.21
15270(b): §11.21
15300: §1.122
15300-15333: §11.22
15300.2: §11.22
15301-15305: §11.22
15304-15305: §8.6
15313: §8.6
15316: §8.6

15319-15320: §1.122
15325-15327: §8.6
15332: §11.22
15352(a): §11.18
15352(b): §11.18
15357: §11.20
15367: §§11.14, 11.16
15369: §11.20
15378(a): §11.19
15378(a)(1): §§10.70, 11.19
15378(b)(3): §11.19
15378(b)(4)-(5): §5.361
15378(b)3: §3.121
15380: §11.296
15381: §11.14
15382: §11.29
15384(a): §11.73
15386: §11.14
18760-18775.4: §6.111
18767: §6.112
18769: §6.111
18794.4-18794.6: §6.112
Title 17
60100-60114: §11.187
70200: §11.206
Title 22: §6.9
1089-1(d): §4.289
60301-60357: §§6.8-6.9
60301.220: §11.181
60301.225: §11.181
60304-60307: §11.181
66260.1-69214: §11.240
66261.1-66261.126: §11.241
Title 23
2235.1: §11.139
3779: §11.146
3830-3869: §11.145
Title 24
105.2: §§10.244-10.245
106.4.4: §§10.242-10.243
106.4.5: §§10.244-10.245
Title 25: §12.10
div 1, chap 1, subchap 5: §10.48
50-70: §12.71
6000-6198: §§8.3, 8.9, 8.14
6006: §8.39
6008(n): §8.39
6018: §8.14
6038: §8.20
6040: §8.39
6080-6114: §8.22
6088: §8.24
6182: §§8.30, 8.38
6182(b)(2): §8.38
6182(c)(3): §8.38
6182(d): §8.38
6182(d)(6: §8.38
6182(e): §8.38
6184: §8.9
6188: §§8.9, 8.36
6924: §5.404
6926: §5.404
6928: §5.404
6930: §5.404
6932: §5.404

Title 27
15100-16150: §11.170

Rules

CALIFORNIA RULES OF COURT
3.724(8): §2.229
3.1702: §13.163
4.102: §5.197

CALIFORNIA RULES OF PROFESSIONAL CONDUCT
1-100: §2.190
3-100: §2.203
3-310: §§2.192, 2.195-2.197, 2.200-2.201, 2.206, 13.88
3-600: §§2.192-2.193, 13.88
3-600(A): §§2.192, 2.199
3-600(B): §2.193
3-600(C): §2.193
3-600(D): §2.194
3-600(E): §2.195
3-700: §2.193
5-100: §2.213
5-110: §2.211

CALIFORNIA JURY INSTRUCTIONS, CIVIL (CACI) APPROVED
400: §13.104
1102: §13.101
1103: §13.106
1111: §13.106
1112: §13.106

Rulings

CALIFORNIA PUBLIC UTILITIES COMMISSION
CPUC Decision 07-03-014: §6.59
CPUC Decision 07-01-025: §6.20
CPUC Decision 06-02-006: §6.20
CPUC Decision 05-12-041: §6.20
CPUC Decision 03-09-052: §6.21
CPUC Decision 03-08-076: §6.21
CPUC Decision 03-07-028: §6.21
CPUC Decision 03-04-030: §6.21
CPUC Decision 02-11-002: §6.21
CPUC Decision 02-03-055: §6.20
CPUC Decision 01-10-036: §6.20
CPUC Decision 01-09-060: §6.20
CPUC Decision 98-10-058: §6.91
CPUC Decision 93-11-013: §6.44
CPUC Docket No. R.08-08-009: §6.22
CPUC Docket No. R.06-10-005: §6.65
CPUC Docket No. R.06-05-027: §6.22
CPUC Docket No. R.06-04-009: §6.22
CPUC Docket No. R.06-02-012: §6.22
CPUC Docket No. R.04-04-026: §6.22
CPUC Docket No. R.03-10-003: §6.20
CPUC Docket No. R.01-10-024: §§6.20, 6.22
General Order 131-D: §6.44
General Order 159A: §6.91

STATE WATER RESOURCES CONTROL BOARD (SWRCB)
Order No. 2006-0003-DWQ: §11.168
Order No. 2003-0005-DWQ: §6.14
Order No. WQ 2005-05 (In the Matter of the Petition for Review of the City of Manteca): §11.135
Order WR 99-012 (1999) (In the Matter of Licenses 1050, Natomas Cent. Mut. Water Co.), modified in part, Order WR 2000-01 (2000): §6.6

Order No. 99-08-DWQ: §11.138
Resolution No. 99-114: §11.127
Resolution No. 88-123: §11.127
Resolution No. 68-16: §11.126

UNITED STATES

Constitution

Art I: §1.93
§2: §3.70
§8, cl 3: §9.4
Art III: §11.279
Art IV
§3: §1.86
Art V: §10.407
cl 2: §§1.33, 1.85
Amend I: §§1.58, 1.224, 1.252, 2.6, 2.17, 2.24-2.25, 2.64, 2.80, 3.51, 3.84, 3.96, 3.176-3.177, 3.184-3.185, 3.222, 4.2, 4.135, 5.46, 5.61, 5.97, 5.172, 5.263, 6.58, 6.87, 6.126, 6.154, 8.177, 9.5-9.6, 9.12, 9.16, 9.28, 9.45, 9.69, 9.76, 9.80, 9.100, 9.103-9.104, 9.118, 9.122-9.123, 9.125, 9.127-9.131, 9.134-9.135, 9.137, 9.150-9.153, 9.156, 10.111, 10.133, 10.145, 13.24, 13.116, 13.159
Amend II: §9.95
Amend IV: §§1.65, 4.94, 4.100-4.101, 4.108, 6.130-6.131, 6.186, 9.35, 9.173, 12.67, 13.116, 13.121, 13.126
Amend V: §§1.66, 3.78, 7.33, 9.80, 10.362-10.363, 10.381, 10.407, 12.62, 13.116
Amend VI: §13.116
Amend VII: §10.218
Amend VIII: §§9.101, 9.106, 13.116
Amend X: §§1.89-1.91, 5.452
Amend XI: §§1.92-1.93, 4.43, 13.127
Amend XIV: §§1.5, 1.65-1.69, 1.104, 2.31, 2.33, 3.69-3.70, 4.9, 4.210, 5.46, 5.90, 5.94, 7.33, 9.81, 9.95, 9.101, 9.104, 10.362-10.363, 10.407, 10.419, 10.431, 12.78, 13.24-13.25, 13.113-13.114, 13.116, 13.139
§1: §7.29
Bill of Rights: §13.113
Commerce Clause: §§6.101, 6.145, 11.278
Equal Protection Clause: §9.28
Supremacy Clause: §5.150

Statutes

UNITED STATES CODE

Title 4
116-126: §5.51
Title 5
552-559: §2.220
701-706: §6.98
706(2)(A): §§11.184, 11.284
1221: §13.116
Title 8
1101-1537: §§4.12, 4.149
1324a-b: §4.12
1324b: §4.149
Title 11
101(32)(A)-(B): §5.444
101(32)(C): §5.444
101(32)(C)(ii): §5.444
101(40): §5.442
109(c): §5.441
301: §5.445
362: §§5.173, 5.449
362(b)(4): §5.173
362(b)(5): §5.173
365: §5.455
503: §5.173
507: §5.173
552(a): §5.450
901: §5.454

901(a): §5.445
902(2): §5.450
903: §§5.443, 5.448
903-904: §5.452
904: §5.448
921(b): §5.446
921(c): §5.447
921(d): §5.447
922(a): §5.449
922(d): §5.450
923: §5.445
924: §5.445
928: §5.450
941: §5.452
943: §5.454
943(4): §5.454
943(7): §5.454
1113: §§5.455-5.456
1123: §5.453
1123(a)(1): §5.453
1123(a)(2): §5.453
1123(a)(3): §5.453
1123(a)(4): §5.453
1123(a)(5): §5.453
1123(b): §5.453
1124: §5.453
1129: §5.454

Title 12

531: §5.101
1768: §5.101
1825: §5.101

Title 15

12-27: §7.42
34-36: §§6.39, 13.153
77a-77aa: §5.242
78a-78oo: §5.242
78j(b): §5.242
717-717z: §6.34
1681-1681x: §4.216

Title 16

791a-828c: §6.25
824(b)(1): §6.30
824(d): §6.30
824d: §§6.26-6.27
824d-824e: §6.25
824e: §6.30
824j: §6.29
824k: §6.29
1531-1544: §§11.256-11.260, 11.264, 11.266, 11.278, 11.282-11.283, 11.289, 11.291, 11.296
1532(5)(A): §11.263
1532(6): §11.260
1532(19): §11.264
1532(20): §11.260
1533: §11.260
1533(b)(3): §11.262
1533(b)(3)(B): §11.262
1533(b)(3)(C)(iii): §11.261
1533(b)(7): §11.261
1533(d): §11.264
1535: §11.287
1536: §§11.280, 11.286
1536(a)(2): §§11.263, 11.267-11.268
1536(b): §11.268
1536(b)(3)(A): §11.268
1536(b)(4): §11.268

1536(c): §11.267
1536(c)(1): §11.268
1536(o): §11.268
1538: §11.260
1538(a)(1): §11.260
1538(a)(1)(B)-(C): §11.264
1538(a)(2): §11.264
1538(c): §11.282
1539(a): §11.270
1539(a)(2)(B)(ii): §11.271
1539(a)(2)(B)(iii): §11.271
1540: §11.276
1540(b)(1): §11.282
1540(c): §§11.277, 11.279
1540(g): §11.276
1540(g)(1): §11.279
1540(g)(1)(A): §11.279
1540(g)(1)(B): §11.279
1540(g)(2)(A)(i): §11.285
1540(g)(3)(A): §11.277
1600-1614: §11.286
2601-2645: §6.33

Title 18
874: §7.156
1166-1168: §§9.30-9.31

Title 20
1681-1688: §4.210

Title 23
134-135: §11.191

Title 25
2701-2721: §§9.30-9.31
2719(a)(1): §9.31
2719(b)(1)(A): §9.31
2719(b)(1)(B): §9.31

Title 26
170: §8.68
170(c)(1): §5.218
501: §1.84
3301-3310: §2.267
4251-4254: §5.50

Title 28
157(a): §5.446
1334(a): §5.446
1446(b): §13.151
1930: §5.445

Title 29
151-169: §§4.325, 4.337
201-219: §§1.90, 2.267, 4.42-4.45, 4.47-4.49, 4.56, 4.58-4.59, 4.61, 4.69, 4.76-4.78, 4.80-4.81, 4.83-4.86, 4.91-4.92
203(d): §4.43
203(e)(2)(C): §4.43
203(e)(4): §4.45
203(g): §4.59
203(l)(1): §4.80
203(x): §4.43
203(y): §4.73
206: §§2.267, 4.259, 4.262
206(a)(1): §4.59
206(d): §§4.81, 4.143, 4.250
206(d)(1): §4.143
207(a)(1): §4.69
207(e): §4.71
207(k): §§4.69, 4.72-4.75, 4.82
207(o): §4.76
212(c): §4.80
213(a)(3): §4.56

213(b)(20): §4.75
215: §4.84
215(a)(3): §4.89
216(a): §4.85
216(b): §§4.86-4.88, 4.90, 4.250, 4.259, 4.262, 4.264
216(b)-(c): §4.90
216(c): §§4.84, 4.86
216(e): §4.80
217: §4.84
218(a): §4.42
254(a): §4.66
255(a): §§4.91, 4.250
259: §4.92
260: §4.92
621-634: §§2.267, 4.248-4.249
621-663: §§4.144, 4.180, 4.204, 4.259
623(d): §4.144
626: §§4.259, 4.262
626(b): §4.264
626(d)-(e): §4.249
626(f): §§4.146, 4.249
630(f): §4.145
701-796l: §§4.7, 4.117, 4.148, 4.156, 4.221, 4.226, 4.259
705(20)(C)(ii)(I)-(II): §4.117
705(20)(C)(v): §§4.117, 4.148
791: §4.148
793: §4.148
793(a): §4.117
794: §4.148
794a: §4.259
1001-1461: §§1.34, 2.267
2006: §4.16
2601-2654: §§4.162, 4.172

Title 31

6501-6508: §1.88
6506(c): §1.88

Title 33

401: §10.355
401-403: §10.355
401-467n: §10.355
403: §10.355
1251-1387: §§6.11, 6.107, 8.13, 10.353-10.354, 11.112, 11.119, 11.137, 11.148, 11.162, 11.169, 11.278
1251(a): §10.354
1288: §11.112
1311: §10.354
1311(a): §11.137
1313: §11.112
1313(c)(1): §11.145
1313(d): §11.144
1313(d)(1)(c): §11.144
1313(d)(2): §11.147
1317(b)(1): §11.163
1317(b)(4): §11.165
1329: §11.127
1342: §§11.112, 11.137, 11.176
1342(b): §§6.13, 11.138
1342(i): §11.154
1342(p): §§6.13, 11.141
1344: §§10.354, 11.176, 11.178
1344(a): §11.178
1345(a): §11.166
1345(d): §11.166
1362(6): §10.354
1362(7): §11.176
1362(14): §11.137

1365: §§11.149, 11.161
1365(b): §11.161
1365(f): §11.148
1368: §7.161
Title 38
4301-4335: §4.163
4303(3): §4.163
4303(4): §4.163
Title 40
554: §6.162
901: §1.88
3141-3148: §§7.157, 7.164
3142: §7.166
3145: §7.167
3700-3708: §7.158
3701-3708: §7.167
3702: §7.167
Title 41
35-45: §7.164
351-358: §7.164
701-707: §§4.115, 4.237
701(a): §4.115
701(b): §4.115
702(a): §4.115
702(b): §4.115
706: §4.115
Title 42
300bb-1—300bb-8: §4.289
300f-300j-26: §11.173
300h-1: §11.173
300h(b): §11.173
1437-1437bbb-9: §5.404
1777(A): §4.261
1973: §§3.45, 3.65-3.67, 3.70, 3.76
1973(b): §§3.66, 3.68-3.69
1973b(a)(1)(A)-(F): §3.65
1973b(f)(4): §3.67
1973c: §3.65
1973gg-6: §3.72
1973gg-9: §3.72
1973gg-1973gg-10: §3.72
1981: §§4.150-4.155, 4.180, 4.261, 13.32, 13.39
1981a(a): §4.261
1981a(a)(3): §4.261
1981a(b)(1): §4.261
1981a(b)(2): §4.261
1981a(b)(3): §4.261
1983: §§4.153, 4.156-4.160, 4.210, 9.51, 10.208, 10.211, 10.218, 10.444, 13.32, 13.39, 13.87, 13.112-13.118, 13.120-13.123, 13.125, 13.127-13.134, 13.137-13.149, 13.151-13.152, 13.156, 13.158-13.159
1985: §4.161
1985(3): §4.161
1988: §§4.160, 4.263, 13.114, 13.145, 13.149, 13.158-13.160, 13.165
1988(c): §13.149
2000a—2000h-6: §2.267
2000bb: §10.134
2000cc—2000cc-5: §8.44, 10.134
2000d: §7.190
2000e: §4.398
2000e—2000e-3: §4.139
2000e-2(1): §4.15
2000e-2(a): §4.139
2000e-2(a)(1): §4.186
2000e-2(e): §4.182
2000e-2(e)(1): §4.181
2000e-2(h): §4.185

2000e-2(j): §4.185
2000e-2(k): §4.182
2000e-2(k)(1)(A)(i): §4.183
2000e-2(m): §4.263
2000e-2(n)(1): §4.10
2000e-3: §4.180
2000e-5: §§4.244-4.245
2000e-3(a): §4.139
2000e-5—2000e-6: §4.243
2000e-5(a): §4.247
2000e-5(f): §4.248
2000e-5(g): §§4.259, 4.264
2000e-5(g)(1): §4.264
2000e-5(g)(2)(B)(i): §4.263
2000e-5(k): §4.263
2000e-5(k) (§113(b): §4.155
2000e-9: §4.245
2000e-16: §4.244
2000e—2000e-17: §§4.6, 4.128, 4.139, 4.141, 4.154, 4.161, 4.180, 4.192, 4.204, 4.244, 4.248-4.250, 4.259-4.260
2000e(a)-(b): §4.139
2000e(f): §4.140
2000e(k): §4.142
2101-12213: §6.1
3601-3631: §10.161
4321-4370f: §6.155
4321-4370h: §§11.38, 11.77-11.78, 11.286
4601-4638: §8.14
4621-4638: §8.3
4901-4918: §9.107
5301-5320: §8.105
6101-6107: §4.147
6901-6992k: §§6.98, 6.100, 7.295, 7.321, 11.237, 11.240, 11.251
6903: §11.251
6924(n): §11.249
6972: §11.251
6973: §11.251
7401-7671q: §§11.184, 11.209
7407: §11.211
7408(a)(2): §§11.184, 11.211
7410: §11.212
7410(a)(2): §11.212
7410(a)(2)(M): §11.197
7410(a)(5)(c): §11.191
7411: §11.213
7412: §11.213
7413: §11.223
7413(c)(6): §11.223
7416: §11.206
7421: §11.197
7502(c)(5): §11.227
7503(c): §11.227
7504: §11.197
7506(c): §11.191
7511-7514(a): §11.212
7543(a): §11.196
7581-7590: §11.214
7602(a): §11.223
7604: §11.224
7606: §7.161
7661-7661f: §11.214
7671-7671q: §11.214
9601-9675: §§6.100, 7.295, 7.321, 11.237, 11.250
9604: §11.239
9606-9607: §11.239
9607(a): §11.250

9607(a)(4)(A): §11.250
9607(a)(4)(B): §11.250
9613(f): §11.250
12101-12213: §§2.58, 4.20, 4.118, 4.156, 4.215, 4.221, 4.226, 4.353, 4.398-4.399, 6.124, 8.179, 9.182
12101(a)(7): §4.241
12102: §§4.223-4.224
12111: §4.222
12111(3): §4.233
12111(8)-(9): §4.120
12111(10)(B): §4.233
12112: §§4.4, 4.221
12112(b)(5)(A): §§4.228, 4.232-**4.233**
12112(d)(2)(A): §4.234
12112(d)(2)(B): §4.234
12112(d)(3): §4.235
12112(d)(3)(B): §4.124
12112(d)(3)(B)(i)-(iii): §4.124
12112(d)(4)(A): §4.236
12114(a): §4.224
12114(b): §4.224
12114(c): §4.237
12114(c)(4): §§4.118, 4.148
12114(d): §4.118
12117: §4.259
12131-12165: §§6.124, 8.181-8.182
12132: §4.221
12201(b): §4.239
12210: §4.118
12210(a): §4.224
12210(b): §4.224
12211: §4.224
15301-15545: §3.73
15482(a)(3): §3.25
15482(a)(4): §3.25
15482(a)(5): §3.25

Title 47

00-185: §6.73
01-337: §6.73
02-33: §6.73
02-52: §6.73
95-20: §6.73
98-10: §6.73
151-161: §6.73
151-615b: §10.139
201-231: §6.73
201(b): §10.139
231: §9.130
251: §10.139
253: §10.139
253(a): §§6.89, 10.139
253(c): §§6.73, 10.139
257: §10.139
259: §10.139
303(y): §10.139
332: §10.139
332(c)(7): §10.139
332(c)(7)(B)(i)(II): §10.139
332(c)(7)(B)(v): §10.139
521-573: §§6.58, 6.69-6.70, 6.73-6.76
522: §6.70
522(3): §6.77
531: §6.80
532(h): §6.81
533(e): §6.81
537: §6.86

541: §§6.58, 6.71
541(a): §§6.63, 6.71, 6.75
541(b): §6.73
542(b): §§5.193, 6.61
542(c): §6.79
543: §§6.76, 10.139
543(a): §§6.76-6.77
543(a)(3): §6.76
543(a)(5): §6.78
543(a)(6): §6.78
543(b): §6.77
543(b)(8): §6.77
543(c)(4): §6.77
543(d): §6.79
543(l): §6.76
544(b): §§6.80, 6.83
544(d): §6.81
544(e): §6.83
544(h): §6.82
546(i): §6.72
547(a): §6.72
547(b): §6.72
552: §6.84
555a: §6.85
556(a): §6.63
556(b): §6.58
571: §6.74
573: §6.74
573(c)(2)(B): §6.74

Title 49
114: §6.155
5301-5340: §6.1
5307(d)(1)(D): §6.129
5310: §6.124
5331: §4.116
14501(c): §9.44
14501(c)(1): §8.167
20140: §4.116
31306: §4.116
40101-46507: §§6.139, 6.143
40103(e): §6.151
40116: §6.141
41713: §6.144
44901-44945: §6.155
45102: §4.116
47107: §6.142
47107(a): §§6.141, 6.151
47107(a)(4): §6.151
47129: §6.141
47133: §6.142
47521-47533: §6.146

Title 50
App §525: §13.59

INTERNAL REVENUE CODE
501: §1.84

ACTS BY POPULAR NAME
Administrative Procedure Act: §§6.98, 7.85, 11.128, 11.184, 11.284
Age Discrimination Act of 1975: §4.147
Age Discrimination in Employment Act of 1967 (ADEA): §§2.267, 4.144-4.146, 4.180, 4.204, 4.248-4.249, 4.259, 4.262, 4.264
Airport Noise and Capacity Act of 1990: §6.146
Americans with Disabilities Act of 1990 (ADA): §§4.20, 4.118, 4.120, 4.124, 4.148, 4.215, 4.221, 4.226, 4.228, 4.232-4.233, 4.235-4.241, 4.249, 4.259, 4.353, 4.365, 4.370, 4.398-4.399, 6.1, 6.125, 6.135, 8.179, 9.182, 10.443
Title II: §§4.156, 4.221, 6.124, 8.181-8.182

Title III: §9.182
§202: §§2.58, 2.77
Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG): §§8.182, 8.184
Anti-Head Tax Act: §6.141
Bankruptcy Act of 1934: §5.440
Cable Communications Policy Act of 1984 (Cable Act): §§6.58, 6.69-6.70, 6.73-6.76
Title I: §6.73
Cable Television Consumer Protection and Competition Act of 1992 (CTCPCA): §§6.69-6.70, 6.73-6.75
California Toxics Rule: §11.129
Child Online Protection Act (COPA): §9.130
Civil Rights Act of 1871: §§4.161, 13.87
Civil Rights Act of 1964: §§2.267, 4.263
Title IX: §13.120
Title VII: §§4.6-4.7, 4.9, 4.11, 4.14, 4.128, 4.139-4.142, 4.154, 4.161, 4.180, 4.186-4.187, 4.192, 4.204, 4.244, 4.248-4.250, 4.259-4.261, 4.264, 7.190
Civil Rights Act of 1991: §§4.10, 4.15, 4.150-4.152, 4.154-4.155, 4.249, 4.261
§106: §4.15
Civil Rights Attorney's Fees Awards Act: §13.114
Clayton Act: §7.42
Clean Air Act: §§11.184, 11.189, 11.191, 11.196, 11.209, 11.211-11.213, 11.223, 11.227
§306: §7.161
Clean Air Act Amendments of 1990: §11.214
Clean Water Act (CWA): §§6.11, 6.13, 6.16, 8.13, 10.354, 11.112-11.113, 11.119, 11.129, 11.137, 11.141, 11.146, 11.148-11.149, 11.162, 11.165-11.166, 11.169, 11.176, 11.178, 11.278
§301: §10.354
§301(b)(1)(C): §11.129
§303(c)(1): §11.145
§303(d): §§11.144, 11.147, 11.151
§303(d)(2): §11.147
§303(d): §11.145
§402(p): §6.13
§404: §§10.353-10.354, 11.178
§505: §11.149
§508: §7.161
1987 Amendments to the Clean Water Act, §319: §11.127
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or "Superfund"): §§6.100, 7.295, 7.321, 11.237, 11.239, 11.250
Communications Act of 1934
Title II: §6.73
Contract Work Hours and Safety Standards Act: §7.167
§103: §7.158
§107: §7.158
Copeland Act: §7.167
Copeland Anti-Kickback Act: §7.156
Davis-Bacon Act: §§7.157, 7.164-7.167
Drug Free Workplace Act of 1988: §§4.115, 4.237
Education Amendments of 1972: §§4.210, 4.263
Employee Polygraph Protection Act of 1988: §4.16
Employee Retirement Income Security Act of 1974 (ERISA): §§1.34, 2.267
Endangered Species Act (ESA): §§11.256-11.260, 11.263, 11.266-11.267, 11.269-11.270, 11.273, 11.275-11.286, 11.289, 11.291, 11.294, 11.296, 11.365
§3(19): §11.264
§4(b)(3): §11.262
§4(b)(3)(B): §11.262
§4(b)(3)(C)(iii): §11.261
§4(b)(7): §11.261
§6: §11.287
§7(a)(2): §§11.267-11.268
§7(b): §11.268
§7(c)(1): §§11.267-11.268
§9: §11.264
§9(a)(1)(B)-(C): §11.264
§10: §§11.270, 11.274
§10(a): §§11.270, 11.272, 11.274
§11: §11.276

§11(c), (g)(1)(A): §11.279
§11(c), (g)(3)(A): §11.277
§11(g)(1): §11.279
§11(g)(1)(B): §11.279
§11(g)(2)(A)(i): §11.285
Energy Policy Act of 1992: §6.29
Energy Policy and Conservation Act: §7.162
Equal Employment Opportunity Act of 1972: §4.398
Equal Pay Act of 1963 (EPA): §§4.81, 4.143, 4.250, 4.259, 4.262, 4.264
Fair Labor Standards Act of 1938 (FLSA): §§1.90, 2.267, 4.42-4.45, 4.47-4.49, 4.56, 4.58-4.59, 4.61, 4.63, 4.69, 4.76-4.78, 4.80-4.81, 4.83-4.86, 4.88-4.92, 4.250
Family and Medical Leave Act of 1993 (FMLA): §§4.162, 4.172
Federal Aviation Act of 1958: §6.143
Federal Aviation Administration Authorization Act of 1994: §6.141
Federal Power Act: §6.25
Federal Transit Act (formally Urban Mass Transportation Act of 1964): §§6.1, 6.124, 6.136
Federal Unemployment Tax Act: §2.267
Federal Voting Rights Act (FVRA): §§3.45, 3.65, 3.70, 3.74-3.76
§2: 3.65-3.66, 3.68-3.69
§4: §3.65
§5: §3.65
§203: §§3.45, 367
Federal Water Pollution Control Act: §11.112
Freedom of Information Act (FOIA): §§2.220, 2.241
Genetic Information Non-Discrimination Act
§302: §4.80
Help America Vote Act of 2002 (HAVA): §§3.25, 3.73
Immigration Reform and Control Act of 1986 (IRCA): §4.12, 4.149
Indian Gaming Regulatory Act of 1988 (IGRA): §§9.30-9.31
Intergovernmental Cooperation Act: §1.88
Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA): §11.191
Ku Klux Klan Act: §13.114
Lilly Ledbetter Fair Pay Act of 2009: §4.244
Local Government Antitrust Act of 1984: §13.153
Mobile Telecommunications Sourcing Act (MTSA): §5.51
Motor Voter Act: §3.72
National Environmental Policy Act of 1969 (NEPA): §§6.155, 11.38, 11.77-11.78, 11.286
National Forest Management Act: §11.286
National Labor Relations Act of 1935 (NLRA): §§4.325, 4.337, 13.120
National Voter Registration Act: §3.72
Natural Gas Act: §6.34
Noise Control Act of 1972: §9.107
Older Workers Benefit Protection Act: §4.249
Omnibus Transportation Employee Testing Act of 1991: §4.116
Portal-to-Portal Act: §§4.66, 4.250
Pregnancy Discrimination Act of 1978: §4.142
Public Utilities Regulatory Policy Act of 1979 (PURPA): §6.33
Rehabilitation Act of 1973: §§4.117, 4.148, 4.221, 4.226, 4.259, 5.217
§503: §4.7
§504: §4.156
Religious Freedom Restoration Act of 1993: §§1.64, 10.134
Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): §§1.64, 8.44, 10.134
Resource Conservation and Recovery Act (RCRA): §§6.98, 6.100, 7.295, 7.321, 11.237-11.238, 11.240, 11.251
Rivers and Harbors Act of 1899: §§10.353, 10.355
§9: §10.355
§10: §10.355
Safe Drinking Water Act: §11.173
Securities Act of 1933: §5.242
Securities Exchange Act of 1934: §5.242
§10(b): §5.242
Services Contract Act: §7.164
Soldiers and Sailors Relief Act of 1970: §13.59
Telecommunications Act of 1996: §§6.69-6.70, 6.73-6.75, 9.132, 10.139
Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments: §7.130
Uniform Federal Accessibility Standards (UFAS): §8.182

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA): §4.163
United States Housing Act of 1937
§8: §5.404
Walsh-Healy Act: §7.164
Water Pollution Prevention and Control Act: §6.107

SESSION LAWS
Pub L 111-2, 123 Stat 5: §4.244
Pub L 94-163, 89 Stat 965: §7.162
Pub L 89-110, 79 Stat 437: §3.65

EXECUTIVE ORDERS
11246 (Sept. 24, 1965) (1965 WL 7913) as amended by Executive Order No. 11375 (Oct. 13, 1967) (1967 WL 7772): §§4.7, 7.155
11375: §4.7
11738 (Sept. 10, 1973): §7.161
12086: §4.7

CONGRESSIONAL REPORTS
S Rep No. 97-417: §3.66
S Rep No. 307: §11.258

Regulations

CODE OF FEDERAL REGULATIONS
Title 2
pt 215: §7.154
Title 14
pt 121, Apps I, J: §4.116
161: §6.146
161.7: §6.146
161.101-161.505: §6.146
161.201-161.213: §6.146
161.301-161.325: §6.146
Title 17
240.15c2-12: §§5.242-5.244
Title 20
1002.34: §4.163
1002.41: §4.163
Title 24
5.603(b): §5.404
570.1-570.913): §5.217
570.201(b): §8.105
Title 25
pt 501: §9.30
Title 28
35.101-35.190: §6.124
35.105: §8.182
35.105(c): §8.182
35.107: §8.182
35.140: §4.221
35.150(c)-(d): §8.182
35.150(d)(2): §8.179
35.150(d)(3): §8.183
35.151: §8.182
35.151(e): §8.180
pt 36, App A: §8.184
36.104: §9.182
Title 29
pt 3: §7.156
3.1-3.11: §7.167
pt 5: §7.157-7.158
5.2: §7.165
5.5(a): §§7.167-7.168
5.5(a)(3): §7.168

5.5(a)(3)(ii)(D): §7.169
5.5(b): §7.167
5.6(a)(1): §7.167
5.8: §7.169
5.12: §7.169
5.13: §7.169
pt 516: §4.42
516.1-516.34: §4.82
pt 541: §4.42
541.2-541.3: §4.54
541.3(b)(1): §4.57
541.100-541.106: §4.54
541.200-541.203: §4.54
541.300-541.304: §4.54
541.400-541.402: §4.56
541.500-541.504: §4.56
541.601: §4.56
541.602(a): §4.50
541.602(b)(5): §4.51
541.603(b): §4.53
541.603(c): §4.53
541.603(d): §4.53
541.710(a): §4.50
541.710(b): §4.52
548.2-548.3: §4.71
pt 553: §4.42
553.11(b)-(c): §4.44
553.11(c): §4.44
553.11(d): §4.44
553.12: §4.44
553.20-553.28: §4.76
553.22: §§4.76-4.77
553.24: §4.77
553.25: §4.78
553.26-553.27: §4.76
553.28(e): §4.76
553.30: §§4.55, 4.71
553.30(c)(3): §4.55
553.50-553.51: §4.82
553.51: §4.72
553.101: §4.45
553.101-553.104: §4.45
553.101(d): §4.45
553.102(b): §4.45
553.104(a): §4.45
553.106: §4.45
553.210: §4.73
553.210-553.216: §4.73
553.210(g): §4.73
553.211: §4.74
553.212: §4.73
553.221(e): §4.62
553.222: §4.63
553.223: §4.61
553.226: §4.65
553.230: §4.72
553.233: §4.75
570.31-570.38: §4.80
570.35: §4.80
579.1-579.5: §4.80
pt 778: §4.42
778.102: §4.69
778.103-778.104: §4.70
778.105: §4.70
778.106: §4.70

778.109: §4.71
778.110: §4.71
778.113-778.115: §4.71
778.200-778.224: §4.71
778.200(c): §4.71
778.208: §4.71
778.301-778.302: §4.70
778.303: §4.71
778.402-778.414: §4.71
778.419: §4.71
pt 785: §4.42
785.9: §4.66
785.12: §4.65
785.14-785.17: §4.63
785.18: §4.61
785.18-785.19: §4.61
785.19: §4.61
785.20-785.23: §4.63
785.23: §4.64
785.27-785.32: §§4.47, 4.65
785.33-785.41: §4.62
785.39: §4.62
785.42: §4.65
785.43: §4.65
785.44: §4.65
790.13-790.19: §4.92
pt 825: §4.162
825.104(a): §4.162
825.110: §4.162
825.110(a): §4.162
825.202: §4.162
1601.7: §4.243
1601.13: §4.244
1601.15-1601.16: §4.245
1601.19: §4.247
1601.21: §4.247
1601.24: §4.247
1601.28: §4.248
1601.28(b): §4.246
1604.7: §4.216
1604.11: §§4.141, 4.186
1604.11(a): §4.187
1604.11(a)(3): §4.193
1604.11(d): §4.202
1604.11(e): §4.203
1604.11(f): §§4.206-4.207
1604.11(g): §4.191
1605.3: §4.216
pt 1607: §4.213-4.214
1607.1-1607.18: §4.14
pt 1608: §4.11
1620.1-1620.34: §4.81
1625.5: §4.216
1625.22: §4.146
1626.18: §4.249
pt 1630, App §1630.2(h): §4.226
1630, App: §4.230
1630.2(h): §4.223
1630.2(k): §4.223
1630.2(m): §4.222
1630.2(n)(1): §4.225
1630.2(n)(1)-(2): §4.225
1630.2(o)(1): §4.229
1630.2(o)(2): §4.231
1630.2(o)(3): §4.232

1630.2(p): §4.233
1630.2(p)(2): §4.233
1630.2(r): §4.233
1630.3(a): §4.224
1630.3(b): §4.224
1630.3(d): §4.224
1630.4: §4.227
1630.4-1630.12: §4.227
1630.13: §§4.216, 4.234
1630.14(a): §4.234
1630.14(c): §§4.235-4.236
1630.15: §4.233
1630.15(a): §4.233
1630.15(b)-(e): §4.233
1630.15(d): §4.233
1630.15(e): §§4.233, 4.239
1630.16(c): §4.238
Title 33
pt 330, App A: §10.358
323.4(c): §11.178
325.1-325.2: §10.359
328.3(a): §10.357
328.3(b): §10.356
329.1: §10.354
330.1: §10.358
330.1-330.6: §10.355
330.5: §10.358
330.5-330.6: §10.358
Title 40
1.5: §11.210
1.7: §11.210
pt 35, subpt E, App C-2: §7.161
pt 50: §§11.184, 11.211
51.165: §11.227
51.165(a)(2): §11.227
pts 122-125: §11.137
122.4(i): §11.150
122.26: §11.140
122.26(a)(1): §6.14
122.26(a)(9): §6.14
122.26(b): §6.14
122.26(b)(8): §11.141
122.26(b)(15)(i): §11.142
122.26(b)(16)-(17): §6.14
122.26(c): §11.143
122.26(d)(2)(iv): §§6.13, 6.15
130.7(d): §11.147
131.21(c)(2): §11.129
135.1: §11.149
147.250-147.251: §11.173
232.2: §11.175
261.1-261.2: §11.238
261.1-261.151: §11.241
261.2: §11.238
403.1: §11.164
403.1-403.20: §6.107
403.5: §11.165
403.5(d): §§11.119, 11.165
403.8(f): §11.165
pt 503: §11.166
1502.14(b): §11.78
Title 41
pt 101-19.6, App A: §8.182
chap 60: §7.155
Title 47

pt 76: §6.69
76.309: §6.84
76.605: §6.83
76.901-76.990: §6.76
76.1500-76.1514: §6.74
76.1501: §6.74
76.1505: §6.74
Title 49
pt 18: §7.130
pts 391-392: §6.131
pt 395: §6.131
18.36: §7.130
18.36(b)(3): §7.133
18.36(c): §7.135
18.36(c)(3): §7.135
18.36(d)(2): §7.138
18.36(d)(3): §7.144
18.36(d)(4): §7.149
18.36(d)(l): §7.137
18.36(e): §7.134
18.36(f)(1): §7.150
18.36(f)(3): §7.150
18.36(f)(4): §7.150
18.36(g): §7.132
18.36(i)(8): §7.159
18.36(i)(12): §7.161
pt 24: §8.14
24.2(15): §8.39
pt 40: §§6.131, 6.133, 6.137, 9.43
40.195: §6.132
40.301: §6.133
199.1-199.245: §4.116
219.1-219.905: §4.116
pt 382: §6.131
382.101-382.605: §4.116
382.405: §6.131
604-604.4: §6.136
pt 1500: §6.155
1550.3: §6.155
Title 50
13.25(d)-(e): §11.275
17.3: §11.265
17.12: §11.260
17.22: §11.270
17.22(b)(8): §11.274
17.32 (b)(8): §11.274
402.01(b): §11.267
402.13-402.14: §11.268
402.14(e): §11.268
402.14(g)(5): §11.268
402.14(i)(1): §11.268
424.02(b): §11.261

Regulatory Actions

FEDERAL REGISTER
67 Fed Reg 48871 (July 26, 2002): §3.67
65 Fed Reg 35242 (2000): §11.275
65 Fed Reg 31681 (May 18, 2000): §11.129
65 Fed Reg 12818 (March 9, 2000): §11.178
65 Fed Reg 6918: §11.274
65 Fed Reg 2000: §11.129
64 Fed Reg 7696 (1999): §6.142
61 Fed Reg 63854 (Dec. 2, 1996): §11.273
61 Fed Reg 31994-32023 (1996): §6.141

53 Fed Reg 8034: §7.130

Court Rules

FEDERAL RULES OF BANKRUPTCY PROCEDURE
1007(a)(1): §5.445
1007(b)(1): §5.445
1007(d): §5.445
1007(e): §5.445

FEDERAL RULES OF CIVIL PROCEDURE
11: §13.169
11(c): §13.169
26: §13.151
26(f)(3): §2.229
34(a)-(b): §2.229
68: §13.160

FEDERAL RULES OF EVIDENCE
404: §13.142

GENERAL ORDERS
General Order No. 266: §5.446

Rules

SECURITIES AND EXCHANGE COMMISSION RULES
15c2-12: §§5.242-5.244

Rulings

REVENUE RULINGS
87-41: §4.46
74-361: §1.84

DEPARTMENT OF LABOR

Wage and Hour Administrative Letter Rulings
August 6, 1999: §4.45
July 11, 1995: §4.45
August 11, 1993: §4.65
February 18, 1992: §§4.74-4.45
September 26, 1991: §4.45
April 10, 1990: §4.45
October 1, 1987: §4.55
May 12, 1986: §4.56

Opinion Letters
Department of Labor Opinion Letter FLSA 2006-20 (June 1, 2006): §4.73
Department of Labor Opinion Letter, FLSA 2006-7 (March 10, 2006): §4.51
Department of Labor Opinion Letter, FLSA 2005-51 (November 10, 2005): §4.45
Department of Labor Opinion Letter, FLSA 2005-32 (September 9, 2005): §4.45
Department of Labor Wage & Hour Opinion Letter WH 504 (October 23, 1980): §4.65
Department of Labor Wage & Hour Opinion Letter WH 388 (August 10, 1976): §4.56
Department of Labor Wage & Hour Opinion Letter (August 12, 1974): §4.45
Department of Labor Wage & Hour Opinion Letter (January 6, 1969): §4.47

FEDERAL AVIATION AUTHORITY (FAA)
FAA Advisory Circular 150/5190-5: §6.151
FAA Order 5100.38A: §6.142
FAA Order 5190.6A: §§6.151, 6.155

FEDERAL COMMUNICATIONS COMMISSION (FCC)
17 FCCR 4798, 4802 (2002) Declaratory Ruling and Notice of Proposed Rule Making, In re Inquiry Concerning High-Speed Access, Internet Over Cable and Other Facilities: §6.73

FCC 09-99, WT Docket No. 08-165, In the Matter of Petition for Declaratory Ruling to Clarify Provisions of §332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under §253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance (24 FCC Rcd 13994, 2009 FCC Lexis 5977): §10.139
14 FCCR 5296 (1999) FCC Report and Order, In the matter of Implementation of Cable Act Reform Provisions of the Telecom Act of 1996: §6.83

FEDERAL ENERGY REGULATORY COMMISSION (FERC)
105 FERC 61, 218 (2003): §6.31
101 FERC 61, 277 (2002): §6.32
100 FERC 61, 055 (2002): §6.32
95 FERC 61, 418 (2001): §6.32
89 FERC 61, 285 (1999): §6.31
75 FERC 61, 078 (1996): §6.31
75 FERC 61, 080 (1996): §6.31
Docket No. EC 89-5-000 (In re merger of San Diego Gas & Elec. Co. and Southern Cal. Edison Co.): §6.28
Docket No. RM01-12-000: §6.31
Order 2000: §6.31
Order 889: §6.31
Order 888 (Final Open Access Rule): §6.31

IRS NOTICE
Notice 2006-50: §5.50

OFFICE OF MANAGEMENT AND BUDGET (OMB)
Circular A-110: §7.154
Circular A-102: 7.130

ETHICS

AMERICAN BAR ASSOCIATION
Ethical Consideration 7-14 (former): §2.215

INTERNATIONAL TREATIES AND TERMS OF TRADE
Vienna Convention on Consular Relations, art 36: §13.115

© The Regents of the University of California

Table of Cases

4805 Convoy, Inc. v City of San Diego (9th Cir 1999) 183 F3d 1108: §9.12

A

A & B Cattle Co. v City of Escondido (1987) 192 CA3d 1032, 238 CR 580: §§1.37, 9.79
A Local & Reg'l Monitor v City of Los Angeles (1993) 16 CA4th 630, 20 CR2d 228: §10.81
A.B.C. Distrib. Co. v City & County of San Francisco (1975) 15 C3d 566, 125 CR 46: §5.34
AB Cellular LA, LLC v City of Los Angeles (2007) 150 CA4th 747, 59 CR3d 295: §§5.51, 5.114
ABS Institute v City of Lancaster (1994) 24 CA4th 285, 29 CR2d 224: §10.238
AFSCME v County of Los Angeles (1983) 146 CA3d 879, 194 CR 540: §4.283
AIU Ins. Co. v Superior Court (1990) 51 C3d 807, 274 CR 820: §7.254
Abifadel v Cigna Ins. Co. (1992) 8 CA4th 145, 9 CR2d 910: §7.269
Abouab v City & County of San Francisco (2006) 141 CA4th 643, 46 CR3d 206: §13.163
Ace Prop. & Cas. Ins. Co., County of San Diego v (2005) 37 C4th 406, 33 CR 3d 583: §7.257
Acceptance Ins. Co. v Syufy Enters. (1999) 69 CA4th 321, 81 CR2d 557: §7.294
Ackerley Communications of the Northwest, Inc. v Krochalis (9th Cir 1997) 108 F3d 1095: §9.139
Ackerman, In re (1907) 6 CA 5: §9.163
Act Up!/Portland v Bagley (9th Cir 1993) 988 F2d 868: §13.126
Adams v Modesto (1960) 53 C2d 833, 3 CR 561: §4.37
Adams v Ziegler (1937) 22 CA2d 135, 70 P2d 537: §7.193
Adarand Constructors, Inc. v Pena (1995) 515 US 200, 132 L Ed 2d 158, 115 S Ct 2097: §7.33
Addison v State (1978) 21 C3d 313, 146 CR 224: §13.59
Adickes v S.H. Kress & Co. (1970) 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598: §13.135
Adkins v State (1996) 50 CA4th 1802, 59 CR2d 59, overruled on other grounds by: §6.191
Adler v Los Angeles Unified Sch. Dist. (1979) 98 CA3d 280, 159 CR 528: §§13.32, 13.39
Aerojet-General Corp. v Commercial Union Ins. Co. (2007) 155 CA4th 132, 65 CR3d 803: §7.291
Aerojet-General Corp. v Transport Indem. Co. (1997) 17 C4th 38, 70 CR2d 118: §§7.256, 7.268
Agins v City of Tiburon (1980) 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138: §§10.218, 10.387
Agins v City of Tiburon (1979) 24 C3d 266, 157 CR 372, aff'd (1980) 447 US 255: §§10.366, 10.404-10.405
Ailanto Props., Inc. v City of Half Moon Bay (2006) 142 CA4th 572, 48 CR3d 340: §§10.85, 10.159
Air Canada v United States Dep't of Transp. (DC Cir 1998) 148 F3d 1142: §6.141
Air Line Pilots Ass'n, Int'l v Trans World Airlines, Inc. (2d Cir 1983) 713 F2d 940, aff'd in part and rev'd in part on other grounds (1985) 469 US 111, 83 L Ed 2d 523, 105 S Ct 613: §4.259
Air Transport Ass'n of Am. v United States Dept. of Transp. (DC Cir 1997) 119 F3d 38, amended (DC Cir 1997) 129 F3d 625: §6.141
Aitchison v Raffiani (3d Cir 1983) 708 F2d 96: §13.125
Akers v County of San Diego (2002) 95 CA4th 1441, 116 CR2d 602: §4.180
Alameda Books, Inc., City of Los Angeles v (2002) 535 US 425, 152 L Ed 2d 670, 122 S Ct 1728: §10.131
Alameda County Land Use Ass'n v City of Hayward (1995) 38 CA4th 1716, 45 CR2d 752: §10.80
Alaska Airlines, Inc. v City of Long Beach (9th Cir 1992) 951 F2d 977: §6.145
Alaska Ctr. for Env't v Browner (9th Cir 1994) 20 F3d 981: §11.149
Albemarle Paper Co. v Moody (1975) 422 US 405, 45 L Ed 2d 280, 95 S Ct 2362: §4.183
Albert v Jamieson (1954) 124 CA2d 298, 268 P2d 542: §3.85
Albertson's, Inc. v United Food & Commercial Workers Union (9th Cir 1998) 157 F3d 758, cert denied (1998) 528 US 809: §4.87
Albertson's, Inc. v Young (2003) 107 CA4th 106, 131 CR2d 721: §9.156
Albright v City of S. San Francisco (1975) 44 CA3d 866, 118 CR 901: §§1.209, 1.217-1.218
Albright v City of South San Francisco (1975) 44 CA3d 866, 118 CR 901: §5.297
Albright v Oliver (1994) 510 US 266, 127 L Ed 2d 114, 114 S Ct 807: §13.116
Alcala v City of Corcoran (2007) 147 CA4th 666, 53 CR3d 908: §13.134
Alden v Maine (1999) 527 US 706, 144 L Ed 2d 636, 119 S Ct 2240: §§1.93, 4.43
Alechoff v Los Angeles Gas & Elec. Corp. (1927) 84 CA 33, 257 P 569: §12.29
Alexander v City & County of San Francisco (9th Cir 1994) 29 F3d 1355: §13.136
Alexander v Estepp (4th Cir 1996) 95 F3d 312: §7.34
Alexander v State ex rel Dep't of Transp. (1984) 159 CA3d 890, 205 CR 758: §13.101
Ali v City of Los Angeles (1999) 77 CA4th 246, 91 CR2d 458: §10.384
Alioto, Williams v (9th Cir 1977) 549 F2d 136: §13.148
Allee v Medrano (1974) 416 US 802, 40 L Ed 2d 566, 94 S Ct 2191: §4.157
Allegretti & Co. v County of Imperial (2006) 138 CA4th 1261, 42 CR3d 122: §§10.387, 11.96

Allen v Hussey (1950) 101 CA2d 457, 225 P2d 674: §1.42
Allen v McCurry (1980) 449 US 90, 66 L Ed 2d 308, 101 S Ct 411: §13.128
Alliance Capital Management L.P. v County of Orange (In re County of Orange) (Bankr CD Cal 1995) 179 BR 185, rev'd on other grounds (CD Cal 1995) 189 BR 499: §§5.448, 5.450
Alliance Fin. v City & County of San Francisco (1998) 64 CA4th 635, 75 CR2d 341: §13.152
Alliance for Community Media v FCC (6th Cir 2008) 529 F3d 763, cert denied (2009) ___ US ___, 174 L Ed 2d 290, 129 S Ct 2821: §10.139
Alliance for a Better Downtown Millbrae v Wade (2003) 108 CA4th 123, 133 CR2d 249: §3.86
Allied-Signal, Inc. v Lujan (ND Cal 1990) 736 F Supp 1558: §11.279
Alma W. v Oakland Unified Sch. Dist. (1981) 123 CA3d 133, 176 CR 287: §§13.109, 13.132
Alpert v Villa Ramano Homeowners' Ass'n (2000) 81 CA4th 1320, 96 CR2d 364: §13.103
Alves v Justice Court (1957) 148 CA2d 419, 306 P2d 601: §9.72
Alvis v County of Ventura (2009) 178 CA4th 536, 100 CR3d 494: §13.106
Alyeska Pipeline Serv. Co. v Wilderness Soc'y (1975) 421 US 240, 44 L Ed 2d 141, 95 S Ct 1612: §13.165
Amador Valley Investors v City of Livermore (1974) 43 C3d 483, 117 CR 749: §§13.29, 13.55
Amador Valley Joint Union High Sch. Dist. v State Bd. of Equalization (1978) 22 C3d 208, 149 CR 239: §§1.52, 2.216, 3.103, 5.19, 5.69, 5.99
Amberger-Warren v City of Piedmont (2006) 143 CA4th 1074, 49 CR3d 631: §13.123
Amelco Elec. v City of Thousand Oaks (2002) 27 C4th 228, 115 CR2d 900: §§7.115-7.116
American Booksellers Ass'n, Inc. v Superior Court (1982) 129 CA3d 197, 181 CR 33: §9.14
American Can v City of Lakeport (1934) 220 C 548, 32 P2d 622: §5.291
American Canyon Community United for Responsible Growth v City of American Canyon (2006) 145 CA4th 1062, 52 CR3d 312: §11.46
American Civil Liberties Union v City of Las Vegas (9th Cir 2003) 333 F3d 1092, cert denied (2004) 540 US 1110: §§8.177, 9.120
American Co. v City of Lakeport (1934) 220 C 548, 32 P2d 622: §5.278
American Fed'n of Gov't Employees v Derwinski (ND Cal 1991) 777 F Supp 1493: §4.108
American Fed'n of Gov't Employees v Thornburgh (ND Cal 1989) 713 F Supp 359: §4.111
American Fed'n of Teachers v Board of Educ. (1980) 107 CA3d 829, 166 CR 89: §1.190
American Library Ass'n, U.S. v (2003) 539 US 194, 156 L Ed 2d 221, 123 S Ct 2297: §9.130
American Microsystems, Inc. v City of Santa Clara (1982) 137 CA3d 1037, 187 CR 550: §§1.25, 6.42
American Motorcycle Ass'n v Superior Court (1978) 20 C3d 578, 146 CR 182: §§13.58, 13.182
American President Lines, Ltd. v Zolin (1995) 38 CA4th 910, 45 CR2d 370: §13.157
American River Flood Control Dist. v Sweet (1932) 214 C 778, 7 P2d 1030: §§1.8, 1.72
American Savings & Loan Ass'n v County of Marin (9th Cir 1981) 653 F2d 364: §10.378
American Trucking Ass'ns, Inc. v Smith (1990) 496 US 167, 110 L Ed 2d 148, 110 S Ct 2323: §5.43
Amestoy Estate Co., People ex rel v Van Nuys Lighting Dist. (1916) 173 C 792, 162 P 97: §13.186
Ammond v McGahn (D NJ 1975) 390 F Supp 655, rev'd on other grounds (3d Cir 1976) 532 F2d 325: §2.25
Amster v City of Tempe (9th Cir 2001) 248 F3d 1198: §9.104
Anaheim, L & J, Assocs. v Kawasaki Leasing Int'l, Inc. (In re L & J Anaheim Assocs.) (9th Cir 1993) 995 F2d 940: §5.453
Anaheim Redev. Agency v Dusek (1987) 193 CA3d 249, 239 CR 319: §§5.304, 8.43-8.44
Anderson v Celebrezze (1983) 460 US 780, 75 L Ed 2d 547, 103 S Ct 1564: §1.220
Anderson v City of La Mesa (1981) 118 CA3d 657, 173 CR 572: §13.177
Anderson v City of Thousand Oaks (1976) 65 CA3d 82, 135 CR 127: §13.106
Anderson v County of Santa Barbara (1976) 56 CA3d 780, 128 CR 707: §3.134
Anderson v Creighton (1987) 483 US 635, 97 L Ed 2d 523, 107 S Ct 3034: §13.126
Anderson v Owens Corning (1991) 53 C3d 987, 281 CR 528: §6.47
Anderson First Coalition v City of Anderson (2005) 130 CA4th 1173, 30 CR3d 738: §11.76
Andrews v Agricultural Labor Relations Bd. (1981) 28 C3d 781, 171 CR 590: §10.417
Andrews v City of San Bernardino (1959) 175 CA2d 459, 346 P2d 457: §5.305
Antenor v City of Los Angeles (1985) 174 CA3d 477, 220 CR 181: §13.101
Anthony v Snyder (Barratt Am.) (2004) 116 CA4th 643, 10 CR3d 505: §§10.154, 10.156, 10.377
Anza Parking Corp. v City of Burlingame (1987) 195 CA3d 855, 241 CR 175: §10.110
Apartment Ass'n of Greater Los Angeles v Santa Monica Rent Control Bd. (1994) 24 CA4th 1730, 30 CR2d 228: §9.51
Apartment Ass'n of Los Angeles County, Inc. v City of Los Angeles (2001) 24 C4th 830, 102 CR2d 719: §§5.174-5.175
Application of D.O. Young, In re (1932) 121 CA 711, 10 P2d 154: §§12.56, 12.58
Application of Jacobson, In re (1936) 16 CA2d 497, 60 P2d 1001: §1.5
Arden Carmichael, Inc. v County of Sacramento (2001) 93 CA4th 507, 113 CR2d 248: §9.27
Ardon v City of Los Angeles (review granted Sept. 9, 2009, S174507; superseded opinion at 174 CA4th 369, 94 CR3d 245): §5.93
Argonaut Ins. Exch. v Industrial Acc. Comm'n (Bellinger) (1958) 49 C2d 706, 321 P2d 460: §4.354
Arkansas Writers' Project, Inc. v Ragland (1987) 481 US 221, 95 L Ed 2d 209, 107 S Ct 1722: §9.153
Armendariz v Penman (9th Cir 1996) 75 F3d 1311: §10.422
Armistead v State Personnel Bd. (1978) 22 C3d 198, 149 CR 1: §1.190
Armstrong v Manzo (1965) 380 US 545, 14 L Ed 2d 62, 85 S Ct 1187: §4.288
Armstrong World Indus., Inc. v Aetna Cas. & Surety Co. (1996) 45 CA4th 1, 52 CR2d 690: §7.306
Arnel Dev. Co. v City of Costa Mesa (1980) 28 C3d 511, 169 CR 904: §§3.107, 3.119, 10.91

Arnel Dev. Co. v City of Costa Mesa (1981) 126 CA3d 330, 178 CR 723: §§3.113, 13.8
Arnke v City of Berkeley (1960) 185 CA2d 842, 8 CR 645: §5.37
Arnold v IBM (9th Cir 1981) 637 F2d 1350: §13.133
Arntz Builders v City of Berkeley (2008) 166 CA4th 276, 82 CR3d 605: §§7.48, 13.41, 13.154
Arntz Builders v Superior Court (2004) 122 CA4th 1195, 19 CR3d 346: §7.74
Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co. (1996) 47 CA4th 464, 54 CR2d 888: §7.95
Arques v City of Sausalito (1954) 126 CA2d 403, 272 P2d 58: §1.3
Arreola, People v (1994) 7 C4th 1144, 31 CR2d 631: §12.62
Art Neon Co. v City & County of Denver (10th Cir 1973) 488 F2d 118, cert denied (1974) 417 US 932: §9.142
Arvin-Edison Water Storage Dist., Johnson v (2009) 174 CA4th 729, 95 CR3d 53: §4.42
Ashcroft v American Civil Liberties Union (2004) 542 US 656, 159 L Ed 2d 690, 124 S Ct 2783: §9.130
Ashoff v City of Ukiah (9th Cir 1997) 130 F3d 409: §6.100
Ashton v Cameron County Water Improvement Dist. (1936) 298 US 513, 80 L Ed 1309, 56 S Ct 892: §5.440
Associated Builders & Contractors, Inc. v City of Seward (9th Cir 1992) 966 F2d 492: §13.153
Associated Gen. Contractors of Cal., Inc. v City & County of San Francisco (9th Cir 1987) 813 F2d 922: §7.198
Associated Homebuilders of the Greater East Bay, Inc. v City of Livermore (1961) 56 C2d 847, 17 CR 5: §§5.160, 10.216
Assoiated Home Builders of the Greater East Bay, Inc. v City of Newark (1971) 18 CA3d 107, 95 CR 648: §5.60
Associated Home Builders of the Greater East Bay, Inc. v Walnut Creek (1971) 4 C3d 633, 94 CR 630: §§1.244, 5.159
Associated Home Builders, Inc. v City of Livermore (1976) 18 C3d 582, 135 CR 41: §§2.32, 3.107, 3.120, 10.201, 10.425, 13.25-13.26
Association of Irritated Residents v County of Madera (2003) 107 CA4th 1383, 133 CR2d 718: §§11.38, 11.50, 11.296
Astenius v State (2005) 126 CA4th 472, 23 CR3d 877: §13.93
Aubry v Tri-City Hosp. Dist. (1992) 2 C4th 962, 9 CR2d 92: §7.91
Auriemma v Rice (7th Cir 1992) 957 F2d 397: §13.137
Avant v South Central Bell Tel. Co. (5th Cir 1983) 716 F2d 1083: §4.23
Avco Community Developers, Inc. v South Coast Reg'l Comm'n (1976) 17 C3d 785, 132 CR 386, cert denied (1977) 429 US 1083: §§10.125, 10.239, 10.241, 10.428
Avila v Citrus Community College Dist. (2006) 38 C4th 148, 41 CR3d 299: §13.93
Aydin Corp. v First State Ins. Co. (1998) 18 C4th 1183, 77 CR2d 537: §7.255
Ayers v City of Richmond (9th Cir 1990) 895 F2d 1267: §13.128
Azusa Land Reclamation Co. v Main San Gabriel Basin Watermaster (1997) 52 CA4th 1165, 61 CR2d 447: §§11.62, 11.153
Azusa Western, Inc. v City of West Covina (1975) 45 CA3d 259, 119 CR 434: §7.124

B

B.F. Goodrich Co. v Murtha (2d Cir 1992) 958 F2d 1192: §6.100
BRV, Inc. v Superior Court (2006) 143 CA4th 742, 49 CR3d 519: §§2.218, 2.246, 4.127
Babbitt v Sweet Home Chapter (1995) 515 US 687, 132 L Ed 2d 597, 115 S Ct 2407: §11.265
Baby Tam & Co. v City of Las Vegas (9th Cir 2000) 199 F3d 1111: §§9.12, 9.145
Baca v Moreno Valley Unified Sch. Dist. (CD Cal 1996) 936 F Supp 719: §§2.64, 2.80, 13.111
Bach v County of Butte (1983) 147 CA3d 554, 195 CR 268: §13.137
Bach v McNelis (1989) 207 CA3d 852, 255 CR 232: §3.190
Bachrach, People v (1980) 114 CA3d Supp 8, 170 CR 773: §12.45
Bagg v Wickizer (1935) 9 CA2d 753, 50 P2d 1047: §3.133
Bagley v City of Manhattan Beach (1976) 18 C3d 22, 132 CR 668: §§1.6, 1.254, 3.107
Bailey v County of El Dorado (1984) 162 CA3d 94, 210 CR 237: §3.123
Baillargeon v Department of Water & Power (1977) 69 CA3d 670, 138 CR 338: §§13.29, 13.55, 13.59
Baines Pickwick Ltd. v City of Los Angeles (1999) 72 CA4th 298, 85 CR2d 74: §§13.32, 13.152
Bak v Postal Serv. (9th Cir 1995) 52 F3d 241: §4.249
Baker v Bindner (WD Ky 1967) 274 F Supp 658: §9.74
Baker v City of Palo Alto (1961) 190 CA2d 744, 12 CR 425: §7.250
Baker v McCollan (1979) 443 US 137, 61 L Ed 2d 433, 99 S Ct 2689: §13.117
Bakersfield Citizens for Local Control v City of Bakersfield (2004) 124 CA4th 1184, 22 CR3d 203: §11.27
Baldwin v County of Tehama (1994) 31 CA4th 166, 36 CR2d 886: §§11.96, 11.122
Baldwin v Redwood City (9th Cir 1976) 540 F2d 1360, cert denied (1977) 431 US 913: §9.143
Balistreri v Pacifica Police Dep't (9th Cir 1990) 901 F2d 696: §13.116
Ball, In re (1972) 23 CA3d 380, 100 CR 189: §9.156
Ballard, City & County of San Francisco v (2006) 136 CA4th 381, 39 CR3d 1: §12.20
Ballard, People v (1980) 104 CA3d 757, 164 CR 81: §3.204
Balmer, People v (1961) 196 CA2d Supp 874, 17 CR 612: §12.45
Bam, Inc. v Board of Police Comm'rs (1992) 7 CA4th 1343, 9 CR2d 738: §13.16
Bangert v Hodel (D DC 1989) 705 F Supp 643: §4.103
Bank of the Orient v Town of Tiburon (1990) 220 CA3d 992, 269 CR 690: §1.38
Bank of the West v Superior Court (1992) 2 C4th 1254, 10 CR2d 538: §7.254
Banker's Hill, Hillcrest Park, West Comm. Preservation Group v City of San Diego (2006) 139 CA4th 249, 42 CR3d 537: §11.62
Barber v Retirement Bd. of the City & County of San Francisco (1971) 18 CA3d 273, 95 CR 657: §4.39

Barber v State Personnel Bd. (1976) 18 C3d 395, 134 CR 206: §§4.284, 4.310
Barden v City of Sacramento (9th Cir 2002) 292 F3d 1073: §8.181
Barkley v City of Blue Lake (1996) 47 CA4th 309, 54 CR2d 679: §13.32
Barnes v Glen Theatre, Inc. (1991) 501 US 560, 115 L Ed 2d 504, 111 S Ct 2456: §9.6
Barnes v Personnel Dep't of the City of El Cajon (1978) 87 CA3d 502, 151 CR 94: §§4.295, 4.309
Baron v City of Los Angeles (1970) 2 C3d 535, 86 CR 673: §2.187
Barquis v Merchants Collection Ass'n of Oakland, Inc. (1972) 7 C3d 94, 101 CR 745: §12.10
Barraclough v ADP Automotive Claims Servs., Inc. (ND Cal 1993) 818 F Supp 1310: §4.221
Barratt Am., Inc. v City of Rancho Cucamonga (2005) 37 C4th 685, 37 CR3d 149: §§5.109, 10.229
Barratt Am., Inc. v City of San Diego (2004) 117 CA4th 809, 12 CR3d 132: §5.152
Barrett v Omaha Nat'l Bank (8th Cir 1984) 726 F2d 424: §4.202
Barthelemy v Orange County Flood Control Dist. (1998) 65 CA4th 558, 76 CR2d 575: §8.62
Bartleson v U.S. (9th Cir 1996) 96 F3d 1270: §12.3
Bass v Attardi (3d Cir 1989) 868 F2d 45: §13.125
Bass v Leavitt (1909) 11 CA 582, 105 P 771: §3.131
Bastian v San Luis Obispo County (1988) 199 CA3d 520, 245 CR 78: §13.58
Bates v Jones (9th Cir 1997) 131 F3d 843, cert denied (1998) 523 US 1021: §1.222
Bateson v Geisse (9th Cir 1988) 857 F2d 1300: §10.428
Batt v City & County of San Francisco (2007) 155 CA4th 65, 65 CR3d 716: §5.93
Baugh, U.S. v (9th Cir 1999) 187 F3d 1037: §9.128
Bay Area Addiction Research & Treatment, Inc. v City of Antioch (9th Cir 1999) 179 F3d 725: §10.443
Bay Area Women's Coalition v San Francisco (1978) 78 CA3d 961, 144 CR 591: §1.251
Bay Dev. Ltd. v Superior Court (1990) 50 C3d 1012, 269 CR 720: §§7.310-7.311
Bayview Hunters Point Community Advocates v Metropolitan Transp. Comm'n (9th Cir 2004) 366 F3d 692: §11.224
Beach Colony II Ltd. v California Coastal Comm'n (1985) 166 CA3d 106, 212 CR 485: §13.163
Beach-Courchesne v City of Diamond Bar (2000) 80 CA4th 388, 95 CR2d 265: §5.319
Beasley v Wells Fargo Bank (1991) 235 CA3d 1407, 1 CR2d 459, overruled on other grounds in Olsen v Auto. Club of S. Cal. (2008) 42 C4th 1142, 74 CR3d 81: §13.165
Beattie v City of Saint Petersburg Beach (MD Fla 1990) 733 F Supp 1455: §4.101
Beauchamp v Los Gatos Golf Course (1969) 273 CA2d 20, 77 CR 914: §13.101
Beck v City Council of Beverly Hills (1973) 30 CA3d 112, 106 CR 163: §6.10
Beck Dev. Co. v Southern Pac. Transp. Co. (1996) 44 CA4th 1160, 52 CR2d 518: §12.3
Beckett v City of Petaluma (1915) 171 C 309, 153 P 20: §8.69
Bekins, U.S. v (1938) 304 US 27, 82 L Ed 1137, 58 S Ct 811: §5.440
Bell v Duffy (1980) 111 CA3d 643, 168 CR 753: §4.295
Bell v Duperrault (7th Cir 2004) 367 F3d 703: §10.437
Bell v Vista Unified Sch. Dist. (2000) 82 CA4th 672, 98 CR2d 263: §2.98
Bell Community Redev. Agency v Woosley (1985) 169 CA3d 24, 214 CR 788: §5.285
Belth v Garamendi (1991) 232 CA3d 896, 283 CR 829: §2.263
Ben Oehrleins & Sons & Daughter, Inc. v Hennepin County (8th Cir 1997) 115 F3d 1372, cert denied (1997) 522 US 1036: §6.101
Benach v County of Los Angeles (2007) 149 CA4th 836, 57 CR3d 363: §4.297
Benane v International Harvester Co. (1956) 142 CA2d Supp 874, 299 P2d 750: §12.29
Bennett v Spear (1997) 520 US 154, 137 L Ed 2d 281, 117 S Ct 1154: §11.279
Benson v California Coastal Comm'n (2006) 139 CA4th 348, 42 CR3d 580: §10.7
Benson v Superior Court (1963) 214 CA2d 551, 29 CR 760: §3.127
Benton v Oregon Student Assistance Comm'n (9th Cir 2005) 421 F3d 901: §13.145
Berger v City of Seattle (9th Cir 2009) 569 F3d 1029: §9.135
Berka v Woodward (1899) 125 C 119, 57 P 777: §2.162
Berkeley Keep Jets Over the Bay Comm. v Board of Port Comm'rs (2001) 91 CA4th 1344, 111 CR2d 598: §11.41
Berkeley Police Ass'n v City of Berkeley (1977) 76 CA3d 931, 143 CR 255: §§1.259, 4.336, 4.340
Berman v City of Daly City (1993) 21 CA4th 276, 26 CR2d 493: §13.134
Berman v City of West Hollywood Rent Stabilization Dept. (1988) 197 CA3d 837, 243 CR 144: §9.55
Berman v Downing (1986) 184 CA3d Supp 1, 229 CR 660: §9.49
Berry v City of Santa Barbara (1995) 40 CA4th 1075, 47 CR2d 661: §§9.14, 9.129
Berry v County of Sonoma (9th Cir 1994) 30 F3d 1174, cert denied (1995) 513 US 1150: §4.60
Berry v State (1992) 2 CA4th 688, 3 CR2d 382: §13.93
Bess v County of Humboldt (1992) 3 CA4th 1544, 5 CR2d 399: §8.73
Bess v Park (1956) 144 CA2d 798, 301 P2d 978: §12.77
Bessard v California Community Colleges (ED Cal 1994) 867 F Supp 1454: §4.218
Bethlehem Steel Corp. v Board of Comm'rs of the Dep't of Water & Power of the City of Los Angeles (1969) 276 CA2d 221, 80 CR 800: §7.199
Bethman v City of Ukiah (1989) 216 CA3d 1395, 265 CR 539: §6.143
Bieneman v City of Chicago (7th Cir 1988) 864 F2d 463: §6.143
Big Sur Props. v Mott (1976) 62 CA3d 99, 132 CR 835: §8.121
Biggs v Best, Best & Krieger (9th Cir 1999) 189 F3d 989: §13.116

Biggs v Wilson (9th Cir 1993) 1 F3d 1537: §4.70
Bighorn-Desert View Water Agency v Verjil (2006) 39 C4th 205, 46 CR3d 73: §§5.120, 5.166, 5.174-5.175
Bilardi Constr., Inc. v Spencer (1970) 6 CA3d 771, 86 CR 406: §7.226
Billie, U.S. v (SD Fla 1987) 667 F Supp 1485: §11.282
Billie, State v (Fla Dist Ct App 1986) 497 So 2d 889: §11.287
Billings v California Coastal Comm'n (1980) 103 CA3d 729, 163 CR 288: §10.239
Billish v City of Chicago (7th Cir 1992) 962 F2d 1269, rev'd on other grounds (7th Cir 1993) 989 F2d 890, cert denied (1993) 510 US 908: §4.9
Binkley v City of Long Beach (1993) 16 CA4th 1795, 20 CR2d 903: §4.309
Biodiversity Legal Found. v Badgley (9th Cir 2002) 309 F3d 1166: §§11.262, 11.276, 11.279
Birkenfeld v City of Berkeley (1976) 17 C3d 129, 130 CR 465: §§1.13, 1.16, 1.32, 1.40-1.41, 1.233, 9.47, 9.49-9.51, 9.58, 10.425
Bishop v City of San Jose (1969) 1 C3d 56, 81 CR 465: §§1.29-1.30, 1.36, 1.41, 7.170
Bishop v Wood (1976) 426 US 341, 48 L Ed 2d 684, 96 S Ct 2074: §§4.286, 13.118
Bivens v Six Unknown Named Agents of Fed. Bureau of Narcotics (1971) 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999: §13.113
Bixel Associates v City of Los Angeles (1989) 216 CA3d 1208, 265 CR 347: §10.221
Black v Los Angeles County (1976) 55 CA3d 920, 127 CR 916: §13.82
Black Historical Soc'y v City of San Diego (2005) 134 CA4th 670, 36 CR3d 378: §11.68
Black Panther Party v Kehoe (1974) 42 CA3d 645, 117 CR 106: §2.220
Black Prop. Owners Ass'n v City of Berkeley (1994) 22 CA4th 974, 28 CR2d 305: §10.26
Blair v Superior Court (1990) 218 CA3d 221, 267 CR 13: §13.45
Blanchard v Bergeron (1989) 489 US 87, 103 L Ed 2d 67, 109 S Ct 939: §13.160
Blim v Western Elec. Co. (10th Cir 1984) 731 F2d 1473: §4.264
Blinder, Robinson & Co. v Tom (1986) 181 CA3d 283, 226 CR 339: §12.77
Block, Sierra Club v (D DC 1985) 614 F Supp 488: §11.285
Blockbuster Videos, Inc. v City of Tempe (9th Cir 1998) 141 F3d 1295: §9.139
Bloom v Illinois (1968) 391 US 194, 20 L Ed 2d 522, 88 S Ct 1477: §12.18
Bloom v WCAB (1997) 62 CCC 680: §4.381
Blotter v Farrell (1954) 42 C2d 804, 270 P2d 481: §1.242
Blue v City of Los Angeles (2006) 137 CA4th 1131, 41 CR3d 10: §5.374
Blue Jeans Equities W. v City & County of San Francisco (1992) 3 CA4th 164, 4 CR2d 114: §10.402
Bluestein v Skinner (9th Cir 1990) 908 F2d 451, cert denied (1991) 498 US 1083: §§4.94, 4.96, 4.107
Blum v Stenson (1984) 465 US 886, 79 L Ed 2d 891, 104 S Ct 1541: §13.160
Board of County Comm'rs v Brown (1997) 520 US 397, 137 L Ed 2d 626, 117 S Ct 1382: §13.142
Board of County Comm'rs v Umbehr (1996) 518 US 668, 135 L Ed 2d 843, 116 S Ct 2342: §4.2
Board of Educ. of Kiryas Joel v Grumet (1994) 512 US 687, 129 L Ed 2d 546, 114 S Ct 2481: §1.60
Board of Med. Quality Assur. v Superior Court (1977) 73 CA3d 860, 141 CR 83: §13.27
Board of Pardons v Allen (1987) 482 US 369, 96 L Ed 2d 303, 107 S Ct 2415: §13.119
Board of Police Comm'rs v Superior Court (1985) 168 CA3d 420, 214 CR 493: §10.111
Board of Pub. Works, Miller v (1925) 195 C 477, 234 P 381: §§1.16, 10.84, 10.432
Board of Regents of State Colleges v Roth (1972) 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701: §§4.278-4.279, 4.285-4.287, 13.118
Board of State Harbor Comm'rs v Dean (1953) 118 CA2d 628, 258 P2d 590: §1.47
Board of Supervisors v Dolan (1975) 45 CA3d 237, 119 CR 347: §§1.43, 1.47, 5.224, 5.278, 5.292, 8.111
Board of Supervisors v Local Agency Formation Comm'n (1992) 3 C4th 903, 13 CR2d 245, cert denied (1993) 507 US 988: §§1.143, 3.78-3.79, 10.442
Board of Supervisors of City & County of San Francisco, Smith v (1989) 216 CA3d 862, 265 CR 466: §10.413
Board of Supervisors, Sierra Club v (1981) 126 CA3d 698, 179 CR 261: §10.17
Board of Trustees of Cal. State Univ. v Superior Court (2005) 132 CA4th 889, 34 CR3d 82: §§2.230, 2.245
Bobo v U.S. (1998) 136 F3d 1465: §4.66
Boccato v City of Hermosa Beach (1994) 29 CA4th 1797, 35 CR2d 282: §§9.18, 10.138
Bodkin, In re (1948) 86 CA2d 208, 194 P2d 588: §§8.176-8.177
Boehm v Kansas City Power & Light Co. (10th Cir 1989) 868 F2d 1182: §4.63
Bogacki v Board of Supervisors (1971) 5 C3d 771, 97 CR 657: §4.279
Bogan v Sandoval County Planning & Zoning Comm'n (1994) 119 NM 334, 890 P2d 395: §13.159
Bogan v Scott-Harris (1998) 523 US 44, 140 L Ed 2d 79, 118 S Ct 966: §13.125
Bohannan v City of San Diego (1973) 30 CA3d 416, 106 CR 333: §10.129
Bohen v City of E. Chicago (7th Cir 1986) 799 F2d 1180: §4.210
Bohn v Albertson (1951) 107 CA2d 738, 238 P2d 128: §10.335
Bollinger v San Diego Civil Serv. Comm'n (1999) 71 CA4th 568, 84 CR2d 27: §§2.97, 4.281
Bolsa Chica Land Trust v Superior Court of San Diego County (1999) 71 CA4th 493, 83 CR2d 850: §10.306
Bonander v Town of Tiburon (2009) 46 C4th 646, 94 CR3d 403: §5.152
Bond v Floyd (1966) 385 US 116, 17 L Ed 2d 235, 87 S Ct 339: §2.25
Bonds of Madera Irrig. Dist., In re (1891) 92 C 296, 28 P 272: §§1.8, 1.73
Bonneville Power Admin. v Federal Energy Regulatory Comm'n (9th Cir 2005) 422 F3d 908: §§6.18, 6.30
Bonsignore v City of New York (2d Cir 1982) 683 F2d 635: §13.132
Boos v Barry (1988) 485 US 312, 99 L Ed 2d 333, 108 S Ct 1157: §§9.120, 9.126

Boss, City & County of San Francisco v (1948) 83 CA2d 445, 189 P2d 32: §9.3
Bowen, County of San Diego v (2008) 166 CA4th 501, 82 CR3d 818: §3.28
Bowman v City of Petaluma (1986) 185 CA3d 1065, 230 CR 413: §13.164
Boyd, City & County of San Francisco v (1943) 22 C2d 685, 140 P2d 666: §4.28
Boyd, City & County of San Francisco v (1941) 17 C2d 606, 110 P2d 1036: §7.193
Boydston v Napa Sanitation Dist. (1990) 222 CA3d 1362, 272 CR 458: §§7.4, 7.20
Boykin v Boeing Co. (9th Cir 1997) 128 F3d 1279: §4.50
Boyle v City of Redondo Beach (1999) 70 CA4th 1109, 83 CR2d 164: §§2.66, 2.113
Bozung v Local Agency Formation Comm'n (1975) 13 C3d 263, 118 CR 249: §§1.122, 1.129, 11.19
Bradbury v Superior Court (1996) 49 CA4th 1108, 57 CR2d 207: §13.110
Bradley v Department of Corrections & Rehabilitation (2008) 158 CA4th 1612, 71 CR3d 222: §4.203
Bradley v Perrodin (2003) 106 CA4th 1153, 131 CR2d 402: §§3.44, 3.134
Bradley, Johnson v (1992) 4 C4th 389, 14 CR2d 470: §§1.7, 1.11, 1.31, 1.36, 3.210
Brady, E.F., Co. v M.H. Golden Co. (1997) 58 CA4th 182, 67 CR2d 886: §§7.75-7.76
Branagh, John E., & Sons v Witcosky (1966) 242 CA2d 835, 51 CR 844: §7.302
Branciforte Heights, LLC v City of Santa Cruz (2006) 138 CA4th 914, 42 CR3d 96: §13.4
Brandenburg v Eureka Redev. Agency (2007) 152 CA4th 1350, 62 CR3d 339: §2.173
Brandon v Holt (1985) 469 US 464, 83 L Ed 2d 878, 105 S Ct 873: §§13.126, 13.141
Branti v Finkel (1980) 445 US 507, 63 L Ed 2d 574, 100 S Ct 1287: §§4.136, 13.116
Braude v City of Los Angeles (1990) 226 CA3d 83, 276 CR 256: §11.64
Braun v City of Taft (1984) 154 CA3d 332, 201 CR 654: §§1.226, 2.240, 2.246, 4.127
Braun, Ex Parte (1903) 141 C 204, 74 P 780: §§1.20, 1.29, 5.2
Bravo Vending v City of Rancho Mirage (1993) 16 CA4th 383, 20 CR2d 164: §1.36
BreakZone Billiards v City of Torrance (2000) 81 CA4th 1205, 97 CR2d 467: §§2.174, 2.180, 10.407, 10.417
Breda Costruzioni Ferroviarie v Los Angeles Metro. Transp. Auth. (1997) 56 CA4th 1433, 66 CR2d 416: §7.121
Brem-Air Disposal v Cohen (9th Cir 1998) 156 F3d 1002: §6.98
Brewer, People v (1991) 235 CA3d 909, 1 CR2d 146: §9.19
Brewster v Lynwood Unified Sch. Dist. (9th Cir 1998) 149 F3d 971, cert denied (1999) 526 US 1018: §§13.116, 13.126
Brigham City v Stuart (2006) 547 US 398, 164 L Ed 2d 650, 126 S Ct 1943: §13.116
Briscoe v LaHue (1983) 460 US 325, 75 L Ed 2d 96, 103 S Ct 1108: §13.125
Briseno v City of Santa Ana (1992) 6 CA4th 1378, 8 CR2d 486: §10.238
Britt v City of Pomona (1990) 223 CA3d 265, 272 CR 724: §5.52
Broadbent v Keith (1911) 15 CA 382, 114 P 996: §3.128
Broadmoor Police Protection Dist. v San Mateo Local Agency Formation Comm'n (1994) 26 CA4th 304, 31 CR2d 536: §1.156
Broadmoor San Clemente Homeowners Ass'n v Nelson (1994) 25 CA4th 1, 30 CR2d 316: §10.443
Broadrick v Oklahoma (1973) 413 US 601, 37 L Ed 2d 830, 93 S Ct 2908: §9.110
Brock v City of Cincinnati (6th Cir 2001) 236 F3d 793: §4.65
Broden v Marin Humane Soc'y (1999) 70 CA4th 1212, 83 CR2d 235: §9.180
Brookhouser v State (1992) 10 CA4th 1665, 13 CR2d 658: §13.93
Brooks, U.S. v (9th Cir 2004) 367 F3d 1128: §13.116
Brosnahan v Eu (1982) 31 C3d 1, 181 CR 100: §3.123
Brosseau v Haugen (2004) 543 US 194, 160 L Ed 2d 583, 125 S Ct 596: §13.126
Brown v A.J. Gerrard Mfg. Co. (11th Cir 1983) 715 F2d 1549: §4.259
Brown v California Dep't. of Transp. (9th Cir 2003) 321 F3d 1217: §9.140
Brown v Legal Found. of Washington (2003) 538 US 216, 155 L Ed 2d 376, 123 S Ct 1406: §§10.365, 10.400-10.401, 10.405
Brown v Lucky Stores, Inc. (9th Cir 2001) 246 F3d 1182: §4.118
Brown v Poway Unified Sch. Dist. (1993) 4 C4th 820, 15 CR2d 679: §§13.99, 13.105
Brown v Superior Court (1971) 5 C3d 509, 96 CR 584: §§3.176, 3.190
Brown, People v (1989) 215 CA3d 452, 263 CR 391: §12.62
Browning v Block (1985) 175 CA3d 423, 220 CR 763: §§4.309-4.310
Bruce v City of Alameda (1985) 166 CA3d 18, 212 CR 304: §3.112
Brunnemann v Terra Int'l, Inc. (5th Cir 1992) 975 F2d 175: §4.259
Brunton v Superior Court (1942) 20 C2d 202, 124 P2d 831: §5.59
Brydon v East Bay Mun. Util. Dist. (1994) 24 CA4th 178, 29 CR2d 128: §6.5
Buckhannon Bd. & Care Home, Inc. v West Virginia Dep't of Health & Human Servs. (2001) 532 US 598, 149 L Ed 2d 855, 121 S Ct 1835: §13.159
Buckley v American Constitutional Law Found., Inc. (1999) 525 US 182, 142 L Ed 2d 599, 119 S Ct 636: §§3.84, 3.96
Buckley v California Coastal Comm'n (1998) 68 CA4th 178, 80 CR2d 562: §10.404
Buckley v Fitzsimmons (1993) 509 US 259, 125 L Ed 2d 209, 113 S Ct 2606: §13.125
Buckley v Valeo (1976) 424 US 1, 46 L Ed 2d 659, 96 S Ct 612: §§3.176, 3.180-3.183, 3.185, 3.191-3.193
Buena Vista Gardens Apartments Ass'n v City of San Diego Planning Dep't (1985) 175 CA3d 289, 220 CR 732: §§10.39, 10.48
Building Indus. Ass'n v City of Camarillo (1986) 41 C3d 810, 226 CR 81: §§3.122, 10.206-10.207
Building Indus. Ass'n v City of Livermore (1996) 45 CA4th 719, 52 CR2d 902: §§1.240, 10.238
Building Indus. Ass'n v City of Oceanside (1994) 27 CA4th 744, 33 CR2d 137: §10.172
Building Indus. Ass'n of Central Cal. v City of Patterson (2009) 171 CA4th 886, 90 CR3d 63, cert denied (2009) ___ US ___, 175 L

Ed 2d 480, 130 S Ct 660: §§10.127, 10.150, 10.228, 10.430
Building Indus. Ass'n of San Diego v City of Oceanside (1994) 27 CA4th 744, 33 CR2d 137: §§10.204, 10.443
Building Indus. Ass'n of San Diego v Superior Court (City of Oceanside) (1989) 211 CA3d 277, 259 CR 325: §10.207
Building Indus. Legal Defense Found. v Superior Court (1999) 72 CA4th 1410, 85 CR2d 828: §10.92
Building Material & Constr. Teamsters' Union v Farrell (1986) 41 C3d 651, 224 CR 688: §4.340
Bullock v Carter (1972) 405 US 134, 31 L Ed 2d 92, 92 S Ct 849: §1.220
Bullock v City & County of San Francisco (1990) 221 CA3d 1072, 271 CR 44: §9.58
Bundy v Jackson (DC Cir 1981) 641 F2d 934: §§4.189-4.190
Burbank-Glendale-Pasadena Airport Auth. v City of Los Angeles (9th Cir 1992) 979 F2d 1338: §6.147
Burbank-Glendale-Pasadena Airport Auth. v Hensler (2000) 83 CA4th 556, 99 CR2d 729: §1.77
Burbank-Glendale-Pasadena Airport Auth. v Hensler (1991) 233 CA3d 577, 284 CR 498: §8.6
Burden v Snowden (1992) 2 C4th 556, 7 CR2d 531: §4.295
Burden, People v (1980) 105 CA3d 917, 166 CR 542, cert denied (1980) 449 US 975: §12.62
Burdick v Takushi (1992) 504 US 428, 119 L Ed 2d 245, 112 S Ct 2059: §3.79
Burlington Indus., Inc. v Ellerth (1998) 524 US 742, 141 L Ed 2d 633, 118 S Ct 2257: §§4.190, 4.198-4.200
Burnett v San Francisco Police Dept. (1995) 36 CA4th 1177, 42 CR2d 879: §9.28
Burns v Reed (1991) 500 US 478, 114 L Ed 2d 547, 111 S Ct 1934: §13.125
Burns, City of Oakland v (1956) 46 C2d 401, 296 P2d 333: §§5.172, 7.243
Burrell v City of Los Angeles (1989) 209 CA3d 568, 257 CR 427: §§4.281, 4.288
Burrtec Waste Indus., Inc. v City of Colton (Taormina Indus.) (2002) 97 CA4th 1133, 119 CR2d 410: §11.65
Burton, City & County of San Francisco v (1962) 201 CA2d 749, 20 CR 378: §12.2
Bush v Vera (1996) 517 US 952, 135 L Ed 2d 248, 116 S Ct 1941: §3.70
Buss v Superior Court (1997) 16 C4th 35, 65 CR2d 366: §7.256
Butler v City of Palos Verdes Estates (2005) 135 CA4th 174, 37 CR3d 199: §§9.158, 9.178
Butler v County of Los Angeles (1981) 116 CA3d 633, 172 CR 244: §4.309
Butler, People v (1967) 252 CA2d Supp 1053, 59 CR 924: §9.19
Butt v City of Richmond (1996) 44 CA4th 925, 52 CR2d 232: §2.262
Butterworth v Boyd (1938) 12 C2d 140, 82 P2d 434: §§1.28, 4.1
Byram, H. L., County of Los Angeles v (1951) 36 C2d 694, 227 P2d 4: §5.291
Byrd v Brishke (7th Cir 1972) 466 F2d 6: §13.142

C

C & A Carbone, Inc. v Town of Clarkstown (1994) 511 US 383, 128 L Ed 2d 399, 114 S Ct 1677: §6.101
C & C Constr., Inc. v Sacramento Mun. Util. Dist. (2004) 122 CA4th 284, 18 CR3d 715: §§4.8, 7.32
C.I. Eng'rs & Constructors, Inc. v Johnson & Turner Painting Co. (1983) 140 CA3d 1011, 189 CR 824: §7.302
CBOCS W., Inc. v Humphries (2008) 553 US 442, 170 L Ed 2d 864, 128 S Ct 1951: §4.152
CBS Broadcasting Inc. v Superior Court (2001) 91 CA4th 892, 110 CR2d 889: §2.240
CBS, Inc. v Block (1986) 42 C3d 646, 230 CR 362: §§2.250, 2.253
CEC Docket No. 06-OIR-1: §6.22
CPF Agency Corp. v R & S Towing Serv. (2005) 132 CA4th 1014, 34 CR3d 106: §8.178
CSX Transp. v Easterwood (1993) 507 US 658, 123 L Ed 2d 387, 113 S Ct 1732: §1.33
Caballero v City of Concord (9th Cir 1992) 956 F2d 204: §13.139
Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v Peterson (DC Cir 1982) 685 F2d 678: §11.284
Cadiz Land Co. v Rail Cycle, L.P. (2000) 83 CA4th 74, 99 CR2d 378: §§10.19, 10.108, 13.21
Cal-Pacific Materials Co. v Redondo Beach City Sch. Dist. (1979) 94 CA3d 652, 156 CR 590: §7.124
CalBeach Advocates v City of Solana Beach (2002) 103 CA4th 529, 127 CR2d 1: §11.24
Caldwell v Montoya (1995) 10 C4th 972, 42 CR2d 842: §13.97
Calfarm Ins. Co. v Deukmejian (1989) 48 C3d 805, 258 CR 161: §1.234
Calhoun v Acme Cleveland Corp. (1st Cir 1986) 801 F2d 558: §13.160
California Ass'n of Retail Tobacconists v State (2003) 109 CA4th 792, 135 CR2d 224: §1.6
California Aviation Council v City of Ceres (1992) 9 CA4th 1384, 12 CR2d 163: §§6.149, 10.259, 13.5
California Bldg. Indus. Ass'n v Governing Bd. (1988) 206 CA3d 212, 253 CR 497: §§5.60, 10.156. 10.213
California Coastal Comm'n v Granite Rock Co. (1987) 480 US 572, 94 L Ed 2d 577, 107 S Ct 1419: §10.305
California Coastal Comm'n v Office of Admin. Law (1989) 210 CA3d 758, 258 CR 560: §10.282
California Coastal Comm'n v Quanta Inv. Corp. (1980) 113 CA3d 579, 170 CR 263: §§10.305, 10.326
California Coastal Comm'n v Superior Court (1989) 210 CA3d 1488, 258 CR 567: §§10.324, 10.404
California Comm'n on the Status of Women, Miller v (1984) 151 CA3d 693, 198 CR 877: §3.211
California Constr. Co., City of Oakland v (1940) 15 C2d 573, 104 P2d 30: §2.162
California Country Club Homes Ass'n v City of Los Angeles (1993) 18 CA4th 1425, 22 CR2d 917: §10.159
California Credit Union League v City of Anaheim (9th Cir 1996) 95 F3d 30, vacated and remanded (1997) 520 US 1261, 138 L Ed 2d 191, 117 S Ct 2429: §5.53
California Dump Truck Owners Ass'n v Davis (ED Cal 2002) 302 F Supp 2d 1139: §8.167
California Educ. Facilities Auth. v Priest (1974) 12 C3d 593, 116 CR 361: §1.63
California Fed. Sav. & Loan Ass'n v City of Los Angeles (1991) 54 C3d 1, 283 CR 569: §§1.13, 1.29-1.31, 1.36, 5.5-5.6, 5.36, 5.104

California Fed. Sav. & Loan Ass'n v Guerra (1987) 479 US 272, 93 L Ed 2d 613, 107 S Ct 683: §4.165
California First Amendment Coalition v Superior Court (1998) 67 CA4th 159, 78 CR2d 847: §§2.233, 2.241
California Hous. Fin. Agency v Elliott (1976) 17 C3d 575, 131 CR 361: §1.47
California Hous. Fin. Agency v Hanover/Cal. Mgmt. & Accounting Ctr., Inc. (2007) 148 CA4th 682, 56 CR3d 92: §2.164
California Hous. Fin. Agency v Patitucci (1978) 22 C3d 171, 148 CR 875: §10.164
California Med. Ass'n v Federal Election Comm'n (1981) 453 US 182, 69 L Ed 2d 567, 101 S Ct 2712: §3.182
California Native Plant Soc'y v City of Rancho Cordova (2009) 172 CA4th 603, 91 CR3d 571: §§11.38, 11.62
California Native Plant Soc'y v City of Santa Cruz (2009) 177 CA4th 957, 99 CR3d 572: §11.50
California Oak Found. v City of Santa Clarita (2005) 133 CA4th 1219, 35 CR3d 434: §11.98
California Oak Found. v County of Tehama (2009) 174 CA4th 1217, 94 CR 3d 902: §11.69
California Prolife Council PAC v Scully (ED Cal 1998) 989 F Supp 1282, aff'd (9th Cir 1999) 164 F3d 1189: §§3.180, 3.188
California Reduction Co. v Sanitary Reduction Works (1905) 199 US 306, 50 L Ed 204, 26 S Ct 100: §6.92
California Rifle & Pistol Ass'n, Inc. v City of West Hollywood (1998) 66 CA4th 1302, 78 CR2d 591: §§1.36, 1.41, 9.96
California Sav. & Loan Ass'n v City of Los Angeles (1991) 54 C3d 1, 283 CR 569: §1.20
California Sch. Bds. Ass'n v State (2009) 171 CA4th 1183, 90 CR3d 501: §5.256
California Sch. Employees Ass'n v Azusa Unified Sch. Dist. (1984) 152 CA3d 580, 199 CR 635: §13.39
California Sch. Employees Ass'n v Sunnyvale Elementary Sch. Dist. (1973) 36 CA3d 46, 111 CR 433: §7.8
California State Univ., Fresno Ass'n, Inc. v Superior Court (2001) 90 CA4th 810, 108 CR2d 870: §2.240
California Teachers Ass'n v Ingwerson (1996) 46 CA4th 860, 53 CR2d 917: §13.12
California Water & Tel. Co. v County of Los Angeles (1967) 253 CA2d 16, 61 CR 618: §1.40
California Water Impact Network v Newhall County Water Dist. (2008) 161 CA4th 1464, 75 CR3d 393: §§11.102, 13.2-13.3, 13.16
Californians for Alternatives to Toxics v Department of Food & Agric. (2005) 136 CA4th 1, 38 CR3d 638: §11.39
Californians for Responsible Toxics Mgmt. v Kizer (1989) 211 CA3d 961, 259 CR 599: §13.165
Call v Los Angeles County Gen. Hosp. (1978) 77 CA3d 911, 143 CR 845: §13.49
Callahan v City & County of San Francisco (1967) 249 CA2d 696, 57 CR 639: §13.101
Callahan v Woods (9th Cir 1984) 736 F2d 1269: §1.64
Calprop Corp. v City of San Diego (2000) 77 CA4th 582, 91 CR2d 792: §10.375
Cameron v State (1972) 7 C3d 318, 102 CR 305: §13.106
Camp v Board of Supervisors (1981) 123 CA3d 334, 176 CR 620: §§10.21, 10.52, 10.62
Campagna v City of Sanger (1996) 42 CA4th 533, 49 CR2d 676: §§2.164, 2.172, 2.209
Campbell v Regents of Univ. of Cal. (2005) 35 C4th 311, 25 CR3d 320: §§10.377, 13.13
Campbell v Residential Rent Stabilization & Arbitration Bd. (1983) 142 CA3d 123, 190 CR 829: §13.157
Campbell Municipal Employees Ass'n v City of Campbell (1982) 131 CA3d 416, 182 CR 461: §4.326
Canales v City of Alviso (1970) 3 C3d 118, 89 CR 601: §§3.131, 3.137
Canatella v Van De Kamp (9th Cir 2007) 486 F3d 1128: §13.152
Canavan, City of San Francisco v (1872) 42 C 541: §1.1
Cancellier v Federated Dep't Stores (9th Cir 1982) 672 F2d 1312, cert denied (1982) 459 US 859: §4.260
Cancun Homeowners Ass'n v City of San Juan Capistrano (1989) 215 CA3d 1352, 264 CR 288: §13.93
Candid Enters., Inc. v Grossmont Union High Sch. Dist. (1985) 39 C3d 878, 218 CR 303: §§1.16, 1.36, 1.39-1.40, 10.216, 10.232, 10.434, 10.436
Candidates' Outdoor Graphic Serv. v City & County of San Francisco (ND Cal 1983) 574 F Supp 1240: §9.143
Cantwell v Connecticut (1940) 310 US 296, 84 L Ed 1213, 60 S Ct 900: §3.191
Capistrano Beach Water Dist. v Taj Dev. Corp. (1999) 72 CA4th 524, 85 CR2d 382: §§5.163, 10.224
Capitol Steel Fabricators v Mega Constr. Co. (1997) 58 CA4th 1049, 68 CR2d 672: §7.120
Carey v Piphus (1978) 435 US 247, 55 L Ed 2d 252, 98 S Ct 1042: §§4.160, 13.145
Carlin v City of Palm Springs (1971) 14 CA3d 706, 92 CR 535: §§1.16, 9.23
Carlsbad Aquafarm, Inc. v Department of Health Servs. (2000) 83 CA4th 809, 100 CR2d 87: §13.146
Carlsbad Mun. Water Dist. v QLC Corp. (1992) 2 CA4th 479, 3 CR2d 318: §§5.160, 6.43
Carlson v Paradise Unified Sch. Dist. (1971) 18 CA3d 196, 95 CR 650: §2.56
Carman v Alvord (1982) 31 C3d 318, 182 CR 506: §5.287
Carmel Valley Fire Protection Dist. v State (2001) 25 C4th 287, 105 CR2d 636: §§5.255, 5.261
Carmel Valley Fire Protection Dist. v State (1987) 190 CA3d 521, 234 CR 795: §5.261
Carmichael v Southern Coal & Coke Co. (1937) 301 US 495, 81 L Ed 1245, 57 S Ct 868: §5.96
Carpenter v City of Los Angeles (1991) 230 CA3d 923, 281 CR 500: §13.93
Carr Bus. Enters. Inc. v City of Chowchilla (2008) 166 CA4th 14, 82 CR3d 128: §13.172
Carrancho v California Air Resources Bd. (2003) 111 CA4th 1255, 4 CR3d 536: §§13.9, 13.11, 13.21
Carrera v Bertaini (1976) 63 CA3d 721, 134 CR 14: §9.165
Carreras v City of Anaheim (9th Cir 1985) 768 F2d 1039: §13.159
Carroll v County of Los Angeles (1997) 60 CA4th 606, 70 CR2d 504: §13.93
Carroll v U.S. (1925) 267 US 132, 69 L Ed 543, 45 S Ct 280: §§9.65-9.66
Carruth v City of Madera (1965) 233 CA2d 688, 43 CR 855: §7.174
Carson v Facilities Dev. Co. (1984) 36 C3d 830, 206 CR 136: §13.102
Carson Citizens for Reform v Kawagoe (2009) 178 CA4th 357, 100 CR3d 358 (2009): §3.162
Carson Harbor Village Ltd. v City of Carson (9th Cir 1994) 37 F3d 468, overruled on other grounds by WMX Technols., Inc. v Miller (1997) 104 F3d 1133: §10.421

Carson Harbor Village, Ltd. v City of Carson (9th Cir 2004) 353 F3d 824: §§10.378-10.379
Carson Harbor Village, Ltd. v City of Carson Mobilehome Park Rental Review Bd. (1999) 70 CA4th 281, 82 CR2d 569: §§9.51, 9.57
Carson Harbor Village, Ltd. v Unocal Corp. (9th Cir 2001) 270 F3d 863: §11.250
Carson Mobilehome Park Owners' Ass'n v City of Carson (1983) 35 C3d 184, 197 CR 284: §§9.47, 9.50, 9.54
Carsten v City of Del Mar (1992) 8 CA4th 1642, 11 CR2d 252: §8.155
Carter, People v (1975) 48 CA3d 369, 121 CR 677: §12.62
Casella v City of Morgan Hill (1991) 230 CA3d 43, 280 CR 876, cert denied (1992) 503 US 983: §9.60
Cashman v City of Cotati (9th Cir 2004) 374 F3d 887, rev'd (9th Cir 2005) 415 F3d 1027: §9.60
Casitas Mun. Water Dist. v U.S. (Fed Cir 2008) 543 F3d 1276: §10.365
Casmalia Resources, Ltd. v County of Santa Barbara (1987) 195 CA3d 827, 240 CR 903: §§10.135, 11.244
Cassino v Reichhold Chems., Inc. (9th Cir 1987) 817 F2d 1338, cert denied (1988) 484 US 1047: §4.260
Cassista v Community Foods, Inc. (1993) 5 C4th 1050, 22 CR2d 287: §4.226
Castro v Los Angeles County Bd. of Supervisors (1991) 232 CA3d 1432, 284 CR 154: §2.204
Cates Constr., Inc. v Talbot Partners (1999) 21 C4th 28, 86 CR2d 855: §§7.95-7.97
Caudel v East Bay Mun. Util. Dist. (1985) 165 CA3d 1, 211 CR 222: §7.220
Cawdrey v City of Redondo Beach (1993) 15 CA4th 1212, 19 CR2d 179: §3.36
Cawdrey v Redondo Beach (1993) 15 CA4th 1212, 19 CR2d 179: §1.222
Cayley v Nunn (1987) 190 CA3d 300, 235 CR 385: §13.110
Cel-Tech Communications, Inc. v Los Angeles Cellular Tel. Co. (1999) 20 C4th 163, 83 CR2d 548: §12.12
Center for Biological Diversity v Fish & Game Comm'n (2008) 166 CA4th 597, 82 CR3d 855: §11.288
Center for Biological Diversity v U.S. Bureau of Land Mgmt. (ND Cal, April 14, 2009, No. 08-05646) 2009 US Dist. Lexis 34249: §11.277
Center for Biological Diversity v U.S. Fish & Wildlife Serv. (ND Cal 2009) 623 F Supp 2d 1044: §11.268
Center for Biological Diversity, Inc. v FPL Group, Inc. (2008) 166 CA4th 1349, 83 CR3d 588: §10.338
Centex Real Estate Corp. v City of Vallejo (1993) 19 CA4th 1358, 24 CR2d 48: §5.60
Central Delta Water Agency v State Water Resources Control Bd. (1993) 17 CA4th 621, 21 CR2d 453: §5.259
Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n (1980) 447 US 557, 65 L Ed 2d 341, 100 S Ct 2343: §§9.123, 9.139
Central Mfg. Dist., Inc. v Board of Supervisors (1960) 176 CA2d 850, 1 CR 733: §§1.228, 2.4
Central Pac. Ry. Co. v Costa (1927) 84 CA 577, 258 P 991: §1.2
Century Fed., Inc. v City of Palo Alto (ND Cal 1988) 710 F Supp 1559: §6.61
Century Fed., Inc. v City of Palo Alto (ND Cal 1987) 710 F Supp 1552: §6.87
Century Indemnity Co. v Hearrean (2002) 98 CA4th 734, 120 CR2d 66: §7.268
Certain Underwriters at Lloyd's of London v Superior Court (2001) 24 C4th 945, 103 CR2d 672: §7.257
Cetacean Community v Bush (9th Cir 2004) 386 F3d 1169: §11.279
Chacon, People v (2007) 40 C4th 558, 53 CR3d 876: §2.171
Chaffee v San Francisco Library Comm'n (2004) 115 CA4th 461, 9 CR3d 336: §2.64
Chaffee v San Francisco Pub. Library Comm'n (2005) 134 CA4th 109, 36 CR3d 1: §2.80
Chandis Sec. Co. v City of Dana Point (1996) 52 CA4th 475, 60 CR2d 481: §§10.73, 10.83, 10.384
Chang v City of Palos Verdes Estates (1979) 98 CA3d 557, 159 CR 630: §4.282
Chaparral Greens v City of Chula Vista (1996) 50 CA4th 1134, 58 CR2d 152: §11.45
Chaplinsky v State of New Hampshire (1942) 315 US 568, 86 L Ed 1031, 62 S Ct 766: §§2.24, 9.136
Chaplis v County of Monterey (1979) 97 CA3d 249, 158 CR 395: §13.177
Chapman v Detroit (6th Cir 1986) 808 F2d 459: §4.248
Chapman v State (1894) 104 C 690, 38 P 457: §13.154
Chapman v Superior Court (2005) 130 CA4th 261, 29 CR3d 852: §2.171
Chapman, People ex rel v Rapsey (1940) 16 C2d 636, 107 P2d 388: §§1.193, 2.176, 2.178, 5.270
Chardon v Fernandez (1981) 454 US 6, 70 L Ed 2d 6, 102 S Ct 28: §13.152
Charles A. Pratt Constr. Co. v California Coastal Comm'n (2008) 162 CA4th 1068, 76 CR3d 466, cert denied (2009) ___ US ___, 173 L Ed 2d 585, 129 S Ct 1317: §10.150
Charlisse C., In re v Shadonna C. (2008) 45 C4th 145, 84 CR3d 597: §§2.198, 2.205
Charter Communications, Inc. v County of Santa Cruz (9th Cir 2002) 304 F3d 927, cert denied (2004) 540 US 1140: §6.86
Chavez v Martinez (2003) 538 US 760, 155 L Ed 2d 984, 123 S Ct 1994: §13.116
Chavez v Municipal Court of Visalia Judicial Dist. (1967) 256 CA2d 149, 64 CR 76: §8.177
Chevron U.S.A. Inc. v Echazabal (2002) 536 US 73, 153 L Ed 2d 82, 122 S Ct 2045: §4.233
Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc. (1984) 467 US 837, 81 L Ed 2d 694, 104 S Ct 2778: §11.278
Chew v Gates (9th Cir 1994) 27 F3d 1432, cert denied (1994) 513 US 1148: §13.131
Chhourr v Community Redev. Agency of Buena Park (1996) 46 CA4th 273, 53 CR2d 585: §8.38
Chiari v City of League City (5th Cir 1991) 920 F2d 311: §4.221
Chicago, B. & Q. Ry. Co. v Illinois (1906) 200 US 561, 50 L Ed 596, 26 S Ct 341: §1.15
Chico Feminist Women's Health Ctr. v Scully (1989) 208 CA3d 230, 256 CR 194: §1.59
Chico Police Officers' Ass'n v City of Chico (1991) 232 CA3d 635, 283 CR 610: §§4.2, 4.135
Children of the Rosary v City of Phoenix (9th Cir 1998) 154 F3d 972, cert denied (1999) 526 US 1131: §§6.126, 9.122, 9.140
Christensen v Harris County (2000) 529 US 576, 146 L Ed 2d 621, 120 S Ct 1655: §4.79
Christensen v Yolo County Bd. of Supervisors (9th Cir 1993) 995 F2d 161: §10.421
Christian, People v (1996) 41 CA4th 986, 48 CR2d 867: §2.202

Christian Gospel Church, Inc. v City & County of San Francisco (9th Cir 1990) 896 F2d 1221, cert denied (1990) 498 US 999: §1.64
Christiansburg Garment Co. v EEOC (1978) 434 US 412, 54 L Ed 2d 648, 98 S Ct 694: §§4.155, 4.263, 13.158
Christopher P. v Mojave Unified Sch. Dist. (1993) 19 CA4th 165, 23 CR2d 353: §13.76
Christward Ministry v County of San Diego (1993) 13 CA4th 31, 16 CR2d 435: §11.53
Church v County of Humboldt (1967) 248 CA2d 855, 57 CR 79: §13.84
Church of Scientology v Commissioner of Internal Revenuer (9th Cir 1987) 823 F.2d 1310: §13.116
Ciani v San Diego Trust & Sav. Bank (1991) 233 CA3d 1604, 285 CR 699: §10.15
Cinelli v City of Revere (1st Cir 1987) 820 F2d 474: §13.116
Cipollone v Liggett Group, Inc. (1992) 505 US 504, 120 L Ed 2d 407, 112 S Ct 2608: §1.33
Citizen Advocates, Inc. v Board of Supervisors (1983) 146 CA3d 171, 194 CR 61: §1.218
Citizens Against Gated Enclaves v Whitley Heights Civic Assoc. (1994) 23 CA4th 812, 28 CR2d 451: §8.156
Citizens Against Rent Control v City of Berkeley (1981) 454 US 290, 70 L Ed 2d 492, 102 S Ct 434: §§3.176, 3.181
Citizens Ass'n for Sensible Dev. v County of Inyo (1985) 172 CA3d 151, 217 CR 893: §§11.26, 11.64
Citizens United v Federal Election Comm'n (2010) ___ US ___, 175 L Ed 2d 753, 130 S Ct 876: §§3.176-3.177, 3.182-3.184
Citizens for Improved Sorrento Access, Inc. v City of San Diego (2004) 118 CA4th 808, 13 CR3d 259: §§8.151, 13.10
Citizens for Responsible & Open Gov't v City of Grand Terrace (2008) 160 CA4th 1323, 73 CR3d 202: §11.29
Citizens for Responsible Behavior v Superior Court (1991) 1 CA4th 1013, 2 CR2d 648: §§3.115, 3.118, 3.123
Citizens for Responsible Equitable Envt'l Dev. v City of San Diego Redev. Agency (2005) 134 CA4th 598, 36 CR3d 249: §11.44
Citizens for Responsible Gov't v City of Albany (1997) 56 CA4th 1199, 66 CR2d 102: §11.18
Citizens of Goleta Valley v Board of Supervisors (1990) 52 C3d 553, 276 CR 410: §§10.16, 11.52, 11.74, 11.77
Citizens to Protect Pub. Funds v Board of Educ. (1953) 13 NJ 172, 98 A2d 673: §3.214
Citizens' Comm. to Save Our Village v City of Clarement (1995) 37 CA4th 1157, 44 CR2d 288: §11.29
City & County of San Francisco v _____ (*see* name of defendant)
City & County of San Francisco, Smith v (1977) 68 CA3d 227, 137 CR 146: §13.67
City Council v McKinley (1978) 80 CA3d 204, 145 CR 461: §§2.164-2.165
City Council of the City of Lawndale, County of Los Angeles v (1962) 202 CA2d 20, 20 CR 363: §§1.10, 1.238
City Council of the City of San Jose v South (1983) 146 CA3d 320, 194 CR 110: §1.53
City Inv. Corp., City & County of San Francisco v (1971) 15 CA3d 1031, 93 CR 690: §12.2
City of Agoura Hills v Local Agency Formation Comm'n (1988) 198 CA3d 480, 243 CR 740: §§1.118, 1.120, 1.122, 1.129
City of Alhambra, County of Los Angeles v (1980) 27 C3d 184, 165 CR 440, superseded on other grounds as stated in County of Alameda v City of Oakland (1987) 193 CA3d 858, 238 CR 646: §§8.153, 8.157
City of Alhambra v P.J.B. Disposal Co. (1998) 61 CA4th 136, 71 CR2d 364: §§6.96-6.97
City of Anaheim v Metropolitan Water Dist. (1978) 82 CA3d 763, 147 CR 336: §6.54
City of Anaheim v Pacific Bell Tel. Co. (2004) 119 CA4th 838, 14 CR3d 725: §8.123
City of Anaheim v Southern Cal. Edison Co. (9th Cir 1992) 955 F2d 1373: §6.28
City of Anaheim v Superior Court (2009) 179 CA4th 825, 102 CR3d 171: §5.56
City of Antioch v Candidates' Outdoor Graphic Serv. (ND Cal 1982) 557 F Supp 52: §9.143
City of Arcadia v EPA (9th Cir 2005) 411 F3d 1103: §11.147
City of Arcadia v State Water Resources Control Board (2006) 135 CA4th 1392, 38 CR3d 373: §13.10
City of Arcadia, Miller v (1932) 121 CA 660, 9 P2d 587: §9.159
City of Atascadero v Daly (1982) 135 CA3d 466, 185 CR 228: §§3.111, 3.119
City of Auburn v Qwest Corp. (9th Cir 2001) 260 F3d 1160, cert denied (2002) 534 US 1079, overruled on other grounds in Sprint Telephony PCS, L.P. v County of San Diego (9th Cir 2008) 543 F3d 571: §10.139
City of Bakersfield v Miller (1966) 64 C2d 93, 48 CR 889, cert denied (1966) 384 US 988: §§10.121, 10.233, 12.3
City of Berkeley v City of Berkeley Rent Stabilization Bd.(1994) 27 CA4th 951, 33 CR2d 317: §9.50
City of Berkeley v Oakland Raiders (1983) 143 CA3d 636, 192 CR 66: §5.42
City of Berkeley, U.S. v (ED Mo 1990) 735 F Supp 937: §6.147
City of Berkeley v Superior Court (1980) 26 C3d 515, 162 CR 327, cert denied sub nom by Santa Fe Land Improvement Co. v City of Berkeley (1980) 449 US 840: §§6.162-6.163, 6.169
City of Boerne v Flores (1997) 521 US 507, 138 L Ed 2d 624, 117 S Ct 2157: §§1.64, 10.133-10.134
City of Bridgeport, In re (Bankr D Conn 1991) 132 BR 85: §5.444
City of Burbank v Burbank-Glendale-Pasadena Airport Auth. (2003) 113 CA4th 465, 6 CR3d 367: §3.119
City of Burbank v Burbank-Glendale-Pasadena Airport Auth. (1999) 72 CA4th 366, 85 CR2d 28: §6.150
City of Burbank v Lockheed Air Terminal, Inc. (1973) 411 US 624, 36 L Ed 2d 547, 93 S Ct 1854: §§1.33, 6.144, 9.112
City of Burbank v State Water Resources Control Bd. (2005) 35 C4th 613, 26 CR3d 304: §11.129
City of Burlington v Dague (1992) 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638: §13.160
City of Canton v Harris (1989) 489 US 378, 103 L Ed 2d 412, 109 S Ct 1197: §§13.133, 13.136, 13.138, 13.142, 13.148
City of Carmel-By-The-Sea v Board of Supervisors (1986) 183 CA3d 229, 227 CR 899: §13.5
City of Carson v City of La Mirada (2004) 125 CA4th 532, 22 CR3d 815: §§5.299, 5.371
City of Chicago v Morales (1999) 527 US 41, 144 L Ed 2d 67, 119 S Ct 1849: §§9.80, 9.100, 9.102
City of Chula Vista v Pagard (1981) 115 CA3d 785, 171 CR 738: §10.199
City of Cincinnati v Discovery Network, Inc. (1993) 507 US 410, 123 L Ed 2d 99, 113 S Ct 1505: §§9.123, 9.129, 9.140
City of Cleburne v Cleburne Living Ctr. (1985) 473 US 432, 87 L Ed 2d 313, 105 S Ct 3249: §13.25
City of Coachella v Riverside County Airport Land Use Comm'n (1989) 210 CA3d 1277, 258 CR 795: §10.254

City of Colorado Springs Spring Creek Gen. Improvement Dist., In re (Bankr D Colo 1995) 177 BR 684: §5.454
City of Colton v City of Rialto (1964) 230 CA2d 174, 40 CR 766: §1.236
City of Columbus v Ours Garage & Wrecker Serv., Inc. (2002) 536 US 424, 153 L Ed 2d 430, 122 S Ct 2226: §§8.178, 9.44
City of Coronado v San Diego Unified Port Dist. (1964) 227 CA2d 455, 38 CR 834: §§6.162-6.163
City of Costa Mesa v Soffer (1992) 11 CA4th 378, 13 CR2d 735: §§9.117, 12.4
City of Dallas v FCC (5th Cir 1997) 118 F3d 393: §6.61
City of Del Mar v City of San Diego (1982) 133 CA3d 401, 183 CR 898: §10.89
City of Dinuba v County of Tulare (2007) 41 C4th 859, 62 CR3d 614: §§13.2, 13.6
City of Downey v Board of Admin. (1975) 47 CA3d 621, 121 CR 295: §5.279
City of Downey, People ex rel v Downey County Water Dist. (1962) 202 CA2d 786, 21 CR 370: §1.8
City of Dublin v County of Alameda (1993) 14 CA4th 264, 17 CR2d 845: §5.160
City of Edmonds v Oxford House, Inc. (1995) 514 US 725, 131 L Ed 2d 801, 115 S Ct 1776: §10.443
City of Erie v Pap's A.M. (2000) 529 US 277, 146 L Ed 2d 265, 120 S Ct 1382: §§9.6, 9.76
City of Fairfield v Superior Court (1975) 14 C3d 768, 122 CR 543: §§2.180, 10.414, 13.7
City of Flagstaff v Atchinson, Topeka & Santa Fe (9th Cir 1983) 719 F2d 322: §5.167
City of Fontana, Smith v (9th Cir 1987) 818 F2d 1411, cert denied (1987) 484 US 935, overruled in part on other grounds in Hodgers-Durgin v De La Vina (9th Cir 1999) 199 F3d 1037: §§13.121, 13.140
City of Fresno v Press Communications, Inc. (1994) 31 CA4th 32, 36 CR2d 456: §9.133
City of Fresno v Superior Court (1980) 104 CA3d 25, 163 CR 807: §13.73
City of Fresno, Howard Jarvis Taxpayers Ass'n v (2005) 127 CA4th 914, 26 CR3d 153: §§5.175-5.176, 5.183
City of Glendale v Superior Court (2002) 95 CA4th 1266, 116 CR2d 16: §§13.156, 13.173
City of Glendale v Trondsen (1957) 48 C2d 93, 308 P2d 1: §§1.13, 1.21, 5.65-5.66
City of Grass Valley v Walkinshaw (1949) 34 C2d 595, 212 P2d 894: §5.2
City of Greenville v W.R. Grace & Co. (D SC 1986) 640 F Supp 559: §13.147
City of Half Moon Bay v Superior Court (2003) 106 CA4th 795, 131 CR2d 213: §10.321
City of Hawaiian Gardens v City of Long Beach (1998) 61 CA4th 1100, 72 CR2d 134: §8.155
City of Hayward, Sierra Club v (1981) 28 C3d 840, 171 CR 619: §10.143
City of Hemet v Superior Court (1995) 37 CA4th 1411, 44 CR2d 532: §§2.245, 2.247
City of Hemet, Smith v (9th Cir 2005) 394 F3d 689: §13.116
City of Highland v County of San Bernardino (1992) 4 CA4th 1174, 6 CR2d 346: §1.138
City of Huntington Beach v Petersen Law Firm (2002) 95 CA4th 562, 115 CR2d 568: §§2.206, 13.86
City of Huntington Beach v Superior Court (1978) 78 CA3d 333, 144 CR 236: §§5.21, 5.59
City of Huntington Park v Superior Court (1995) 34 CA4th 1293, 41 CR2d 68: §13.59
City of Imperial Beach v Bailey (1980) 103 CA3d 191, 162 CR 663: §§2.165, 2.170
City of Inglewood v Kew (1913) 21 CA 611, 132 P 780: §5.2
City of Inglewood-Los Angeles County Civic Ctr. v Superior Court (1972) 7 C3d 861, 103 CR 689: §7.27
City of Irvine v Irvine Citizens Against Overdevelopment (1994) 25 CA4th 868, 30 CR2d 797: §§3.118, 10.20, 10.89
City of Irvine v Southern Cal. Ass'n of Gov'ts (2009) 175 CA4th 506, 96 CR3d 78: §10.44
City of La Habra v Pellerin (1963) 216 CA2d 99, 30 CR 752: §5.291
City of La Habra, Howard Jarvis Taxpayers Ass'n v (2001) 25 C4th 809, 107 CR2d 369: §5.112
City of Ladue v Gilleo (1994) 512 US 43, 129 L Ed 2d 36, 114 S Ct 2038: §9.144
City of Lafayette v County of Contra Costa (1979) 91 CA3d 749, 154 CR 374: §§8.153, 8.156, 8.167
City of Lafayette v Louisiana Power & Light Co. (1978) 435 US 389, 55 L Ed 2d 364, 98 S Ct 1123: §§6.39, 13.153
City of Lakewood v Plain Dealer Publ'g Co. (1988) 486 US 750, 100 L Ed 2d 771, 108 S Ct 2138: §9.129
City of Las Vegas v Lujan (DC Cir 1989) 891 F2d 927: §11.261
City of Littleton v Z. J. Gifts D-4, L.L.C. (2004) 541 US 774, 159 L Ed 2d 84, 124 S Ct 2219: §§9.12, 9.128
City of Livermore v PG&E (1997) 51 CA4th 1410, 59 CR2d 852: §§6.54, 8.123
City of Long Beach v Department of Indus. Relations (2004) 34 C4th 942, 22 CR3d 518: §7.84
City of Long Beach v Mansell (1970) 3 C3d 462, 91 CR 23: §§6.163, 6.169, 13.174-13.176
City of Long Beach v Morse (1947) 31 C2d 254, 188 P2d 17: §5.264
City of Long Beach v Vickers (1961) 55 C2d 153, 10 CR 359: §§6.162, 6.164
City of Los Angeles v _____ (*see* name of defendant)
City of Los Angeles, County of Los Angeles v (1963) 219 CA2d 838, 33 CR 503: §12.25
City of Los Angeles, Howard Jarvis Taxpayers Ass'n v (2000) 79 CA4th 242, 93 CR2d 742: §13.14
City of Los Angeles, Williams v (1988) 47 C3d 195, 252 CR 817: §4.310
City of Los Angeles, Williams v (1990) 220 CA3d 1212, 269 CR 869: §§4.284, 4.310
City of Los Angeles, People v (1958) 160 CA2d 494, 325 P2d 639: §11.117
City of Madera v Black (1919) 181 C 306, 184 P 397: §1.19
City of Malibu v California Coastal Comm'n (2004) 121 CA4th 989, 18 CR3d 40: §10.287
City of Manhattan Beach v Superior Court (1996) 13 C4th 232, 52 CR2d 82: §8.140
City of Marina v Board of Trustees of the Cal. State Univ. (2006) 39 C4th 341, 46 CR3d 355: §11.50
City of Marysville v Boyd (1960) 181 CA2d 755, 5 CR 598: §8.95
City of Menlo Park v Artino (1957) 151 CA2d 261, 311 P2d 135: §1.22
City of Mill Valley v Saxton (1940) 41 CA2d 290, 106 P2d 455: §1.23
City of Mobile v Bolden (1980) 446 US 55, 64 L Ed 2d 47, 100 S Ct 1490: §3.65

City of Modesto v Modesto Irrig. Dist. (1973) 34 CA3d 504, 110 CR 111: §§5.48, 5.55
City of Monte Sereno v Padgett (2007) 149 CA4th 1530, 58 CR3d 218: §12.23
City of Monterey v Del Monte Dunes at Monterey, Ltd. (1999) 526 US 687, 143 L Ed 2d 882, 119 S Ct 1624: §§10.218, 10.220, 10.375, 10.379, 10.396-10.397
City of Moorpark v Superior Court (1998) 18 C4th 1143, 77 CR2d 445: §§4.352, 4.380
City of Napa, Smith v (2004) 120 CA4th 194, 14 CR3d 908: §4.35
City of Nat'l City v Wiener (1992) 3 C4th 832, 12 CR2d 701, cert denied (1993) 510 US 824: §§9.7, 9.9, 9.11, 10.131
City of New Haven, U.S. v (2d Cir 1974) 496 F2d 452: §6.140
City of New York v FCC (1988) 486 US 57, 100 L Ed 2d 48, 108 S Ct 1637: §1.34
City of Newport v Fact Concerts, Inc. (1981) 453 US 247, 69 L Ed 2d 616, 101 S Ct 2748: §§4.160, 13.123, 13.147, 13.156
City of North Sacramento v Citizens Utils. Co. of Cal. (1963) 218 CA2d 178, 32 CR 308: §6.41
City of Oakland v _____ (*see* name of defendant)
City of Oakland, Johnson v (1961) 188 CA2d 181, 10 CR 409: §13.45
City of Oakland, Williams v (ND Cal 1996) 915 F Supp 1074: §13.146
City of Oklahoma City v Tuttle (1985) 471 US 808, 85 L Ed 2d 791, 105 S Ct 2427: §§13.135, 13.138
City of Ontario v Superior Court (1993) 12 CA4th 894, 16 CR2d 32: §§13.31, 13.40, 13.39, 13.178
City of Orange v Valenti (1974) 37 CA3d 240, 112 CR 379: §13.25
City of Orange, Sierra Club v (2008) 163 CA4th 523, 78 CR 3d 1: §11.62
City of Oxnard v Dale (1955) 45 C2d 729, 290 P2d 859: §§5.224, 5.292
City of Palm Springs v Ringwald (1959) 52 C2d 620, 342 P2d 898: §1.47
City of Pasadena v Charleville (1932) 215 C 384, 10 P2d 745: §7.247
City of Pasadena v City of Alhambra (1946) 75 CA2d 91, 170 P2d 499: §12.16
City of Pasadena v Estrin (1931) 212 C 231, 298 P 14: §§7.177, 13.174
City of Pasadena v Paine (1954) 126 CA2d 93, 271 P2d 577: §§1.227, 1.246, 2.10-2.11, 2.13
City of Pleasanton, Johnson v (9th Cir 1992) 982 F2d 350: §9.131
City of Poway v City of San Diego (1991) 229 CA3d 847, 280 CR 368: §8.155
City of Rancho Palos Verdes v City Council of the City of Rolling Hills Estates (1976) 59 CA3d 869, 129 CR 173: §8.131
City of Redondo Beach v Taxpayers, Property Owners, Citizens & Electors (1960) 54 C2d 126, 5 CR 10: §§5.290, 5.292, 6.162
City of Renton v Playtime Theatres, Inc. (1986) 475 US 41, 89 L Ed 2d 29, 106 S Ct 925: §§9.7-9.9, 9.131-9.132
City of Richmond v J.A. Croson Co. (1989) 488 US 469, 102 L Ed 2d 854, 109 S Ct 706: §§4.9, 7.33
City of Riverside v Rivera (1986) 477 US 561, 91 L Ed 2d 466, 106 S Ct 2686: §13.160
City of Riverside, Howard Jarvis Taxpayers Ass'n v (1999) 73 CA4th 679, 86 CR2d 592: §5.153
City of Riverside, Smith v (1973) 34 CA3d 529, 110 CR 67: §§7.171, 7.193
City of Roseville, Howard Jarvis Taxpayers Ass'n v (2002) 97 CA4th 637, 119 CR2d 91: §§1.25, 5.162, 5.170, 5.175-5.176
City of Roseville, Howard Jarvis Taxpayers Ass'n v (2003) 106 CA4th 1178, 132 CR2d 1: §5.71
City of S. Lake Tahoe v California Tahoe Reg'l Planning Agency (9th Cir 1980) 625 F2d 231, cert denied (1980) 449 US 1039: §§1.3, 1.104
City of Sacramento v Barden (2003) 539 US 958, 156 L Ed 2d 656, 123 S Ct 2639: §8.181
City of Sacramento v Barden (2003) 537 US 1231, 155 L Ed 2d 195, 123 S Ct 1383: §8.181
City of Sacramento v Barden, US. No. 02-815 (May 2003), cert denied (2003) 539 US 958, Brief for the Solicitor General as Amicus Curiae: §8.181
City of Sacramento v Gemsch Inv. Co. (1981) 115 CA3d 869, 171 CR 764: §13.182
City of Sacramento v State (1990) 50 C3d 51, 266 CR 139: §§1.97, 5.251, 5.284
City of Sacramento v Trans Pac. Indus. Acc., Inc. (1979) 98 CA3d 389, 159 CR 514: §7.98
City of Sacramento, Miller v (1977) 66 CA3d 863, 136 CR 315: §§1.45, 4.289
City of Salinas v Ryan Outdoor Adver., Inc. (1987) 189 CA3d 416, 234 CR 619: §9.142
City of Salinas, Howard Jarvis Taxpayers Ass'n v (2002) 98 CA4th 1351, 121 CR2d 228: §§5.175, 6.16
City of San Diego, Howard Jarvis Taxpayers Ass'n v (2004) 120 CA4th 374, 15 CR3d 457: §5.116
City of San Diego, Howard Jarvis Taxpayers Ass'n v (1999) 72 CA4th 230, 84 CR2d 804: §§5.124, 5.136, 5.155
City of San Diego v De Leeuw (1993) 12 CA4th 10, 15 CR2d 98: §5.52
City of San Diego v Neumann (1993) 6 C4th 738, 25 CR2d 480: §8.62
City of San Diego v Roe (2004) 543 US 77, 160 L Ed 2d 410, 125 S Ct 521: §§4.135, 13.116
City of San Diego v Sobke (1998) 65 CA4th 379, 76 CR2d 9: §8.62
City of San Diego, In re (9th Cir 2008) 291 Fed Appx 798: §2.215
City of San Jose v _____ (*see* name of defendant)
City of San Marcos v Coast Waste Mgmt., Inc. (1996) 47 CA4th 320, 54 CR2d 588: §6.103
City of San Mateo v Hardy (1944) 64 CA2d 794, 149 P2d 307: §12.2
City of Sanger v Superior Court (1992) 8 CA4th 444, 10 CR2d 436: §§12.26, 13.173
City of Santa Ana v Board of Educ. (1967) 255 CA2d 178, 62 CR 863: §6.99
City of Santa Ana v City of Garden Grove (1979) 100 CA3d 521, 160 CR 907: §10.70
City of Santa Ana v Santa Ana Police Benevolent Ass'n (1989) 207 CA3d 1568, 255 CR 688: §4.348
City of Santa Barbara v Adamson (1980) 27 C3d 123, 164 CR 539: §10.199
City of Santa Barbara v Superior Court (Janeway) (2007) 41 C4th 747, 62 CR3d 527: §7.222
City of Santa Barbara v Superior Court (Stenson) (2004) 122 CA4th 17, 18 CR3d 403: §2.205
City of Santa Clara v Von Raesfeld (1970) 3 C3d 239, 90 CR 8: §5.224

City of Santa Cruz v Local Agency Formation Comm'n (1978) 76 CA3d 381, 142 CR 873: §1.129
City of Santa Cruz v Santa Cruz City Sch. Bd. of Educ.(1989) 210 CA3d 1, 258 CR 101: §10.136
County of Santa Cruz, Miller v (ND Cal 1992) 796 F Supp 1316: §4.159
City of Santa Monica v Gonzalez (2008) 43 C4th 905, 76 CR3d 483: §12.9
City of Santa Monica v Yarmark (1988) 203 CA3d 153, 249 CR 732: §9.58
City of Saratoga v Hinz (2004) 115 CA4th 1202, 9 CR3d 791: §5.145
City of Saratoga v Huff (1972) 24 CA3d 978, 101 CR 32: §§1.46, 5.291
City of Sausalito v County of Marin (1970) 12 CA3d 550, 90 CR 843: §1.244
City of Seattle, Johnson v (9th Cir 2007) 474 F3d 634: §13.133
City of South El Monte v Southern Cal. Joint Powers Ins. Auth. (1995) 38 CA4th 1629, 45 CR2d 729: §7.262
City of South Lake Tahoe v Superior Court (1998) 62 CA4th 971, 73 CR2d 146: §13.106
City of South San Francisco v Cypress Lawn Cemetery Ass'n (1992) 11 CA4th 916, 14 CR2d 323: §13.176
City of Spokane, U.S. v (9th Cir 1990) 918 F2d 84: §5.53
City of St. Louis v Praprotnik (1988) 485 US 112, 99 L Ed 2d 107, 108 S Ct 915: §§13.135, 13.137-13.138
City of Stockton v Frisbie & Latta (1928) 93 CA 277, 270 P 270: §12.2
City of Stockton v Marina Towers LLC (2009) 171 CA4th 93, 88 CR3d 909: §8.32
City of Stockton v Superior Court (2007) 42 C4th 730, 68 CR3d 295: §§13.29, 13.154
City of Vallejo v Adult Books (1985) 167 CA3d 1169, 213 CR 143, cert denied (1986) 475 US 1064: §9.11
City of Vernon v Central Basin Mun. Water Dist. (1999) 69 CA4th 508, 81 CR2d 650: §2.162
City of Vernon v Southern Cal. Edison Co. (9th Cir 1992) 955 F2d 1361: §6.28
City of Victorville v County of San Bernardino (1991) 233 CA3d 1312, 285 CR 206: §5.200
City of Vista v Fielder (1996) 13 C4th 612, 54 CR2d 861: §8.35
City of W. Covina v Perkins (1999) 525 US 234, 142 L Ed 2d 636, 119 S Ct 678: §13.116
City of Watsonville v Corrigan (2007) 149 CA4th 1542, 58 CR3d 458: §7.306
City of Watsonville v Department of Health Servs. (2005) 133 CA4th 875, 35 CR3d 216: §1.41
City of West Hollywood v Beverly Towers, Inc. (1991) 52 C3d 1184, 278 CR 375: §10.239
City of Westminster v County of Orange (1988) 204 CA3d 623, 251 CR 511: §§3.105, 5.107
Civil Serv. Ass'n v City & County of San Francisco (1978) 22 C3d 552, 150 CR 129: §§4.274, 4.281-4.282
Civil Serv. Comm'n v Superior Court (1984) 163 CA3d 70, 209 CR 159: §2.200
Civil Serv. Comm'n v Velez (1993) 14 CA4th 115, 17 CR2d 490: §4.280
Clack v State (1969) 275 CA2d 743, 80 CR 274: §7.109
Clancy, People ex rel v Superior Court (1985) 39 C3d 740, 218 CR 24: §§2.215, 12.28
Claremont Police Officers Ass'n v City of Claremont (2006) 39 C4th 623, 47 CR3d 69: §§4.335, 4.340
Clark v Burleigh (1992) 4 C4th 474, 14 CR2d 455: §§3.57, 9.119, 9.122
Clark v City of Hermosa Beach (1996) 48 CA4th 1152, 56 CR2d 223, cert denied (1997) 520 US 1167: §§2.33, 2.41, 2.174, 10.407, 10.414, 10.417
Clark v Community for Creative Non-Violence (1984) 468 US 288, 82 L Ed 2d 221, 104 S Ct 3065: §§9.8, 9.63
Clark County Sch. Dist. v Breeden (2001) 532 US 268, 149 L Ed 2d 509, 121 S Ct 1508: §4.193
Classic, U.S. v (1941) 313 US 299, 85 L Ed 1368, 61 S Ct 1031: §13.132
Claudio v Regents of Univ. of Cal. (2005) 134 CA4th 224, 35 CR3d 837: §4.353
Clayton v Superior Court (1998) 67 CA4th 28, 78 CR2d 750: §8.50
Cleary v County of Stanislaus (1981) 118 CA3d 348, 173 CR 390: §11.41
Cleavinger v Saxner (1985) 474 US 193, 88 L Ed 2d 507, 106 S Ct 496: §13.124
Clements v Fashing (1982) 457 US 957, 73 L Ed 2d 508, 102 S Ct 2836: §1.220
Cleveland Bd. of Educ. v Loudermill (1985) 470 US 532, 84 L Ed 2d 494, 105 S Ct 1487: §§4.281, 4.288
Cleveland v City of Los Angeles (9th Cir 2005) 420 F3d 981, cert denied sub nom City of Los Angeles v Cleveland (2006) 546 US 1176: §4.73
Cline v Roadway Express, Inc. (4th Cir 1982) 689 F2d 481: §4.259
Coachella Valley Mosquito & Vector Control Dist. v California Pub. Employment Relations Bd. (2005) 35 C4th 1072, 29 CR3d 234: §4.323
Coalition Advocating Legal Hous. Options v City of Santa Monica (2001) 88 CA4th 451, 105 CR2d 802: §10.199
Coalition for Clean Air v Southern Cal. Edison Co. (9th Cir 1992) 971 F2d 219, cert denied sub nom EPA v Coalition for Clean Air (1993) 507 US 950: §§11.184, 11.212
Coalition for Economic Survival v Deukmejian (1985) 171 CA3d 954, 217 CR 621: §13.164
Coalition for Student Action v City of Fullerton (1984) 153 CA3d 1194, 200 CR 855: §11.62
Coalition of Labor, Agriculture & Business v County of Santa Barbara Bd. of Supervisors (2005) 129 CA4th 205, 28 CR3d 198: §2.64
Coates v Cincinnati (1971) 402 US 611, 29 L Ed 2d 214, 91 S Ct 1686: §§9.83, 9.104
Cobb v Pozzi (2d Cir 2004) 363 F3d 89: §10.437
Cobra Solutions, Inc., City & County of San Francisco v (2006) 38 C4th 839, 43 CR3d 771: §§2.198, 2.202, 2.205
Coburn v State Personnel Bd. (1978) 83 CA3d 801, 148 CR 134: §4.281
Coca-Cola Bottling Co. v Lucky Stores, Inc. (1992) 11 CA4th 1372, 14 CR2d 673: §13.182
Codding Enters. v City of Merced (1974) 42 CA3d 375, 116 CR 730: §1.13
Cogswell v City of Seattle (9th Cir 2003) 347 F3d 809: §9.122
Cohan v City of Thousand Oaks (1994) 30 CA4th 547, 35 CR2d 782: §§2.62, 2.180, 10.417

Cohen v Board of Supervisors (1985) 40 C3d 277, 219 CR 467: §§1.36-1.37
Cohen v State (1971) 403 US 15, 29 L Ed 2d 284, 91 S Ct 1780: §2.24
Cohen, L., Grocery Co., U.S. v (1921) 255 US 81, 65 L Ed 516, 41 S Ct 298: §9.102
Cohn v City of Oakland (1990) 223 CA3d 261, 272 CR 714: §§5.68, 5.98, 5.100
Cohn, R. Ernest, D.C., D.A.B.C.O. v Bond (4th Cir 1991) 953 F2d 154: §6.39
Coit Ranch, Inc., People v (1962) 204 CA2d 52, 21 CR 875: §13.13
Cole v Los Angeles Unified Sch. Dist. (1986) 177 CA3d 1, 222 CR 426: §13.67
Coleman v County of Santa Clara (1998) 64 CA4th 662, 75 CR2d 516: §§5.16, 5.71, 5.100
Coleman v Department of Personnel Admin. (1991) 52 C3d 1102, 278 CR 346: §4.282
Coleman v Regents of Univ. of Cal. (1979) 93 CA3d 521, 155 CR 589: §4.281
Collier v City & County of San Francisco (2007) 151 CA4th 1326, 60 CR3d 698: §§5.72, 5.74, 10.225
Collier v City of Pasadena (1983) 142 CA3d 917, 191 CR 681: §13.59
Collier v Menzel (1985) 176 CA3d 24, 221 CR 110: §3.63
Collins v City of Harker Heights (1992) 503 US 115, 117 L Ed 2d 261, 112 S Ct 1061: §13.136
Collins v County of Los Angeles (1966) 241 CA2d 451, 50 CR 586: §13.29
Collins, City & County of San Francisco v (1932) 216 C 187, 13 P2d 912: §5.278-5.279
Colmenares v Braemar Country Club, Inc. (2003) 29 C4th 1019, 130 CR2d 662: §4.223
Columbus v Ours Garage & Wrecker Serv., Inc. (2002) 536 US 424, 153 L Ed 2d 430, 122 S Ct 2226: §1.33
Commercial Builders of N. Cal. v City of Sacramento (9th Cir 1991) 941 F2d 872, cert denied (1992) 504 US 931: §§10.217, 10.230
Commercial Union Assurance Co. v City of San Jose (1982) 127 CA3d 730, 179 CR 814: §13.29
Commission on Cal. State Gov't Org. & Econ. v Fair Political Practices Comm'n (1977) 75 CA3d 716, 142 CR 468: §2.130
Commission on Peace Officer Standards & Training v Superior Court (2007) 42 C4th 278, 64 CR3d 661: §§2.246-2.247, 2.257, 4.127
Committee for Responsible Planning v City of Indian Wells (1989) 209 CA3d 1005, 257 CR 635: §§10.27-10.28, 10.162
Committee of Seven Thousand v Superior Court (1988) 45 C3d 491, 247 CR 362: §§1.30, 3.110, 3.123
Commodore Home Sys., Inc. v Superior Court (1982) 32 C3d 211, 185 CR 270: §4.267
Common Cause v Board of Supervisors (1989) 49 C3d 432, 261 CR 574: §13.6
Communities for a Better Env't v California Resources Agency (2002) 103 CA4th 98, 126 CR2d 441: §11.12
Communities for a Better Env't v South Coast Air Quality Mgmt. Dist. (2010) 48 C4th 310, __ CR3d __: §11.37
Community Communications Co. v City of Boulder (1982) 455 US 40, 70 L Ed 2d 810, 102 S Ct 835: §13.153
Community Dev. Comm'n v City of Fort Bragg (1988) 204 CA3d 1124, 251 CR 709: §10.111
Community Mem. Hosp. v County of Ventura (1996) 50 CA4th 199, 56 CR2d 732: §1.43
Community for Creative Non-Violence v Reid (1989) 490 US 730, 104 L Ed 2d 811, 109 S Ct 2166: §7.233
Compton v City of Santee (1993) 12 CA4th 591, 15 CR2d 660: §13.93
Concerned Citizens v City of Carlsbad (1988) 204 CA3d 937, 251 CR 583: §3.93
Concerned Citizens of Calaveras County v Board of Supervisors (1985) 166 CA3d 90, 212 CR 273: §10.25
Concerned Citizens of Costa Mesa v Thirty-second Dist. Agric. Ass'n (1986) 42 C3d 929, 231 CR 748: §11.59
Concerned McCloud Citizens v McCloud Community Servs. Dist. (2007) 147 CA4th 181, 54 CR3d 1: §§11.17-11.18
Condon-Johnson & Assocs., Inc. v Sacramento Mun. Util. Dist. (2007) 149 CA4th 1384, 57 CR3d 849: §§7.43, 7.108
Congregation Etz Chaim v City of Los Angeles (2004) 371 F3d 1122: §§10.240, 10.245
Conlin v Board of Supervisors of the City & County of San Francisco (1893) 99 C 17, 33 P 753, aff'd (1896) 114 C 404, 46 P 279: §5.13
Connally v General Constr. Co. (1926) 269 US 385, 70 L Ed 322, 46 S Ct 126: §§9.82, 12.42
Connell v Superior Court (InterSource, Inc.) (1997) 56 CA4th 601, 65 CR2d 738: §§2.232, 2.240
Connelly v Newman (ND Cal 1990) 753 F Supp 293: §4.111
Connelly v State (1970) 3 CA3d 744, 84 CR 257: §13.96
Conner v City of Santa Ana (9th Cir 1990) 897 F2d 1487: §12.69
Conner, People v (1983) 34 C3d 141, 193 CR 148: §2.212
Conner v Burford (9th Cir 1988) 848 F2d 1441, cert denied sub nom Sun Exploration & Prod. Co. v Lujan (1989) 489 US 1012: §11.269
Connerly v State Personnel Bd. (2001) 92 CA4th 16, 112 CR2d 5: §§4.8, 4.185, 7.30
Connick v Myers (1983) 461 US 138, 75 L Ed 2d 708, 103 S Ct 1684: §§4.2, 4.135
Consaul v City of San Diego (1992) 6 CA4th 1781, 8 CR2d 762: §§10.239, 10.428, 13.5
Consolidated Rock Prods. Co. v City of Los Angeles (1962) 57 C2d 515, 20 CR 638: §§1.16, 1.32
Construction Fin. v Perlite Plastering Co. (1997) 53 CA4th 170, 61 CR2d 574: §7.37
Construction Indus. Ass'n v City of Petaluma (9th Cir 1975) 522 F2d 897, cert denied (1976) 424 US 934: §10.203
Continental Heller Corp. v Amtech Mechanical Servs., Inc. (1997) 53 CA4th 500, 61 CR2d 668: §7.306
Contra Blue Jeans Equities West v City & County of San Francisco (1992) 3 CA4th 164, 4 CR2d 114: §10.370
Contra Costa Theatre, Inc. v Redevelopment Agency of the City of Concord (1982) 131 CA3d 860, 184 CR 630: §8.109
Contractors Labor Pool, Inc. v Westway Contractors, Inc. (1997) 53 CA4th 152, 61 CR2d 715: §7.117
Conway v City of Imperial Beach (1997) 52 CA4th 78, 60 CR2d 402: §10.93
Conway, People v (1974) 42 CA3d 875, 117 CR 251: §12.52
Cook v Craig (1976) 55 CA3d 773, 127 CR 712: §2.219
Cook County v U.S. (2003) 538 US 119, 155 L Ed 2d 247, 123 S Ct 1239: §13.123
Cooper v Dupnik (9th Cir 1991) 924 F2d 1520: §13.112

Cooper v Jevne (1976) 56 CA3d 860, 128 CR 724: §§13.29, 13.55
Cooper v Selig (1920) 48 CA 228, 191 P 983: §8.140
Cooper, People v (1944) 64 CA2d Supp 946, 149 P2d 86: §§9.160, 12.38
Cooper, City & County of San Francisco v (1975) 13 C3d 898, 120 CR 707: §1.234
Cooperrider v Civil Service Comm'n (1979) 97 CA3d 495, 158 CR 801: §4.5
Copeland v City of Oakland (1993) 19 CA4th 717, 23 CR2d 719: §13.100
Copeland v Marshall (Copeland III) (DC Cir 1980) 641 F2d 880: §13.160
Copeland v Philadelphia Police Dep't (3d Cir 1988) 840 F2d 1139, cert denied (1989) 490 US 1004: §4.117
Cornejo v County of San Diego (9th Cir 2007) 504 F3d 853: §13.115
Cornelius v NAACP Legal Defense & Educ. Fund (1985) 473 US 788, 87 L Ed 2d 567, 105 S Ct 3439: §9.119
Cornette v Department of Transp. (2001) 26 C4th 63, 109 CR2d 1: §13.106
Cornwell v City of Riverside (9th Cir 1990) 896 F2d 398: §13.89
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v City of Porterville (1949) 90 CA2d 656, 203 P2d 823: §10.133
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos (1987) 483 US 327, 97 L Ed 2d 273, 107 S Ct 2862: §8.115
Corrales v Bradstreet (2007) 153 CA4th 33, 62 CR3d 440: §7.85
Coshow v City of Escondido (2005) 132 CA4th 687, 34 CR3d 19: §6.10
Costa v Superior Court (2006) 37 C4th 986, 39 CR3d 470: §3.123
Cotati Alliance for Better Housing v City of Cotati (1983) 148 CA3d 280, 195 CR 825: §9.57
Cotran v Rollins Hudig Hall Int'l, Inc. (1998) 17 C4th 93, 69 CR2d 900: §4.208
Cottonwood Christian Ctr. v Cypress Redev. Agency (CD Cal 2002) 218 F Supp 2d 1203: §§1.64, 8.44
Coulter v Pool (1921) 187 C 181, 201 P 120: §2.177
County Sanitation Dist. v Inland Container Corp. (9th Cir 1986) 803 F2d 1074: §11.163
County Sanitation Dist. No. 2 v County of Kern (2005) 127 CA4th 1544, 27 CR3d 28: §§10.421, 11.29
County Sanitation Dist. No. 2 v Los Angeles County Employees' Ass'n (1985) 38 C3d 564, 214 CR 424: §4.348
County of Alameda v City & County of San Francisco (1971) 19 CA3d 750, 97 CR 175: §5.34
County of Alameda v Janssen (1940) 16 C2d 276, 106 P2d 11: §§1.42, 5.278, 8.111
County of Allegheny v American Civil Liberties Union (1989) 492 US 573, 106 L Ed 2d 472, 109 S Ct 3086: §1.62
County of Amador v El Dorado County Water Agency (1999) 76 CA4th 931, 91 CR2d 66: §11.92
County of Colusa v California Wildlife Conserv. Bd. (2006) 145 CA4th 637, 52 CR3d 1: §13.163
County of Fresno v State (1991) 53 C3d 482, 280 CR 92: §§5.248, 5.251
County of Imperial v McDougal (1977) 19 C3d 505, 138 CR 472: §§10.110, 10.119
County of Inyo v PUC (1980) 26 C3d 154, 161 CR 172: §§6.3, 6.35
County of Los Angeles v _____ (*see* name of defendant)
County of Los Angeles, City of Los Angeles v (1989) 216 CA3d 916, 265 CR 461: §5.201
County of Los Angeles, Smith v (1989) 211 CA3d 188, 259 CR 231: §9.12
County of Los Angeles, Smith v (1989) 214 CA3d 266, 262 CR 754: §13.55
County of Los Angeles, Williams v (1978) 22 C3d 731, 150 CR 475: §4.279
County of Marin v Superior Court (1960) 53 C2d 633, 2 CR 758: §1.2
County of Napa, Sierra Club v (2004) 121 CA4th 1490, 19 CR3d 1: §§11.50, 11.52
County of Orange v Barratt Am., Inc. (2007) 150 CA4th 420, 58 CR3d 542: §10.225
County of Orange v Heim (1973) 30 CA3d 694, 106 CR 825: §6.162
County of Orange v Superior Court (2003) 113 CA4th 1, 6 CR3d 286: §11.69
County of Orange, In re (Bankr CD Cal 1995) 183 BR 594: §5.444
County of Placer v Corin (1980) 113 CA3d 443, 170 CR 232: §5.286
County of Plumas v Wheeler (1906) 149 C 758, 87 P 909: §§5.3, 5.159, 5.161, 9.158, 10.216
County of Riverside v Loma Linda Univ. (1981) 118 CA3d 300, 173 CR 371: §13.179
County of Riverside v Superior Court (Riverside Sheriff's Ass'n) (2003) 30 C4th 278, 132 CR2d 713: §§1.6, 1.254, 4.324, 4.342, 5.14
County of Riverside v Superior Court (Madrigal) (2002) 27 C4th 793, 118 CR2d 167: §4.298
County of Sacramento v Assessment Appeals Bd. (1973) 32 CA3d 654, 108 CR 434: §5.293
County of Sacramento v Fair Political Practices Comm'n (1990) 222 CA3d 687, 271 CR 802: §3.210
County of Sacramento v Lackner (1979) 97 CA3d 576, 159 CR 1: §13.32
County of Sacramento v PG&E (1987) 193 CA3d 300, 238 CR 305: §5.188
County of San Bernardino v City of San Bernardino (1997) 15 C4th 909, 64 CR2d 814: §§7.178, 9.22, 9.25
County of San Bernardino v Pacific Indem. Co. (1997) 56 CA4th 666, 65 CR2d 657: §7.256
County of San Bernardino v Walsh (2007) 158 CA4th 533, 69 CR3d 848: §§2.162-2.163, 2.172
County of San Diego v _____ (*see* name of defendant)
County of San Diego, U.S. v (9th Cir 1995) 53 F3d 965: §1.90
County of San Diego, U.S. v (9th Cir 1992) 965 F2d 691: §5.23
County of San Joaquin v Stockton Swim Club (1974) 42 CA3d 968, 117 CR 300: §§7.297, 13.154
County of San Luis Obispo v Abalone Alliance (1986) 178 CA3d 848, 223 CR 846: §§5.167, 13.164
County of San Mateo v Berney (1988) 199 CA3d 1489, 245 CR 738: §13.182
County of San Mateo v City Council of Palo Alto (1959) 168 CA2d 220, 335 P2d 1013: §1.10

County of San Mateo, City & County of San Francisco v (1995) 10 C4th 554, 41 CR2d 888: §5.24
County of Santa Barbara, Smith v (1992) 7 CA4th 770, 9 CR2d 120: §13.177
County of Santa Clara, People v (1996) 49 CA4th 1471, 57 CR2d 322: §1.193
County of Shasta v County of Trinity (1980) 106 CA3d 30, 165 CR 18: §5.290
County of Sonoma v Commission on State Mandates (2000) 84 CA4th 1264, 101 CR2d 784: §5.248
County of Sonoma v Superior Court (2009) 173 CA4th 322, 93 CR3d 39: §§4.324, 4.342
Courtemanche v General Servs. Admin. (D Mass 2001) 172 F Supp 2d 251: §9.148
Covina-Azusa Fire Fighters Union, Local 2415 v City of Azusa (1978) 81 CA3d 48, 146 CR 155: §4.333
Cox v County of San Diego (1991) 233 CA3d 300, 284 CR 266: §4.285
Cox v New Hampshire (1941) 312 US 569, 85 L Ed 1049, 61 S Ct 762: §9.146
Cox, In re (1970) 3 C3d 205, 90 CR 24: §1.41
Cox Cable San Diego, Inc. v City of San Diego (1987) 188 CA3d 952, 233 CR 735: §5.193
Craib v Bulmash (1989) 49 C3d 475, 261 CR 686: §4.123
Craik v County of Santa Cruz (Odenweller) (2000) 81 CA4th 880, 96 CR2d 538: §§10.113, 10.117
Cramer v San Diego (1958) 164 CA2d 168, 330 P2d 235: §7.170
Cranston v City of Richmond (1985) 40 C3d 755, 221 CR 779: §§4.276-4.277
Crawford v Lungren (9th Cir 1996) 96 F3d 380, cert denied (1997) 520 US 1117: §§9.14, 9.129
Crawford v Weather Shield Mfg., Inc. (2008) 44 C4th 541, 79 CR3d 721: §§7.217, 7.221, 7.298, 7.306
Crawford-El v Britton (1998) 523 US 574, 140 L Ed 2d 759, 118 S Ct 1584: §§13.126, 13.139
Creighton v Reviczky (1985) 171 CA3d 1225, 217 CR 834: §3.83
Crosby v National Foreign Trade Council (2000) 530 US 363, 147 L Ed 2d 352, 120 S Ct 2288: §1.33
Crossman v Marcoccio (1st Cir 1986) 806 F2d 329: §13.160
Crowe v Boyle (1920) 184 C 117, 193 P 111: §1.228
Crown Motors v City of Redding (1991) 232 CA3d 173, 283 CR 356: §§1.238, 5.116
Crumpton v Gates (9th Cir 1991) 947 F2d 1418: §13.121
Cryer, In re (1926) 77 CA 605, 247 P 252: §§3.126, 3.134
Cucamongans United for Reasonable Expansion v City of Rancho Cucamonga (2000) 82 CA4th 473, 98 CR2d 202: §11.45
Cumming v City of San Bernardino Redev. Agency (2002) 101 CA4th 1229, 125 CR2d 42: §11.59
Cummings v Stanley (2009) 177 CA4th 493, 99 CR3d 284: §§3.128, 3.138
Curcini v County of Alameda (2008) 164 CA4th 629, 79 CR3d 383: §4.61
Curtis v Board of Supervisors of Los Angeles County (1972) 7 C3d 942, 104 CR 297: §1.234
Customer Co. v City of Sacramento (1995) 10 C4th 368, 41 CR2d 658: §13.97
Cwynar v City & County of San Francisco (2001) 90 CA4th 637, 109 CR2d 233: §10.382
Cynthia D., In re (1993) 5 C4th 242, 19 CR2d 698: §9.66

D

D.H. Williams Constr., Inc. v Clovis Unified Sch. Dist. (2007) 146 CA4th 757, 53 CR3d 345: §7.20, 7.229
Dahms v Downtown Pomona Prop. & Bus. Improvement Dist. (2009) 174 CA4th 708, 96 CR3d 10: §5.145
Dallas v Stanglin (1989) 490 US 19, 104 L Ed 2d 18, 109 S Ct 1591: §9.28
Dallas Fire Fighters Ass'n v City of Dallas (5th Cir 1998) 150 F3d 438: §7.34
Dalton v East Bay Mun. Util. Dist. (1993) 18 CA4th 1566, 23 CR2d 230: §13.31
D'Amato v Superior Court (2008) 167 CA4th 861, 84 CR3d 497: §§2.165, 7.232
Damjanovic v Ambrose (1992) 3 CA4th 503, 4 CR2d 560: §13.67
Dang Vang v Toyed (9th Cir 1991) 944 F2d 476: §13.132
Daniel v County of Santa Barbara (9th Cir 2002) 288 F3d 375, cert denied (2002) 537 US 973: §10.380
Daniels v Williams (1986) 474 US 327, 88 L Ed 2d 662, 106 S Ct 662: §§13.117, 13.139
Daniels, Ex Parte (1920) 183 C 636, 192 P 442: §1.38
Dapper v Municipal Court (1969) 276 CA2d 816, 81 CR 340: §12.30
Dart Indus., Inc. v Commercial Union Ins. Co. (2002) 28 C4th 1059, 124 CR2d 142: §7.268
Dateline Builders, Inc. v City of Santa Rosa (1983) 146 CA3d 520, 194 CR 258: §10.202
Davidson v Cannon (1986) 474 US 344, 88 L Ed 2d 677, 106 S Ct 668: §13.139
Davidson v City of Westminster (1982) 32 C3d 197, 185 CR 252: §13.93
Davidson v County of San Diego (1996) 49 CA4th 639, 56 CR2d 617: §10.124
Davis v City of Berkeley (1990) 51 C3d 227, 272 CR 139: §10.164
Davis v City of Ellensburg (9th Cir 1989) 869 F2d 1230: §§13.134, 13.136
Davis v City of Santa Ana (1952) 108 CA2d 669, 239 P2d 656: §§6.92, 7.193, 7.197
Davis v Indiana State Police (7th Cir 2008) 541 F3d 760: §4.217
Davis v Justice Court (1970) 10 CA3d 1002, 89 CR 409: §9.71
Davis v Monroe County Bd. of Educ. (1999) 526 US 629, 143 L Ed 2d 839, 119 S Ct 1661: §4.210
Davoust v City of Alameda (1906) 149 C 69, 84 P 760: §1.25
Dawson v Town of Los Altos Hills (1976) 16 C3d 676, 129 CR 97: §5.151
De Anza Properties X, Ltd. v County of Santa Cruz (9th Cir 1991) 936 F2d 1084: §13.152
deBottari v City Council of Norco (1985) 171 CA3d 1204, 217 CR 790: §§3.114, 3.123
De Vera v Long Beach Pub. Transp. Co. (1986) 180 CA3d 782, 225 CR 789: §6.123
DeAryan v Butler (1953) 119 CA2d 674, 260 P2d 98: §§1.41, 6.10

DeCintio v Westchester County Med. Ctr. (2d Cir 1986) 807 F2d 304, cert denied (1987) 484 US 825: §4.191
DeGrassi v City of Glendora (9th Cir 2000) 207 F3d 636: §§2.207, 13.143
DeMerritt v Weldon (1908) 154 C 545, 98 P 671: §4.28
DeMuria v Hawkes (2nd Cir 2003) 328 F3d 704: §10.437
DeShaney v Winnebago County Dep't of Soc. Servs. (1989) 489 US 189, 103 L Ed 2d 249, 109 S Ct 998: §13.117
DeVita v County of Napa (1995) 9 C4th 763, 38 CR2d 699: §§3.106-3.107, 10.1, 10.73, 10.80
DeYoung v Del Mar Thoroughbred Club (1984) 159 CA3d 858, 206 CR 28: §13.72
Dean v Kuchel (1950) 35 C2d 444, 218 P2d 521: §§1.48, 5.230, 5.235
Decker, City of Los Angeles v (1977) 18 C3d 860, 135 CR 647: §2.215
Defend Bayview Hunters Point Comm. v City & County of San Francisco (2008) 167 CA4th 846, 84 CR3d 486: §3.95
Defend the Bay v City of Irvine (2004) 119 CA4th 1261, 15 CR3d 176: §11.50
Del Norte Disposal Inc. v Department of Corrections (1994) 26 CA4th 1009, 31 CR2d 746: §6.99
Del Real v City of Riverside (2002) 95 CA4th 761, 115 CR2d 705: §§13.45, 13.47
Delcambre v Delcambre (5th Cir 1981) 635 F2d 407: §13.132
Delfino v Sloan (1993) 20 CA4th 1429, 25 CR2d 265: §12.45
Delgado v W.C. Garcia & Assocs. (1963) 212 CA2d 5, 27 CR 613: §7.219
Delles, People v (1968) 69 C2d 906, 73 CR 389: §12.58
Dennis v Higgins (1991) 498 US 439, 112 L Ed 2d 969, 111 S Ct 865: §13.116
Denny's Inc. v City of Agoura Hills (1997) 56 CA4th 1312, 66 CR2d 382: §9.142
Department of Corrections, Miller v (2005) 36 C4th 446, 30 CR3d 797: §4.191
Dep't of Pub. Works, People ex rel v Adco Advertisers (1973) 35 CA3d 507, 110 CR 849: §9.117
Dep't of Pub. Works, People ex rel v Southern Pac. Transp. Co. (1973) 33 CA3d 960, 109 CR 525: §13.25
Dep't of Transp., People ex rel v Cole (1992) 7 CA4th 1281, 9 CR2d 750: §8.41
Dep't of Transp., People ex rel v Superior Court (Isenhower) (2003) 105 CA4th 39, 129 CR2d 60: §§13.73, 13.75
Dep't of Transp., People ex rel v Superior Court (Verdeja) (1992) 5 CA4th 1480, 7 CR2d 498: §13.108
Dep't of Transp., State ex rel v Superior Court (1984) 159 CA3d 331, 205 CR 518: §13.29
Department of Fair Employment & Hous. v Bee Hive Answering Serv. (1984) (FEHC Decision No. FEP 80-81; A7-1047s; N-18839; 84-16) 1984 CAFEHC Lexis 1: §§4.187, 4.194
Department of Fair Employment & Hous. v Madera County (1990) (FEHC Decision No. FEP 84-85; C2-0217se; N-26041; 90-03) 1990 CAFEHC Lexis 11: §§4.187, 4.194, 4.202
Department of Fin. v Commission on State Mandates (2009) 170 CA4th 1355, 89 CR3d 93: §§5.247, 5.251
Department of Fish & Game v Anderson-Cottonwood Irrig. Dist. (1992) 8 CA4th 1554, 11 CR2d 222: §§11.287-11.288
Department of Health Servs. v Superior Court of Sacramento County (McGinnis) (2003) 31 C4th 1026, 6 CR3d 441: §4.199
Department of Indus. Relations v Fidelity Roof Co. (1997) 60 CA4th 411, 70 CR2d 465: §§7.97, 7.119
Department of Pub. Works v MacNamara Corp. (1972) 28 CA3d 641, 104 CR 822: §7.109
Department of Transp. v Chavez (1992) 7 CA4th 407, 9 CR2d 176: §7.176
Department of Transp., People ex rel v Wilson (1994) 25 CA4th 977, 31 CR2d 52: §8.151
Department of Water & Power v Superior Court (2000) 82 CA4th 1288, 99 CR2d 173: §13.73
Deputy Sheriff's Ass'n of Santa Clara County, People ex rel v County of Santa Clara (1996) 49 CA4th 1471, 57 CR2d 322: §2.178
Des Vergnes v Seekonk Water Dist. (1st Cir 1979) 601 F2d 9, vacated on other grounds (1981) 454 US 807, 70 L Ed 2d 76, 102 S Ct 81: §4.153
Desert Outdoor Adver., Inc. v City of Moreno Valley (9th Cir 1996) 103 F3d 814, cert denied (1997) 522 US 912: §§9.138-9.140, 9.144, 10.145
Desert Turf Club v Board of Supervisors (1956) 141 CA2d 446, 296 P2d 882: §10.415
Desmond v Dunn (1880) 55 C 242: §1.5
Deukmejian, People ex rel v Brown (1981) 29 C3d 150, 172 CR 478: §§2.191, 2.201
Deukmejian, People ex rel v County of Mendocino (1984) 36 C3d 476, 204 CR 897: §§1.36, 1.39, 11.117
Deysher, People v (1934) 2 C2d 141, 40 P2d 259: §2.166
Dhuyvetter v City of Fresno (1980) 110 CA3d 659, 168 CR 61: §13.29
Digre, City of Oakland v (1988) 205 CA3d 99, 252 CR 99: §§5.59, 5.65-5.66, 5.70
DiQuisto v County of Santa Clara (2010) 181 CA4th 236, 104 CR3d 93: §3.214
DiSilva v Polaroid Corp. (D Mass 1985) 45 FEP Cases 639: §4.209
Dilts v Cantua Elementary Sch. Dist. (1987) 189 CA3d 27, 234 CR 612: §13.45
Dimon v County of Los Angeles (2008) 166 CA4th 1276, 83 CR3d 576: §4.67
District of Columbia v Heller (2008) __ US __, 171 L Ed 2d 637, 128 S Ct 2783: §9.95
Division of Indus. Safety, State ex rel v Superior Court of Los Angeles County (1974) 43 CA3d 778, 117 CR 726: §§2.219, 2.230
Division of Labor Standards Enforcement v Erisson Info. Sys. (1990) 221 CA3d 114, 270 CR 75: §7.84
Dixon v City of Turlock (1990) 219 CA3d 907, 268 CR 510: §13.60
Dodd v Hood River County (9th Cir 1998) 136 F3d 1219, cert denied (1998) 525 US 923: §10.377
Doe v City & County of Honolulu (1991) 8 Haw App 571, 6 IER Cases 1406: §4.101
Doe v City of Butler (3d Cir 1989) 892 F2d 315: §10.442
Dolan v City of Tigard (1994) 512 US 374, 129 L Ed 2d 304, 114 S Ct 2309: §§10.217, 10.219, 10.391-10.393
Doland v Clark (1904) 143 C 176, 76 P 958: §13.180
Domar Elec., Inc. v City of Los Angeles (1994) 9 C4th 161, 36 CR2d 521): §7.31
Domar Elec., Inc. v City of Los Angeles (1995) 41 CA4th 810, 48 CR2d 822: §7.29

Dominguez v Solano Irrig. Dist. (1991) 228 CA3d 1098, 279 CR 470: §13.101
Donnellan v City of Novato (2001) 86 CA4th 1097, 103 CR2d 882: §13.23
Donohue, City of San Jose v (1975) 51 CA3d 40, 123 CR 804: §§5.90, 5.94
Doty v Elias dba Eddy's Steakhouse (10th Cir 1984) 733 F2d 720: §4.46
Doucette v City of Santa Monica (CD Cal 1997) 955 F Supp 1192: §9.152
Douglas Aircraft Co. v Johnson (1939) 13 C2d 545, 90 P2d 572: §§5.21, 5.59, 5.66
Dowell v County of Contra Costa (1985) 173 CA3d 896, 219 CR 341: §13.68
Downey Cares v Downey Community Dev. Comm'n (1987) 196 CA3d 983, 242 CR 272: §§2.138, 13.162, 13.165
Downtown Palo Alto Comm. for Fair Assessment v City Council (1986) 180 CA3d 384, 225 CR 559: §10.413
Doyle v City of Chino (1981) 117 CA3d 673, 172 CR 844: §§4.295, 4.309
Draper v City of Los Angeles (1990) 52 C3d 502, 276 CR 864: §13.75
Drew, People ex rel v Rodgers (1897) 118 C 393, 50 P 668: §1.189
Drum v Fresno County Dept. of Pub. Works (1983) 144 CA3d 777, 192 CR 782: §10.7
Dublin Prof. Fire Fighters, Local 1885 v Valley Community Servs. Dist. (1975) 45 CA3d 116, 119 CR 182: §§4.338, 4.347
Duffy v City of Arcadia (1987) 195 CA3d 308, 243 CR 87: §9.129
Duffy v City of Oceanside (1986) 179 CA3d 666, 224 CR 879: §13.109
Duffy, Johnson v (9th Cir 1978) 588 F2d 740: §§13.133, 13.142
Dujardin v Ventura County Gen. Hosp. (1977) 69 CA3d 350, 138 CR 20: §§13.58, 13.60, 13.69
Duke v Langdon (9th Cir 1983) 701 F2d 768: §13.118
Duncan, City of Los Angeles v (1933) 130 CA 11, 19 P2d 289: §10.339
Dunn v County of Santa Barbara (2006) 135 CA4th 1281, 38 CR3d 316: §13.19
Dunn v Santa Barbara County (2006) 135 CA4th 1281, 38 CR3d 316: §10.306
Dunston v State (1984) 161 CA3d 79, 207 CR 196: §13.72
Duran, People v (1995) 43 CA4th Supp 1, 52 CR2d 79: §9.19
Durant v City of Beverly Hills (1940) 39 CA2d 133, 102 P2d 759: §§6.3, 6.42
Dusek v Redevelopment Agency of the City of Anaheim (1985) 173 CA3d 1029, 219 CR 346: §5.316
Dusenbery v U.S. (2002) 534 US 161, 151 L Ed 2d 597, 122 S Ct 694: §10.407
Duval v Board of Trustees (2001) 93 CA4th 902, 113 CR2d 517: §2.97
Dynamic Indus. Co. v City of Long Beach (1958) 159 CA2d 294, 323 P2d 768: §7.243

E

E. I. Malone v White Motor Corp. (1978) 435 US 497, 55 L Ed 2d 443, 98 S Ct 1185: §1.33
E.F. Brady Co. v M.H. Golden Co. (1997) 58 CA4th 182, 67 CR2d 886: §§7.75-7.76
E.L. White, Inc. v City of Huntington Beach (1978) 21 C3d 497, 146 CR 614: §§7.217, 7.310-7.311, 13.180
E.W.A.P., Inc. v City of Los Angeles (1997) 56 CA4th 310, 65 CR2d 325: §9.132
EEOC v Enterprise Ass'n Steamfitters Local 638 (2d Cir 1976) 542 F2d 579: §4.259
EEOC v Hacienda Hotel (9th Cir 1989) 881 F2d 1504: §§4.180, 4.195
EEOC v Levi Strauss & Co. (ND Ill 1981) 515 F Supp 640: §4.209
EWAP, Inc. v City of Los Angeles (1979) 97 CA3d 179, 158 CR 579: §1.234
Earth Island Inst. v Carlton (ED Cal, Aug. 20, 2009, No. 09-2020) 2009 US Dist Lexis 74066: §11.283
East Bay Asian Local Dev. Corp. v State (2000) 24 C4th 693, 102 CR2d 280, cert denied (2001) 532 US 1008: §10.133
Eastburn v Regional Fire Protection Auth. (2003) 31 C4th 1175, 7 CR3d 552: §13.94
Eastern Inv. Corp. v U.S. (10th Cir 1995) 49 F3d 651: §4.46
Ebbetts Pass Forest Watch v California Dep't of Forestry & Fire Protection (2008) 43 C4th 936, 77 CR3d 239: §11.38
Ebel v City of Garden Grove (1981) 120 CA3d 399, 176 CR 312: §9.12
Ebersol v Cowan (1983) 35 C3d 427, 197 CR 601: §13.73
Echevarrieta v City of Rancho Palos Verdes (2001) 86 CA4th 472, 103 CR2d 165, cert denied (2001) 534 US 950: §10.130
Eckis Advice Letter No. A 93 270: §2.172
Edelman v Jordan (1974) 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347: §1.93
Edelstein v City & County of San Francisco (2002) 29 C4th 164, 126 CR2d 727: §1.220
Edgemont Community Servs. Dist. v City of Moreno Valley (1995) 36 CA4th 1157, 42 CR2d 823: §5.48
Edgerton v State Personnel Bd. (2000) 83 CA4th 1350, 100 CR2d 491: §6.134
Edwards v Aguillard (1987) 482 US 578, 96 L Ed 2d 510, 107 S Ct 2573: §1.61
Egan v City & County of San Francisco (1913) 165 C 576, 133 P 294: §5.218
Egan v San Francisco (1913) 165 C 576, 133 P 294: §8.67
Ehrlich v City of Culver City (1996) 12 C4th 854, 50 CR2d 242: §§10.220, 10.230, 10.394
Eichorn, In re (1998) 69 CA4th 382, 81 CR2d 535: §9.61
El Dorado Irrig. Dist. v Superior Court (1979) 98 CA3d 57, 159 CR 267: §§13.69, 13.72-13.73
El Dorado Palm Springs Ltd. v Rent Review Comm'n (1991) 230 CA3d 335, 281 CR 327: §9.51
El Dorado Palm Springs, Ltd. v City of Palm Springs (2002) 96 CA4th 1153, 118 CR2d 15: §10.10
El Morro Community Ass'n v California Dep't of Parks & Recreation (2004) 122 CA4th 1341, 19 CR3d 445: §11.70
Eldridge v Sierra View Local Hosp. Dist. (1990) 224 CA3d 311, 273 CR 654: §2.168
Elias v San Bernardino County Flood Control Dist. (1977) 68 CA3d 70, 135 CR 621: §13.47
Elkins v Derby (1974) 12 C3d 410, 115 CR 641: §13.59
Eller Media Co. v City of Los Angeles (2001) 87 CA4th 1217, 105 CR2d 262: §§10.13, 11.58

Ellerbroek v Saddleback Valley Unified Sch. Dist. (1981) 125 CA3d 348, 177 CR 910: §13.161
Ellicott School Bldg. Auth., In re (Bankr D Colo 1992) 150 BR 261: §5.442
Elliot-Park v Manglona (9th Cir 2010) 592 F3d 1003: §13.126
Elliott v McFarland Unified Sch. Dist. (1985) 165 CA3d 562, 211 CR 802: §2.202
Ellis v City Council of the City of Burlingame (1963) 222 CA2d 490, 35 CR 317: §13.4
Ellis v City of San Diego (9th Cir 1999) 176 F3d 1183: §13.32
Ellis v City of La Mesa (9th Cir 1993) 990 F2d 1518, cert denied sub nom County of San Diego v Murphy (1994) 512 US 1220, cert denied sub nom City of San Diego v Paulson (1994) 513 US 925: §1.62
Ellis, Ex Parte (1938) 11 C2d 571: §9.159
Ellison v Brady (9th Cir 1991) 924 F2d 872: §§4.187, 4.195, 4.197, 4.206-4.208
Elrod v Burns (1976) 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673: §§4.136, 13.116
Elysium Institute, Inc. v County of Los Angeles (1991) 232 CA3d 408, 283 CR 688, cert denied (1992) 502 US 1098: §10.442
Emery v San Francisco Gas Co. (1865) 28 C 345: §5.264
Endangered Habitats League, Inc. v County of Orange (2005) 131 CA4th 777, 32 CR3d 177: §§10.16, 10.68, 10.83, 11.38
Engine Mfrs. Ass'n v South Coast Air Quality Mgmt. Dist. (2004) 541 US 246, 158 L Ed 2d 529, 124 S Ct 1756: §11.196
Engineering Contractors Ass'n v Metro Dade County (11th Cir 1997) 122 F3d 895: §7.34
Ensign Bickford Realty Corp. v City Council (1977) 68 CA3d 467, 137 CR 304: §10.95
Enterprise Residents Legal Action Against Annexation Comm. v Brennan (1978) 22 C3d 767, 151 CR 1: §3.137
Environmental Coalition of Orange County v Local Agency Formation Comm'n (1980) 110 CA3d 164, 167 CR 735: §13.185
Environmental Council of Sacramento v City of Sacramento (2006) 142 CA4th 1018, 48 CR3d 544: §11.294
Environmental Defense Project of Sierra County v County of Sierra (2008) 158 CA4th 877, 70 CR3d 474: §10.9
Environmental Planning & Info. Council v County of El Dorado (1982) 131 CA3d 350, 182 CR 317: §11.37
Environmental Protection Info. Ctr. v California Dep't of Forestry & Fire Protection (2008) 44 C4th 459, 80 CR3d 28: §§11.274, 11.288, 11.294
Epperson v Rosemond (1950) 100 CA2d 344, 223 P2d 655: §13.13
Epstein v Hollywood Entertainment Dist. II Bus. Improvement Dist. (2001) 87 CA4th 862, 104 CR2d 857: §§2.5, 2.37
Erdman v Cochise County (9th Cir 1991) 926 F2d 877: §13.160
Erfurt v State (1983) 141 CA3d 837, 190 CR 569: §13.106
Erickson v Pierce County (9th Cir 1992) 960 F2d 801: §4.286
Espinoza v Machonga (1992) 9 CA4th 268, 11 CR2d 498: §13.182
Estelle v Gamble (1976) 429 US 97, 50 L Ed 2d 251, 97 S Ct 285: §13.116
Estes v City of Grover City (1978) 82 CA3d 509, 147 CR 131: §4.305
Estes v Richmond (1967) 249 CA2d 538, 57 CR 536: §4.34
Eureka Teacher's Ass'n v Board of Educ. (1988) 202 CA3d 469, 247 CR 790: §13.32
Eva v Andersen (1913) 166 C 420, 137 P 16: §7.305
Evans v City of San Jose (1992) 3 CA4th 728, 4 CR2d 601: §§5.124, 5.136
Evans v DMV (1994) 21 CA4th 958, 26 CR2d 460, cert denied (1994) 513 US 825: §§13.17, 13.21
Evans v Jeff D. (1986) 475 US 717, 89 L Ed 2d 747, 106 S Ct 1531: §13.160
Ewing Advice Letter, No. A-97-061: §3.211
Ex Parte _____ (*see* name of party)

F

FCC v Beach Communications (1993) 508 US 307, 124 L Ed 2d 211, 113 S Ct 2096: §6.60
FCC Memorandum Opinion and Order, In the Matter of, TCI Cablevision of Oakland County, Inc. (1997) 12 FCCR 21396: §6.89
FW/PBS, Inc. v City of Dallas (1990) 493 US 215, 107 L Ed 2d 603, 110 S Ct 596: §9.12
Fair Political Practices Commission's McEwen Advice Letter No. I 92 481: §2.172
Fairbanks N. Star Borough v U.S. Army Corps of Eng'rs (9th Cir 2008) 543 F3d 586, cert denied (2009) ___ US ___, 174 L Ed 2d 552, 129 S Ct 2825: §11.179
Fairley v Superior Court (1998) 66 CA4th 1414, 78 CR2d 648: §13.108
Fairview Neighbors v County of Ventura (1999) 70 CA4th 238, 82 CR2d 436: §11.37
Faitoute Iron & Steel Co. v Asbury Park (1942) 316 US 502, 86 L Ed 1629, 62 S Ct 1129: §5.440
Fall River Wild Trout Found. v County of Shasta (1999) 70 CA4th 482, 82 CR2d 705: §11.33
Fallbrook Sanitary Dist. v San Diego Local Agency Formation Comm'n (1989) 208 CA3d 753, 256 CR 590: §§1.108, 1.116
Fano v Newport Heights Irrig. Dist. (9th Cir 1940) 114 F2d 563: §5.451
Faragher v City of Boca Raton (1998) 524 US 775, 141 L Ed 2d 662, 118 S Ct 2275: §§4.199-4.200
Farmers Ins. Group v County of Santa Clara (1995) 11 C4th 992, 47 CR2d 478: §§13.88, 13.132, 13.155
Farrar v Hobby (1992) 506 US 103, 121 L Ed 2d 494, 113 S Ct 566: §§13.145, 13.159-13.160
Farrell, City & County of San Francisco v (1982) 32 C3d 47, 184 CR 713: §§5.69, 5.100, 5.108
Faux-Burhans v County Comm'rs of Frederick County (D Md 1987) 674 F Supp 1172, aff'd (4th Cir 1988) 859 F2d 149, cert denied (1989) 488 US 1042: §6.140
Favorite v County of Los Angeles (1998) 68 CA4th 835, 80 CR2d 656: §13.71
Fazio v City & County of San Francisco (9th Cir 1997) 125 F3d 1328: §13.116
Federal Aviation Admin. , City & County of San Francisco v (9th Cir 1991) 942 F2d 1391: §6.144
Federal Election Comm'n v Massachusetts Citizens for Life, Inc. (1986) 479 US 238, 93 L Ed 2d 539, 107 S Ct 616: §§3.182, 3.184
Federal Election Comm'n v National Conservative PAC (1985) 470 US 480, 84 L Ed 2d 455, 105 S Ct 1459: §§3.182-3.184

Federal Election Comm'n v National Right to Work Comm. (1982) 459 US 197, 74 L Ed 2d 364, 103 S Ct 552: §3.176
Federal Express Corp. v California Pub. Utils. Comm'n (9th Cir 1991) 936 F2d 1075: §6.140
Federal Express Corp. v Holowecki (2008) 552 US 389, 170 L Ed 2d 10, 128 S Ct 1147: §4.243
Federal Power Comm'n v Hope (1944) 320 US 591, 88 L Ed 333, 64 S Ct 281: §9.51
Federal Power Comm'n v Natural Gas Pipeline Co. (1942) 315 US 575, 86 L Ed 1037, 62 S Ct 736: §9.51
Federal Power Comm'n v Southern Cal. Edison Co. (1964) 376 US 205, 11 L Ed 2d 638, 84 S Ct 644: §6.25
Federation of Hillside & Canyon Ass'ns v City of Los Angeles (2004) 126 CA4th 1180, 24 CR3d 543: §§10.68, 13.8
Felder v Casey (1988) 487 US 131, 101 L Ed 2d 123, 108 S Ct 2302: §13.152
Fellom v Redevelopment Agency of the City & County of San Francisco (1958) 157 CA2d 243, 320 P2d 884: §5.347
Feminist Women's Health Ctr. v Blythe (1993) 17 CA4th 1543, 22 CR2d 184, vacated and remanded (1995) 512 US 1249, 129 L Ed 2d 888, 114 S Ct 2776, on remand 32 CA4th 1641, 39 CR2d 189, cert denied (1995) 516 US 987: §1.59
Fenton v Board of Dirs. (1984) 156 CA3d 1107, 203 CR 388: §1.191
Fenton v City of Delano (1984) 162 CA3d 400, 208 CR 486: §§5.34, 5.47, 5.71, 5.91
Ferran v City of Palo Alto (1942) 50 CA2d 374, 122 P2d 965: §1.232
Festival Enters., Inc. v City of Pleasant Hill (1986) 182 CA3d 960, 227 CR 601: §5.61
Fielder v City of Glendale (1977) 71 CA3d 719, 139 CR 876: §13.103
Fielder v City of Los Angeles (1993) 14 CA4th 137, 17 CR2d 630: §§5.68, 5.105
Fields v Fong Eu (1976) 18 C3d 322, 134 CR 367: §1.189
Filarsky v Superior Court (2002) 28 C4th 419, 121 CR2d 844: §2.258
Findleton v Board of Supervisors of El Dorado County (1993) 12 CA4th 709, 15 CR2d 665: §10.10
Fiol v Doellstedt (1996) 50 CA4th 1318, 58 CR2d 308: §4.205
Fire Fighters Union v City of Vallejo (1974) 12 C3d 608, 116 CR 507: §§4.41, 4.337
Firefighters Local Union No. 1784 v Stotts (1984) 467 US 561, 81 L Ed 2d 483, 104 S Ct 2576: §4.7
Fireman's Fund Ins. Co. v Escobedo (1978) 80 CA3d 610, 145 CR 785: §7.256
Fireman's Fund Ins. Co. v City of Turlock (1985) 170 CA3d 988, 216 CR 796, disapproved on other grounds by Vandenberg v Superior Court (1999) 21 C4th 815, 88 CR2d 366: §2.210
First English Evangelical Lutheran Church v County of Los Angeles (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378: §§10.210, 10.363, 10.366, 10.369, 10.372, 10.383-10.384, 10.405, 13.118
First English Evangelical Lutheran Church v County of Los Angeles (1989) 210 CA3d 1353, 258 CR 893, cert denied (1990) 493 US 1056: §§10.208, 10.372
First Nat'l Bank of Boston v Bellotti (1978) 435 US 765, 55 L Ed 2d 707, 98 S Ct 1407: §§3.178-3.179
Fiscal v City & County of San Francisco (2008) 158 CA4th 895, 70 CR3d 324: §9.96
Fischer v Los Angeles Unified Sch. Dist. (1999) 70 CA4th 87, 82 CR2d 452, : §2.97
Fisher v City of Berkeley (1984) 37 C3d 644, 209 CR 682, aff'd (1986) 475 US 260: §§1.38-1.40, 9.50
Fisher v County of Alameda (1993) 20 CA4th 120, 24 CR2d 384: §5.105
Fisher v San Pedro Peninsula Hosp. (1989) 214 CA3d 590, 262 CR 842: §§4.180, 4.187, 4.194
Fishman v City of Palo Alto (1978) 86 CA3d 506, 150 CR 326: §3.108
Flahive v City of Dana Point (1999) 72 CA4th 241, 85 CR2d 51: §12.69
Flatt v Superior Court (Daniel) (1994) 9 C4th 275, 36 CR2d 537: §§2.197-2.198
Florida Lime & Avocado Growers, Inc. v Paul (1963) 373 US 132, 10 L Ed 2d 248, 83 S Ct 1210: §1.35
Flynn v San Francisco (1941) 18 C2d 210, 115 P2d 3: §5.59
Folkerson v Circus Circus Enters., Inc. (9th Cir 1997) 107 F3d 754: §4.203
Folsom v Butte County Ass'n of Governments (1982) 32 C3d 668, 186 CR 589: §13.165
Fonseca v City of Gilroy (2007) 148 CA4th 1174, 56 CR3d 374: §10.30
Fontana Police Dep't. v Villegas-Banuelos (1999) 74 CA4th 1249, 88 CR2d 641: §2.263
Fontana Redev. Agency v Torres (2007) 153 CA4th 902, 62 CR3d 875: §13.184
Foothill-DeAnza Community College Dist. v Emerich (2007) 158 CA4th 11, 69 CR3d 678: §3.79
Foremost Dairies, Inc. v State (1986) 190 CA3d 361, 232 CR 70: §13.106
Forsyth County v Nationalist Movement (1992) 505 US 123, 120 L Ed 2d 101, 112 S Ct 2395: §§9.149, 9.151
Fort Halifax Packing Co. v Coyne (1987) 482 US 1, 96 L Ed 2d 1, 107 S Ct 2211: §1.34
Foster v McFadden (1973) 30 CA3d 943, 106 CR 685: §13.46
Foster, Williams v (1989) 216 CA3d 510, 265 CR 15: §13.103
Foster Constr. C.A. & Williams Bros.Co. v U.S. (Ct Cl 1970) 435 F2d 873: §7.107
Foster-Gardner, Inc. v National Union Fire Ins. Co. (1998) 18 C4th 857, 77 CR2d 107: §7.256
Foti v City of Menlo Park (9th Cir 1998) 146 F3d 629: §§9.138-9.139
Fox v City of Los Angeles (1978) 22 C3d 792, 150 CR 867: §1.62
Fox Bakersfield Theatre Corp. v City of Bakersfield (1950) 36 C2d 136, 222 P2d 879: §§5.36, 5.42, 5.46, 5.61
Foxen v City of Santa Barbara (1913) 166 C 77, 134 P 1142: §§7.177, 13.174
Francis v County of Stanislaus (1967) 249 CA2d 862, 57 CR 881: §9.85
Franklin v Gwinnette County Public Sch. (1992) 503 US 60, 117 L Ed 2d 208, 112 S Ct 1028: §13.120
Fraser-Yamor Agency, Inc. v County of Del Norte (1977) 68 CA3d 201, 137 CR 118: §§2.163, 2.166
Frazer v Dixon Unified Sch. Dist. (1993) 18 CA4th 781, 22 CR2d 641: §2.38
Frazier v County of Sonoma (1990) 218 CA3d 454, 267 CR 39: §13.106
Fredette v City of Long Beach (1986) 187 CA3d 122, 231 CR 598: §13.101
Freedman v Maryland (1965) 380 US 51, 13 L Ed 2d 649, 85 S Ct 734: §9.129

Freedman v State of Maryland (1965) 380 US 51, 13 L Ed 2d 649, 85 S Ct 734: §9.146
Freeman v City of Beverly Hills (1994) 27 CA4th 892, 32 CR2d 731: §§10.380, 10.405
French v Cook (1916) 173 C 126, 160 P 411: §4.40
French v Rishell (1953) 40 C2d 477, 254 P2d 26: §4.395
Freshour v Howard (1904) 142 C 501, 77 P 1101: §3.129
Fresno Metro. Projects Auth., Howard Jarvis Taxpayers Ass'n v (1995) 40 CA4th 1359, 48 CR2d 269: §5.14
Friedman v Beverly Hills (1996) 47 CA4th 436, 54 CR2d 882: §8.158
Friedman v City of Beverly Hills (1996) 47 CA4th 436, 54 CR2d 882: §8.159
Frieman v San Rafael Rock Quarry, Inc. (2004) 116 CA4th 29, 10 CR3d 82: §9.115
Friends of "B" St. v City of Hayward (1980) 106 CA3d 988, 165 CR 514: §§10.68, 11.29, 11.35, 13.163
Friends of Davis v City of Davis (2000) 83 CA4th 1004, 100 CR2d 413: §10.147
Friends of E. Willits Valley v County of Mendocino (2002) 101 CA4th 191, 123 CR2d 708: §10.143
Friends of Endangered Species, Inc. v Jantzen (9th Cir 1985) 760 F2d 976: §§11.266, 11.271
Friends of Mammoth v Board of Supervisors (1972) 8 C3d 247, 104 CR 761: §11.17
Friends of Mammoth v Town of Mammoth Lakes Redev. Agency (2000) 82 CA4th 511, 98 CR2d 334: §§5.319, 5.329, 5.364, 11.44
Friends of Pinto Creek v U.S. EPA (9th Cir 2007) 504 F3d 1007, cert denied sub nom Carlota Copper Co. v Friends of Pinto Creek (2009) ___ US ___, 173 L Ed 2d 106, 129 S Ct 896: §11.150
Friends of Sierra Madre v City of Sierra Madre (2001) 25 C4th 165, 105 CR2d 214: §§3.121, 3.124, 11.19
Friends of Westwood, Inc. v City of Los Angeles (1987) 191 CA3d 259, 235 CR 788: §§10.231, 11.20, 13.4
Friends of the Eel River v Sonoma County Water Agency (2003) 108 CA4th 859, 134 CR2d 322: §10.412
Friends of the Old Trees v Department of Forestry & Fire Protection (1997) 52 CA4th 1383, 61 CR2d 297: §§11.75, 11.146, 13.2
Friends of the Santa Clara River v Castaic Lake Water Agency (2004) 123 CA4th 1, 19 CR3d 625: §§11.95, 11.100
Friends of the Santa Clara River v Castaic Lake Water Agency (2002) 95 CA4th 1373, 116 CR2d 54: §11.44
Friends of the Sierra R.R. v Tuolumne Park & Recreation Dist. (2007) 147 CA4th 643, 54 CR3d 500: §11.17
Frisbee v O'Connor (1932) 119 CA 601, 7 P2d 316: §1.27
Frisby v Schultz (1988) 487 US 474, 101 L Ed 2d 420, 108 S Ct 2495: §9.120
Frisk v Merrihew (1974) 42 CA3d 319, 116 CR 781: §13.110
Fuchs v County of Los Angeles Civil Serv. Comm'n (1973) 34 CA3d 709, 110 CR 311: §10.103
Fuller v City of Oakland (9th Cir 1995) 47 F3d 1522: §4.208
Fuller v Frank (9th Cir 1990) 916 F2d 558: §4.148
Fuller v M.G. Jewelry (9th Cir 1991) 950 F2d 1437: §13.126
Fuller v Vines (9th Cir 1994) 36 F3d 65: §9.173
Fullerton v Houston Fire & Cas. Ins. Co. (1965) 234 CA2d 743, 44 CR 711: §7.253
Fundiller v City of Cooper City (11th Cir 1985) 777 F2d 1436: §13.142
Furtado v Sierra Community College (1998) 68 CA4th 876, 80 CR2d 589: §2.97

G

GTE Cal., Inc. v FCC (9th Cir 1994) 39 F3d 940: §6.87
GTE Mobilnet of Cal. Ltd. Partnership v City & County of San Francisco (ND Cal 2006) 440 F Supp 2d 1097: §6.90
Gage, City of Los Angeles v (1954) 127 CA2d 442, 274 P2d 34: §10.121
Gai v City Council (1976) 63 CA3d 381, 133 CR 753: §4.29
Galante Vineyards v Monterey Peninsula Water Mgmt. Dist. (1997) 60 CA4th 1109, 71 CR2d 1: §11.41
Galbiso v Orosi Pub. Util. Dist. (2008) 167 CA4th 1063, 84 CR3d 788: §§2.263, 13.162
Galena, People v (1937) 24 CA2d Supp 770, 70 P2d 724: §9.41
Gallamore v Workers' Compensation Appeals Bd. (1979) 23 C3d 815, 153 CR 590: §4.375
Galland v City of Clovis (2001) 24 C4th 1003, 103 CR2d 711: §9.51
Gallo, People ex rel v Acuna (1997) 14 C4th 1090, 60 CR2d 277: §9.80
Galvan v Superior Court (1969) 70 C2d 851, 76 CR 642: §§1.40-1.41
Galvin v Hay (9th Cir 2004) 374 F3d 739: §9.135
Gammoh v City of La Habra (9th Cir 2005) 395 F3d 1114, amended (9th Cir 2005) 402 F3d 875, cert denied (2005) 546 US 871: §9.12
Gantt v Sentry Ins. (1992) 1 C4th 1083, 4 CR2d 874: §4.166, 4.352
Garat v City of Riverside (1991) 2 CA4th 259, 3 CR2d 504, disapproved on other grounds in Morehart v County of Santa Barbara (1994) 7 C4th 725, 29 CR2d 804: §§3.114, 10.16, 10.81, 10.88, 11.92
Garcetti v Ceballos (2006) 547 US 410, 164 L Ed 2d 689, 126 S Ct 1951: §§4.2, 4.135, 9.118, 13.116
Garcia v Los Angeles Unified Sch. Dist. (1985) 173 CA3d 701, 219 CR 544: §13.32
Garcia v San Antonio Metro. Transit Auth. (1985) 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005: §§1.33, 1.90
Garcia v Superior Court (1996) 42 CA4th 177, 49 CR2d 580: §13.146
Garcia v Whitehead (CD Cal 1997) 961 F Supp 230: §13.146
Gardner v County of Sonoma (2003) 29 C4th 990, 129 CR2d 869: §10.160
Gardner v Michigan (1905) 199 US 325, 50 L Ed 212, 26 S Ct 106: §6.92
Garrett v City & County of San Francisco (9th Cir 1987) 818 F2d 1515: §4.128
Garrett v Swanton (1932) 216 C 220, 13 P2d 725, overruled on other grounds by City of Oxnard v Dale (1955) 45 C2d 729, 290 P2d 859: §§5.224, 5.292

Garrison v Rourke (1948) 32 C2d 430, 196 P2d 884, overruled on other grounds in Keane v Smith (1971) 4 C3d 932, 95 CR 197: §3.129
Garrison, City of Oakland v (1924) 194 C 298, 228 P 433: §5.279
Garrity v New Jersey (1967) 385 US 493, 17 L Ed 2d 562, 87 S Ct 616: §4.2
Garth, People v (1991) 234 CA3d 1797, 286 CR 451: §8.160
Garvatti v Fairfax Planning Comm'n (1971) 22 CA3d 145, 99 CR 260: §10.111
Garza v County of Los Angeles (9th Cir 1990) 918 F2d 763: §3.70
Garziano v E.I. du Pont de Nemours & Co. (5th Cir 1987) 818 F2d 380: §4.209
Gates v Municipal Court (1982) 135 CA3d 309, 185 CR 330: §9.105
Gates v Superior Court (1995) 32 CA4th 481, 38 CR2d 489: §13.146
Gaudiya Vaishnava Soc'y v City & County of San Francisco (9th Cir 1991) 952 F2d 1059, cert denied (1992) 504 US 914: §§9.125, 9.128, 9.145, 9.152
Gauthier v City of Red Bluff (1995) 34 CA4th 1441, 41 CR2d 35: §4.295
Gauvin v Trombatore (ND Cal 1988) 682 F Supp 1067: §4.168
Gay Law Students Ass'n v Pacific Tel. & Tel. Co. (1979) 24 C3d 458, 156 CR 14: §4.135
Gehman v Superior Court (1979) 96 CA3d 257, 158 CR 62, overruled on other grounds in People ex rel Dep't of Transp. v Superior Court (1980) 26 C3d 744, 163 CR 585: §13.29
Gen-Probe, Inc. v Amoco Corp. (SD Cal 1996) 926 F Supp 948: §13.127
General Motors Corp. v City & County of San Francisco (1999) 69 CA4th 448, 81 CR2d 544: §5.43
General Motors Corp. v City of Los Angeles (1971) 5 C3d 229, 95 CR 635: §5.39
General Motors Corp. v City of Los Angeles (1995) 35 CA4th 1736, 42 CR2d 430: §5.43
General Motors Corp., U.S. v (1945) 323 US 373, 89 L Ed 311, 65 S Ct 357: §10.385
Gentry v City of Murrieta (1995) 36 CA4th 1359, 43 CR2d 170: §§11.31, 11.33
Geoghegan v Retirement Bd. (1990) 222 CA3d 1525, 272 CR 419: §§4.356, 4.395
Georgia v Randolph (2006) 547 US 103, 164 L Ed 2d 208, 126 S Ct 1515: §13.116
Gerawan Farming Inc. v Kawamura (2004) 33 C4th 1, 14 CR3d 14: §9.123
Gerling Global Reinsurance Corp. v Garamendi (2005) 400 F3d 803: §13.159
Gerling Global Reinsurance Corp. v Low (9th Cir 2002) 296 F3d 832: §10.421
Ghilotti Constr. Co. v City of Richmond (1996) 45 CA4th 897, 53 CR2d 389: §7.18
Giannuzzi v State (1993) 17 CA4th 462, 21 CR2d 335: §13.93
Gibbons v Ogden (1824) 22 US 1, 6 L Ed 23: §1.33
Gibbs v Babbitt (4th Cir 2000) 214 F3d 483: §11.278
Gibson v Aro Corp. (1995) 32 CA4th 1628, 38 CR2d 882: §4.220
Gibson by Gibson v County of Riverside (9th Cir 1997) 132 F3d 1311: §10.161
Gillespie v San Francisco Pub. Library Comm'n (1998) 67 CA4th 1165, 79 CR2d 649: §§1.250, 2.97
Gion v City of Santa Cruz (1970) 2 C3d 29, 84 CR 162: §§8.71-8.73
Gisler v County of Madera (1974) 38 CA3d 303, 112 CR 919: §10.59
Gitlow v New York (1925) 268 US 652, 69 L Ed 1138, 45 S Ct 625: §3.191
Giumarra Farms, Inc., People v (1971) 22 CA3d 98, 99 CR 272: §8.40
Glass v Fresno (1936) 17 CA2d 555, 62 P2d 765: §6.92
Glenbrook Dev. Co. v City of Brea (1967) 253 CA2d 267, 61 CR 189: §§1.23, 6.5
Glendale v Superior Court (1993) 18 CA4th 1768, 23 CR2d 305: §1.22
Glendale City Employees' Ass'n v City of Glendale (1975) 15 C3d 328, 124 CR 513: §4.346
Glorietta Foods, Inc. v City of San Jose (1983) 147 CA3d 835, 195 CR 355: §§13.64, 13.67
Gluck v County of Los Angeles (1979) 93 CA3d 121, 155 CR 435: §§1.39, 9.14
Gnass, People v (2002) 101 CA4th 1271, 125 CR2d 225: §2.172
Goat Hill Tavern v City of Costa Mesa (1992) 6 CA4th 1519, 8 CR2d 385: §§10.108, 10.111, 13.18
Goebel, People v (1987) 195 CA3d 418, 238 CR 242: §5.173
Gogo v Los Angeles County Flood Control Dist. (1941) 45 CA2d 334, 114 P2d 65: §7.107
Goldberg v Kelly (1970) 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011: §4.288
Goldblatt v Town of Hempstead (1962) 369 US 590, 8 L Ed 2d 130, 82 S Ct 987: §1.66
Golden v Planning Bd. of Town of Ramapo (1972) 30 NY2d 359, 285 NE2d 291: §10.201
Golden Day Schs. v Department of Educ. (2000) 83 CA4th 695, 99 CR2d 917: §2.33
Golden Feather Community Ass'n v Thermalito Irrig. Dist. (1989) 209 CA3d 1276, 257 CR 836: §§10.340, 11.6
Golden Gate Bridge & Highway Dist. v Luehring (1970) 4 CA3d 204, 84 CR 291: §§5.279, 8.111
Golden Gate Water Ski Club v County of Contra Costa (2008) 165 CA4th 249, 80 CR3d 876: §§13.174, 13.177
Golden State Transit Corp. v City of Los Angeles (9th Cir 1984) 726 F2d 1430, rev'd on other grounds (1986) 475 US 608, 89 L Ed 2d 616, 106 S Ct 1395: §13.153
Golden State Transit Corp. v City of Los Angeles (1989) 493 US 103, 107 L Ed 2d 420, 110 S Ct 444: §§1.34, 13.120
Golson-El v Runyon (ED Pa 1993) 812 F Supp 558: §4.117
Gomez v Toledo (1980) 446 US 635, 64 L Ed 2d 572, 100 S Ct 1920: §13.130
Gomez-Perez v Potter (2008) __ US __, 170 L Ed 2d 887, 128 S Ct 1931: §4.180
Gonzales v City of San Jose (2004) 125 CA4th 1127, 23 CR3d 178: §§13.103, 13.107
Gonzales v City of Santa Ana (1993) 12 CA4th 1335, 16 CR2d 132: §8.20
Gonzales v County of Los Angeles (1988) 199 CA3d 601, 245 CR 112: §13.56

Gooch v Hendrix (1993) 5 C4th 266, 19 CR2d 712: §§3.133-3.134, 3.136
Gooding v Wilson (1972) 405 US 518, 31 L Ed 2d 408, 92 S Ct 1103: §2.24
Goodlow v Superior Court (1980) 101 CA3d 969, 162 CR 121: §12.63
Goodrich, B.F., Co. v Murtha (2d Cir 1992) 958 F2d 1192: §6.100
Goodwill Indus. v County of Los Angeles (1953) 117 CA2d 19, 254 P2d 877: §13.174
Gorman v Cranston (1966) 64 C2d 441, 50 CR 533: §4.34
Gotthardt v National R.R. Passenger Corp. (9th Cir 1999) 191 F3d 1148: §4.260
Gould v Grubb (1975) 14 C3d 661, 122 CR 377: §3.213
Government Employees Ins. Co. v Gibraltar Cas. Co. (1986) 184 CA3d 163, 229 CR 57: §13.87
Gowens v City of Bakersfield (1961) 193 CA2d 79, 13 CR 820: §5.52
Graber v City of Upland (2002) 99 CA4th 424, 121 CR2d 649: §5.320
Grace, U.S. v (1983) 461 US 171, 75 L Ed 2d 736, 103 S Ct 1702: §9.146
Graham v Connor (1989) 490 US 386, 104 L Ed 2d 443, 109 S Ct 1865: §§10.422, 13.116, 13.126
Graham v DaimlerChrysler Corp. (2004) 34 C4th 553, 21 CR3d 331: §13.164
Graham v Kirkwood Meadows Pub. Utils. Dist. (1994) 21 CA4th 1631, 26 CR2d 793: §4.5
Graham v Richardson (1971) 403 US 365, 29 L Ed 2d 534, 91 S Ct 1848: §4.157
Granado v WCAB (1968) 69 C2d 399, 71 CR 678: §4.354
Gray v City of Gustine (1990) 224 CA3d 621, 273 CR 730: §§4.295, 4.309
Gray v County of Madera (2008) 167 CA4th 1099, 85 CR3d 50: §11.41
Graydon v Pasadena Redev. Agency (1980) 104 CA3d 631, 164 CR 56, cert denied (1980) 449 US 983: §§7.5, 13.184
Grayned v City of Rockford (1972) 408 US 104, 33 L Ed 2d 222, 92 S Ct 2294: §9.109
Great Am. Fed. Sav. & Loan Ass'n v Novotny (1979) 442 US 366, 60 L Ed 2d 957, 99 S Ct 2345: §4.161
Great Oaks Water Co. v Santa Clara Valley Water Dist. (2009) 170 CA4th 956, 88 CR3d 506: §11.24
Great Oaks Water Co. , City of San Jose v (1987) 192 CA3d 1005, 237 CR 845: §8.3
Great Western Shows, Inc. v County of Los Angeles (2002) 27 C4th 853, 118 CR2d 746: §9.96
Greater Westchester Homeowners Ass'n v City of Los Angeles (1979) 26 C3d 86, 160 CR 733: §6.143
Green v Missouri Pac. R.R. Co. (8th Cir 1975) 523 F2d 1290: §4.23
Green v State Ctr. Community College Dist. (1995) 34 CA4th 1348, 41 CR2d 140: §13.47
Greene v Marin County Flood Control & Water Conserv. Dist. (review granted June 24, 2009, S172199; superseded opinion at 171 CA4th 1458, 91 CR3d 27): §5.182
Greene v State (1990) 222 CA3d 117, 272 CR 52: §§13.72-13.73
Greene, People v (1968) 264 CA2d 774, 70 CR 818: §12.44
Greene County Hosp., In re (Bankr SD Miss 1986) 59 BR 388: §5.442
Greenwood Addition Homeowners Ass'n v City of San Marino (1993) 14 CA4th 1360, 18 CR2d 350: §1.152
Greyhound Corp. v Superior Court (1961) 56 C2d 355, 15 CR 90: §6.138
Griffin Dev. Co. v City of Oxnard (1985) 39 C3d 256, 217 CR 1: §§10.433, 13.26
Griggs v Duke Power Co. (1971) 401 US 424, 28 L Ed 2d 158, 91 S Ct 849: §§4.15, 4.179, 4.182-4.183
Grimm v Westinghouse Elec. Corp. (ND Cal 1969) 300 F Supp 984: §4.247
Grimsley v Board of Supervisors of San Benito (1985) 169 CA3d 960, 213 CR 108: §13.163
Grinzi v San Diego Hospice Corp. (2004) 120 CA4th 72, 14 CR3d 893: §4.133
Griset v Fair Political Practices Comm'n (2001) 25 C4th 688, 107 CR2d 149: §13.15
Griset v Fair Political Practices Comm'n (1994) 8 C4th 851, 35 CR2d 659, cert denied (1994) 514 US 1083: §3.200
Groch v City of Berkeley (1981) 118 CA3d 518, 173 CR 534: §10.99
Grossmont Union High Sch. Dist. v State Dep't of Educ. (2008) 169 CA4th 869, 86 CR3d 890: §5.257
Group W Cable, Inc. v City of Santa Cruz (ND Cal 1988) 679 F Supp 977: §§5.193, 6.61
Growe v Emison (1993) 507 US 25, 122 L Ed 2d 388, 113 S Ct 1075: §3.71
Grupe v California Coastal Comm'n (1985) 166 CA3d 148, 212 CR 578: §§10.307, 10.343
Grupe Dev. Co. v Superior Court (Chino Unified Sch. Dist.) (1993) 4 C4th 911, 16 CR2d 226: §10.216
Grutter v Bollinger (2003) 539 US 306, 156 L Ed 2d 304, 123 S Ct 2325: §§4.9, 13.25
Guam Soc'y of Obstetricians & Gynecologists v Ada (9th Cir 1996) 100 F3d 691, cert denied (1996) 522 US 949: §13.160
Guiney v Roache (1st Cir 1989) 873 F2d 1557, cert denied (1989) 493 US 963: §4.107
Guinnane v City & County of San Francisco (1987) 197 CA3d 862, 241 CR 787, cert denied (1988) 488 US 823: §10.374
Guinnane v San Francisco City Planning Comm'n (1989) 209 CA3d 732, 257 CR 742, cert denied (1989) 493 US 936: §§10.130, 10.374
Guru Nanak Sikh Soc'y v Sutter County (9th Cir 2006) 456 F3d 978: §10.134
Gustafson v Zolin (1997) 57 CA4th 1361, 67 CR2d 645: §13.157
Gwillim v City of San Jose (9th Cir 1991) 929 F2d 465: §4.301

H

HFH, Ltd. v Superior Court (1975) 15 C3d 508, 125 CR 365: §10.427
H. L. Byram, County of Los Angeles v (1951) 36 C2d 694, 227 P2d 4: §5.291
Haas v County of San Bernardino (2002) 27 C4th 1017, 119 CR2d 341: §§4.288, 9.57, 10.417, 12.79
Hacienda Valley Mobile Estates v City of Morgan Hill (9th Cir 2003) 353 F3d 651: §§10.378, 13.152
Hafer v Melo (1991) 502 US 21, 116 L Ed 2d 301, 112 S Ct 358: §13.127
Haggerty v County of Kings (1953) 117 CA2d 470, 256 P2d 393: §8.177

Hale v Farrell (1981) 115 CA3d 164, 171 CR 228: §3.126
Hale v Morgan (1978) 22 C3d 388, 149 CR 375: §§1.18, 12.25
Hall v City of Los Angeles (1941) 19 C2d 198, 120 P2d 13: §§2.73, 13.45
Hall v City of Taft (1956) 47 C2d 177, 302 P2d 574: §1.105
Hall v Gus Constr. Co. (8th Cir 1988) 842 F2d 1010: §§4.188, 4.202
Halus v San Diego County Assessment Appeals Bd. (SD Cal 1992) 789 F Supp 327: §13.69
Hamilton, Johnson v (1975) 15 C3d 461, 125 CR 129: §1.185
Hamilton, People v (Sup Ct 1986) 511 NYS2d 190: §4.203
Hanlon v Berger (1999) 526 US 808, 143 L Ed 2d 978, 119 S Ct 1706: §6.186
Hanna v City of Los Angeles (1989) 212 CA3d 363, 260 CR 782: §4.310
Hanover Nat'l Bank v Moyses (1902) 186 US 181, 46 L Ed 1113, 22 S Ct 857: §5.440
Hansen v Black (9th Cir 1989) 885 F2d 642: §13.142
Hansen v City of San Buenaventura (1986) 42 C3d 1172, 233 CR 22: §§1.25, 5.162, 5.170, 6.42
Hansen v Lucky Stores, Inc. (1999) 74 CA4th 215, 87 CR3d 487): §4.231
Hansen Bros. Enters., Inc. v Board of Supervisors (1992) 12 C4th 533, 48 CR2d 778: §10.429
Haraguchi v Superior Court (2008) 43 C4th 706, 76 CR3d 250: §2.212
Harbor v Deukmejian (1987) 43 C3d 1078, 240 CR 569: §13.159
Harbor Carriers, Inc. v Sausalito (1975) 46 CA3d 773, 121 CR 577: §6.36
Hardeman v Thomas (1989) 208 CA3d 153, 256 CR 158: §3.124
Hardin v Straub (1989) 490 US 536, 104 L Ed 2d 582, 109 S Ct 1998: §13.152
Harlow v Fitzgerald (1982) 457 US 800, 73 L Ed 2d 396, 102 S Ct 2727: §§4.158, 13.124, 13.126
Harman v City & County of San Francisco (1972) 7 C3d 150, 101 CR 880: §5.75
Harman v City & County of San Francisco (2006) 136 CA4th 1279, 39 CR3d 589: §13.160
Harmon v Board of Retirement (1976) 62 CA3d 689, 133 CR 154: §4.369
Harnish v Smith (1956) 138 CA2d 307, 291 P2d 532: §13.110
Haro v City of Rosemead (2009) 174 CA4th 1067, 94 CR3d 874: §4.88
Harrahill v City of Monrovia (2002) 104 CA4th 761, 128 CR2d 552: §9.68
Harris v City of Costa Mesa (1994) 25 CA4th 963, 31 CR2d 1: §10.107
Harris v County of Riverside (9th Cir 1990) 904 F2d 497: §10.407
Harris v Forklift Sys., Inc. (1993) 510 US 17, 126 L Ed 2d 295, 114 S Ct 367: §§4.187, 4.193, 4.195-4.197
Harris v Harvey (7th Cir 1979) 605 F2d 330, cert denied (1980) 445 US 938: §4.160
Harris v McCarthy (9th Cir 1986) 790 F2d 753: §13.160
Harrison v County of Del Norte (1985) 168 CA3d 1, 213 CR 658: §§13.75, 13.83
Harroman Co. v Town of Tiburon (1991) 235 CA3d 388, 1 CR2d 72: §10.79
Hartford Cas. Ins. Co. v Travelers Indem. Co. (2003) 110 CA4th 710, 2 CR3d 18: §7.294
Hartman v Kenyon (1991) 227 CA3d 413, 277 CR 765: §3.165
Harvey & Harvey, Inc. v County of Chester (3d Cir 1995) 68 F3d 788: §6.101
Hassey, City of Oakland v (2008) 163 CA4th 1477, 78 CR3d 621: §4.68
Hasty v County of Los Angeles (1976) 61 CA3d 623, 131 CR 347: §13.73
Hawkins v County of Marin (1976) 54 CA3d 586, 126 CR 754: §§10.87, 10.106
Hawn v County of Ventura (1977) 73 CA3d 1009, 141 CR 111: §3.115
Hayden v County of Nassau (2d Cir 1999) 180 F3d 42: §7.34
Hayes v Comm'n on State Mandates (1992) 11 CA4th 1564, 15 CR2d 547: §1.97
Haynie v Superior Court (2001) 26 C4th 1061, 112 CR2d 80: §§2.232, 2.237, 2.251
Hayssen v Board of Zoning Adjustments (1985) 171 CA3d 400, 217 CR 464: §10.8
Hayward, W.F., Area Planning Ass'n v City of Hayward (2005) 128 CA4th 176, 26 CR3d 783: §11.68
Hazon-Iny Dev., Inc. v City of Santa Monica (1982) 128 CA3d 1, 179 CR 860: §10.124
Healdsburg Police Officers Ass'n v City of Healdsburg (1976) 57 CA3d 444, 129 CR 216, overruled on other grounds in Palma v U.S. Indus. Fasteners (1984) 36 C3d 171, 203 CR 626: §13.157
Healing v California Coastal Comm'n (1994) 22 CA4th 1158, 27 CR2d 758: §10.301
Health First v March Joint Powers Auth. (2009) 174 CA4th 1135, 96 CR3d 290: §11.20
Heath v Cast (9th Cir 1987) 813 F2d 254: §13.128
Heathorn, N. V., v County of San Mateo (2005) 126 CA4th 1526, 25 CR3d 400: §7.101
Hebard v Bybee (1998) 65 CA4th 1331, 77 CR2d 352: §3.95
Heck v Humphrey (1994) 512 US 477, 129 L Ed 2d 383, 114 S Ct 2364: §13.128
Heckendorn v City of San Marino (1986) 42 C3d 481, 229 CR 324: §5.63
Hefner v County of Sacramento (1988) 197 CA3d 1007, 243 CR 291, abrogated on other grounds by Cornette v Department of Transp. (2001) 26 C4th 63, 109 CR2d 1: §13.106
Heist v County of Colusa (1984) 163 CA3d 841, 213 CR 278: §§3.107, 8.131
Helena F. v West Contra Costa Unified Sch. Dist. (1996) 49 CA4th 1793, 57 CR2d 605: §13.6
Helix Land Co. v City of San Diego (1978) 82 CA3d 932, 147 CR 683: §10.137
Heller v Doe (1993) 509 US 312, 125 L Ed 2d 257, 113 S Ct 2637: §4.241
Heller, City of Los Angeles v (1986) 475 US 796, 89 L Ed 2d 806, 106 S Ct 1571: §§13.129, 13.131
Henneberque v City of Culver City (1985) 172 CA3d 837, 218 CR 704: §4.310
Henneberque v City of Culver City (1983) 147 CA3d 250, 194 CR 869: §4.296

Henriksen v City of Rialto (1993) 20 CA4th 1612, 25 CR2d 308: §13.183
Hensler v City of Glendale (1994) 8 C4th 1, 32 CR2d 244, cert denied (1995) 513 US 1184: §§10.371, 10.377, 10.380, 10.404, 13.14
Hensley v Eckerhart (1983) 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933: §§4.263, 13.159-13.160
Henson v City of Dundee (11th Cir 1982) 682 F2d 897: §§4.190, 4.195
Hermanson v Board of Pension Comm'rs (1933) 219 C 622, 28 P2d 21: §4.39
Hermosa Beach Stop Oil Coalition v City of Hermosa Beach (Windward Assocs.) (2001) 86 CA4th 534, 103 CR2d 447: §§10.125, 10.127, 10.429
Hernandez v Badger Constr. Equipment Co. (1994) 28 CA4th 1791, 34 CR2d 732: §7.298
Hernandez v City of Encinitas (1994) 28 CA4th 1048, 33 CR2d 875: §§10.29, 10.207
Hernandez v City of Hanford (2007) 41 C4th 279, 59 CR3d 442: §§10.146, 13.25
Hernandez v County of Los Angeles (1986) 42 C3d 1020, 232 CR 519: §§13.29, 13.71, 13.74
Hernandez v County of Los Angeles (2008) 167 CA4th 12, 84 CR3d 10: §3.103
Hernandez v Mendoza (1988) 199 CA3d 721, 245 CR 36: §4.270
Herrington v County of Sonoma (9th Cir 1987) 834 F2d 1488: §§10.421, 13.27
Hesperia Citizens for Responsible Dev. v City of Hesperia (2007) 151 CA4th 653, 60 CR3d 124: §5.370
Hewitt v City of Stanton (9th Cir 1986) 798 F2d 1230: §13.151
Hewitt v Joyner (9th Cir 1991) 940 F2d 1561, cert denied (1992) 502 US 1073: §1.62
Hewlett v Squaw Valley Ski Corp. (1997) 54 CA4th 499, 63 CR2d 118: §10.112
Heyne v Caruso (9th Cir 1995) 69 F3d 1475: §4.190
Hi-Voltage Wire Works, Inc. v City of San Jose (2000) 24 C4th 537, 101 CR2d 653: §§4.8, 7.29, 7.31, 7.34
Hibbard v City of Anaheim (1984) 162 CA3d 270, 208 CR 733: §13.32
Hicks v Gates Rubber Co. (10th Cir 1987) 833 F2d 1406: §4.188
Hicks, People ex rel v Sarong Gals (1972) 27 CA3d 46, 103 CR 414: §9.76
Hill v City of Clovis (2000) 80 CA4th 438, 94 CR2d 901: §§10.154, 10.157
Hill v Colorado (2000) 530 US 703, 147 L Ed 2d 597, 120 S Ct 2480: §1.59
Hill v National Collegiate Athletic Ass'n (1994) 7 C4th 1, 26 CR2d 834: §§4.99-4.100
Hill v Stone (1975) 421 US 289, 44 L Ed 2d 172, 95 S Ct 1637: §3.78
Hill, N.T., Inc. v City of Fresno (1999) 72 CA4th 977, 85 CR2d 562: §10.229
Hill, People v (1899) 125 C 16: §3.1
Hills v Scottsdale Unified Sch. Dist. No. 48 (9th Cir 2003) 329 F3d 1044: §9.121
Hills for Everyone v Local Agency Formation Comm'n (1980) 105 CA3d 461, 164 CR 420: §§1.129, 13.184
Hillsborough County v Automated Med. Labs., Inc. (1985) 471 US 707, 85 L Ed 2d 714, 105 S Ct 2371: §1.33
Hinchliffe v City of San Diego (1985) 165 CA3d 722, 211 CR 560: §4.279
Hladek v City of Merced (1977) 69 CA3d 585, 138 CR 194: §6.39
Hoagland, Miller v (1966) 247 CA2d 57, 55 CR 311: §13.29
Hoblitzell v City of Ione (2003) 110 CA4th 675, 2 CR3d 8: §13.88
Hodel v Virginia Surface Mining & Reclamation Ass'n, Inc. (1981) 452 US 264, 69 L Ed 2d 1, 101 S Ct 2352: §10.372
Hoehne v County of San Benito (9th Cir 1989) 870 F2d 529: §10.375
Hoffman, In re (1967) 67 C2d 845, 64 CR 97: §9.66
Hoffmaster v City of San Diego (1997) 55 CA4th 1098, 64 CR2d 684: §§10.43, 10.204
Holcomb v City of Los Angeles (1989) 210 CA3d 1560, 259 CR 1: §4.309
Holdings, Ltd. v City of Rohnert Park (2006) 136 CA4th 186, 38 CR3d 589: §10.80
Holliday v City of Modesto (1991) 229 CA3d 528, 280 CR 206: §§4.113, 4.325
Hollister Park Inv. Co. v Goleta County Water Dist. (1978) 82 CA3d 290, 147 CR 91: §10.202
Hollywood v Superior Court (2008) 43 C4th 721, 76 CR3d 264, cert denied (2008) __ US __, 172 L Ed 2d 327, 129 S Ct 458: §2.212
Holmes v McColgan (1941) 17 C2d 426, 110 P2d 428: §4.311
Holmgren v County of Los Angeles (2008) 159 CA4th 593, 71 CR3d 611: §4.46
Holt v Kelly (1978) 20 C3d 560, 143 CR 625: §13.32
Holtz v Superior Court (1970) 3 C3d 296, 90 CR 345: §6.181
Holtzendorff v Housing Auth. of City of Los Angeles (1967) 250 CA2d 596, 58 CR 886, cert denied (1967) 389 US 1038: §4.33
Homes on Wheels v City of Santa Barbara (2004) 119 CA4th 1173, 15 CR3d 132: §8.160
Honig, People v (1996) 48 CA4th 289, 55 CR2d 555: §§2.162, 2.166, 2.173
Honolulu Weekly, Inc. v Harris (9th Cir 2002) 298 F3d 1037: §9.129
Hopper v City of Pasco (9th Cir 2001) 241 F3d 1067, cert denied (2001) 534 US 951: §9.121
Horn v County of Ventura (1979) 24 C3d 605, 156 CR 718: §§3.108, 10.5-10.6, 10.14, 10.151, 10.155, 10.407
Horneff v City & County of San Francisco (2003) 110 CA4th 814, 2 CR3d 79: §3.57
Horton v City of Oakland (2000) 82 CA4th 580, 98 CR2d 371: §1.37
Horton, People v (1971) 14 CA3d 930, 92 CR 666: §9.66
Horwath v City of East Palo Alto (1989) 212 CA3d 766, 261 CR 108: §§3.223-3.224
Horvath, Williams v (1976) 16 C3d 834, 129 CR 453: §§13.32, 13.39, 13.87, 13.122, 13.151-13.152
Hosford v Board of Admin. (1978) 77 CA3d 854, 143 CR 760: §4.369
Hovd v Hayward Unified Sch. Dist. (1977) 74 CA3d 470, 141 CR 527: §13.35
Howard Contracting, Inc. v G.A. MacDonald Constr. Co. (1998) 71 CA4th 38, 83 CR2d 590: §§7.106, 7.170

Howard Jarvis Taxpayers Ass'n v _____ (*see* name of defendant)
Howitt v County of Imperial (1989) 210 CA3d 312, 258 CR 384: §4.297
Howitt v Superior Court (1992) 3 CA4th 1575, 5 CR2d 196: §§2.208, 4.288, 12.79
Howland v Board of Supervisors (1895) 109 C 152, 41 P 864: §5.296
Howlett v Rose (1990) 496 US 356, 110 L Ed 2d 332, 110 S Ct 2430: §13.123
Hubbard v City of San Diego (1976) 55 CA3d 380, 127 CR 587: §§7.174-7.175
Hubbard, In re (1964) 62 C2d 119, 41 CR 393, overruled in part on other grounds by Bishop v City of San Jose (1969) 1 C3d 56, 81 CR 465: §§1.39, 1.232
Hudson v Palmer (1984) 468 US 517, 82 L Ed 2d 393, 104 S Ct 3194: §13.140
Hughes v Los Angeles (1914) 168 C 764: §9.5
Hughes v Rowe (1980) 449 US 5, 66 L Ed 2d 163, 101 S Ct 173: §13.158
Hunter v Bryant (1991) 502 US 224, 116 L Ed 2d 589, 112 S Ct 534: §13.126
Hunter, People v (1940) 42 CA2d 87, 108 P2d 472: §12.58
Huntington Beach City Council v Superior Court (2002) 94 CA4th 1417, 115 CR2d 439: §3.54
Huntington Park Redev. Agency v Duncan (1983) 142 CA3d 17, 190 CR 744: §5.349
Huntington Park Redev. Agency v Martin (1985) 38 C3d 100, 211 CR 133: §5.285
Hurwitt v City of Oakland (ND Cal 1965) 247 F Supp 995: §9.151
Hurwitz v City of Orange (2004) 122 CA4th 835, 19 CR3d 213: §9.117
Hussey v City of Portland (9th Cir 1995) 64 F3d 1260: §1.153
Huston v WCAB (1979) 95 CA3d 856, 157 CR 355: §4.389
Hutchinson v City of Sacramento (1993) 17 CA4th 791, 21 CR2d 779: §§13.3-13.4
Hyland v Wonder (9th Cir 1992) 972 F2d 1129, cert denied (1993) 508 US 908: §§1.252, 4.2, 4.135, 4.286
Hynes v Borough of Oradell (1976) 425 US 610, 48 L Ed 2d 243, 96 S Ct 1755: §9.145

I

IBP, Inc. v Alvarez (2005) 546 US 21, 163 L Ed 2d 288, 126 S Ct 514: §4.65
IESI AR Corp. v Northwest Arkansas Reg'l Solid Waste Mgmt. Dist. (8th Cir 2006) 433 F3d 600: §6.101
IT Corp. v County of Imperial (1983) 35 C3d 63, 196 CR 715: §§9.117, 12.2, 12.16, 13.187
IT Corp. v Solano Bd. of Supervisors (1991) 1 C4th 81, 2 CR2d 513: §11.244
Ibarra v City of Carson (1989) 214 CA3d 90, 262 CR 485: §10.413
Igna v City of Baldwin Park (1970) 9 CA3d 909, 88 CR 581: §10.377
Imada v City of Hercules (9th Cir 1998) 138 F3d 1294: §4.62
Imbler v Pachtman (1976) 424 US 409, 47 L Ed 2d 128, 96 S Ct 984: §13.125
Imperial Irrig. Dist. v State Water Resources Control Bd. (1990) 225 CA3d 548, 275 CR 250: §11.87
Ingels v Riley (1936) 5 C2d 154, 53 P2d 939: §§5.66, 5.70
Inglewood Redev. Agency v Aklilu (2007) 153 CA4th 1095, 64 CR3d 519: §8.62
Inglewood-Los Angeles County Civic Ctr. Auth. v Superior Court (1972) 7 C3d 861, 103 CR 689: §§7.7, 7.15, 7.20
Ingram v Flippo (1999) 74 CA4th 1280, 89 CR2d 60: §2.114
Inouye v Kemna (9th Cir 2007) 504 F3d 705: §13.116
Institoris v City of Los Angeles (1989) 210 CA3d 10, 258 CR 418: §6.143
International Ass'n of Fire Fighters, Local 55, AFL-CIO v City of San Leandro (1986) 181 CA3d 179, 226 CR 238: §4.5
International Ass'n of Firefighters, Local 1186 v City of Vallejo (In re City of Vallejo) (BAP 9th Cir 2009) 408 BR 280: §5.444
International Bhd. of Elec. Workers v City of Gridley (1983) 34 C3d 191, 193 CR 518: §§4.282, 4.321
International Bhd. of Elec. Workers v Skinner (9th Cir 1990) 913 F2d 1454: §§4.95, 4.107
International Bhd. of Elec. Workers, Local 889 v Aubry (1996) 42 CA4th 861, 50 CR2d 1: §13.22
International Bhd. of Teamsters v Department of Transp. (9th Cir 1991) 932 F2d 1292: §§4.100-4.101, 4.107, 4.110
International Fed'n of Prof. & Tech. Eng'rs v City & County of San Francisco (2000) 79 CA4th 1300, 94 CR2d 790: §4.330
International Fed'n of Prof. & Tech. Eng'rs v Superior Court (2007) 42 C4th 319, 64 CR3d 693: §§2.246-2.247, 4.127
International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc. (1999) 69 CA4th 287, 81 CR2d 456: §2.37
International Soc'y for Krishna Consciousness v City of Los Angeles (9th Cir 2008) 530 F3d 768: §6.154
International Soc'y for Krishna Consciousness v City of Los Angeles (2010) 48 C4th 446, ___ CR3d ___: §6.154
International Soc'y for Krishna Consciousness, Inc. v Lee (1992) 505 US 672, 120 L Ed 2d 541, 112 S Ct 2711: §§6.154, 9.122
International Union, Auto., Aerospace & Agric. Implement Workers v Johnson Controls, Inc. (1991) 499 US 187, 113 L Ed 2d 158, 111 S Ct 1196: §4.181
Interstate Marina Dev. Co. v County of Los Angeles (1984) 155 CA3d 435, 202 CR 377: §9.49
Intlekofer v Turnage (9th Cir 1992) 973 F2d 773: §4.208
Irwin v City of Hemet (1994) 22 CA4th 507, 27 CR2d 433: §13.121
Irwin v City of Manhattan Beach (1966) 65 C2d 13, 51 CR 881: §§1.11, 1.27, 5.2, 8.119
Isaac v City of Los Angeles (1998) 66 CA4th 586, 77 CR2d 752: §1.30
Isbell v City of San Diego (9th Cir 2001) 258 F3d 1108: §10.131
Iscoff v Police Comm'n of City & County of San Francisco (1963) 222 CA2d 395, 35 CR 189: §1.242
Island Club Marina Ltd. v Lee County (Bankr ND Ill 1984) 38 BR 847: §5.173
Ivey, U.S. v (5th Cir 1991) 949 F2d 759: §11.282

J

J.H. Thompson Corp. v DC Contractors (1992) 4 CA4th 1355, 7 CR2d 604: §7.123
J.L. v Social Security Admin. (9th Cir 1992) 971 F2d 260: §4.240
J.L. Thomas, Inc. v County of Los Angeles (1991) 232 CA3d 916, 283 CR 815: §9.12
J.W. Jones Co. v City of San Diego (1984) 157 CA3d 745, 203 CR 580: §5.121
Jackson v Gates (9th Cir 1992) 975 F2d 648: §4.308
Jaco v Bloechle (6th Cir 1984) 739 F2d 239: §13.121
Jacobsen v Bonine (9th Cir 1997) 123 F3d 1272: §9.122
Jacobson v Glidden (1978) 84 CA3d 748, 148 CR 825: §3.139
Jahr v Casebeer (1999) 70 CA4th 1250, 83 CR2d 172: §§3.112, 3.117
Janken v GM Hughes Electronics (1996) 46 CA4th 55, 53 CR2d 741: §4.205
Japan Air Lines Co., City of Los Angeles v (1974) 41 CA3d 416, 116 CR 69: §§7.217, 13.180
Jasper, People v (1983) 33 C3d 931, 191 CR 648: §12.62
Javor v Taggart (2002) 98 CA4th 795, 120 CR2d 174: §13.69
Jaynes v Stockton (1961) 193 CA2d 47, 14 CR 49: §7.175
Jenkins v County of Contra Costa (1985) 167 CA3d 152, 213 CR 126: §§13.69-13.70
Jensen v Franchise Tax Board (2009) 178 CA4th 426, 100 CR3d 408: §§5.46, 5.96
Jett v Dallas Indep. Sch. Dist. (1989) 491 US 701, 105 L Ed 2d 598, 109 S Ct 2702: §13.137
Jiminez v Pacific Western Constr. Co. (1986) 185 CA3d 102, 229 CR 575: §7.301
John E. Branagh & Sons v Witcosky (1966) 242 CA2d 835, 51 CR 844: §7.302
John R. v Oakland Unified Sch. Dist. (1989) 48 C3d 438, 256 CR 766: §§13.76, 13.88
Johnson v _____ (*see* name of defendant)
Johnson, People v (1954) 129 CA2d 1, 277 P2d 45: §9.113
Johnson, Miller v (1995) 515 US 900, 132 L Ed 2d 762, 115 S Ct 2475: §3.70
Joiner v City of Sebastopol (1981) 125 CA3d 799, 178 CR 299: §2.38
Joint Highway Dist. No. 13 v Hinman (1934) 220 C 578, 32 P2d 144: §1.8
Jones v City of Los Angeles (9th Cir 2006) 444 F3d 1118, vacated as moot (9th Cir 2007) 505 F3d 1006: §9.106
Jones v Deeter (1984) 152 CA3d 798, 199 CR 825: §13.103
Jones v The Lodge at Torrey Pines Partnership (2008) 42 C4th 1158, 72 CR3d 624: §4.205
Jones, In re (1943) 56 C2d 658, 133 P2d 418: §9.159
Jones & Matson v Hall (2007) 155 CA4th 1596, 66 CR3d 872: §13.139
Jones Intercable of San Diego, Inc. v City of Chula Vista (9th Cir 1996) 80 F3d 320: §6.85
Jones, J.W., Co. v City of San Diego (1984) 157 CA3d 745, 203 CR 580: §5.121
Jones, Johnson v (1995) 515 US 304, 132 L Ed 2d 238, 115 S Ct 2151: §13.126
Joyce v City of San Francisco (ND Cal 1994) 846 F Supp 843: §9.61
Juan C., In re (1994) 28 CA4th 1093, 33 CR2d 919: §§6.186, 9.71
Judson Steel v Workers' Compensation Appeals Bd. (Maese) (1978) 22 C3d 658, 150 CR 250: §4.379

K

K. Sakai Co., People v (1976) 56 CA3d 531, 128 CR 536: §11.287
K.G. v County of Riverside (2003) 106 CA4th 1374, 131 CR2d 762: §§13.88, 13.132
Kachadoorian v Calwa County Water Dist. (1979) 96 CA3d 741, 158 CR 223: §8.136
Kaiser Aetna v U.S. (1979) 444 US 164, 62 L Ed 2d 332, 100 S Ct 383: §10.364
Kaiser Dev. Co. v City & County of Honolulu (9th Cir 1990) 898 F2d 112: §10.371
Kaiser Dev. Co. v City & County of Honolulu (D Ha 1986) 649 F Supp 926, aff'd (9th Cir 1990) 898 F2d 112: §10.375
Kaiser Found. Hosps. v Superior Court (1998) 66 CA4th 1217, 78 CR2d 543: §4.208
Kajima/Ray Wilson v Los Angeles County Metro. Transp. Auth. (2000) 23 C4th 305, 96 CR2d 747: §7.15
Kane v County of San Diego (1969) 2 CA3d 550, 83 CR 19: §§9.173, 13.63
Kantor v Housing Auth. of Fresno County (1992) 8 CA4th 424, 10 CR2d 695: §13.182
Kaplan v California (1973) 413 US 115, 37 L Ed 2d 492, 93 S Ct 2680: §9.76
Karim-Panahi v Los Angeles Police Dep't (9th Cir 1988) 839 F2d 621: §§13.32, 13.152
Karrin v Ocean-Aire Mobile Home Estates (1991) 1 CA4th 1066, 2 CR2d 581: §9.55
Kash Enters. v City of Los Angeles (1977) 19 C3d 294, 138 CR 53: §9.129
Kasky v Nike, Inc. (2002) 27 C4th 939, 119 CR2d 296: §9.123
Katsura v City of Buenaventura (2007) 155 CA4th 104, 65 CR3d 762: §7.250
Kaufman & Broad Cent. Valley, Inc. v City of Modesto (1994) 25 CA4th 1577, 30 CR2d 904: §§10.126, 10.150, 10.430
Kaufman & Broad-South Bay, Inc. v Morgan Hill Unified Sch. Dist. (1992) 9 CA4th 464, 11 CR2d 792: §11.19
Kavanau v Santa Monica Rent Control Bd. (1997) 16 C4th 761, 66 CR2d 672, cert denied (1998) 522 US 1077: §§9.50-9.51, 10.390, 10.397
Kawaoka v City of Arroyo Grande (9th Cir 1994) 17 F3d 1227, cert denied (1994) 513 US 870: §10.420
Kay, In re (1970) 1 C3d 930, 83 CR 686: §§1.225, 2.9
Kazensky v City of Merced (1998) 65 CA4th 44, 76 CR2d 356: §4.276
Keane v Smith (1971) 4 C3d 932, 95 CR 197: §3.145
Keenan v San Francisco Unified Sch. Dist. (1950) 34 C2d 708, 214 P2d 382: §1.5
Kehoe v City of Berkeley (1977) 67 CA3d 666, 135 CR 700: §5.305

Keith v Volpe (9th Cir 1988) 858 F2d 467, cert denied sub nom City of Hawthorne v Wright (1989) 493 US 813: §10.443
Kelly v City of San Jose (ND Cal 1987) 114 FRD 653: §13.151
Kelly v Robinson (1986) 479 US 36, 93 L Ed 2d 216, 107 S Ct 353: §5.173
Kelly v Yee (1989) 213 CA3d 336, 261 CR 568: §1.40
Kelly-Zurian v Wohl Shoe Co. (1994) 22 CA4th 397, 27 CR2d 457: §4.201
Kelo v City of New London (2005) 545 US 469, 162 L Ed 2d 439, 125 S Ct 2655: §§5.304, 8.31, 10.381
Kelsey v Cowell (1973) 30 CA3d 590, 106 CR 420: §10.140
Kempland v Regents of Univ. of Cal. (1984) 155 CA3d 644, 202 CR 275: §§4.280, 4.288
Kennedy v City of Ridgefield (9th Cir 2006) 439 F3d 1055: §13.116
Kennedy v City of Ukiah (1977) 69 CA3d 545, 138 CR 207: §5.166
Ker v California (1963) 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623: §1.65
Kerley v Workers' Compensation Appeals Bd. (1971) 4 C3d 223, 93 CR 192: §4.374
Kern v Long Beach (1947) 29 C2d 848, 179 P2d 799: §4.36
Kerr, People ex rel v County of Orange (2003) 106 CA4th 914, 131 CR2d 274: §3.224
Kestler v City of Los Angeles (1978) 81 CA3d 62, 146 CR 61: §§4.279, 4.286
Keyishian v Board of Regents (1967) 385 US 589, 17 L Ed 2d 629, 87 S Ct 675: §4.2
Keystone Bituminous Coal Ass'n v DeBenedictis (1987) 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232: §§10.366, 10.372, 10.393, 10.402
Kieffer v Spencer (1984) 153 CA3d 954, 200 CR 755: §13.8
Kim v Dolch (1985) 173 CA3d 736, 219 CR 248: §9.35
Kimura v Roberts (1979) 89 CA3d 871, 152 CR 569: §2.179
Kindt v Santa Monica Rent Control Bd. (9th Cir 1995) 67 F3d 266: §§2.17, 2.80, 13.116
King v Lewis (1990) 219 CA3d 552, 268 CR 277: §§3.53, 3.87
King v Timber Structures, Inc. (1966) 240 CA2d 178, 49 CR 414: §7.304
Kings County Farm Bureau v City of Hanford (1990) 221 CA3d 692, 270 CR 650: §§10.81, 11.39
Kinzli v City of Santa Cruz (9th Cir 1987) 818 F2d 1449, modified (9th Cir 1987) 830 F2d 968, cert denied (1988) 484 US 1043: §10.378
Kirkorowicz v California Coastal Comm'n (2000) 83 CA4th 980, 100 CR2d 124: §§10.306, 13.19
Kirkpatrick v City of Los Angeles (9th Cir 1986) 803 F2d 485: §13.126
Kirkpatrick v City of Oceanside (1991) 232 CA3d 267, 283 CR 191: §9.57
Kirkpatrick v Civil Service Comm'n (1978) 77 CA3d 940, 144 CR 51: §4.284
Klein v City of San Clemente (9th Cir 2009) 584 F3d 1196, cert denied ___ US ___, 176 L Ed 2d 183, ___ S Ct ___: §9.120
Klistoff v Superior Court (2007) 157 CA4th 469, 68 CR3d 704: §7.232
Klopping v City of Whittier (1972) 8 C3d 39, 104 CR 1: §§8.9, 8.15, 8.62
Knight v Board of Admin. (1948) 32 C2d 400, 196 P2d 547: §4.32
Knight v City of Capitola (1992) 4 CA4th 918, 6 CR2d 874: §§13.93, 13.166
Knox v City of Orland (1992) 4 C4th 132, 14 CR2d 159: §5.73
Kobzoff v Los Angeles County Harbor/UCLA Med. Ctr. (1998) 19 C4th 851, 80 CR2d 803: §13.166
Kohn v Kohn (1950) 95 CA2d 708, 214 P2d 71: §12.52
Kokinda, U.S. v (1990) 497 US 720, 111 L Ed 2d 571, 110 S Ct 3115: §9.122
Kolender v Lawson (1983) 461 US 352, 75 L Ed 2d 903, 103 S Ct 1855: §§9.73, 9.102
Konica Business Machs. U.S.A., Inc. v Regents of Univ. of Cal. (1988) 206 CA3d 449, 253 CR 591: §7.16
Korean Am. Legal Advocacy Found. v City of Los Angeles (1994) 23 CA4th 376, 28 CR2d 530: §§9.18, 10.138
Kovacs v Cooper (1949) 336 US 77, 93 L Ed 513, 69 S Ct 448: §9.109
Krainock v Superior Court (1990) 216 CA3d 1473, 265 CR 715: §§13.33, 13.38
Kreisner v City of San Diego (9th Cir 1993) 1 F3d 775, cert denied (1994) 510 US 1044: §1.62
Krenwinkle v Los Angeles (1935) 4 C2d 611, 51 P2d 1098: §5.235
Kreutzer v County of San Diego (1984) 153 CA3d 62, 200 CR 322: §13.157
Kronemyer, People v (1987) 189 CA3d 314, 234 CR 442: §2.173
Kuba v 1-A Agric. Ass'n (9th Cir 2004) 387 F3d 850: §9.135
Kucinich v Forbes (ND Ohio 1977) 432 F Supp 1101: §2.25
Kugler v Yocum (1968) 69 C2d 371, 71 CR 687: §§1.6, 1.254
Kuhns v State (1992) 8 CA4th 982, 10 CR2d 773: §13.93
Kunec v Brea Redev. Agency (1997) 55 CA4th 511, 64 CR2d 143: §5.433
Kuzinich v County of Santa Clara (9th Cir 1982) 689 F2d 1345: §13.125

L

L & J Anaheim Assocs. v Kawasaki Leasing Int'l, Inc. (In re L & J Anaheim Assocs.) (9th Cir 1993) 995 F2d 940: §5.453
L. Cohen Grocery Co., U.S. v (1921) 255 US 81, 65 L Ed 516, 41 S Ct 298: §9.102
L.I.F.E. Comm. v City of Lodi (1989) 213 CA3d 1139, 262 CR 166: §1.108
La Fe, Inc. v Los Angeles County (1999) 73 CA4th 231, 86 CR2d 217: §10.305
Lacy v City of Monrovia (1974) 44 CA3d 152, 118 CR 277: §13.52
Ladd v County of San Mateo (1996) 12 C4th 913, 50 CR2d 309: §13.104
Ladd v State Bd. of Equalization (1973) 31 CA3d 35, 106 CR 885: §5.96
Lagiss v County of Contra Costa (1963) 223 CA2d 77, 35 CR 450: §5.293

Laidlaw Waste Sys., Inc. v Bay Cities Servs., Inc. (1996) 43 CA4th 630, 50 CR2d 824: §§6.94, 6.99
Lake Country Estates, Inc. v Tahoe Reg'l Planning Agency (1979) 440 US 391, 59 L Ed 2d 401, 99 S Ct 1171: §§1.93-1.94, 13.125
Lake Madrone Water Dist. v State Water Resources Control Bd. (1989) 209 CA3d 163, 256 CR 894: §§11.115, 11.131, 11.169
Lake Nacimiento Ranch Co. v San Luis Obispo County (9th Cir 1987) 841 F2d 872: §10.372
Lambert v Richard (9th Cir 1995) 59 F3d 134, cert denied (1995) 516 US 1028: §13.116
Lanam v Civil Service Comm'n (1978) 80 CA3d 315, 145 CR 590: §4.5
Land Waste Mgmt. v Contra Costa County Bd. of Supervisors (1990) 222 CA3d 950, 271 CR 909: §§10.12, 11.57-11.58
Landberg v Landberg (1972) 24 CA3d 742, 101 CR 335: §13.174
Landeros v Department of Corrections (2002) 99 CA4th 271, 120 CR2d 867: §5.300
Landgate, Inc. v California Coastal Comm'n (1998) 17 C4th 1006, 73 CR2d 841, cert denied (1998) 525 US 876: §§10.384, 10.396
Landi v County of Monterey (1983) 139 CA3d 934, 189 CR 55: §§10.12, 11.58
Lane v City of Redondo Beach (1975) 49 CA3d 251, 122 CR 189: §§6.168-6.169, 10.344
Langazo v San Joaquin Light & Power Corp. (1939) 32 CA2d 678, 90 P2d 825: §6.36
Lanier v City of Woodburn (9th Cir 2008) 518 F3d 1147: §§4.19, 4.93-4.94, 4.100, 6.130-6.131
Laraway v Pasadena Unified Sch. Dist. (2002) 98 CA4th 579, 120 CR2d 213: §13.15
Larcher v Wanless (1976) 18 C3d 646, 135 CR 75: §13.58
Larez v City of Los Angeles (9th Cir 1991) 946 F2d 630: §13.142
Larez v Holcomb (9th Cir 1994) 16 F3d 1513: §13.147
Larson v State Personnel Bd. (1994) 28 CA4th 265, 33 CR2d 412: §13.17
Las Virgenes Homeowners Fed'n v County of Los Angeles (1986) 177 CA3d 300, 223 CR 18: §13.8
Laura Vincent Co. v City of Selma (1941) 43 CA2d 473, 111 P2d 17: §§8.119, 8.152
Laurel Heights Improvement Ass'n v Regents of Univ. of Cal. (1993) 6 C4th 1112, 26 CR2d 231: §11.42
Laurel Heights Improvement Ass'n v Regents of Univ. of Cal. (1988) 47 C3d 376, 253 CR 426: §§11.12, 11.39, 11.76
Law v City & County of San Francisco (1904) 144 C 384, 77 P 1014: §5.2
Law v San Francisco (1904) 144 C 384, 77 P 1014: §8.77
Lawler v City of Redding (1992) 7 CA4th 778, 9 CR2d 392: §1.105
Lawrence v State (1985) 171 CA3d 242, 217 CR 200: §13.73
Lawrence v Texas (2003) 539 US 558, 156 L Ed 2d 508, 123 S Ct 2472: §1.58
Lawrence Berkeley Labs, Inc. v Mitchell (1952) 39 C2d 56, 244 P2d 385: §13.55
Laws v County of San Diego (1990) 219 CA3d 189, 267 CR 921: §§2.207, 13.89, 13.143
LeVald, Inc. v City of Palm Desert (9th Cir 1993) 998 F2d 680: §10.379
League of Women Voters v Countywide Criminal Justice Coordination Comm. (1988) 203 CA3d 529, 250 CR 161: §§3.212, 3.215, 3.220-3.222
League of Women Voters of Cal. v McPherson (2006) 145 CA4th 1469, 52 CR3d 585: §3.64
Leatherman v Tarrant County Narcotics Intelligence & Coordination Unit (1993) 507 US 163, 122 L Ed 2d 517, 113 S Ct 1160: §13.139
Leathers v Medlock (1991) 499 US 439, 113 L Ed 2d 494, 111 S Ct 1438: §9.153
Leavitt, Sierra Club, Inc. v (ND Fla 2005) 393 F Supp 2d 1263, aff'd in part and rev'd in part on other grounds (11th Cir 2007) 488 F3d 904: §11.151
Lee v Board of Admin. (1982) 130 CA3d 122, 181 CR 754: §4.38
Lee v City of Monterey Park (1985) 173 CA3d 798, 219 CR 309: §10.207
Lee v Weisman (1992) 505 US 577, 120 L Ed 2d 467, 112 S Ct 2649: §§1.60-1.61
Lee G., In re (1991) 1 CA4th 17, 1 CR2d 375: §§2.202, 2.204
Leever v City of Carson (9th Cir 2004) 360 F3d 1014: §4.65
Legislature of the State v Eu (1991) 54 C3d 492, 286 CR 283, cert denied (1992) 503 US 919: §§1.221-1.222
Lehane v City & County of San Francisco (1972) 30 CA3d 1051, 106 CR 918, appeal dismissed (1973) 410 US 962, 35 L Ed 2d 698, 93 S Ct 1445: §2.185
Lehman v City of Shaker Heights (1974) 418 US 298, 41 L Ed 2d 770, 94 S Ct 2714: §§6.126, 9.122
Leiserson v City of San Diego (1986) 184 CA3d 41, 229 CR 22: §6.186
Lemat Corp. v American Basketball Ass'n (1975) 51 C3d 267, 124 CR 388: §7.309
Lemoge Elec. Co. v San Mateo County (1956) 46 C2d 659, 257 P2d 638: §7.243
Lemon v Kurtzman (1971) 403 US 602, 29 L Ed 2d 745, 91 S Ct 2105: §1.60
Lent, People v (1975) 15 C3d 481, 124 CR 905: §12.56
Leonard v People ex rel Dept. of Transp. (1998) 62 CA4th 1296, 73 CR2d 328: §8.151
Leonoff v Monterey County Bd. of Supervisors (1990) 222 CA3d 1337, 272 CR 372: §11.25
Leppo v City of Petaluma (1971) 20 C3d 711, 97 CR 840: §§12.77, 12.80
Leroy Land Dev. v Tahoe Reg'l Planning Agency (1991) 939 F2d 696: §10.217
Lertora v Riley (1936) 6 C2d 171, 57 P2d 140: §9.173
Lesher Communications, Inc. v City of Walnut Creek (1990) 52 C3d 531, 277 CR 1: §§3.114, 10.2, 10.16
Leslie Salt Co. v San Francisco Bay Conservation Comm'n (1984) 153 CA3d 605, 200 CR 575: §12.45
Level 3 Communications, L.L.C. v City of St. Louis (8th Cir 2007) 477 F3d 528: §6.89
Leventhal v Vista Unified Sch. Dist. (SD Cal 1997) 973 F Supp 951: §§2.16-2.17, 2.64
Levering, People v (1981) 122 CA3d Supp 19, 176 CR 297: §8.178
Levine v City of Alameda (9th Cir 2008) 525 F3d 903: §4.41
Levy v City of Santa Monica (2004) 114 CA4th 1252, 8 CR3d 507: §1.59

Lewis v City & County of San Francisco (1971) 21 CA3d 339, 98 CR 407: §13.50
Lewis v Hyland (3d Cir 1977) 554 F2d 93, cert denied (1977) 434 US 931: §13.148
Lewis v Seventeenth Dist. Agric. Ass'n (1985) 165 CA3d 823, 211 CR 884: §11.59
Lewis Jorge Constr. Mgmt., Inc. v Pomona Unified Sch. Dist. (2004) 34 C4th 960, 22 CR3d 340: §7.95
Lexin v Superior Court (2010) 47 C4th 1050, 103 CR3d 767: §2.162
Libertarian Party v Eu (1980) 28 C3d 535, 170 CR 25: §3.46
Library One, People v (1991) 229 CA3d 973, 280 CR 400: §9.12
Lincoln Club v City of Irvine (9th Cir 2002) 292 F3d 934: §3.181
Lindsey v Shalmy (9th Cir 1994) 29 F3d 1382: §13.139
Lingle v Chevron U.S.A., Inc. (2005) 544 US 528, 161 L Ed 2d 876, 125 S Ct 2074: §§9.49, 9.60, 10.218, 10.388, 10.422
Linney v Turpen (1996) 42 CA4th 763, 49 CR2d 813: §10.417
Lipson v Superior Court (1982) 31 C3d 362, 182 CR 629: §4.397
Little v City of North Miami (11th Cir 1986) 805 F2d 962: §1.226
Livingston Rock & Gravel Co. v County of Los Angeles (1954) 43 C2d 121, 272 P2d 4: §10.121
Local 28 of Sheet Metal Workers' Int'l Ass'n v Equal Employment Opportunity Comm'n (1986) 478 US 421, 92 L Ed 2d 344, 106 S Ct 3019: §4.265
Local 889, A.F.S.C.M.E. v Louisiana (5th Cir 1998) 145 F3d 280: §4.79
Lockard v City of Los Angeles (1949) 33 C2d 453, 202 P2d 38: §13.11
Lockary v Kayfetz (9th Cir 1990) 908 F2d 543, amended (9th Cir 1990) 917 F2d 1150: §§10.208, 10.210
Locklin v City of Lafayette (1994) 7 C4th 327, 27 CR2d 613: §10.363
Loder v City of Glendale (1997) 14 C4th 846, 59 CR2d 696, cert denied (1997) 522 US 807: §§4.19, 4.93, 4.100, 4.105, 4.114, 4.118, 6.130-6.131
Loehr v Ventura County Community College Dist. (1983) 147 CA3d 1071, 195 CR 576: §§13.29, 13.32, 13.45, 13.57, 13.59
Loewenstein v City of Lafayette (2002) 103 CA4th 718, 127 CR2d 79: §§10.217, 10.384
Logan v City of Glendale (1933) 132 CA 169, 22 P2d 552: §1.25
Logan v Zimmerman Brush Co. (1982) 455 US 422, 71 L Ed 2d 265, 102 S Ct 1148: §13.140
Lombard v U.S. (DC Cir 1982) 690 F2d 215, cert denied (1983) 462 US 1118: §4.153
Long v City of Fresno (1964) 225 CA2d 59, 36 CR 886: §1.9
Long v City of Los Angeles (1998) 68 CA4th 782, 80 CR2d 583: §13.32
Long Beach v Lisenby (1919) 180 C 52, 179 P 198: §5.290
Long Beach City Employees Ass'n v City of Long Beach (1986) 41 C3d 937, 227 CR 90: §§4.16, 4.305
Long Beach Community Redeployment Agency v Morgan (1993) 14 CA4th 1047, 18 CR2d 100: §5.352
Long Beach Equities, Inc. v County of Ventura (1991) 231 CA3d 1016, 282 CR 877, cert denied (1992) 505 US 1219: §§10.371, 10.374, 10.382
Long Beach Lesbian & Gay Pride, Inc. v City of Long Beach (1993) 14 CA4th 312, 17 CR2d 861: §§9.146, 9.150
Long Beach Police Officers Ass'n v City of Long Beach (1988) 46 C3d 736, 250 CR 869: §2.184
Long Beach Police Officers Ass'n v City of Long Beach (1976) 61 CA3d 364, 132 CR 348: §9.96
Loop Lumber Co. v Van Loben Sels (1916) 173 C 228, 159 P 600: §7.170
Lopez v Southern Cal. Rapid Transit Dist. (1985) 40 C3d 780, 221 CR 840: §6.122
Loretto v Teleprompter Manhattan CATV Corp. (1982) 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164: §§10.364-10.365, 10.370, 10.385, 10.400-10.403, 13.118
Lorillard Tobacco Co. v Reilly (2001) 533 US 525, 150 L Ed 2d 532, 121 S Ct 2404: §9.138
Los Altos El Granada Investors v City of Capitola (2006) 139 CA4th 629, 43 CR3d 434: §10.388
Los Angeles Alliance for Survival v City of Los Angeles (2000) 22 C4th 352, 93 CR2d 1: §§6.154, 8.177, 9.133
Los Angeles Brick & Clay Prods. Co. v City of Los Angeles (1943) 60 C2d 478, 141 P2d 46: §13.32
Los Angeles County v Emme (1940) 42 CA2d 239, 108 P2d 695: §5.200
Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles (1985) 168 CA3d 683, 214 CR 350: §4.326
Los Angeles County Employees Ass'n, Local 660 v County of Los Angeles (1973) 33 CA3d 1, 108 CR 625: §4.338
Los Angeles County Flood Control Dist. v Southern Cal. Edison Co. (1958) 51 C2d 331, 333 P2d 1: §§1.8, 1.73
Los Angeles County Metro. Transp. Auth. v Continental Dev. Corp. (1997) 16 C4th 694, 66 CR2d 630: §§8.38, 8.62
Los Angeles County Metro. Transp. Auth. v Superior Court (2004) 123 CA4th 261, 20 CR3d 92: §13.156
Los Angeles Dredging Co. v City of Long Beach (1930) 210 C 348, 291 P 839: §7.172
Los Angeles Gas & Elec. Corp. v City of Los Angeles (1922) 188 C 307, 205 P 125: §§1.44, 5.277
Los Angeles Gas & Elec. Corp. v Department of Pub. Serv. of the City of Los Angeles (1921) 52 CA 27, 197 P 962: §6.37
Los Angeles Mem. Coliseum Comm. v National Football League (9th Cir 1980) 634 F2d 1197: §13.148
Los Angeles Police Dep't v Superior Court (1977) 65 CA3d 661, 135 CR 575: §2.230
Los Angeles Police Dep't v United Reporting Publ'g Corp. (1999) 528 US 32, 145 L Ed 2d 451, 120 S Ct 483: §2.249
Los Angeles Police Protective League v City of Los Angeles (1995) 35 CA4th 1535, 42 CR2d 23: §4.305
Los Angeles Police Protective League v City of Los Angeles (1994) 27 CA4th 168, 32 CR2d 574: §13.155
Los Angeles Police Protective League v Gates (9th Cir 1990) 907 F2d 879: §§4.281, 4.308
Los Angeles Police Protective League v City of Los Angeles (1985) 166 CA3d 55, 212 CR 251, overruled on unrelated grounds in Laurel Heights Improvement Ass'n v Regents of Univ. of Cal. (1988) 47 C3d 376, 253 CR 426: §4.338
Los Angeles Times v Alameda Corridor Transp. Auth. (2001) 88 CA4th 1381, 107 CR2d 29: §§2.233, 2.263
Los Angeles Times Communications v Los Angeles County Bd. of Supervisors (2003) 112 CA4th 1313, 5 CR3d 776: §2.116
Los Angeles Unified Sch. Dist. v State (1991) 229 CA3d 552, 280 CR 237: §5.246

Los Angeles Unified Sch. Dist. v Superior Court (2007) 151 CA4th 759, 60 CR3d 445: §2.230
Louisiana Pub. Serv. Comm'n v FCC (1986) 476 US 355, 90 L Ed 2d 369, 106 S Ct 1890: §1.34
Low v City of Sacramento (1970) 7 CA3d 826, 87 CR 173: §13.100
Lowe v Aldridge (11th Cir 1992) 958 F2d 1565: §13.126
Lowell v Mother's Cake & Cookie Co. (1978) 79 CA3d 13, 144 CR 664: §6.39
Lozada v City & County of San Francisco (2006) 145 CA4th 1139, 52 CR3d 209: §13.129
Lubey v City & County of San Francisco (1979) 98 CA3d 340, 159 CR 440: §§4.278, 4.285-4.287
Lucas v South Carolina Coastal Council (1992) 505 US 1003, 120 L Ed 2d 798, 112 S Ct 2886: §§10.210, 10.212, 10.387, 10.389-10.390, 10.397-10.399, 10.401, 10.406
Lucchesi v City of San Jose (1980) 104 CA3d 323, 163 CR 700: §13.165
Luck v Southern Pac. Transp. Co. (1990) 218 CA3d 1, 267 CR 618, cert denied (1990) 498 US 939: §§4.99, 4.108
Lugar v Edmondson Oil Co. (1982) 457 US 922, 73 L Ed 2d 482, 102 S Ct 2744: §13.132
Lujan v Defenders of Wildlife (1992) 504 US 555, 119 L Ed 2d 351, 112 S Ct 2130: §11.279
Lukovsky v City & County of San Francisco (9th Cir 2008) 535 F3d 1044, cert denied sub nom Zolotarev v City & County of San Francisco (2009) ___US ___, 173 L Ed 2d 1086, 129 S Ct 1997: §§4.244, 4.253
Lumpkin v Brown (9th Cir 1997) 109 F3d 1498, cert denied (1997) 522 US 995: §1.252
Lusardi Constr. Co. v Aubry (1992) 1 C4th 976, 4 CR2d 837: §7.91
Lutz v Tri-City Hosp. (1986) 179 CA3d 807, 224 CR 787: §§13.46, 13.73
Lybarger v City of Los Angeles (1985) 40 C3d 822, 221 CR 529: §§2.195, 4.301
Lynch, City of San Jose v (1935) 4 C2d 760, 52 P2d 919: §7.170
Lyons, City of Los Angeles v (1983) 461 US 95, 75 L Ed 2d 675, 103 S Ct 1660: §13.148

M

M&B Constr. v Yuba County Water Agency (1999) 68 CA4th 1353, 81 CR2d 231: §7.36
MacDonald & Kruse, Inc. v San Jose Steel Co. (1972) 29 C3d 413, 105 CR 725: §7.304
MacDonald, Sommer & Frates v Yolo County (1986) 477 US 340, 91 L Ed 2d 285, 106 S Ct 2561: §§10.374-10.375
Machado v Southern Pac. Transp. Co. (1991) 233 CA3d 347, 284 CR 560: §8.140
Machinists v Wisconsin Employment Relations Comm'n (1976) 427 US 132, 49 L Ed 2d 396, 96 S Ct 2548: §1.34
Madden v Riley (1942) 53 CA2d 814, 128 P2d 602: §1.208
Madison Joint Sch. Dist. v Wisconsin Employment Relations Comm'n (1976) 429 US 167, 50 L Ed 2d 376, 97 S Ct 421: §2.24
Madonna v County of San Luis Obispo (1974) 39 CA3d 57, 113 CR 916: §13.157
Madrigal v City of Huntington Beach (2007) 147 CA4th 1375, 55 CR3d 209: §11.20
Madsen v Women's Health Ctr. (1994) 512 US 753, 129 L Ed 2d 593, 114 S Ct 2516: §§1.59, 9.120
Magnus v Jackson (1973) 31 CA3d 399, 107 CR 287: §§13.29, 13.55
Mahon v San Mateo County (2006) 139 CA4th 812, 43 CR3d 235: §10.10
Maier, Ex Parte (1894) 103 C 476: §9.179
Main San Gabriel Basin Watermaster v State Water Resources Control Bd. (1993) 12 CA4th 1371, 16 CR2d 288: §11.21
Maine v Thiboutot (1980) 448 US 1, 65 L Ed 2d 555, 100 S Ct 2502: §13.120
Maine Audubon Soc'y v Purslow (D Me 1987) 672 F Supp 528: §§11.266, 11.285
Malick v Athenour (1995) 37 CA4th 1120, 44 CR2d 281: §3.97
Malish v City of San Diego (2000) 84 CA4th 725, 101 CR2d 18: §9.36
Malone, E. I., v White Motor Corp. (1978) 435 US 497, 55 L Ed 2d 443, 98 S Ct 1185: §1.33
Mandjik v Eden Township Hosp. Dist. (1992) 4 CA4th 1488, 6 CR2d 582: §13.82
Manhattan Sepulveda, Ltd. v City of Manhattan Beach (1994) 22 CA4th 865, 27 CR2d 565: §10.123
Mani Bros. Real Estate Group v City of Los Angeles (2007) 153 CA4th 1385, 64 CR3d 79: §§11.45-11.46
Manibog v MediaOne of Los Angeles, Inc. (2000) 81 CA4th 1366, 98 CR2d 297: §6.64
Mann v Mack (1984) 155 CA3d 666, 202 CR 296: §9.109
Mannheim v Superior Court (1970) 3 C3d 678, 91 CR 585: §1.43
Mansperger v Public Employees' Retirement Sys. (1970) 6 CA3d 873, 86 CR 450: §4.39
Manufactured Home Communities, Inc. v County of San Luis Obispo (2008) 167 CA4th 705, 84 CR3d 367: §§2.19, 9.56
Manzanares v Safeway Stores, Inc. (10th Cir 1979) 593 F2d 968: §4.151
Maple Props. v Harris (1984) 158 CA3d 997, 205 CR 532, cert denied (1985) 470 US 1054: §13.162
Mapp v Ohio (1961) 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684: §1.65
Mapstead v Anchundo (1998) 63 CA4th 246, 73 CR2d 602: §§3.85, 3.164
Marbled Murrelet v Babbitt (9th Cir 1996) 83 F3d 1068: §11.283
Marblehead v City of San Clemente (1991) 226 CA3d 1504, 277 CR 550: §3.109
Marchuk v Ralphs Grocery Co. (1990) 226 CA3d 1273, 276 CR 627: §13.56
Marculescu v City Planning Comm'n of City & County of San Francisco (1935) 7 CA2d 371, 46 P2d 308: §1.231
Marek v Chesny (1985) 473 US 1, 87 L Ed 2d 1, 105 S Ct 3012: §13.160
Marek v Napa Community Redev. Agency (1988) 46 C3d 1070, 251 CR 778: §5.394
Marina County Water Dist. v State Water Resources Control Bd. (1984) 163 CA3d 132, 209 CR 212: §11.153
Marine Forests Soc'y v California Coastal Comm'n (2005) 36 C4th 1, 30 CR3d 30: §1.201
Mariposa Unified Sch. Dist., Williams v (1978) 82 CA3d 843, 147 CR 452: §13.85
Markborough Cal., Inc. v Superior Court (J. Harlan Glenn & Assocs.) (1991) 227 CA3d 705, 277 CR 919: §7.226
Markley v Beagle (1967) 66 C2d 951, 59 CR 809: §7.301

Marks v Whitney (1971) 6 C3d 251, 98 CR 790: §§10.336, 10.339, 11.6
Markus v Justice's Court (1953) 117 CA2d 391, 255 P2d 883: §9.163
Marsa v Wernik (NJ 1981) 430 A2d 888: §2.6
Marsh v Chambers (1983) 463 US 783, 77 L Ed 2d 1019, 103 S Ct 3330: §§1.61, 2.6
Marsh, Sierra Club v (9th Cir 1987) 816 F2d 1376: §11.266
Martin v City & County of San Francisco (2005) 135 CA4th 392, 37 CR3d 470: §11.23
Martin v City of Madera (1968) 265 CA2d 76, 70 CR 908: §13.75
Martin v City of Struthers (1943) 319 US 141, 87 L Ed 1313, 63 S Ct 862: §9.45
Martin v Superior Court (Sierra Madre) (1991) 234 CA3d 1765, 286 CR 513: §10.209
Martinez v California (1980) 444 US 277, 62 L Ed 2d 481, 100 S Ct 553: §13.133
Martinez v City of Los Angeles (9th Cir 1998) 141 F3d 1373: §13.113
Martinez v County of Los Angeles (1978) 78 CA3d 242, 144 CR 123: §13.58
Martinez v Procunier (ND Cal 1973) 354 F Supp 1092, aff'd (1974) 416 US 396, 40 L Ed 2d 224, 94 S Ct 1800: §4.160
Martinez, In re (1943) 22 C2d 259, 138 P2d 10, overruled on other grounds in People v Western Airlines, Inc. (1954) 42 C2d 621, 268 P2d 723: §9.2
Mary M. v City of Los Angeles (1991) 54 C3d 202, 285 CR 99: §§13.88, 13.109, 13.132
Maryland v Wirtz (1968) 392 US 183, 20 L Ed 2d 1020, 88 S Ct 2017: §1.90
Marylander v Superior Court (2000) 81 CA4th 1119, 97 CR2d 439: §§2.230, 2.241
Masonite Corp. v County of Mendocino Air Quality Mgmt. Dist. (1996) 42 CA4th 436, 49 CR2d 639: §2.225
Massa v Southern Cal. Rapid Transit Dist. (1996) 43 CA4th 1217, 51 CR2d 164: §§13.67, 13.69
Mathews v City of Cerritos (1992) 2 CA4th 1380, 4 CR2d 16: §§13.99, 13.101
Mathews v Eldridge (1976) 424 US 319, 47 L Ed 2d 18, 96 S Ct 893: §13.118
Mathews v State ex rel Dep't of Transp. (1978) 82 CA3d 116, 145 CR 443: §13.101
Matter of Stoltenberg (1913) 165 C 789, 134 P 971: §10.232
Matula v Superior Court (1956) 146 CA2d 93, 303 P2d 871: §6.92
Maxfield v Sinclair Int'l (3d Cir 1985) 766 F2d 788: §4.259
Maxwell's Int'l, Inc. , Miller v (9th Cir 1993) 991 F2d 583: §4.204
Maya Del Mar v California Coastal Comm'n (1984) 152 CA3d 49, 199 CR 225: §10.293
Mayhew Tech Ctr., Phase II v County of Sacramento (1992) 4 CA4th 497, 5 CR2d 702: §1.48
Mazzola v City & County of San Francisco (1980) 112 CA3d 141, 169 CR 127: §2.175
McAllister v California Coastal Comm'n (2008) 169 CA4th 912, 87 CR3d 365: §10.318
McBrearty v City of Brawley (1997) 59 CA4th 1441, 69 CR2d 862, disapproved on other grounds in Howard Jarvis Taxpayers Ass'n v City of La Habra (2001) 25 C4th 809, 107 CR2d 369: §5.183
McCarty v Department of Transp. (2008) 164 CA4th 955, 79 CR3d 777: §§7.209, 7.218
McCaughan, People v (1957) 49 C2d 409, 317 P2d 974: §12.42
McClatchy v Laguna Lands, Ltd. (1917) 32 CA 718, 164 P 41: §12.4
McClelland v Facteau (10th Cir 1979) 610 F2d 693: §13.142
McClung v City of Sumner (9th Cir 2008) 548 F3d 1219: §10.386
McClurken, County of San Diego v (1951) 37 C2d 683, 234 P2d 972: §10.123
McConnell v Federal Election Comm'n (2003) 540 US 93, 157 L Ed 2d 491, 124 S Ct 619, overruled on other grounds by Citizens United v Federal Election Comm'n (2010) ___ US ___, 175 L Ed 2d 753, 130 S Ct 876: §3.183
McCreary County v American Civil Liberties Union (2005) 545 US 844, 162 L Ed 2d 729, 125 S Ct 2722: §§1.62, 13.116
McCullough, City of Oakland v (1996) 46 CA4th 1, 53 CR2d 531: §12.14
McDade v West (9th Cir 2000) 223 F3d 1135: §13.129
McDonald v Antelope Valley Community College Dist. (2008) 45 C4th 88, 84 CR3d 734: §§4.244, 13.59
McDonald v Santa Fe Trail Transp. Co. (1976) 427 US 273, 49 L Ed 2d 493, 96 S Ct 2574: §4.151
McDonnell Douglas Corp. v Green (1973) 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817: §4.178
McDougal v County of Imperial (9th Cir 1991) 942 F2d 668: §4.154
McFayden v Town of Calistoga (1925) 74 CA 378, 240 P 523: §5.293
McGavock v City of Water Valley (5th Cir 2006) 452 F3d 423: §4.73
McGill v Regents of Univ. of Cal. (1996) 44 CA4th 1776, 52 CR2d 466: §13.5
McHugh v Santa Monica Rent Control Bd. (1989) 49 C3d 348, 261 CR 318: §9.55
McIntosh v Aubry (1993) 14 CA4th 1576, 18 CR2d 680: §7.85
McKale, People v (1979) 25 C3d 626, 159 CR 811: §12.10
McKee v Los Angeles Interagency Metro. Police Apprehension Crime Task Force (2005) 134 CA4th 354, 36 CR3d 47: §2.37
McKee v Orange Unified Sch. Dist. (2003) 110 CA4th 1310, 2 CR3d 774: §2.113
McKenna, Miller v (1944) 23 C2d 774, 147 P2d 531: §13.186
McKennon v Nashville Banner Publ'g Co. (1995) 513 US 352, 130 L Ed 2d 852, 115 S Ct 879: §4.260
McKittrick, U.S. v (9th Cir 1998) 142 F3d 1170: §11.282
McKray v State (1977) 74 CA3d 59, 141 CR 280: §13.101
McLaughlin v Richland Shoe Co. (1988) 486 US 128, 108 S Ct 1677, 100 L Ed 2d 115: §4.91
McLaughlin v Superior Court (1972) 29 CA3d 35, 105 CR 384: §13.69
McLeod v Board of Pension Comm'rs (1970) 14 CA3d 23, 94 CR 58: §5.266
McMahon v Albany Unified Sch. Dist. (2002) 104 CA4th 1275, 129 CR2d 184, cert denied (2003) 540 US 824: §§2.9, 13.116
McMahon v City of Los Angeles (2009) 172 CA4th 1324, 92 CR3d 68: §4.299

McManigal v City of Seal Beach (1985) 166 CA3d 975, 212 CR 733: §§4.282, 4.296
McMartin v County of Los Angeles (1988) 202 CA3d 848, 249 CR 53: §§13.67, 13.74
McNeil v City of South Pasadena (1913) 166 C 153, 135 P 32: §7.176
McNeil & Wills v City of Los Angeles (1930) 209 C 448, 287 P 962: §7.176
McPherson v City of Manhattan Beach (2000) 78 CA4th 1252, 93 CR2d 725: §10.159
McQuirk v Donnelley (9th Cir 1999) 189 F3d 793: §13.111
Meacham v Knolls Atomic Power Lab. (2008) __ US __, 171 L Ed 2d 283, 128 S Ct 2395: §4.144
Mead, Johnson v (1987) 191 CA3d 156, 236 CR 277: §13.98
Meehan v County of Los Angeles (9th Cir 1988) 856 F2d 102: §13.142
Meeker v Reed (1924) 70 CA 119, 232 P 760: §1.190
Mehl v People ex rel Dep't of Pub. Works (1975) 13 C3d 710, 119 CR 625: §§13.29, 13.55
Mehret Ghirmai d/b/a Liquor to Go v Department of Alcoholic Beverage Control, Appeal No. AB-7579: §9.79
Meija v City of Los Angeles (2005) 130 CA4th 322, 29 CR3d 788: §§11.29, 11.69
Melamed v City of Long Beach (1993) 15 CA4th 70, 18 CR2d 729: §§5.353, 8.30, 8.40
Memphis Community Sch. Dist. v Stachura (1986) 477 US 299, 91 L Ed 2d 249, 106 S Ct 2537: §13.146
Mendocino County Employees Ass'n v County of Mendocino (1992) 3 CA4th 1472, 5 CR2d 353: §4.344
Menefee v County of Fresno (1985) 163 CA3d 1175, 210 CR 99: §7.18
Mennig v City Council (1978) 86 CA3d 341, 150 CR 207: §2.180
Menotti v City of Seattle (9th Cir 2005) 409 F3d 1113: §13.116
Merco Constr. Eng'rs, Inc. v Los Angeles Unified Sch. Dist. (1969) 274 CA2d 154, 79 CR 23: §12.25
Meritor Sav. Bank v Vinson (1986) 477 US 57, 91 L Ed 2d 49, 106 S Ct 2399: §§4.187, 4.189, 4.193
Merritt v City of Pleasanton (2001) 89 CA4th 1032, 107 CR2d 675: §10.20
Merritt v County of Los Angeles (9th Cir 1989) 875 F2d 765: §13.136
Mervyn's v Reyes (1998) 69 CA4th 93, 81 CR2d 148: §3.82
Metcalf v County of Los Angeles (1944) 24 C2d 267, 148 P2d 645: §§10.377, 13.13
Metro Broadcasting, Inc. v FCC (1990) 497 US 547, 111 L Ed 2d 445, 110 S Ct 2997: §7.33
Metromedia, Inc. v City of San Diego (1981) 453 US 490, 69 L Ed 2d 800, 101 S Ct 2882: §§9.140-9.141
Metropolitan Water Dist. v Fair Political Practices Comm'n (1977) 73 CA3d 650, 141 CR 8: §2.130
Metropolitan Water Dist. v Superior Court (2004) 32 C4th 491, 9 CR3d 857: §4.46
Metropolitan Water Dist. , City of Los Angeles v (1981) 115 CA3d 169, 171 CR 217: §8.122
Meyers v Industrial Acc. Comm'n (Titsworth) (1940) 39 CA2d 665, 103 P2d 1025: §4.36
Myers, S.D., Inc. v City & County of San Francisco (9th Cir 2003) 336 F3d 1174, cert denied (2004) 541 US 936: §1.233
Michaelis, Montanari & Johnson v Superior Court (2006) 38 C4th 1065, 44 CR3d 663: §§2.240, 2.260
Middlesex County Sewerage Auth. v National Sea Clammers Ass'n (1981) 453 US 1, 69 L Ed 2d 435, 101 S Ct 2615: §13.120
Midstate Theaters, Inc. v Board of Supervisors of Stanislaus County (1975) 46 CA3d 204, 119 CR 894: §13.157
Midway Orchards v County of Butte (1990) 220 CA3d 765, 269 CR 796: §§1.228, 1.247, 3.107
Mike Moore's 24-Hour Towing v City of San Diego (1996) 45 CA4th 1294, 53 CR2d 355: §13.5
Mikels v Rager (1991) 232 CA3d 334, 284 CR 87: §8.147
Miklosy v Regents of Univ. of Cal. (2008) 44 C4th 876, 80 CR3d 690: §4.352
Milagra Ridge Partners, Ltd. v City of Pacifica (1998) 62 CA4th 108, 72 CR2d 394: §10.375
Millbrae Ass'n for Residential Survival v City of Millbrae (1968) 262 CA2d 222, 69 CR 251: §§2.164-2.165
Miller v _____ (*see* name of defendant)
Miller, In re (1910) 13 CA 564, 110 P 139: §9.158
Miller, Miller v (1978) 87 CA3d 762, 151 CR 197, superseded by statute as stated in Miller v California Comm'n on the Status of Women (1984) 151 CA3d 693, 198 CR 877: §3.219
Miller, U.S. v (1939) 307 US 174, 83 L Ed 1206, 59 S Ct 816: §9.95
Milligan v City of Laguna Beach (1983) 34 C3d 829, 196 CR 38: §§13.102, 13.106
Mills v County of Trinity (1980) 108 CA3d 656, 166 CR 674: §§1.21, 5.70, 5.72, 10.211, 10.216
Milotz, County of San Diego v (1956) 46 C2d 761, 300 P2d 1: §1.208
Minifie v Rowley (1921) 187 C 481, 202 P 673: §12.52
Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue (1983) 460 US 575, 75 L Ed 2d 295, 103 S Ct 1365: §§5.97, 9.5, 9.153
Minney v City of Azusa (1958) 164 CA2d 12, 330 P2d 255: §10.133
Minor, People v (2002) 96 CA4th 29, 116 CR2d 591: §12.65
Minsky v City of Los Angeles (1974) 11 C3d 113, 113 CR 102: §13.32
Minton v Cavaney (1961) 56 C2d 576, 15 CR 641: §13.13
Mira Dev. Corp. v City of San Diego (1988) 205 CA3d 1201, 252 CR 825: §§10.89, 10.216
Mira Mar Mobile Community v City of Oceanside (2004) 119 CA4th 477, 14 CR3d 308: §10.130
Mirande, Ex Parte (1887) 73 C 365, 14 P 888: §2.6
Mission Hous. Dev. Co. v City & County of San Francisco (1997) 59 CA4th 55, 69 CR2d 185: §13.13
Mission Indep. Sch. Dist. v Texas (5th Cir 1940) 116 F2d 175: §5.449
Mississippi Power & Light Co. v Mississippi (Ex rel Moore) (1988) 487 US 354, 101 L Ed 2d 322, 108 S Ct 2428: §6.25
Mississippi Univ. for Women v Hogan (1982) 458 US 718, 73 L Ed 2d 1090, 102 S Ct 3331: §13.25
Mitchell v County of Orange (1985) 165 CA3d 1185, 211 CR 563: §10.83
Mitchell v Forsyth (1985) 472 US 511, 86 L Ed 2d 411, 105 S Ct 2806: §§13.125-13.126

Mitchell v Gonzales (1991) 54 C3d 1041, 1 CR2d 913: §13.104
Mitchell v Superior Court (1989) 49 C3d 1230, 265 CR 144: §12.17
Mitchell v Walker (1956) 140 CA2d 239, 295 P2d 90, overruled on other grounds in Kugler v Yocum (1968) 69 C2d 371, 71 CR 687: §3.110
Mittenhuber v City of Redondo Beach (1983) 142 CA3d 1, 190 CR 694: §13.108
Mobil Oil Corp. v Comm'r of Taxes (1980) 445 US 425, 100 S Ct 1223, 63 L Ed 2d 510: §5.45
Mobilepark West Homeowners Ass'n v Escondido Mobilepark West (1995) 35 CA4th 32, 41 CR2d 393: §3.92
Mogilefsky v Superior Court (1993) 20 CA4th 1409, 26 CR2d 116: §4.190
Mohilef v Janovici (1996) 51 CA4th 267, 58 CR2d 721: §§12.77, 12.80
Mohlmann v City of Burbank (1986) 179 CA3d 1037, 225 CR 109: §13.67
Molina v Richardson (9th Cir 1978) 578 F2d 846: §13.113
Moncharsh v Heily & Blase (1992) 3 C4th 1, 10 CR2d 183: §7.231
Monell v Department of Soc. Servs. (1978) 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018: §§4.158, 13.114, 13.126, 13.129-13.131, 13.133-13.135, 13.138, 13.141-13.142, 13.148
Monette, People v (1994) 25 CA4th 1572, 31 CR2d 203: §12.58
Monge v Superior Court (1986) 176 CA3d 503, 222 CR 64: §4.267
Monroe v Pape (1961) 365 US 167, 5 L Ed 2d 492, 81 S Ct 473: §13.114
Montana Chamber of Commerce v Argenbright (9th Cir 2000) 226 F3d 1049: §3.181
Monterey Club v Superior Court of Los Angeles (1941) 48 CA2d 131, 119 P2d 349: §1.231
Monterey Initiative & Referendum Cases, In re (ND Cal, May 17, 2007, Nos. 06-1407, 06-2202) 2007 US Dist Lexis 39557: §3.67
Monterey Mechanical v Wilson (9th Cir 1997) 125 F3d 702: §7.29
Montgomery v Superior Court (1975) 46 CA3d 657, 121 CR 44: §1.256
Montrose Chemical Corp. v Admiral Ins. Co. (1995) 10 C4th 645, 42 CR2d 324: §7.268
Moor v County of Alameda (1973) 411 US 693, 36 L Ed 2d 596, 93 S Ct 1785: §1.94
Moore v City of E. Cleveland (1977) 431 US 494, 52 L Ed 2d 531, 97 S Ct 1932: §10.438
Moore v Morhar (1977) 65 CA3d 896, 135 CR 626: §13.85
Moore Bus. Forms, Inc. , City of Los Angeles v (1966) 247 CA2d 353, 55 CR 820: §5.40
Moorman Mfg. Co. v Bair (1978) 437 US 267, 57 L Ed 2d 197, 98 S Ct 2340: §5.45
More v Farrier (8th Cir 1993) 984 F2d 269: §4.241
Morehart v County of Santa Barbara (1994) 7 C4th 725, 29 CR2d 804: §§1.41, 10.152
Moreno v City of King (2005) 127 CA4th 17, 25 CR3d 29: §§2.73, 2.115
Morgan v Stubblefield (1972) 6 C3d 606, 100 CR 1: §§7.302, 7.304
Morongo Band of Mission Indians v State Water Resources Control Bd. (2009) 45 C4th 731, 88 CR3d 610: §§2.33, 2.180, 2.208
Morris v County of Marin (1977) 18 C3d 901, 136 CR 251: §10.235
Morrison v Housing Auth. of City of Los Angeles Bd. of Comm'rs (2003) 107 CA4th 860, 132 CR2d 453: §2.98
Morrison Homes Corp. v City of Pleasanton (1976) 58 CA3d 724, 130 CR 196: §7.176
Morrow v Los Angeles Unified Sch. Dist. (2007) 149 CA4th 1424, 57 CR3d 885: §2.95
Mortensen v County of Sacramento (9th Cir 2004) 368 F3d 1082: §4.78
Morton Thiokol, Inc. v Metal Bldg. Alteration Co. (1987) 193 CA3d 1025, 238 CR 722: §7.302
Moss v County of Humboldt (2008) 162 CA4th 1041, 76 CR3d 428: §11.29
Motorola Communication & Electronics, Inc. v State Dep't. of Gen. Servs. (1997) 55 CA4th 1340, 64 CR2d 477: §2.263
Mountain Defense League v Board of Supervisors (1977) 65 CA3d 723, 135 CR 588: §§10.95, 13.5
Mountain Lion Found. v Fish & Game Comm'n (1997) 16 C4th 105, 65 CR2d 580: §11.288
Moylan v Maries County (8th Cir 1986) 792 F2d 746: §4.189
Mt. Healthy Sch. Dist. Bd. of Educ. v Doyle (1977) 429 US 274, 50 L Ed 2d 471, 97 S Ct 568: §13.116
Mueller v County of Los Angeles (2009) 176 CA4th 809, 98 CR3d 281: §4.134
Munn v Illinois (1877) 94 US 113, 24 L Ed 77: §1.15
Murgia v Municipal Court (1975) 15 C3d 286, 124 CR 204: §9.84
Murphy v City of Alameda (1992) 11 CA4th 906, 14 CR2d 329: §10.207
Murrieta Valley Unified Sch. Dist. v County of Riverside (1991) 228 CA3d 1212, 279 CR 421: §§10.216, 11.64
Musser, U.S. v (DC Cir 1989) 873 F2d 1513: §9.63
Mutual Life Ins. Co. of New York v City of Los Angeles (1990) 50 C3d 402, 267 CR 589: §5.102
Muzzy Ranch Co. v Solano County Airport Land Use Comm'n (2007) 41 C4th 372, 60 CR3d 247: §11.23
Myers v City of Pismo Beach (1966) 241 CA2d 237, 50 CR 402: §5.2
Myers v County of Orange (1970) 6 CA3d 626, 86 CR 198: §§13.29, 13.46, 13.59
Myers v Patterson (1987) 196 CA3d 130, 241 CR 751: §§3.57, 3.86

N

N. V. Heathorn v County of San Mateo (2005) 126 CA4th 1526, 25 CR3d 400: §7.101
N.T. Hill, Inc. v City of Fresno (1999) 72 CA4th 977, 85 CR2d 562: §10.229
NAACP Western Region v City of Richmond (9th Cir 1984) 743 F2d 1346: §9.147
NJD, Ltd. v City of San Dimas (2003) 110 CA4th 1428, 2 CR3d 818: §10.387
Nacimiento Reg. Water Mgmt. Advisory Comm. v Monterey County Water Resources Agency (2004) 122 CA4th 961, 18 CR3d 921: §11.72
Nancy C., In re (1972) 28 CA3d 747, 105 CR 113: §9.69

Napa Citizens for Honest Gov't v Napa County Bd. of Supervisors (2001) 91 CA4th 342, 110 CR2d 579: §10.82
Napa County (Beringer Wine Estates), Sierra Club v (2004) 121 CA4th 1490, 19 CR3d 1: §10.83
Nasha v City of Los Angeles (2004) 125 CA4th 470, 22 CR3d 772: §§2.33, 2.180
National Adver. Co. v City of Orange (9th Cir 1988) 861 F2d 246: §§9.138-9.139, 9.144
National Adver. Co. v County of Monterey (1970) 1 C3d 875, 83 CR 577, cert denied (1970) 398 US 946: §10.122
National Ass'n for the Advancement of Colored People v Alabama (1958) 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163: §§3.191-3.192
National Ass'n for the Advancement of Colored People v Button (1963) 371 US 415, 9 L Ed 2d 405, 83 S Ct 328: §3.192
National Ass'n of Home Builders v Norton (9th Cir 2003) 340 F3d 835: §§11.276, 11.284
National Audubon Soc'y v Superior Court (1983) 33 C3d 419, 189 CR 346, cert denied (1983) 464 US 977: §§10.337, 11.4-11.5
National Aviation v City of Hayward (ND Cal 1976) 418 F Supp 417: §6.143
National Cable & Telecommunications Ass'n v Brand X Internet Servs. (2005) 545 US 967, 162 L Ed 2d 820, 125 S Ct 2688: §6.73
National Indep. Bus. Alliance v City of Beverly Hills (1982) 128 CA3d 13, 180 CR 59: §§1.236, 5.116
National Labor Relations Bd. v Bildisco & Bildisco (1984) 465 US 513, 79 L Ed 2d 482, 104 S Ct 1188: §5.455
National League of Cities v Usery (1976) 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465: §§1.90, 1.94
National Parks & Conserv. Ass'n v County of Riverside (1999) 71 CA4th 1341, 84 CR2d 563: §11.288
National Rifle Ass'n v City of Chicago (7th Cir 2009) 567 F3d 856, cert granted sub nom McDonald v City of Chicago (2009) ___ US ___, 174 L Ed 2d 632, 130 S Ct 48: §9.95
National Steel Corp. v Gorsuch (6th Cir 1983) 700 F2d 314: §11.212
National Tech. Sys. v Superior Court (2002) 97 CA4th 415, 118 CR2d 465: §7.97
National Treasury Employees Union v Von Raab (1989) 489 US 656, 103 L Ed 2d 685, 109 S Ct 1384: §§4.96, 4.100, 4.105, 6.130
National Treasury Employees Union v Yeutter (DC Cir 1990) 918 F2d 968: §4.107
National Wildlife Fed. v Burlington N. R.R., Inc. (9th Cir 1994) 23 F3d 1508: §§11.265, 11.283
National Wildlife Fed. v National Marine Fisheries Serv. (9th Cir 2005) 422 F3d 782: §11.283
Native Sun/Lyon Communities v City of Escondido (1993) 15 CA4th 892, 19 CR2d 344: §10.127
Natural Resources Defense Council v Costle (DC Cir 1977) 568 F2d 1369: §11.140
Natural Resources Defense Council v Fish & Game Comm'n (1994) 28 CA4th 1104, 33 CR2d 904: §11.288
Navab-Safavi v Broadcasting Bd. of Governors (D DC 2009) 650 F Supp 2d 40: §4.135
Nealis, People v (1991) 232 CA3d Supp 1, 283 CR 376: §9.168
Near v State of Minnesota (1931) 283 US 697, 75 L Ed 1357, 51 S Ct 625: §9.127
Nebbia v New York (1934) 291 US 502, 78 L Ed 940, 54 S Ct 505: §10.424
Nectow v City of Cambridge (1928) 277 US 183, 72 L Ed 842, 48 S Ct 447: §1.66
Neecke v City of Mill Valley (1995) 39 CA4th 946, 46 CR2d 266: §§5.18, 5.21, 5.66
Neighborhood Action Group v County of Calaveras (1984) 156 CA3d 1176, 203 CR 401: §10.81
Neighbors in Support of Appropriate Land Use v County of Tuolumne (2007) 157 CA4th 997, 68 CR3d 882: §§10.127, 10.430
Neilson v City of Cal. City (2005) 133 CA4th 1296, 35 CR3d 453, cert denied (2006) 549 US 816: §3.79
Nelson v Carlson (1993) 17 CA4th 732, 21 CR2d 485: §§3.95, 3.107
Nelson v Pima Community College (9th Cir 1996) 83 F3d 1075: §13.116
Nelson v State (1982) 139 CA3d 72, 188 CR 479: §13.108
Nesvig, County of Los Angeles v (1965) 231 CA2d 603, 41 CR 918: §5.293
Nevens v City of Chino (1965) 233 CA2d 775, 44 CR 50: §§2.4, 2.11, 2.26
New Mexico, U.S. v (1982) 455 US 720, 71 L Ed 2d 580, 102 S Ct 1373: §5.53
New Orleans v Dukes (1976) 427 US 297, 49 L Ed 2d 511, 96 S Ct 2513: §9.45
New Penn Mines, Inc., People v (1963) 212 CA2d 667, 28 CR 337: §11.117
New York v U.S. (1992) 505 US 144, 120 L Ed 2d 120, 112 S Ct 2408: §1.91
New York Times Co. v Sullivan (1964) 376 US 254, 11 L Ed 2d 686, 84 S Ct 710: §9.136
New York Times Co. v Superior Court (1990) 218 CA3d 1579, 268 CR 21: §§2.240, 2.250
Newsom v Board of Supervisors (1928) 205 C 262, 270 P 676: §3.111
Newton v Brodie (1930) 107 CA 512, 290 P 1058: §5.264
Ng v State Personnel Bd. (1977) 68 CA3d 600, 137 CR 387: §4.282
Nguyen v Los Angeles County Harbor/UCLA Med. Ctr. (1992) 8 CA4th 729, 10 CR2d 709: §§13.29, 13.51
Nguyen v Nguyen (2008) 158 CA4th 1636, 70 CR3d 753: §3.28
Nguyen, U.S. v (5th Cir 1990) 916 F2d 1016: §11.282
Nichols v Dancer (2009) 567 F3d 423: §4.136
Nicolopulos v City of Lawndale (2001) 91 CA4th 1221, 111 CR2d 420: §1.200
Nielsen v Richards (1925) 75 CA 680, 243 P 697: §2.166
Nielsen Constr. Co. v International Iron Products (1993) 18 CA4th 863, 22 CR2d 497: §7.298
Niemotko v State of Maryland (1951) 340 US 268, 95 L Ed 267, 71 S Ct 325: §§9.146, 9.148
Nightlife Partners, Ltd. v City of Beverly Hills (2003) 108 CA4th 81, 133 CR2d 234: §§2.33, 2.208, 9.57, 12.79
Nike, Inc. v Kasky (2003) 539 US 654, 156 L Ed 2d 580, 123 S Ct 2554: §9.123
Nilsson v City of Mesa (9th Cir 2007) 503 F3d 947: §13.123
Nixon v Shrink Missouri Gov't PAC (2000) 528 US 377, 145 L Ed 2d 886, 120 S Ct 897: §§3.176, 3.181
No Oil, Inc. v City of Los Angeles (1974) 13 C3d 68, 118 CR 34: §11.35
No Oil, Inc. v City of Los Angeles (1987) 196 CA3d 223, 242 CR 37: §§7.210, 7.217, 10.90
Noble v City of Palo Alto (1928) 89 CA 47, 264 P 529: §2.174

Nola M. v University of S. Cal. (1993) 16 CA4th 421, 20 CR2d 97: §13.104
Nollan v California Coastal Comm'n (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141: §§10.217-10.219, 10.307, 10.363, 10.366, 10.373, 10.391-10.393, 10.398
Nordlinger v Hahn (1992) 505 US 1, 120 L Ed 2d 1, 112 S Ct 2326: §§1.52, 5.19, 5.99
Nordyke v King (9th Cir 2009) 563 F3d 439, vacated and rehearing en banc granted July 29, 575 F3d 890: §9.95
Norfolk Redev. & Hous. Auth. v Chesapeake & Potomac Tel. Co. of Virginia (1983) 464 US 30, 78 L Ed 2d 29, 104 S Ct 304: §8.122
North County Parents Org. for Children with Special Needs v Deptartment of Educ. (1994) 23 CA4th 144, 28 CR2d 359: §§2.231, 2.234
North Hollywood Project Area Comm. v City of Los Angeles (1998) 61 CA4th 719, 71 CR2d 675: §§2.200, 5.389
North Olmsted Chamber of Commerce v City of North Olmsted (ND Ohio 2000) 108 F Supp 2d 792: §9.145
North Pacifica, LLC v City of Pacifica (ND Cal 2003) 274 F Supp 2d 1118: §2.109
Northern Cal. Psychiatric Soc'y v City of Berkeley (1986) 178 CA3d 90, 223 CR 609: §1.38
Northern Cal. River Watch v City of Healdsburg (9th Cir 2007) 496 F3d 993, cert denied (2008) 552 US 1180: §11.177
Northwest Airlines v County of Kent (1994) 510 US 355, 127 L Ed 2d 183, 114 S Ct 855: §6.141
Northwest Austin Mun. Util. Dist. Number One v Holder (2009) ___ US ___, 174 L Ed 2d 140, 129 S Ct 2504: §3.65
Norton, People v (1930) 108 CA Supp 767, 288 P 33: §1.235
Not About Water Comm. v Solano County (2002) 95 CA4th 982, 116 CR2d 526, disapproved on other grounds in Silicon Valley Taxpayers' Ass'n, Inc. v Santa Clara County Open Space Auth. (2008) 44 C4th 431, 79 CR3d 312: §5.148
Nourse v City of Los Angeles (1914) 25 CA 384, 143 P 801: §6.5
Novato Fire Protection Dist. v U.S. (9th Cir 1999) 181 F3d 1135: §5.150
Novi v City of Pacifica (1985) 169 CA3d 678, 215 CR 439: §10.147
Nunez v City of Los Angeles (9th Cir 1998) 147 F3d 867: §13.118
Nunez v City of San Diego (9th Cir 1997) 114 F3d 935: §§9.65-9.66, 9.69-9.70, 9.73, 9.134
Nuno v County of San Bernardino (CD Cal 1999) 58 F Supp 2d 1127: §13.128
Nussbaum v Weeks (1989) 214 CA3d 1589, 263 CR 360: §2.174

O

O.W.L. Found. et al v City of Rohnert Park (2008) 168 CA4th 568, 86 CR3d 1: §11.103
Oakland Raiders, City of Oakland v (1982) 32 C3d 60, 183 CR 673: §1.43
Oakland Paving Co. v Donovan (1912) 19 CA 488, 126 P 388: §1.201
Oakland Water-Front Co. , City of Oakland v (1897) 118 C 160, 50 P 277: §6.163
Oberhauser, Miller v (9th Cir 1961) 293 F2d 29: §12.58
O'Brien v City of Greers Ferry (9th Cir 1989) 873 F2d 1115: §13.160
O'Brien, U.S. v (1968) 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673: §§9.6, 9.8
Ocean Servs. Corp. v Ventura Port Dist. (1993) 15 CA4th 1762, 19 CR2d 750: §13.177
Ocean View Estates Homeowners Ass'n v Montecito Water Dist. (2004) 116 CA4th 396, 10 CR3d 451: §11.29
Oceanside Mobilehome Park Owners' Ass'n v City of Oceanside (1984) 157 CA3d 887, 204 CR 239: §9.50
O'Connell v City of Stockton (2007) 41 C4th 1061, 63 CR3d 67: §12.66
O'Connell v City of Stockton (2005) 128 CA4th 831, 27 CR3d 696: §1.37
O'Dowd v Superior Court (1910) 158 C 537, 111 P 751: §3.130
Officers for Justice v Civil Service Comm'n of the City of San Francisco (9th Cir 1992) 979 F2d 721, cert denied (1993) 507 US 1004: §4.9
Offner, City of Los Angeles v (1942) 19 C2d 483, 122 P2d 14: §§1.48, 5.230, 5.235
Ogborn v City of Lancaster (2002) 101 CA4th 448, 124 CR2d 238: §§12.69, 13.125-13.126
Ogo Assocs. v City of Torrance (1974) 37 CA3d 830, 112 CR 761: §13.8
O'Hagen v Board of Zoning Adjustment (1971) 19 CA3d 151, 96 CR 484: §10.111
Ohio Bell Tel. Co. v Pub. Util. Comm'n (1937) 301 US 292, 81 L Ed 1093, 57 S Ct 724: §12.78
Ojai v Chaffee (1943) 60 CA2d 54, 140 P2d 116: §5.279
Old Town Dev. Corp. v Urban Renewal Agency of the City of Monterey (1967) 249 CA2d 313, 57 CR 426: §2.181
Oliver, People v (1948) 86 CA2d 885, 195 P2d 926: §12.3
O'Loane v O'Rourke (1965) 231 CA2d 774, 42 CR 283: §10.84
Olson v Hickman (1972) 25 CA3d 920, 102 CR 248: §13.157
O'Melveney v Griffith (1918) 178 C 1, 171 P 934: §§5.218, 8.67
Oncale v Sundowner Offshore Servs., Inc. (1998) 523 US 75, 140 L Ed 2d 201, 118 S Ct 998: §4.187
One World One Family Now v City & County of Honolulu (9th Cir 1996) 76 F3d 1009, cert denied (1996) 519 US 1009: §9.152
Opdyke Inv. Co. v City of Detroit (6th Cir 1989) 883 F2d 1265: §13.153
Operating Engineers Local Union No. 3, City of San Jose v (review granted June 18, 2008, S162647; superseded opinion at 160 CA4th 951, 73 CR3d 159): §4.323
Opp v St. Paul Fire & Marine Ins. Co. (2007) 154 CA4th 71, 64 CR3d 260: §7.229
Orange County Employees Ass'n v County of Orange (1988) 205 CA3d 1289, 253 CR 584: §§4.283, 4.297
Orange County Employees Ass'n v County of Orange (In re County of Orange) (Bankr CD Cal 1995) 179 BR 177: §5.456
Orange County Found. v Irvine Co. (1983) 139 CA3d 195, 188 CR 552: §5.279
Orange County Water Dist. v Association of Cal. Water Auth. (1997) 54 CA4th 772, 63 CR2d 182: §7.263
Orazio v Town of North Hempstead (ED NY 1977) 426 F Supp 1144: §9.143

Oregon Waste Sys., Inc. v Department of Envt'l Quality (1994) 511 US 93, 128 L Ed 2d 13, 114 S Ct 1345: §11.117
Organization of Deputy Sheriffs v County of San Mateo (1975) 48 CA3d 331, 122 CR 210: §4.329
Orinda Ass'n v Board of Supervisors (1986) 182 CA3d 1145, 227 CR 688: §10.120
Orozco, People v (1968) 266 CA2d 507, 72 CR 452: §1.41
Otis v City of Los Angeles (1942) 52 C2d 605, 126 P2d 954: §13.32
Otis Elevator Co. v Toda Constr. of Cal. (1994) 27 CA4th 559, 32 CR2d 404: §7.306
O'Toole v Retirement Bd. (1983) 139 CA3d 600, 188 CR 853: §4.365
Otter Tail Power Co. v U.S. (1973) 410 US 366, 35 L Ed 2d 359, 93 S Ct 1022: §6.41
Otto v Los Angeles Unified Sch. Dist. (2001) 89 CA4th 985, 107 CR2d 664: §§4.296-4.297
Oubre v Entergy Operations, Inc. (1998) 522 US 422, 139 L Ed 2d 849, 118 S Ct 838: §§4.146, 4.249
Outdoor Sys., Inc. v City of Mesa (9th Cir 1993) 997 F2d 604: §§9.140-9.141
Ovando v City of Los Angeles (CD Cal 2000) 92 F Supp 2d 1011: §13.76
Oviatt By & Through Waugh v Pearce (9th Cir 1992) 954 F2d 1470: §13.134
Owen v City of Independence (1980) 445 US 622, 63 L Ed 2d 673, 100 S Ct 1398: §§4.158, 13.123, 13.126
Owens v City of Signal Hill (1984) 154 CA3d 123, 201 CR 70: §9.35
Owens-Illinois, Inc. , Williams v (9th Cir 1982) 665 F2d 918, cert denied (1982) 459 US 971: §4.154
Oxnard Harbor Dist. v Local Agency Formation Comm'n (1993) 16 CA4th 259, 19 CR2d 819: §13.7

P

PG&E v City of Berkeley (1976) 60 CA3d 123, 131 CR 350: §3.178
PG&E v County of San Mateo (1965) 233 CA2d 268, 43 CR 450: §8.125
PG&E v Dame Constr. Co. (1987) 191 CA3d 233, 236 CR 351: §6.54
PG&E v San Jose (1985) 172 CA3d 598, 218 CR 400: §8.123
PKS, Inc., People v (1994) 26 CA4th 400, 31 CR2d 543: §9.44
Pacific Bell Tel. Co. v City of Walnut Creek (ND Cal 2006) 428 F Supp 2d 1037: §6.58
Pacific Elec. Ry. Co. , City of Los Angeles v (1959) 168 CA2d 224, 335 P2d 1042: §8.140
Pacific Indem. Co. v American Mut. Ins. Co. (1972) 28 C3d 983, 105 CR 295: §13.183
Pacific Indem. Co., State v (1998) 63 CA4th 1535, 75 CR2d 69: §7.256
Pacific Legal Found. v Brown (1981) 29 C3d 168, 172 CR 487: §1.6
Pacific Tel. & Telegraph Co. v City & County of San Francisco (1959) 51 C2d 766, 336 P2d 514: §§6.90-6.91
Pacific Tel. & Telegraph Co. v County of Riverside (1980) 106 CA3d 183, 165 CR 29: §§13.29, 13.49
Pacific Tel. & Telegraph Co. v Redevelopment Agency of City of Redlands (1977) 75 CA3d 957, 142 CR 584: §6.91
Pacific Tel. & Telegraph Co. v Redevelopment Agency of the City of Glendale (1978) 87 CA3d 296, 151 CR 68: §8.122
Packer v Board of Retirement (1950) 35 C2d 212, 217 P2d 660: §4.36
Padilla v Lever (9th Cir 2006) 463 F3d 1046: §§3.67, 3.156
Padilla Constr. Co. v Transp. Ins. Co. (2007) 150 CA4th 984, 58 CR3d 807: §7.291
Pajaro Valley Water Mgmt. Agency v Amrhein (2007) 150 CA4th 1364, 59 CR3d 484: §§5.174-5.175
Pala Band of Mission Indians v Board of Supervisors (1997) 54 CA4th 565, 63 CR2d 148: §3.104
Palacio de Anza v Palm Springs Rent Review Comm'n (1989) 209 CA3d 116, 257 CR 121: §9.51
Paland v Brooktrails Township Community Servs. Dist. (2009) 179 CA4th 1358, 102 CR3d 270: §5.176
Palazzolo v Rhode Island (2001) 533 US 606, 150 L Ed 2d 592, 121 S Ct 2448: §§10.374-10.375, 10.386-10.387, 10.389, 10.403
Palila v Hawaii Dep't of Land & Natural Resources (9th Cir 1988) 852 F2d 1106: §11.265
Palila v Hawaii Dep't of Land & Natural Resources (9th Cir 1981) 639 F2d 495: §§11.265, 11.281
Palila v Hawaii Dep't of Land & Natural Resources (D Ha 1979) 471 F Supp 985, aff'd (9th Cir 1981) 639 F2d 495: §11.264
Palladio, Inc. v Diamond (SD NY 1970) 321 F Supp 630, aff'd per curiam (2d Cir 1971) 440 F2d 1319, cert denied (1971) 404 US 983: §11.287
Palm Springs v Ringwald (1959) 52 C2d 620, 342 P2d 898: §5.290
Palomar Mobilehome Park Ass'n v Mobile Home Rent Review Comm'on (1993) 16 CA4th 481, 20 CR2d 371: §9.51
Palos Verdes Shores Mobile Estates, Ltd. v City of Los Angeles (1983) 142 CA3d 362, 190 CR 866: §9.50
Pan Pac. Props., Inc. v County of Santa Cruz (1978) 81 CA3d 244, 146 CR 428: §13.13
Paoli v California Coastal Comm'n (1986) 178 CA3d 544, 223 CR 792: §13.20
Paoli v Civil Service Comm'n (1993) 12 CA4th 1073, 15 CR2d 874: §4.288
Park 'N Fly of San Francisco, Inc. v City of South San Francisco (1987) 188 CA3d 1201, 234 CR 23: §5.40
Park Area Neighbors v Town of Fairfax (1994) 29 CA4th 1442, 35 CR2d 334: §13.13
Parker v Brown (1943) 317 US 341, 87 L Ed 315, 63 S Ct 307: §13.153
Parker v City of Fountain Valley (1981) 127 CA3d 99, 179 CR 351: §§4.284, 4.288
Parola v Weinberger (9th Cir 1988) 848 F2d 956: §6.98
Parr v Municipal Court (1971) 3 C3d 861, 92 CR 153, cert denied sub nom City of Carmel-By-The-Sea v Parr (1971) 404 US 869: §§1.238, 9.62
Parratt v Taylor (1981) 451 US 527, 68 L Ed 2d 420, 101 S Ct 1908: §13.139-13.140
Pasadena v Paine (1954) 126 CA2d 93, 271 P2d 577: §2.4
Pasadena v Stimson (1891) 91 C 238, 27 P 604: §1.5
Pasadena Hotel Dev. Venture v City of Pasadena (1981) 119 CA3d 412, 174 CR 52: §§13.39, 13.152
Pasadena Police Officers Ass'n v City of Pasadena (1990) 51 C3d 564, 273 CR 584: §4.302
Patel v City of Gilroy (2002) 97 CA4th 483, 118 CR2d 354: §5.52

Patel v Penman (9th Cir 1996) 103 F3d 868: §10.422
Patrick Media Group, Inc. v California Coastal Comm'n (1992) 9 CA4th 592, 11 CR2d 824: §10.404
Patsy v Board of Regents (1982) 457 US 496, 73 L Ed 2d 172, 102 S Ct 2557: §4.159
Patsy v Florida Bd. of Regents (1982) 457 US 496, 73 L Ed 2d 172, 102 S Ct 2557: §13.129
Patten v Grant Joint Union High Sch. Dist. (2005) 134 CA4th 1378, 37 CR3d 113: §4.134
Patterson v Board of Supervisors (1988) 202 CA3d 22, 248 CR 253: §3.223
Patterson v McLean Credit Union (1989) 491 US 164, 105 L Ed 2d 132, 109 S Ct 2363: §4.152
Paul v Davis (1976) 424 US 693, 47 L Ed 2d 405, 96 S Ct 1155: §§13.112, 13.117
Paul, Smith v (1959) 174 CA2d 744, 345 P2d 546: §§2.221, 2.256
Paulson v City of San Diego (9th Cir 2002) 294 F3d 1124, cert denied (2003) 538 US 978: §1.60
Payne & Dewey v Treadwell (1860) 16 C 221: §1.1
Peace & Freedom Party v Shelley (2004) 114 CA4th 1237, 8 CR3d 497: §3.46
Peacock v County of Sacramento (1969) 271 CA2d 845, 77 CR 391: §6.148
Pearl v Workers' Compensation Appeals Bd. (2001) 26 C4th 189, 109 CR2d 308: §4.395
Pearson v Callahan (2009) ___ US ___, 172 L Ed 2d 565, 129 S Ct 808: §13.126
Peloza v Capistrano Unified Sch. Dist. (9th Cir 1994) 37 F3d 517: §13.116
Pembaur v City of Cincinnati (1986) 475 US 469, 89 L Ed 2d 452, 106 S Ct 1292: §§4.158, 13.135, 13.137-13.138
Pendleton, People v (1979) 25 C3d 371, 158 CR 343: §2.214
Penn v City of San Diego (1987) 188 CA3d 636, 233 CR 514: §6.39
Penn Cent. Transp. Co. v City of New York (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646: §§10.129, 10.210, 10.368, 10.386-10.387, 10.397, 10.427
Penn Dairies, Inc. v Milk Control Comm'n (1943) 318 US 261, 87 L Ed 748, 63 S Ct 617: §1.87
Penn-Co v Board of Supervisors (1984) 158 CA3d 1072, 205 CR 298: §13.176
Pennell v City of San Jose (1988) 485 US 1, 99 L Ed 2d 1, 108 S Ct 849: §§9.47, 9.49, 9.51, 10.382, 10.423-10.424
Pennell v City of San Jose (1986) 42 C3d 365, 228 CR 726: §5.72
Pennhurst State Sch. & Hosp. v Halderman (1984) 465 US 89, 79 L Ed 2d 67, 104 S Ct 900: §13.127
Pennsylvania v Delaware Valley Citizens' Council for Clean Air (1986) 478 US 546, 92 L Ed 2d 439, 106 S Ct 3088: §13.160
People v _____ (*see* name of defendant)
Perez-Torres v State (2007) 42 C4th 136, 64 CR3d 155: §13.93
Perrin v Anderson (10th Cir 1986) 784 F2d 1040: §13.147
Perry v East Bay Reg. Park Dist. (2006) 141 CA4th 1, 45 CR3d 477: §13.93
Perry v Los Angeles Police Dept. (9th Cir 1997) 121 F3d 1365, cert denied (1998) 523 US 1047: §§9.125, 9.148
Perry v Sindermann (1972) 408 US 593, 33 L Ed 2d 570, 92 S Ct 2694: §13.118
Perry v Washburn (1862) 20 C 318: §1.19
Perry Educ. Ass'n v Perry Local Educators' Ass'n (1983) 460 US 37, 74 L Ed 2d 794, 103 S Ct 948: §§2.23, 9.122
Pescosolido v Smith (1983) 142 CA3d 964, 191 CR 415: §13.22
Pesola v City of Los Angeles (1975) 54 CA3d 479, 126 CR 580: §§1.41, 5.57
Petersen v City of Vallejo (1968) 259 CA2d 757, 66 CR 776: §13.50
Peterson v San Francisco Community College Dist. (1984) 36 C3d 799, 205 CR 842: §§13.99, 13.102
Pettitt v City of Fresno (1973) 34 CA3d 813, 110 CR 262: §§10.240, 13.177
Pettus v Cole (1996) 49 CA4th 402, 57 CR2d 46: §4.114
Pewee Coal Co., U.S. v (1951) 341 US 114, 95 L Ed 809, 71 S Ct 670: §§10.365, 10.400-10.401
Philip Morris, Inc. , City & County of San Francisco v (ND Cal 1997) 957 F Supp 1130: §2.215
Phillips v Civil Service Comm'n (1987) 192 CA3d 996, 237 CR 751: §4.287
Phillips v Desert Hosp. Dist. (1989) 49 C3d 699, 263 CR 119: §§13.46, 13.60, 13.62
Phillips v San Luis Obispo County (1986) 183 CA3d 372, 228 CR 101: §9.165
Pickering v Board of Educ. (1968) 391 US 563, 20 L Ed 2d 811, 88 S Ct 1731: §§4.2, 4.135
Pierce v PG&E (1985) 166 CA3d 68, 212 CR 283: §6.47
Piledrivers' Local Union v City of Santa Monica (1984) 151 CA3d 509, 198 CR 731: §§7.171, 8.77
Pines v Tomson (1984) 160 CA3d 370, 206 CR 866: §1.59
Pinewood Investors v City of Oxnard (1982) 133 CA3d 1030, 184 CR 417: §§1.228, 5.166
Pinkstaff v U.S. (9th Cir 1992) 974 F2d 113: §5.173
Pipes v Hilderbrand (1952) 110 CA2d 645, 243 P2d 123: §1.23
Pipkin v Board of Supervisors (1978) 82 CA3d 652, 147 CR 502: §4.288
Pipoly v Benson (1942) 20 C2d 366, 125 P2d 482: §§1.37, 8.165
Placentia Fire Fighters v City of Placentia (1976) 57 CA3d 9, 129 CR 126: §4.339
Planned Parenthood v Casey (1992) 505 US 833, 120 L Ed 2d 674, 112 S Ct 2791: §10.439
Planning & Conserv. League v Department of Water Resources (2000) 83 CA4th 892, 100 CR2d 173: §§11.98, 11.100
Playboy Entertainment Group, Inc., U.S. v (2000) 529 US 803, 146 L Ed 2d 865, 120 S Ct 1878: §9.132
Plumbing, Heating & Piping Employers Council v Quillin (1976) 64 CA3d 215, 134 CR 332: §13.157
Pocket Protectors v City of Sacramento (2004) 124 CA4th 903, 21 CR3d 791: §11.29
Poe, People v (1965) 236 CA2d Supp 928, 47 CR 670, overruled on other grounds in vacated opinion in In re Hayes (1968) 69 CR 310, 442 P2d: §9.156
Polk v Los Angeles (1945) 26 C2d 519, 159 P2d 931: §6.36
Polk County v Dodson (1981) 454 US 312, 70 L Ed 2d 509, 102 S Ct 445: §13.138

Pollok v San Diego (1897) 118 C 593, 50 P 769: §1.245
Pomona College v Superior Court (1996) 45 CA4th 1716, 53 CR2d 662: §13.17
Poniktera v Seiler (2010) 181 CA4th 121, 104 CR3d 291: §3.51
Ponti v Burastero (1952) 112 CA2d 846, 247 P2d 597: §6.92
Pooled Money Inv. Bd. v Unruh (1984) 153 CA3d 155, 200 CR 500: §1.50
Portnoy, In re (1942) 21 C2d 237, 131 P2d 1: §9.85
Poway Royal Mobilehome Owners Ass'n v City of Poway (2007) 149 CA4th 1460, 58 CR3d 153: §13.177
Poway Unified Sch. Dist. v Superior Court (Copely Press) (1998) 62 CA4th 1496, 73 CR2d 777: §2.245
Powers v City of Richmond (1995) 10 C4th 85, 40 CR2d 839: §2.262
Pozar v Department of Transp. (1983) 145 CA3d 269, 193 CR 202: §7.16
Preferred Communications, Inc. , City of Los Angeles v (1986) 476 US 488, 90 L Ed 2d 480, 106 S Ct 2034: §6.87
Preservation Action Council v City of San Jose, (2006) 141 CA4th 1336, 46 CR3d 902: §11.50
Preserve Shorecliff Homeowners v City of San Clemente (2008) 158 CA4th 1427, 71 CR3d 332: §§3.84, 3.96
Price v City of Stockton (9th Cir 2004) 390 F3d 1105: §8.15
Price v City of Stockton (ED Cal 2005) 394 F Supp 2d 1256: §§5.408, 8.14-8.15
Priceline.com Inc. v City of Anaheim (LA Super Ct, 2010, JCCP 4472): §5.56
Priceline.com Inc. v City of Anaheim (LA Super Ct, Feb. 1, 2010, JCCP 4472): §5.56
Priceline.com Inc. v City of Anaheim (2010) 180 CA4th 1130, 103 CR3d 521: §5.56
Priest v Rotary (ND Cal 1986) 634 F Supp 571: §4.191
Prilliman v United Air Lines, Inc. (1997) 53 CA4th 935, 62 CR2d 142: §4.231
Prince v Pacific Gas & Elec. Co. (2009) 45 C4th 1151, 90 CR3d 732: §7.303
Printz v U.S. (1997) 521 US 898, 138 L Ed 2d 914, 117 S Ct 2365: §1.91
Protect Our Water v County of Merced (2003) 110 CA4th 362, 1 CR3d 726: §§11.68-11.69
Protect the Historic Amador Waterways v Amador Water Agency (2004) 116 CA4th 1099, 11 CR3d 104: §11.27
Pryor v Municipal Court (1979) 25 C3d 238, 158 CR 330: §§9.75-9.76
Pub. Utils. Comm'n, People ex rel v City of Fresno (1967) 254 CA2d 76, 62 CR 79: §6.3
Public Employees Ass'n v Board of Supervisors of Tulare County (1985) 167 CA3d 797, 213 CR 491: §4.325
Public Employees of Riverside County, Inc. v County of Riverside (1977) 75 CA3d 882, 142 CR 521: §4.329
Puglisi v Underhill Park Taxpayer Ass'n (SDNY 1997) 964 F Supp 811: §13.158
Purdy & Fitzpatrick v State (1969) 71 C2d 566, 79 CR 77: §7.247

Q

Quern v Jordan (1979) 440 US 332, 59 L Ed 2d 358, 99 S Ct 1139: §13.127
Quill Corp. v North Dakota (1992) 504 US 298, 119 L Ed 2d 91, 112 S Ct 1904: §9.4
Quintero v City of Santa Ana (2003) 114 CA4th 810, 7 CR3d 896: §2.208
Qwest Communications v City of Berkeley (ND Cal 2001) 146 F Supp 2d 1081: §6.73

R

R & A Vending Servs., Inc. v City of Los Angeles (1985) 172 CA3d 1188, 218 CR 667: §§7.3, 7.171
R. Ernest Cohn, D.C., D.A.B.C.O. v Bond (4th Cir 1991) 953 F2d 154: §6.39
R.A.V. v City of St. Paul (1992) 505 US 377, 120 L Ed 2d 305, 112 S Ct 2538: §9.136
RK Ventures, Inc. v City of Seattle (9th Cir 2002) 307 F3d 1045: §9.28
Rackauckas v Superior Court (2002) 104 CA4th 169, 128 CR2d 234: §§2.250-2.251
Rafael v Boyle (1916) 31 CA 623, 161 P 126: §7.175
Railway Express, Johnson v (1975) 421 US 454, 44 L Ed 2d 295, 95 S Ct 1716: §4.155
Ramirez v City of Redondo Beach (1987) 192 CA3d 515, 237 CR 505: §13.106
Ramos v Town of Vernon (2d Cir 2003) 353 F3d 171: §9.70
Ramsey v City of Lake Elsinore (1990) 220 CA3d 1530, 270 CR 198: §13.167
Rancho Santa Anita, Inc. v Arcadia (1942) 20 C2d 319, 125 P2d 475: §5.274
Rankin v McPherson (1987) 483 US 378, 97 L Ed 2d 315, 107 S Ct 2891: §4.135
Rapanos v U.S. (2006) 547 US 715, 165 L Ed 2d 159, 126 S Ct 2208: §§11.176, 11.178, 11.278
Ravettino v City of San Diego (1945) 70 CA2d 37, 160 P2d 52: §§1.25-1.26
Reams v Cooley (1915) 171 C 150, 152 P 293: §7.243
Redevelopment Agency v City of Berkeley (1978) 80 CA3d 158, 143 CR 633: §3.112
Redevelopment Agency v Hayes (1954) 122 CA2d 777, 266 P2d 105, cert denied (1954) 348 US 897: §5.318
Redevelopment Agency v Salvation Army (2002) 103 CA4th 755, 127 CR2d 30: §13.161
Redevelopment Agency v Shepard (1977) 75 CA3d 453, 142 CR 212: §5.13
Redevelopment Agency of San Pablo v Shepard (1977) 75 CA3d 453, 142 CR 212: §1.43
Redevelopment Agency of the City of Huntington Park v Norm's Slauson (1985) 173 CA3d 1121, 219 CR 365: §§5.347, 5.354, 5.357, 8.43
Redevelopment Agency of the City of Pomona v Thrifty Oil Co. (1992) 4 CA4th 469, 5 CR2d 687: §8.62
Redevelopment Plan for Bunker Hill Urban Renewal Project 1B of Community Redev. Agency, In re (1964) 61 C2d 21, 37 CR 74, cert denied sub nom Babcock v Community Redev. Agency (1964) 379 US 899, cert denied sub nom Trautwein v Community Redev. Agency (1964) 379 US 28: §§1.43, 1.201, 5.304, 5.348-5.349
Redman v County of San Diego (9th Cir 1991) 942 F2d 1435, cert denied (1992) 502 US 1074: §§13.116, 13.139

Rees v Layton (1970) 6 CA3d 815, 86 CR 268: §1.202
Regency Outdoor Adver., Inc. v City of West Hollywood (2007) 153 CA4th 825, 63 CR3d 287: §11.65
Regents of Univ. of Cal. v Bakke (1978) 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733: §4.9
Regents of Univ. of Cal. v City of Santa Monica (1978) 77 CA3d 130, 143 CR 276: §1.105
Regents of Univ. of Cal. v Doe (1997) 519 US 425, 137 L Ed 2d 55, 117 S Ct 900: §1.93
Region 8 Forest Serv. Timber Purchasers Council v Alcock (ND Ga 1990) 736 F Supp 267, aff'd in part and vacated in part (11th Cir 1993) 993 F2d 800: §11.286
Regus v City of Baldwin Park (1977) 70 CA3d 968, 139 CR 196: §13.184
Reinsch v City of Los Angeles (1966) 243 CA2d 737, 52 CR 613: §8.70
Relyea v Ventura County Fire Protection Dist. (1992) 2 CA4th 875, 3 CR2d 614: §4.331
Rene v MGM Grand Hotel, Inc. (9th Cir 2001) 243 F3d 1206: §4.187
Reno v American Civil Liberties Union (1997) 521 US 844, 138 L Ed 2d 874, 117 S Ct 2329: §9.130
Reno v Baird (1998) 18 C4th 640, 76 CR2d 499: §4.205
Renteria v Juvenile Justice, Dep't of Corrections & Rehabilitation (2006) 135 CA4th 903, 37 CR3d 777: §13.73
Resource Defense Fund v County of Santa Cruz (1982) 133 CA3d 800, 184 CR 371: §§10.52, 10.76
Resource Defense Fund v Local Agency Formation Comm'n (1987) 191 CA3d 886, 236 CR 794: §10.412
Resource Invs. Inc. v United States Army Corps of Eng'rs (9th Cir 1998) 151 F3d 1162: §6.100
Retired Employees Ass'n v County of Orange (CD Cal 2009) 632 F Supp 2d 983: §4.35
Reyes v County of Los Angeles (1988) 197 CA3d 584, 243 CR 35: §13.71
Reynolds v City of San Carlos (1981) 126 CA3d 208, 178 CR 636: §4.39
Reynolds v Sims (1964) 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362: §§3.70, 3.78
Rhaburn v Superior Court (2006) 140 CA4th 1566, 45 CR3d 464: §2.198
Rhodes v Superior Court (1979) 90 CA3d 484, 153 CR 495: §3.205
Rhodes, People v (1974) 12 C3d 180, 115 CR 235: §2.214
Ricci v DeStefano (2009) ___ US ___, 174 L Ed 2d 490, 129 S Ct 2658: §§4.15, 4.179
Rice v Santa Fe Elevator Corp. (1947) 331 US 218, 91 L Ed 1447, 67 S Ct 1146: §1.33
Richard v City of Pasadena (CD Cal 1995) 889 F Supp 384: §§1.224, 1.226
Richardson v City & County of Honolulu (9th Cir 1997) 124 F3d 1150: §9.60
Richardson, People v (1994) 33 CA4th Supp 11, 39 CR2d 17: §9.71
Richmond v Shasta Community Servs. Dist. (2004) 32 C4th 409, 9 CR3d 121: §§5.163, 5.174, 5.185
Richmond Ramblers Motorcycle Club v Western Title Guar. Co. (1975) 47 CA3d 747, 121 CR 308: §8.73
Richter v Lightston (1911) 161 C 260, 118 P 790: §12.29
Rider v City of San Diego (1998) 18 C4th 1035, 77 CR2d 189: §§1.46, 1.78, 5.224, 5.235, 5.237, 5.293
Rider v County of San Diego (1991) 1 C4th 1, 2 CR2d 490: §§5.31, 5.111
Riley v National Fed'n of the Blind of North Carolina, Inc. (1988) 487 US 781, 101 L Ed 2d 669, 108 S Ct 2667: §§9.124, 9.152
Rinker v County of Napa (9th Cir 1987) 831 F2d 829: §13.159
Rivas v City of Kerman (1992) 10 CA4th 1110, 13 CR2d 147: §§13.87-13.88
Rivera v City of Fresno (1971) 6 C3d 132, 98 CR 281, overruled on other grounds in Yamaha Corp. v State Bd. of Equalization (1998) 19 C4th 1, 78 CR2d 1: §5.26
Riverside Bayview Homes, U.S. v (1985) 474 US 121, 88 L Ed 2d 419, 106 S Ct 455: §§11.176, 11.178
Riverwatch v County of San Diego (1999) 76 CA4th 1428, 91 CR2d 322: §11.58
Riverwatch v San Diego County (Palomar Aggregates) (1999) 76 CA4th 1428, 91 CR2d 322: §10.13
Rizzo v Goode (1976) 423 US 362, 46 L Ed 2d 561, 96 S Ct 598: §13.148
Roberts v City of Palmdale (1993) 5 C4th 363, 20 CR2d 330: §§1.242, 2.79, 2.109
Roberts v State (1974) 39 CA3d 844, 114 CR 518: §13.49
Robertson v Amtrak/Nat'l R.R. Passenger Corp. (SD NY 2005) 400 F Supp 2d 612: §4.117
Robertson v Hecksel (11th Cir 2005) 420 F3d 1254: §13.121
Robertson v Wegmann (1978) 436 US 584, 56 L Ed 2d 554, 98 S Ct 1991: §13.146
Robins v Pruneyard Shopping Ctr. (1979) 23 C3d 899, 153 CR 854, aff'd (1980) 447 US 74: §§1.59, 9.156
Robinson v California (1962) 370 US 660, 8 L Ed 2d 758, 82 S Ct 1417: §9.101
Robinson v City of Yucaipa (1994) 28 CA4th 1506, 34 CR 291: §§9.55, 9.59
Robinson v Shell Oil Co. (1997) 519 US 337, 136 L Ed 2d 808, 117 S Ct 843: §4.180
Rodeo Sanitary Dist. v Board of Supervisors of Contra Costa County (1999) 71 CA4th 1443, 84 CR2d 601: §1.71
Rodriguez v Solis (1991) 1 CA4th 495, 2 CR2d 50: §13.4
Rodriguez, People v (1990) 51 C3d 437, 272 CR 613: §12.63
Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705: §1.58
Rogers v Superior Court (1993) 19 CA4th 469, 23 CR2d 412: §§2.233, 2.241
Rohn v City of Visalia (1989) 214 CA3d 1463, 263 CR 319: §10.219
Rojes v Riverside Gen. Hosp. (1988) 203 CA3d 1151, 250 CR 435, overruled on other grounds in Passavanti v Williams (1990) 225 CA3d 1602, 275 CR 887: §13.73
Rojo v Kliger (1990) 52 C3d 65, 276 CR 130: §§4.168, 4.210
Romano v Bible (9th Cir 1999) 169 F3d 1182, cert denied (1999) 528 US 816: §13.141
Romberg v Nichols (9th Cir 1995) 48 F3d 453, cert denied (1995) 516 US 943: §13.159
Romero v City of Pomona (9th Cir 1989) 883 F2d 1418, overruled on other grounds in Townsend v Holman Consulting Corp. (9th Cir 1990) 914 F2d 1136: §3.68

Ron Yates Constr. Co. v Superior Court (1986) 186 CA3d 337, 230 CR 629: §7.36
Roosevelt Campobello Int'l Park Comm'n v EPA (1st Cir 1982) 684 F2d 1041: §11.269
Rosales v City of Los Angeles (2000) 82 CA4th 419, 98 CR2d 144: §2.247
Rose v City of Coalinga (1987) 190 CA3d 1627, 236 CR 124: §6.181
Rosenberger v Rector & Visitors of the Univ. of Virginia (1995) 515 US 819, 132 L Ed 2d 700, 115 S Ct 2510: §9.121
Rosenstein v City of Dallas (5th Cir 1989) 876 F2d 392: §13.119
Rosenthal v Hansen (1973) 34 CA3d 754, 110 CR 257: §§2.231-2.232
Ross v City of Berkeley (ND Cal 1987) 655 F Supp 820: §9.47
Ross v City of Rolling Hills Estates (1987) 192 CA3d 370, 238 CR 561: §10.130
Ross v City of Yorba Linda (1991) 1 CA4th 954, 2 CR2d 638: §13.25
Ross v RagingWire Telecommunications, Inc. (2008) 42 C4th 920, 70 CR3d 382: §4.224
Ross, City & County of San Francisco v (1955) 44 C2d 52, 279 P2d 529: §1.22
Rossco Holdings Inc. v State (1989) 212 CA3d 642, 260 CR 736, cert denied (1990) 494 US 1080: §§10.280, 10.404
Rossi v Brown (1995) 9 C4th 688, 38 CR2d 363: §§1.54, 3.105, 3.115
Rossmoor Sanitation, Inc. v Pylon, Inc. (1975) 13 C3d 622, 119 CR 449: §7.301
Roth v Rhodes (1994) 25 CA4th 530, 30 CR2d 706: §4.217
Rotman, 10 FPPC Ops 1, In re (1987): §§5.387, 5.433
Roulette v City of Seattle (9th Cir 1996) 97 F3d 300: §§8.177, 9.103-9.104
Rousseau v City of San Carlos (1987) 192 CA3d 498, 236 CR 373: §13.74
Royal Convalescent Hosp. v State Bd. of Control (1979) 99 CA3d 788, 160 CR 458: §13.78
Royer v Steinberg (1979) 90 CA3d 490, 153 CR 499: §§13.110-13.111
Roylance v Doelger (1962) 57 C2d 255, 19 CR 7: §7.306
Ruane v City of San Diego (1968) 267 CA2d 548, 73 CR 316: §5.235
Rubalcava v Martinez (2007) 158 CA4th 563, 70 CR3d 225: §3.102
Rubin v City of Burbank (2002) 101 CA4th 1194, 124 CR2d 867, cert denied (2003) 538 US 1034: §§1.61, 2.6
Rubin v City of Santa Monica (9th Cir 2002) 308 F3d 1008: §3.42
Ruiz v Sylva (2002) 102 CA4th 199, 125 CR2d 351: §3.156
Rumford v City of Berkeley (1982) 31 C3d 545, 183 CR 73: §§8.153, 8.156
Runyon v Board of Prison Terms & Paroles of the State (1938) 26 CA2d 183, 79 P2d 101: §2.221
Runyon v McCrary (1976) 427 US 160, 49 L Ed 2d 415, 96 S Ct 2586: §4.150
Rupf v Yan (2000) 85 CA4th 411, 102 CR2d 157: §9.97
Ruppe v City of Los Angeles (1921) 186 C 400, 199 P 496: §13.109
Rural Landowners Ass'n v City Council (1983) 143 CA3d 1013, 192 CR 325: §10.412
Russ Bldg. Partnership v City & County of San Francisco (1988) 44 C3d 839, 244 CR 682: §10.241
Russ Bldg. Partnership v City & County of San Francisco (1987) 199 CA3d 1496, 246 CR 21: §§10.221, 10.236
Rutan v Republican Party of Illinois (1990) 497 US 62, 111 L Ed 2d 52, 110 S Ct 2729: §4.136
Ruthroff & Englekirk Eng'rs, Inc. , City of San Jose v (1982) 131 CA3d 462, 183 CR 391: §§5.39, 5.44

S

S.D. Myers, Inc. v City & County of San Francisco (9th Cir 2003) 336 F3d 1174, cert denied (2004) 541 US 936: §1.233
S.O.C., Inc. v County of Clark (9th Cir 1998) 152 F3d 1136: §9.120
SSC Corp. v Town of Smithtown (2d Cir 1995) 66 F3d 502, cert denied (1996) 516 US 1112, reh'g denied, 517 US 1150: §6.101
Saad v City of Berkeley (1994) 24 CA4th 1206, 30 CR2d 95: §10.104
Saathoff v City of San Diego (1995) 35 CA4th 697, 41 CR2d 352: §13.6
Sacramento Cable Television v City of Sacramento (1991) 234 CA3d 232, 286 CR 470: §§5.61, 9.153
Sacramento Mun. Util. Dist. v County of Solano (1997) 54 CA4th 1163, 63 CR2d 286: §§5.22, 5.101
Sacramento Newspaper Guild v Sacramento County Bd. of Supervisors (1968) 263 CA2d 41, 69 CR 480: §§2.53, 2.84
Sacramento Police Officers Ass'n v Venegas (2002) 101 CA4th 916, 124 CR2d 666: §§4.123, 4.298
Safeway Stores, Inc. v Nest-Kart (1978) 21 C3d 322, 146 CR 550: §13.182
Safeway Stores, Inc. v City of Burlingame (1959) 170 CA2d 637, 339 P2d 933: §2.41
Sagaser v McCarthy (1986) 176 CA3d 288, 221 CR 746: §13.164
Saia v New York (1948) 334 US 558, 92 L Ed 1574, 68 S Ct 1148: §9.108
Sainez, City & County of San Francisco v (2000) 77 CA4th 1302, 92 CR2d 418: §12.25
Salinas v Souza & McCue Constr. Co. (1967) 66 C2d 217, 57 CR 337, overruled in part on other grounds in Helfend v Southern Cal. Rapid Transit Dist. (1970) 2 C3d 1, 84 CR 173: §7.106
Salmon Protection & Watershed Network v County of Marin (2004) 125 CA4th 1098, 23 CR3d 321: §11.22
Sambrano v City of San Diego (2001) 94 CA4th 225, 114 CR2d 151: §13.103
San Benito Foods v Veneman (1996) 50 CA4th 1889, 58 CR2d 571: §13.20
San Bernardino Assoc. Gov'ts v Superior Court (2006) 135 CA4th 1106, 38 CR3d 293: §11.19
San Bernardino Pub. Employees Ass'n v City of Fontana (1998) 67 CA4th 1215, 79 CR2d 634: §4.30
San Bernardino Valley Audubon Soc'y v City of Moreno Valley (1996) 44 CA4th 593, 51 CR2d 897: §11.288
San Diego County v Carlstrom (1961) 196 CA2d 485, 16 CR 667: §12.3
San Diego Gas & Elec. Co. v City of Carlsbad (1998) 64 CA4th 785, 75 CR2d 534: §1.99
San Diego Gas & Elec. Co. v San Diego County Air Pollution Control Dist. (1988) 203 CA3d 1132, 250 CR 420: §5.74
San Diego Gas & Elec. Co. v Superior Court (1996) 13 C4th 893, 55 CR2d 724: §6.45

San Diego Metro. Transit Dev. Board v Handlery Hotel (1999) 73 CA4th 517, 86 CR2d 473: §8.35
San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y (1984) 162 CA3d 358, 208 CR 494: §13.143
San Diego Serv. Auth. for Freeway Emergencies v Superior Court (1988) 198 CA3d 1466, 244 CR 440: §7.193
San Diego Unified Port Dist. v Gianturco (SD Cal 1978) 457 F Supp 283, aff'd (9th Cir 1981) 651 F2d 1306: §1.104
San Diego Unified Port Dist. v Superior Court (1988) 197 CA3d 843, 243 CR 163: §13.53
San Diego Unified Port Dist. v Superior Court (1977) 67 CA3d 361, 136 CR 557: §6.140
San Elijo Ranch v County of San Diego (1998) 65 CA4th 608, 76 CR2d 601: §6.100
San Franciscans Upholding the Downtown Plan v City & County of San Francisco (2002) 102 CA4th 656, 125 CR2d 745: §§11.50, 13.13
San Francisco Baykeeper v Cargill Salt Div. (9th Cir 2007) 481 F3d 700: §11.176
San Francisco Baykeeper v Whitman (9th Cir 2002) 297 F3d 877: §11.149
San Francisco Forty-Niners v Nishioka (Comstock) (1999) 75 CA4th 637, 89 CR2d 388: §§3.83-3.84, 3.95, 3.123
San Francisco Int'l Yachting Group v City & County of San Francisco (1992) 9 CA4th 672, 12 CR2d 25: §7.243
San Francisco Oakland Terminal Rys. v Alameda County (1924) 66 CA 77, 225 P 304: §5.187
San Francisco Taxpayers Ass'n v Board of Supervisors (1992) 2 C4th 571, 7 CR2d 245: §5.287
San Gabriel Tribune v Superior Court (1983) 143 CA3d 762, 192 CR 415: §2.248
San Joaquin County Employees' Ass'n, Inc. v County of San Joaquin (1974) 39 CA3d 83, 113 CR 912: §§1.45, 4.31
San Joaquin County Local Agency Formation Comm'n v Superior Court (2008) 162 CA4th 159, 76 CR3d 93: §§13.7, 13.9
San Joaquin Light & Power Corp. v Madera (1917) 175 C 229, 165 P 701: §5.296
San Joaquin Local Agency Formation Comm'n, Sierra Club v (1999) 21 C4th 489, 87 CR2d 702: §1.141
San Jose Christian College v Morgan Hill (9th Cir 2004) 360 F3d 1024: §10.134
San Jose Parking, Inc. v Superior Court (2003) 110 CA4th 1321, 2 CR3d 505: §5.354
San Jose Peace Officer's Ass'n v City of San Jose (1978) 78 CA3d 935, 144 CR 638: §§4.337, 4.340
San Leandro Police Officers Ass'n v City of San Leandro (1976) 55 CA3d 553, 127 CR 856: §4.326
San Leandro Rock Co. v City of San Leandro (1982) 136 CA3d 25, 185 CR 829: §8.170
San Lorenzo Valley Community Advocates for Responsible Educ. v San Lorenzo Valley Unified Sch. Dist. (2006) 139 CA4th 1356, 44 CR3d 128: §11.24
San Marcos Mobilehome Park Owners' Ass'n v City of San Marcos (1987) 192 CA3d 1492, 238 CR 290: §§9.50, 9.57
San Mateo County Coastal Landowners' Ass'n v County of San Mateo (1995) 38 CA4th 523, 45 CR2d 117: §§3.103, 3.107, 10.82
San Mateo County Harbor Dist. v People ex rel San Francisco Bay Conservation & Dev. Comm'n (1994) 25 CA4th 1789, 31 CR2d 447: §6.179
San Remo Hotel L.P. v City & County of San Francisco (2002) 27 C4th 643, 117 CR2d 269: §§10.218, 10.395
San Remo Hotel, L.P. v City & County of San Francisco (2005) 545 US 323, 162 L Ed 2d 315, 125 S Ct 2491: §10.379
San Remo Hotel, L.P. v City & County of San Francisco (9th Cir 2004) 364 F3d 1088: §10.379
San Vicente Nursery School v Los Angeles County (1956) 147 CA2d 79, 304 P2d 837: §8.98
Sanborn v Chronicle Publ'g Co. (1976) 18 C3d 406, 134 CR 402: §13.111
Sanchez v City of Modesto (2006) 145 CA4th 660, 51 CR3d 821, cert denied (2007) 552 US 974: §3.74
Sanchez v City of Santa Ana (9th Cir 1990) 915 F2d 424: §§4.282, 4.296
Sandpiper Mobile Village v City of Carpinteria (1992) 10 CA4th 542, 12 CR2d 623, cert denied (1992) 507 US 1032: §9.60
Sands v Morongo Unified Sch. Dist. (1991) 53 C3d 863, 281 CR 34, cert denied (1992) 505 US 1218: §§1.59, 1.61, 1.63
Sanitary and Improvement Dist. 65 v First Nat'l Bank (D Neb 1987) 79 BR 877, aff'd per curiam (8th Cir 1989) 873 F2d 209: §5.454
Santa Ana Unified Sch. Dist. v Orange County Dev. Agency (2001) 90 CA4th 404, 108 CR2d 770: §5.328
Santa Barbara County Flower & Nursery Growers Ass'n, Inc. v Santa Barbara County (2004) 121 CA4th 864, 17 CR3d 489: §10.325
Santa Barbara County Water Agency v All Persons & Parties (1957) 47 C2d 699, 306 P2d 875, overuled on other grounds by Ivanhoe Irrig. Dist. v McCracken (1958) 357 US 275, 2 L Ed 2d 1313, 78 S Ct 1174: §5.279
Santa Clara County Counsel Attorneys' Ass'n v Woodside (1994) 7 C4th 525, 28 CR2d 617, overruled on other grounds by Coachella Valley Mosquito & Vector Control Dist. v California Pub. Employment Relations Bd. (2005) 35 C4th 1072, 29 CR3d 234: §2.190
Santa Clara County Local Transp. Auth. v Guardino (1995) 11 C4th 220, 45 CR2d 207: §§1.54, 1.145, 3.105, 5.105, 5.107, 5.116, 5.119
Santa Clara Fed'n of Teachers v Governing Bd. (1981) 116 CA3d 831, 172 CR 312: §2.97
Santa Clara Valley Water Dist. v Gross (1988) 200 CA3d 1363, 246 CR 580: §2.165
Santa Clarita Org. for Planning the Env't v County of Los Angeles ("SCOPE I") (2003) 106 CA4th 715, 131 CR2d 186: §§11.82, 11.98, 11.100
Santa Clarita Org. for Planning the Env't v County of Los Angeles ("SCOPE II") (2007) 157 CA4th 149, 68 CR3d 449: §§11.82, 11.98
Santa Margarita Area Residents Together v San Luis Obispo County Bd. of Supervisors (2000) 84 CA4th 221, 100 CR2d 740: §§10.95, 10.127, 10.430
Santa Monica Airport Ass'n v City of Santa Monica (CD Cal 1979) 481 F Supp 927: §6.144
Santa Monica Airport Ass'n v City of Santa Monica (9th Cir 1981) 659 F2d 100: §9.112
Santa Monica Beach, Ltd. v Superior Court (1999) 19 C4th 952, 81 CR2d 93, cert denied (1999) 526 US 1131: §§9.48-9.49
Santa Monica Pines, Ltd. v Rent Control Bd. (1984) 35 C3d 858, 201 CR 593: §§1.40-1.41
Santa Teresa Citizen Action Group v City of San Jose (2003) 114 CA4th 689, 7 CR3d 868: §§13.9, 13.27
Santee v Santa Clara County Office of Educ. (1990) 220 CA3d 702, 269 CR 605: §13.81

Santiago County Water Dist. v County of Orange (1981) 118 CA3d 818, 173 CR 602: §11.63
Sapiro v Frisbie (1928) 93 CA 299, 270 P 280: §1.242
Sasaki, County of Los Angeles v (1994) 23 CA4th 1442, 29 CR2d 103: §5.25
Sattar v Unocal Corp. (ND Cal 1993) 829 F Supp 331: §4.204
Saucier v Katz (2001) 533 US 194, 150 L Ed 2d 272, 121 S Ct 2151, overruled on other grounds in Pearson v Callahan (2009) ___ US ___, 172 L Ed 2d 565, 129 S Ct 808: §13.126
Sausalito v County of Marin (1970) 12 CA3d 550, 90 CR 843: §1.243
Save El Toro Ass'n v Days (1977) 74 CA3d 64, 141 CR 282: §10.60
Save Our Neighborhood v Lishman (2006) 140 CA4th 1288, 45 CR3d 306: §11.45
Save Our Peninsula Comm. v Monterey County Bd. of Supervisors (September Ranch Partners) (2001) 87 CA4th 99, 104 CR2d 326: §10.90
Save Our Sunol, Inc. v Mission Valley Rock Co. (2004) 124 CA4th 276, 21 CR3d 171: §10.100
Save Round Valley Alliance v County of Inyo (2007) 157 CA4th 1437, 70 CR3d 59: §11.50
Save Stanislaus Area Farm Econ. v Board of Supervisors (1993) 13 CA4th 141, 16 CR2d 408: §§3.86, 3.118-3.119, 3.123
Save Tara v City of West Hollywood (2008) 45 C4th 116, 84 CR3d 614: §§11.17-11.18
Save the Welwood Murray Mem. Library Comm. v City Council (1989) 215 CA3d 1003, 263 CR 896: §8.66
Save the Yaak Comm. v Block (9th Cir 1988) 840 F2d 714: §11.285
Schaefer v Berinstein (1956) 140 CA2d 278, 295 P2d 113: §2.164
Schaefer Dixon Assocs. v Santa Ana Watershed Project Auth. (1996) 48 CA4th 524, 55 CR2d 698: §13.29
Schenck v Pro Choice Network of Western New York (1997) 519 US 357, 137 L Ed 2d 1, 117 S Ct 855: §1.59
Schenck v U.S. (1919) 249 US 47, 63 L Ed 470, 39 S Ct 247: §9.136
Schettler v County of Santa Clara (1977) 74 CA3d 990, 141 CR 731: §1.43
Schifando v City of Los Angeles (2003) 31 C4th 1074, 6 CR3d 457: §§4.199, 4.240, 4.258
Schleifer v City of Charlottesville (4th Cir 1998) 159 F3d 843, cert denied (1999) 526 US 1018: §§9.69, 9.134
Schmidt v Southern Cal. Rapid Transit Dist. (1993) 14 CA4th 23, 17 CR2d 340: §§13.66-13.67, 13.69
Schmitz v Younger (1978) 21 C3d 90, 145 CR 517: §§2.216, 3.83, 3.86, 3.118
Schneider v California Coastal Comm'n (2006) 140 CA4th 1339, 44 CR3d 867: §10.318
Schneider v County of San Diego (9th Cir 1994) 28 F3d 89, cert denied (1995) 513 US 1155: §13.116
Schroeder v City of Irvine (2002) 97 CA4th 174, 118 CR2d 330: §3.216
Schroeder v Municipal Court (1977) 73 CA3d 841, 141 CR 85: §12.1
Schultz v Regents of Univ. of Cal. (1984) 160 CA3d 768, 206 CR 910: §4.283
Schwartz v City of Rosemead (1984) 155 CA3d 547, 202 CR 400: §11.67
Scott v City of Indian Wells (1972) 6 C3d 541, 99 CR 745: §10.6
Scott v Los Angeles (1977) 73 CA3d 476, 140 CR 785: §13.66
Scott v McDonnell Douglas Corp. (1974) 37 CA3d 277, 112 CR 609: §§1.226, 13.110
Scott v San Bernardino (1996) 44 CA4th 684, 52 CR2d 161: §5.264
Scott, People v (1993) 20 CA4th Supp 5, 26 CR2d 179: §9.62
Scrutton v County of Sacramento (1969) 275 CA2d 412, 79 CR 872: §§10.128, 13.25
Sebago, Inc. v City of Alameda (1989) 211 CA3d 1372, 259 CR 918: §§9.13, 9.131
Sechrist v Municipal Court (1976) 64 CA3d 737, 134 CR 733: §§12.42-12.43
Secretary of State of Maryland v J.H. Munson Co. (1984) 467 US 947, 81 L Ed 2d 786, 104 S Ct 2839: §9.45
Security Nat'l Guar., Inc. v California Coastal Comm'n (2008) 159 CA4th 402, 71 CR3d 522: §§10.300, 10.318
Security Sav. Bank & Trust Co. v Hinton (1893) 97 C 214, 32 P 3: §1.20
Security Truck Line v City of Monterey (1953) 117 CA2d 441, 256 P2d 366: §5.41
Sehie v City of Aurora (7th Cir 2005) 432 F3d 749: §4.65
Seidler v Municipal Court (1993) 12 CA4th 1229, 16 CR2d 90: §4.279
Selby Realty Co. v City of San Buenaventura (1973) 10 C3d 110, 109 CR 799: §10.147
Seltenreich v Town of Fairbanks (9th Cir 1954) 211 F2d 83: §6.153
Seminole Tribe of Florida v Florida (1996) 517 US 44, 134 L Ed 2d 252, 116 S Ct 1114: §1.93
Semore v Pool (1990) 217 CA3d 1087, 266 CR 280: §§4.98, 4.108
Senate of the State v Jones (1999) 21 C4th 1142, 90 CR2d 810: §3.123
Separation of Church & State Comm. v City of Eugene (9th Cir 1996) 93 F3d 617: §1.62
Serra Canyon Co. v California Coastal Comm'n (2004) 120 CA4th 663, 16 CR3d 110: §10.229
Serrano v Priest (Serrano III) (1977) 20 C3d 25, 141 CR 315: §13.165
Serrano v Unruh (1982) 32 C3d 621, 186 CR 754: §13.165
Servantes, People v (2001) 86 CA4th 1081, 103 CR2d 870: §8.178
Service Employees Int'l Union v Fair Political Practices Comm'n (9th Cir 1992) 955 F2d 1312: §3.187
Sethy v Alameda County Water Dist. (9th Cir 1976) 545 F2d 1157: §§13.32, 13.39
Severns v Union Pac. R.R. Co. (2002) 101 CA4th 1209, 125 CR2d 100: §8.140
Shank v County of Los Angeles (1983) 139 CA3d 152, 188 CR 644: §13.73
Shapiro v Board of Directors (2005) 134 CA4th 170, 35 CR3d 826: §2.92
Shapiro v San Diego City Council (2002) 96 CA4th 904, 117 CR2d 631: §§2.90, 2.113
Shaw v Hunt (1996) 517 US 899, 135 L Ed 2d 207, 116 S Ct 1894: §3.70
Shaw v Reno (1993) 509 US 630, 125 L Ed 2d 511, 113 S Ct 2816: §3.70
Shell Oil Co. v Winterthur Swiss Ins. Co. (1993) 12 CA4th 715, 15 CR2d 815: §§7.254-7.255

Shell Oil Co. , City of Los Angeles v (1971) 4 C3d 108, 93 CR 1, cert denied (1971) 404 US 831: §§5.38-5.39
Shelton v City of Los Angeles (1929) 206 C 544, 275 P 421: §1.47
Shelton v Superior Court (1976) 56 CA3d 66, 128 CR 454: §§13.29, 13.55
Sherwin-Williams Co. v City & County of San Francisco (ND Cal 1994) 857 F Supp 1355: §§9.86, 9.89
Sherwin-Williams Co. v City of Los Angeles (1993) 4 C4th 893, 16 CR2d 215: §§1.37, 9.86, 9.89, 12.66
Sherwin-Williams Co. v South Coast Air Quality Mgmt. Dist. (2001) 86 CA4th 1258, 104 CR2d 288: §11.230
Shinn v Heusner (1949) 91 CA2d 248, 204 P2d 886: §3.126
Shirk v Vista Unified Sch. Dist. (2007) 42 C4th 201, 64 CR3d 210: §13.58
Shpegel-Dimsey, Inc. , City of Los Angeles v (1988) 198 CA3d 1009, 244 CR 507: §§12.66, 13.173
Siegert v Gilley (1991) 500 US 226, 114 L Ed 2d 277, 111 S Ct 1789: §13.126
Sierra Club v _____ (*see* name of defendant)
Sierra Lake Reserve v City of Rocklin (9th Cir 1991) 938 F2d 951, vacated (1992) 506 US 802, 121 L Ed 2d 4, 113 S Ct 31, reinstated in part (9th Cir 1993) 987 F2d 662: §9.49
Silberg v Anderson (1990) 50 C3d 205, 266 CR 638: §13.110
Silicon Valley Taxpayers' Ass'n, Inc. v Santa Clara County Open Space Auth. (2008) 44 C4th 431, 79 CR3d 312: §§5.145, 5.151, 5.176, 13.6, 13.10
Silva v Crain (9th Cir 1999) 169 F3d 608: §13.69
Silveira v Las Gallinas Valley Sanitary Dist. (1997) 54 CA4th 980, 63 CR2d 244: §11.26
Silver v Reagan (1967) 67 C2d 452, 62 CR 424: §3.70
Silverman v U.S. (1961) 365 US 505, 5 L Ed 2d 734, 81 S Ct 679: §1.65
Simi Valley Recreation & Park Dist. v Local Agency Formation Comm'n (1975) 51 CA3d 648, 124 CR 635: §1.112
Simons v City of Los Angeles (1976) 63 CA3d 455, 133 CR 721: §§8.95, 8.98, 9.61Simpson v Bergmann (1932) 125 CA 1, 13 P2d 531: §7.98
Simpson v City of Los Angeles (1953) 40 C2d 271, 253 P2d 464: §§9.162-9.163
Simpson v Hite (1950) 36 C2d 125, 222 P2d 225: §3.111
Simpson v Los Angeles (1935) 4 C2d 60, 47 CR 474: §8.176
Sinaloa Lake Owners Ass'n v City of Simi Valley (9th Cir 1989) 882 F2d 1398, cert denied (1990) 494 US 1016, overruled on other grounds in Armendariz v Penman (9th Cir 1996) 75 F3d 1311: §§10.379, 10.423
Sinclair Oil Corp. v County of Santa Barbara (9th Cir 1996) 96 F3d 401: §10.372
Sinclair Paint Co. v State Bd. of Equalization (1997) 15 C4th 866, 64 CR2d 447: §§5.3, 5.17, 5.72
Singletary v Kelley (1966) 242 CA2d 611, 51 CR 682: §3.137
Six Flags, Inc. v WCAB (2006) 145 CA4th 91, 51 CR3d 377: §4.373
Skaggs v Los Angeles (1954) 43 C2d 497, 275 P2d 9: §4.35
Skelly v State Personnel Bd. (1975) 15 C3d 194, 124 CR 14: §§4.278, 4.280-4.282
Skinner v Railway Labor Executives' Ass'n (1989) 489 US 602, 103 L Ed 2d 639, 109 S Ct 1402: §§4.94, 4.97, 4.110, 6.130
Skorepa v City of Chula Vista (SD Cal 1989) 723 F Supp 1384: §3.68
Skyline Materials, Inc. v City of Belmont (1961) 198 CA2d 449, 18 CR 95: §8.170
Slagle Constr. Co. v County of Contra Costa (1977) 67 CA3d 559, 136 CR 748: §13.4
Slavich v Hamilton (1927) 201 C 299, 257 P 60: §8.98
Sloman v Tadlock (9th Cir 1994) 21 F3d 1462: §13.116
Smiddy v Varney (9th Cir 1986) 803 F2d 1469: §13.133
Smilie v Fresno County (1896) 112 C 311, 44 P 556: §5.293
Smith v _____ (*see* name of defendant)
Smith, Miller v (7th Cir 2000) 220 F3d 491: §13.141
Snarled Traffic Obstructs Progress v City & County of San Francisco (1999) 74 CA4th 793, 88 CR2d 455: §11.45
Sneed v County of Riverside (1963) 218 CA2d 205, 32 CR 318: §6.148
Snipes v City of Bakersfield (1983) 145 CA3d 861, 193 CR 760: §4.253
Snow v City of Garden Grove (1961) 188 CA2d 496, 10 CR 480: §10.107
Snowden, Ex Parte (1910) 12 CA 521, 107 P 724: §1.235
Sobel, People v (1974) 40 CA3d 1046, 115 CR 532: §§2.165-2.166
Social Workers Union Local 535 v Los Angeles County (1969) 270 CA2d 65, 75 CR 566: §8.111
Socialist Party v Uhl (1909) 155 C 776, 103 P 181: §2.15
Socialist Workers Party v March Fong Eu (9th Cir 1978) 591 F2d 1252: §3.46
Societa per Azioni de Navigazione Italia v City of Los Angeles (1982) 31 C3d 446, 183 CR 51, cert denied (1982) 459 US 990: §13.154
Society of Prof. Journalists v Briggs (D Utah 1988) 687 F Supp 1521: §2.116
Solano County Employees' Ass'n v County of Solano (1982) 136 CA3d 256, 186 CR 147: §§4.337-4.338
Solano Garbage Co. v Cheney (ED Cal 1991) 779 F Supp 477: §6.98
Solid Waste Agency v United States Army Corps of Eng'rs (2001) 531 US 159, 148 L Ed 2d 576, 121 S Ct 675: §§10.306, 10.356, 11.176, 11.178, 11.278
Sonleitner, People v (1960) 185 CA2d 350, 8 CR 528: §5.94
Sonoma County Org. of Pub. Employees v County of Sonoma ("Sonoma I") (1979) 23 C3d 296, 152 CR 903: §5.456
Sonoma County Org. of Pub./Private Employees v County of Sonoma (1991) 1 CA4th 267, 1 CR2d 850: §§4.334, 4.348
South Bay Senior Hous. Corp. v City of Hawthorne (1997) 56 CA4th 1231, 66 CR2d 99: §13.174
South Carolina v Baker (1988) 485 US 505, 99 L Ed 2d 592, 108 S Ct 1355: §1.90

South Santa Clara Valley Water Conserv. Dist. v Santa Clara Valley Water Dist. (1978) 76 CA3d 852, 143 CR 193: §§1.8, 1.72
Southeastern Community College v Davis (1979) 442 US 397, 99 S Ct 2361, 60 L. Ed 2d 980: §4.117
Southern Cal. Acoustics Co. v C. V. Holder, Inc. (1969) 71 C2d 719, n7, 79 CR 319: §7.76
Southern Cal. Rapid Transit Dist. v Bolen (1992) 1 C4th 654, 3 CR2d 843: §3.79
Southern Pac. Co. v City of Los Angeles (1966) 242 CA2d 38, 51 CR 197: §10.236
Southern Pac. Transp. Co. v City of Los Angeles (9th Cir 1990) 922 F2d 498, cert denied (1990) 502 US 943: §§10.422-10.423
Southwest Diversified, Inc. v City of Brisbane (1991) 229 CA3d 1548, 280 CR 869: §13.5
Southwestern Cable Co., U.S. v (1968) 392 US 157, 20 L Ed 2d 1001, 88 S Ct 1994: §6.58
Souza & McCue Constr. Co. v Superior Court (1962) 57 C2d 508, 20 CR 634: §13.154
Spencer v Merced County Office of Educ. (1997) 59 CA4th 1429, 69 CR2d 750: §13.73
Spielbauer v County of Santa Clara (2009) 45 C4th 704, 88 CR3d 590: §§4.271, 4.301
Spinks, In re (1967) 253 CA2d 748, 61 CR 743: §9.77
Spires v City of Los Angeles (1906) 150 C 64, 87 P 1026: §8.98
Sports Comm. Dist. 37 AMA, Inc. v County of San Bernardino (1980) 113 CA3d 155, 169 CR 652: §1.41
Spreckels v Graham (1924) 194 C 516, 228 P 1040: §2.177
Springfield v San Diego Unified Port Dist. (SD Cal 1996) 950 F Supp 1482: §9.122
Springs Ambulance Serv. v City of Rancho Mirage (9th Cir 1984) 745 F2d 1270: §13.153
Sprint PCS Assets, L.L.C. v City of Palos Verdes Estates (9th Cir 2009) 583 F3d 716: §§6.91, 10.139
Sprint Telephony PCS, L.P. v County of San Diego (9th Cir 2008) 543 F3d 571, cert denied (2009) ___ US ___, 174 L Ed 2d 576, 129 S Ct 2860: §§6.89, 10.139
Squaw Valley Dev. Co. v Goldberg (9th Cir 2004) 375 F3d 936, overruled in part on other grounds in Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd. (9th Cir 2007) 509 F3d 1020: §§13.116, 13.139
St. Onge, U.S. v (D. Mont. 1988) 676 F Supp 1044: §11.282
St. Vincent's Sch. for Boys v City of San Rafael (2008) 161 CA4th 989, 75 CR3d 213: §§10.86, 11.69
Stacey & Witbeck, Inc. v City & County of San Francisco (1995) 36 CA4th 1074, 44 CR2d 472: §7.114
Stand Tall on Principles v Shasta Union High Sch. Dist. (1991) 235 CA3d 772, 1 CR2d 107: §8.6
Stanley v University of S. Cal. (9th Cir 1999) 178 F3d 1069: §4.143
Stanson v Mott (1976) 17 C3d 206, 130 CR 697: §§2.157, 3.211, 3.214, 3.217
Stanson v San Diego Coast Reg'l Comm'n (1980) 101 CA3d 38, 161 CR 392: §10.305
Stanton v City of W. Sacramento (1991) 226 CA3d 1438, 277 CR 478: §§4.283, 4.288, 4.309
Star-Kist Foods, Inc. v County of Los Angeles (1986) 42 C3d 1, 227 CR 391: §1.104
Stark v Independent Sch. Dist. (8th Cir 1997) 123 F3d 1068, cert denied (1998) 523 US 1094: §1.60
State, City of Los Angeles v (1982) 138 CA3d 526, 187 CR 893: §§1.5, 10.88
State, City of San Jose v (1996) 45 CA4th 1802, 53 CR2d 521: §5.252
State, County of Los Angeles v (1987) 43 C3d 46, 233 CR 38: §5.249
State, County of San Diego v (2008) 164 CA4th 580, 79 CR3d 489: §5.261
State, Johnson v (1968) 69 C2d 782, 73 CR 240: §§13.87, 13.96-13.97
State, Miller v (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607: §9.136
State Bar Ethics Opinion No. 2001-156: §2.192
State Bd. of Equalization v Superior Court (1992) 10 CA4th 1177, 13 CR2d 342: §§2.231-2.233
State Bd. of Equalization v Superior Court (1980) 111 CA3d 568, 169 CR 3: §1.82
State Bldg. & Constr. Trades Council of Cal. v Duncan (2008) 162 CA4th 289, 76 CR3d 507: §§7.85, 7.89
State Bldg. & Constr. Trades Council of Cal., AFL-CIO v City of Vista (review granted Aug. 19, 2009, S173586; superseded opinion at 173 CA4th 567, 93 CR3d 95): §§7.84, 7.173
State Compensation Ins. Fund v WPS, Inc. (1999) 70 CA4th 644, 82 CR2d 799: §2.190
State Farm Fire & Cas. Co. v Eddy (1990) 218 CA3d 958, 267 CR 379: §§7.308-7.309
State Water Resources Control Bd. v Office of Admin. Law (1993) 12 CA4th 697, 16 CR2d 25: §11.128
State Water Resources Control Bd., U.S. v (1986) 182 CA3d 82, 227 CR 161: §11.87
State Water Resources Control Bd. Cases (2006) 136 CA4th 674, 39 CR3d 189: §§10.418, 11.5, 11.87
State ex rel Dep't of Transp. v Superior Court (1984) 159 CA3d 331, 205 CR 518: §13.29
State ex rel Division of Indus. Safety v Superior Court of Los Angeles County (1974) 43 CA3d 778, 117 CR 726: §§2.219, 2.230
State of Cal. v Allstate Ins. Co. (2009) 45 C4th 1008, 90 CR3d 1: §7.268
Stationary Eng'rs v San Juan Suburban Water Dist. (1979) 90 CA3d 796, 153 CR 666, disapproved on other grounds in County Sanitation Dist. No. 2 v Los Angeles County Employees' Ass'n (1985) 38 C3d 564, 214 CR 424: §§4.339, 4.344
Stebbins v Gonzales (1992) 3 CA4th 1138, 5 CR2d 88: §§3.126, 3.134
Steele v Offshore Shipbuilding, Inc. (11th Cir 1989) 867 F2d 1311: §4.219
Steele v Youthful Offender Parole Board (2008) 162 CA4th 1241, 76 CR3d 632: §4.180
Stein v City of Santa Monica (1980) 110 CA3d 458, 168 CR 39: §3.121
Stein v Southern Cal. Edison Co. (1992) 7 CA4th 565, 8 CR2d 907: §6.47
Steiner v Showboat Operating Co. (9th Cir 1994) 25 F3d 1459: §4.197
Steinkamp v Teglia (1989) 210 CA3d 402, 258 CR 265: §1.222
Stengel v Belcher (6th Cir 1975) 522 F2d 438, cert granted (1975) 425 US 910, cert dismissed (1975) 429 US 118: §13.132
Stephens v City of Vista (9th Cir 1993) 994 F2d 650: §10.127
Sterling v Santa Monica Rent Control Bd. (1985) 168 CA3d 176, 214 CR 71: §9.55
Stevens v Corbell (5th Cir 1987) 832 F2d 884, cert denied (1988) 486 US 1033: §13.126

Stevenson v San Francisco Hous. Auth. (1994) 24 CA4th 269, 29 CR2d 398: §13.93
Stewart v City of Pismo Beach (1995) 35 CA4th 1600, 42 CR2d 382: §13.86
Stigall v City of Taft (1962) 58 C2d 565, 25 CR 441: §2.165
Stiles v Blunt (8th Cir 1990) 912 F2d 260: §1.220
Stockley v AT&T Info. Sys., Inc. (ED NY 1988) 687 F Supp 764: §4.209
Stockton Newspapers, Inc. v Redevelopment Agency (1985) 171 CA3d 95, 214 CR 561: §2.54
Stockton Plumbing & Supply Co. v Wheeler (1924) 68 CA 592, 229 P 1020: §2.162
Stockton Unified Sch. Dist. (1980) 4 PERC 11189: §4.129
Stoiber v Honeychuck (1980) 101 CA3d 903, 162 CR 194: §12.10
Stokes v Board of Permit Appeals (1997) 52 CA4th 1348, 61 CR2d 181: §10.428
Stoltenberg, Matter of (1913) 165 C 789, 134 P 971: §10.232
Stotts v Memphis Fire Dep't (6th Cir 1982) 679 F2d 541, rev'd on other grounds (1984) 467 US 561, 81 L Ed 2d 483, 104 S Ct 2576: §4.9
Stromberg, Inc. v Los Angeles County Flood Control Dist. (1969) 270 CA2d 759, 76 CR 183: §13.48
Strother v California Coastal Comm'n (2009) 173 CA4th 873, 92 CR3d 831: §10.288
Strumsky v San Diego County Employees Retirement Ass'n (1974) 11 C3d 28, 112 CR 805: §§4.40, 13.2, 13.5-13.6, 13.18, 13.20
Stubblefield Constr. Co. v City of San Bernardino (1995) 32 CA4th 687, 38 CR2d 413, cert denied (1995) 516 US 913: §§10.421, 10.427, 10.434
Stuessel v City of Glendale (1983) 141 CA3d 1047, 190 CR 773: §4.39
Stump v Sparkman (1978) 435 US 349, 55 L Ed 2d 331, 98 S Ct 1099: §13.125
Sturgeon v County of Los Angeles (2008) 167 CA4th 630, 84 CR3d 242: §5.13
Suitum v Tahoe Reg'l Planning Agency (1997) 520 US 725, 137 L Ed 2d 980, 117 S Ct 1659: §10.374
Sullivan v City of Los Angeles (1953) 116 CA2d 807, 254 P2d 590: §12.1
Summerford v Board of Retirement (1977) 72 CA3d 128, 139 CR 814: §4.39
Sundstrom v County of Mendocino (1988) 202 CA3d 296, 248 CR 352: §§11.26, 11.31
Sunset Drive Corp. v City of Redlands (1999) 73 CA4th 215, 86 CR2d 209: §11.57
Superior Court (Axelrad), County of Los Angeles v (2000) 82 CA4th 819, 98 CR2d 564: §2.230
Superior Court (Oronoz), County of Los Angeles v (2008) 159 CA4th 353, 71 CR3d 485: §5.93
Superior Court (Williamson), City of Los Angeles v (2003) 111 CA4th 883, 3 CR3d 915: §2.247
Superior Court, City of Los Angeles v (1996) 41 CA4th 1083, 49 CR2d 35: §2.245
Superior Court, City of Oakland v (1996) 45 CA4th 740, 53 CR2d 120: §§9.18, 10.138, 12.3
Superior Court, City of San Jose v (1974) 12 C3d 447, 115 CR 797: §§5.93, 13.32, 13.45, 13.54
Superior Court, City of San Jose v (1999) 74 CA4th 1008, 88 CR2d 552: §2.257
Superior Court, City of San Jose v (Thompson) (1995) 32 CA4th 330, 38 CR2d 205, cert denied (1995) 516 US 932: §1.59
Superior Court, County of Los Angeles v (1993) 18 CA4th 588, 22 CR2d 409: §2.230
Superior Court, County of Los Angeles v (1999) 21 C4th 292, 87 CR2d 441: §13.146
Superior Court, County of Los Angeles v (2005) 130 CA4th 1099, 30 CR3d 708: §2.110
Superior Court, People v (Caswell) (1988) 46 C3d 381, 250 CR 515: §§9.101-9.102
Superior Court, People v (Humberto S.) (2008) 43 C4th 737, 76 CR3d 276: §2.212
Superior Court, People v (Lucero) (1989) 49 C3d 14, 259 CR 740: §10.132
Superior Court, State v (Veta Co.) (1974) 12 C3d 237, 115 CR 497: §13.5
Superior Court, State v (Bodde) (2004) 32 C4th 1234, 13 CR3d 534: §§13.13, 13.28
Superior Court, State v (Fogerty) (1981) 29 C3d 240, 172 CR 713, cert denied (1981) 454 US 865: §10.340
Superior Court, State v (Lyon) (1981) 29 C3d 210, 172 CR 696: §10.340
Superior Court of Sacramento County, State v (1978) 86 CA3d 475, 150 CR 308, overruled on other grounds in Hernandez v County of Los Angeles (1986) 42 C3d 1020, 232 CR 519: §13.84
Superior Court, Williams v (1993) 5 C4th 337, 19 CR2d 882: §§2.220, 2.251
Supreme Court of Virginia v Consumers Union (1980) 446 US 719, 64 L Ed 2d 641, 100 S Ct 1967: §§13.124-13.125
Surfside Colony Ltd. v California Coastal Comm'n (1991) 226 CA3d 1260, 277 CR 371: §10.219
Susan A. v County of Sonoma (1991) 2 CA4th 88, 3 CR2d 27: §13.110
Suter v City of Lafayette (1997) 57 CA4th 1109, 67 CR2d 420: §9.96
Sutter's Place Inc. v Superior Court (City of San Jose) (2008) 161 CA4th 1370, 75 CR3d 9: §§2.36, 2.241
Suzuki v City of Los Angeles (1996) 44 CA4th 263, 51 CR2d 880: §12.3
Swanson v Marin Mun. Water Dist. (1976) 56 CA3d 512, 128 CR 485: §10.202
Sweesy v Los Angeles County Peace Officers' Retirement Bd. (1941) 17 C2d 356, 110 P2d 37: §4.35
Swenson v Potter (9th Cir 2001) 271 F3d 1184: §4.208
Swift v County of Placer (1984) 153 CA3d 209, 200 CR 181: §4.309
Swink, People v (1984) 150 CA3d 1076, 198 CR 290, superseded by statute on other grounds as stated in People v American Bankers Ins. Co. (1991) 227 CA3d 1289, 278 CR 314: §12.78

T

T & R Painting Constr., Inc. v St. Paul Fire & Marine Ins. Co. (1994) 23 CA4th 738, 29 CR2d 199: §7.97
Tahoe Reg'l Planning Agency v King (1991) 233 CA3d 1365, 285 CR 335: §9.144
Tahoe Vista Concerned Citizens v County of Placer (2000) 81 CA4th 577, 96 CR2d 880: §§11.62, 13.13
Tahoe-Sierra Preservation Council, Inc. v Tahoe Reg'l Planning Agency (2002) 535 US 302, 152 L Ed 2d 517, 122 S Ct 1465:

§§10.210, 10.365, 10.372, 10.383-10.387
Tammen v County of San Diego (1967) 66 C2d 468, 58 CR 249: §13.74
Taxpayers for Livable Communities v City of Malibu (2005) 126 CA4th 1123, 24 CR3d 493: §2.38
Taxpayers for Vincent, City of Los Angeles v (1984) 466 US 789, 80 L Ed 2d 772, 104 S Ct 2118: §§2.247, 9.103, 9.122, 9.143
Taxpayers to Limit Campaign Spending v Fair Political Practices Comm'n (1990) 51 C3d 744, 274 CR 787: §§3.93, 3.187
Taylor v List (9th Cir 1989) 880 F2d 1040: §13.142
Taylor Bus Serv., Inc. v San Diego Bd. of Educ. (1987) 195 CA3d 1331, 241 CR 379: §§7.15, 7.18, 7.20
Teall v City of Cudahy (1963) 60 C2d 431, 34 CR 869: §13.106
Temecula Band of Luiseno Mission Indians v Rancho Cal. Water Dist. (1996) 43 CA4th 425, 50 CR2d 769: §11.37
Tennessee Valley Auth. v Hill (1978) 437 US 153, 57 L Ed 2d 117, 98 S Ct 2279: §§11.258, 11.269, 11.281
Tennessee Valley Auth. v Whitman (11th Cir 2003) 336 F3d 1236, cert denied sub nom Leavitt v Tennessee Valley Auth. (2004) 541 US 1030: §11.223
Tenney v Brandhove (1951) 341 US 367, 95 L Ed 1019, 71 S Ct 783: §13.125
Teresi v State (1986) 180 CA3d 239, 225 CR 517: §13.65
Terminal Plaza Corp. v City & County of San Francisco (1986) 177 CA3d 892, 223 CR 379: §§2.32, 10.420
Terminals Equip. Co. v City & County of San Francisco (1990) 221 CA3d 234, 270 CR 329: §10.373
Terry v Bender (1956) 143 CA2d 198, 300 P2d 119: §2.174
Terry v Ohio (1968) 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868: §13.116
Tessier v City of Newport Beach (1990) 219 CA3d 310, 268 CR 233: §13.106
Tevis v City & County of San Francisco (1954) 43 C2d 190, 272 P2d 757: §1.44
Thain v City of Palo Alto (1962) 207 CA2d 173, 24 CR 515: §§12.66, 12.68
The Pines v City of Santa Monica (1981) 29 C3d 656, 175 CR 336: §5.60
Thirteen Comm. v Weinreb (1985) 168 CA3d 528, 214 CR 297: §§3.190, 3.205
Thomas v City of East Palo Alto (1997) 53 CA4th 1084, 62 CR2d 185: §§5.18, 5.21
Thomas v Peterson (9th Cir 1985) 753 F2d 754: §§11.268, 11.280
Thomas v Sports Chalet, Inc. (1977) 42 CCC 625: §4.388
Thomas, In re (1909) 10 CA 375, 102 P 19: §8.177
Thomas, People v (1987) 43 C3d 818, 239 CR 307: §12.43
Thomas, U.S. v (DC Cir 1988) 864 F2d 188: §9.63
Thomas, J.L., Inc. v County of Los Angeles (1991) 232 CA3d 916, 283 CR 815: §9.12
Thompson v City of Lake Elsinore (1993) 18 CA4th 49, 22 CR2d 344: §§10.245, 13.94
Thompson, People v (2006) 38 C4th 811, 43 CR3d 750: §13.116
Thompson, J.H., Corp. v DC Contractors (1992) 4 CA4th 1355, 7 CR2d 604: §7.123
Thomson v Call (1985) 38 C3d 633, 214 CR 139, cert denied (1986) 474 US 1057: §§2.162-2.164, 2.166, 2.172
Thorn v City of Glendale (1994) 28 CA4th 1379, 35 CR2d 1: §§13.88, 13.132
Thornburg v Gingles (1986) 478 US 30, 92 L Ed 2d 25, 106 S Ct 2752: §3.68
Thornhill v Alabama (1940) 310 US 88, 60 S Ct 736, 84 L Ed 1093: §9.110
Tidewater Southern Ry., Co. v Jordan (1912) 163 C 105, 124 P 716: §5.116
Tielsch v City of Anaheim (1984) 160 CA3d 570, 206 CR 738: §4.297
Tiernan v Trustees of Cal. State Univ. & Colleges (1982) 33 C3d 211, 188 CR 115: §13.13
Tietz v Los Angeles Unified Sch. Dist. (1965) 238 CA2d 905, 48 CR 245: §13.29
Timberidge Enters., Inc. v City of Santa Rosa (1978) 86 CA3d 873, 150 CR 606: §1.109
Times Mirror Co. v City of Los Angeles (1987) 192 CA3d 170, 237 CR 346: §5.97
Times Mirror Co. v Superior Court (1991) 53 C3d 1325, 283 CR 893: §2.241
Titan Elec. Corp. v Los Angeles Unified Sch. Dist. (2008) 160 CA4th 188, 72 CR3d 570: §7.78
Titus v Los Angeles County Civil Serv. Comm'n (1982) 130 CA3d 357, 181 CR 699: §4.281
T-Mobile USA Inc., Smith v (9th Cir 2009) 570 F3d 1119: §4.88
Tobe v City of Santa Ana (1995) 9 C4th 1069, 40 CR2d 402: §§9.61, 9.63
Tolan v State ex rel Dep't of Transp. (1979) 100 CA3d 980, 161 CR 307: §13.100
Tolman, People v (1980) 110 CA3d Supp 6, 168 CR 328: §8.165
Topanga Ass'n for a Scenic Community v County of Los Angeles (1974) 11 C3d 506, 113 CR 836: §§3.108, 4.288, 6.149, 9.57, 10.100, 10.104, 10.115, 10.117, 13.16-13.17, 13.19
Topanga Press, Inc. v City of Los Angeles (9th Cir 1993) 989 F2d 1524, cert denied (1994) 511 US 1030: §10.131
Torre v Barry (DC Cir 1981) 661 F2d 1371: §4.154
Toscano v County of Los Angeles (1979) 92 CA3d 775, 155 CR 146: §§13.29, 13.55, 13.72, 13.85
Tosco Corp., Johnson v (1991) 1 CA4th 123, 1 CR2d 747: §7.220
Touchton v City of Fort Pierce (5th Cir 1940) 109 F2d 370: §5.449
Town of Castle Rock v Gonzales (2005) 545 US 748, 162 L Ed 2d 658, 125 S Ct 2796: §13.116
Town of Hallie v City of Eau Claire (1985) 471 US 34, 85 L Ed 2d 24, 105 S Ct 1713: §13.153
Town of Los Altos Hills v Adobe Creek Props., Inc. (1973) 32 CA3d 488, 108 CR 271: §13.12
Townsel v San Diego Metro. Transit Board (1998) 65 CA4th 940, 77 CR2d 231: §13.15
Trader Joe's Co. v Progressive Campaigns, Inc. (1999) 73 CA4th 425, 86 CR2d 442: §9.156
Traders Sports, Inc. v City of San Leandro (2001) 93 CA4th 37, 112 CR2d 677: §§5.16, 5.105, 5.108, 5.115
Train v Natural Resources Defense Council (1975) 421 US 60, 43 L Ed 2d 731, 95 S Ct 1470: §11.212
Trancas Prop. Owners Ass'n v City of Malibu (2006) 138 CA4th 172, 41 CR3d 200: §§2.92, 10.128

Transport Indem. Co. v Financial Trust Co. (CD Cal 1972) 339 F Supp 405: §13.151
Transport Workers' Union v Southeastern Pennsylvania Transp. Auth. (3d Cir 1988) 884 F2d 709: §§4.102, 4.107
Transportation Agency, Santa Clara County, Johnson v (1987) 480 US 616, 94 L Ed 2d 615, 107 S Ct 1442: §§4.7, 4.9
Transportation Leasing Co. v State (CD Cal 1993) 861 F Supp 931: §6.100
Trantham, People v (1984) 161 CA3d Supp 1, 208 CR 535: §§9.61, 9.81
Trautvetter v Quick (7th Cir 1990) 916 F2d 1140: §4.190
Traver v Meshriy (9th Cir 1980) 627 F2d 934: §13.132
Travers, People v (1975) 52 CA3d 111, 124 CR 728: §12.45
Traverso v People ex rel Dep't of Transp. (1996) 46 CA4th 1197, 54 CR2d 434: §13.157
Travis v County of Santa Cruz (2004) 33 C4th 757, 16 CR3d 404: §§10.229, 10.380
Traweek v City & County of San Francisco (9th Cir 1990) 920 F2d 589: §13.153
Trebilcox v City of Sacramento (1928) 91 CA 257, 266 P 1015: §1.235
Trent Meredith, Inc. v City of Oxnard (1981) 114 CA3d 317, 170 CR 685: §§5.17, 5.66, 10.213, 10.216
Trevino v Gates (9th Cir 1996) 99 F3d 911: §§13.89, 13.126, 13.156
Trevino v Gates (9th Cir 1994) 23 F3d 1480, cert denied (1994) 513 US 932: §§13.89, 13.125, 13.156
Tribal Village of Akutan v Hodel (9th Cir 1988) 869 F2d 1185, cert denied (1989) 493 US 873: §11.284
Triplett Grille, Inc. v City of Akron (6th Cir 1994) 40 F3d 129: §9.6
Trujillo v Superior Court (1983) 148 CA3d 368, 196 CR 4: §2.212
Tsingaris v State (1979) 91 CA3d 312, 154 CR 135: §13.83
Tudyman v United Airlines (CD Cal 1984) 608 F Supp 739: §4.226
Tulare County v City of Dinuba (1922) 188 C 664, 206 P 983: §5.188
Tunkl v Regents of Univ. of Cal. (1963) 60 C2d 92, 32 CR 33: §7.222
Turlock Irrig. Dist. v Hetrick (1999) 71 CA4th 948, 84 CR2d 175: §§1.8, 1.73
Turner v Anheuser-Busch, Inc. (1994) 7 C4th 1238, 32 CR2d 223: §4.220
Turner v County of Del Norte (1972) 24 CA3d 311, 101 CR 93: §10.137
Turner v State (1991) 232 CA3d 883, 284 CR 349: §§13.45, 13.108
Turner Broadcasting System, Inc. v FCC (1994) 512 US 622, 129 L Ed 2d 497, 114 S Ct 2445: §6.87
Turpen v City of Corvallis (9th Cir 1994) 26 F3d 978, cert denied (1994) 513 US 963: §13.140
Turtle Island Restoration Network v National Marine Fisheries Serv. (9th Cir 2003) 340 F3d 969: §11.267
Turturici v City of Redwood City (1987) 190 CA3d 1447, 236 CR 53: §§4.283, 4.297
Turudich v Industrial Accident Comm'n (1965) 237 CA2d 455, 47 CR 21: §4.384
Tutor-Saliba Corp. v City of Hailey (9th Cir 2006) 452 F3d 1055: §13.145
Twain Harte Homeowners Ass'n v County of Tuolumne (1982) 138 CA3d 664, 188 CR 233: §10.21
Twyford v Twyford (1976) 63 CA3d 916, 134 CR 145: §13.110

U

U.C. Nuclear Weapons Labs Conversion Project v Lawrence Livermore Lab. (1984) 154 CA3d 1157, 201 CR 837: §3.149
U.S. Labor Party v Pomerleau (4th Cir 1977) 557 F2d 410: §9.110
U.S.A. Recycling, Inc. v Town of Babylon (2d Cir 1995) 66 F3d 1272, cert denied (1996) 517 US 1135: §6.101
Uhler v City of Encinitas (1991) 227 CA3d 795, 278 CR 157: §8.155
Umpqua River & Nav. Co. v Crescent City Harbor Dist. (9th Cir 1980) 618 F2d 588: §7.107
United Air Lines v County of San Diego (1991) 1 CA4th 418, 2 CR2d 212: §5.23
United Artists Communications, Inc. v City of Montclair (1989) 209 CA3d 245, 257 CR 124, cert denied (1989) 493 US 918: §5.61
United Auto Workers, Local 887 v Department of Transp. (1993) 20 CA4th 1462, 25 CR2d 290: §§8.3, 8.14
United Bhd. of Carpenters & Joiners v Scott (1983) 463 US 825, 77 L Ed 2d 1049, 103 S Ct 3352: §4.161
United Bldg. & Constr. Trades Council of Camden County & Vicinity v City of Camden (1984) 465 US 208, 79 L Ed 2d 249, 104 S Ct 1020: §7.198
United Bus. Comm'n v City of San Diego (1979) 91 CA3d 156, 154 CR 263: §§5.160-5.161, 9.142
United Farm Workers v Dutra Farms (2000) 83 CA4th 1146, 100 CR2d 251: §10.112
United Food & Commercial Workers Union, Local No. 324, AFL-CIO, CLC v Superior Court (2000) 83 CA4th 566, 99 CR2d 849: §9.156
United Haulers Ass'n, Inc. v Oneida-Herkimer Solid Waste Mgmt. Auth. (2007) 550 US 330, 167 L Ed 2d 655, 127 S Ct 1786: §6.101
United Mine Workers v Gibbs (1966) 383 US 715, 16 L Ed 2d 218, 86 S Ct 1130, superseded by statute as stated in Grube v Miller (ED Mich 2009) 2009 US Dist Lexis 117907: §13.159
United Pub. Employees Local 790 v City & County of San Francisco (1997) 53 CA4th 1021, 62 CR2d 440: §6.131
United States Dep't of Transp., City of Los Angeles v (DC Cir 1999) 165 F3d 972: §6.141
United Steelworkers of Am. v Weber (1979) 443 US 193, 61 L Ed 2d 480, 99 S Ct 2721: §§4.7, 4.9
Uphold Our Heritage v Town of Woodside (2007) 147 CA4th 587, 54 CR3d 366: §§11.50, 11.52
Upland Police Officers Ass'n v City of Upland (2003) 111 CA4th 1294, 4 CR3d 629: §4.300
Upton v Gray (1969) 269 CA2d 352, 74 CR 783: §10.99
Usher v County of Monterey (1998) 65 CA4th 210, 76 CR2d 274: §4.39

V

Vallerga, People v (1977) 67 CA3d 847, 136 CR 429: §§2.164, 2.166

Valley Bank of Nevada v Superior Court of San Joaquin County (1975) 15 C3d 652, 125 CR 553: §4.130
Valley Crest Landscape Inc. v City Council (1996) 41 CA4th 1432, 49 CR2d 184: §7.18
Valley Vista Servs., Inc. v City of Monterey Park (2004) 118 CA4th 881, 13 CR3d 433: §6.96
Van Orden v Perry (2005) 545 US 677, 162 L Ed 2d 607, 125 S Ct 2854: §§1.62, 13.116
Van't Rood v Santa Clara County (2003) 113 CA4th 549, 6 CR3d 746: §10.156
Vance v Villa Park Mobilehome Estates (1995) 36 CA4th 698, 42 CR2d 723: §9.59
Vanelli v Reynolds Sch. Dist. No. 7 (9th Cir 1982) 667 F2d 773: §4.286
Vargas v City of Salinas (2009) 46 C4th 1, 92 CR3d 286: §§2.157, 3.211, 3.214
Vedder v County of Imperial (1974) 36 CA3d 654, 111 CR 728: §12.3
Vega v City of W. Hollywood (1990) 223 CA3d 1342, 273 CR 243: §§9.50-9.51
Venegas v County of Los Angeles (2007) 153 CA4th 1230, 63 CR3d 741: §13.128
Venegas v Mitchell (1990) 495 US 82, 109 L Ed 2d 74, 110 S Ct 1679: §13.160
Venerable v City of Sacramento (ED Cal 2002) 185 F Supp 2d 1128: §13.146
Venice Canals Resident Homeowners Ass'n v Superior Court (1977) 72 CA3d 675, 140 CR 361: §10.323
Ventura Mobilehome Communities Owners Ass'n v City of San Buenaventura (9th Cir 2004) 371 F3d 1046: §10.379
Venuto v Owens Corning Fiberglass Corp. (1971) 22 CA3d 116, 99 CR 350: §§9.115-9.116
Vera v Bethlehem Steel Corp. (MD Pa 1978) 448 F Supp 610: §4.151
Verner, Hilby & Dunn v City of Monte Sereno (1966) 245 CA2d 29, 53 CR 592: §9.3
Vernon Fire Fighters v City of Vernon (1980) 107 CA3d 802, 165 CR 908: §§4.334, 4.344
Verrilli v City of Concord (9th Cir 1977) 548 F2d 262: §9.143
Versaci v Superior Court (2005) 127 CA4th 805, 26 CR3d 92: §4.127
Vial v City of San Diego (1981) 122 CA3d 346, 175 CR 647: §§7.84, 7.173
Vickers, People v (1972) 8 C3d 451, 105 CR 305: §12.61
Village Laguna of Laguna Beach, Inc. v Board of Supervisors (1982) 134 CA3d 1022, 185 CR 41: §11.52
Village of Euclid v Ambler Realty Co. (1926) 272 US 365, 71 L Ed 303, 47 S Ct 114: §§10.85, 10.425, 10.432, 13.26
Village of Schaumburg v Citizens for a Better Environment (1980) 444 US 620, 63 L Ed 2d 73, 100 S Ct 826: §9.125
Village of Willowbrook v Olech (2000) 528 US 562, 145 L Ed 2d 1060, 120 S Ct 1073: §§10.437, 13.139
Villarino, People v (1955) 134 CA2d Supp 893, 286 P2d 86: §9.78
Vineyard Area Citizens for Responsible Growth, Inc. v City of Rancho Cordova (2007) 40 C4th 412, 53 CR3d 821: §§11.74, 11.98, 11.100
Vinson v Thomas (9th Cir 2002) 288 F3d 1145: §4.156
Virginia v Black (2003) 538 US 343, 155 L Ed 2d 535, 123 S Ct 1536: §2.24
Vo v City of Garden Grove (2004) 115 CA4th 425, 9 CR3d 257: §§9.128, 10.110
Voinovich v Quilter (1993) 507 US 146, 122 L Ed 2d 500, 113 S Ct 1149: §3.71
Volkswagen Pac., Inc. v City of Los Angeles (1972) 7 C3d 48, 101 CR 869: §5.40
Vollstedt v City of Stockton (1990) 220 CA3d 265, 269 CR 404: §4.288
Von Durjais v Board of Trustees (1978) 83 CA3d 681, 148 CR 192: §13.157
Voters for Responsible Retirement v Board of Supervisors (1994) 8 C4th 765, 35 CR2d 814: §3.112
Voth v Wasco Pub. Util. Dist. (1976) 56 CA3d 353, 128 CR 608: §§13.29, 13.55

W

W.F. Hayward v Transamerica Ins. Co. (1993) 16 CA4th 1101, 20 CR2d 468: §7.119
Wade v Campbell (1962) 200 CA2d 54, 19 CR 173: §9.160
Wade, Smith v (1983) 461 US 30, 75 L Ed 2d 632, 103 S Ct 1625: §§4.160, 13.115, 13.123, 13.147
Wal-Mart Stores, Inc. v City of Turlock (2006) 138 CA4th 273, 41 CR3d 420: §§10.146, 11.44
Walker v City of Berkeley (9th Cir 1991) 951 F2d 182: §§2.208, 4.288
Walker v Salinas (1976) 56 CA3d 711, 128 CR 832: §5.305
Wallace v Kato (2007) 549 US 384, 166 L Ed 2d 973, 127 S Ct 1091: §13.152
Walt Rankin & Assocs., Inc. v City of Murrieta (2000) 84 CA4th 605, 101 CR2d 48: §7.101
Walter v Adams (1952) 110 CA2d 484, 243 P2d 21: §1.192
Walter H. Leimert Co. v California Coastal Comm'n (1983) 149 CA3d 222, 196 CR 739: §10.324
Walters v City of Atlanta (11th Cir 1986) 803 F2d 1135: §13.146
Walters v Weed (1988) 45 C3d 1, 246 CR 5: §§1.191, 3.63
Walton, People v (1945) 70 CA2d Supp 862, 161 P2d 498: §9.72
Ward v Caulk (9th Cir 1981) 650 F2d 1144: §13.113
Ward v Rock Against Racism (1989) 491 US 781, 105 L Ed 2d 661, 109 S Ct 2746: §§3.180, 9.10, 9.120, 9.131
Ward v San Diego (9th Cir 1986) 791 F2d 1329, cert denied (1987) 483 US 1020: §13.126
Ward v Superior Court (1977) 70 CA3d 23, 138 CR 532: §2.192
Warnock v WCAB (1997) 62 CCC 406: §4.381
Washington v City & County of San Francisco (1990) 219 CA3d 1531, 269 CR 58: §13.106
Washington v Lambert (9th Cir 1996) 98 F3d 1181: §13.126
Washington Int'l Ins. Co. v Superior Court (1998) 62 CA4th 981, 73 CR2d 282: §7.97
Waste Mgmt. of Alameda County v County of Alameda (2000) 79 CA4th 1223, 94 CR2d 740: §11.65
Waste Mgmt. of Alameda County, Inc. v Biagini Waste Reduction Sys., Inc. (1998) 63 CA4th 1488, 74 CR2d 676: §6.101
Waste Mgmt. of the Desert, Inc. v Palm Springs Recycling Ctr., Inc. (1994) 7 C4th 478, 28 CR2d 461: §§6.95, 6.103

Watchtower Bible & Tract Soc'y, Inc. v Village of Stratton (2002) 536 US 150, 153 L Ed 2d 205, 122 S Ct 2080: §§9.45, 9.128, 9.152
Watson v Nationwide Ins. Co. (9th Cir 1987) 823 F2d 360: §4.219
Watson v State (1993) 21 CA4th 836, 26 CR2d 262: §13.45
Watson, People v (1971) 15 CA3d 28, 92 CR 860: §2.166
Watts v Valley Med. Ctr. (1992) 8 CA4th 1050, 10 CR2d 794: §13.62
We Care—Santa Paula v Herrera (2006) 139 CA4th 387, 42 CR3d 577: §3.95
Web Serv. Co. v Spencer (1967) 252 CA2d 827, 61 CR 493: §5.41
Weber v City Council (1973) 9 C3d 950, 109 CR 553: §§1.1, 9.84, 10.434
Wedges/Ledges of Cal., Inc v City of Phoenix (9th Cir 1994) 24 F3d 56: §10.421
Weekes v City of Oakland (1978) 21 C3d 386, 146 CR 558: §5.34
Weidenfeller v Star & Garter (1991) 1 CA4th 1, 2 CR2d 14: §13.182
Weinstein v Department of Transp. (2006) 139 CA4th 52, 42 CR3d 417: §13.93
Weisblat v City of San Diego (2009) 176 CA4th 1022, 98 CR3d 366: §5.72
Wesberry v Sanders (1964) 376 US 1, 11 L Ed 2d 481, 84 S Ct 526: §§3.70, 3.78
Wesley Inv. Co. v County of Alameda (1984) 151 CA3d 672, 198 CR 872: §10.147
West v Atkins (1988) 487 US 42, 101 L Ed 2d 40, 108 S Ct 2250: §13.132
West Coast Adver. Co. v San Francisco (1939) 14 C2d 516, 95 P2d 138: §§1.20, 9.2
West Hollywood Concerned Citizens v City of West Hollywood (1991) 232 CA3d 486, 283 CR 470: §§9.50-9.51
West Side Irrig. Dist., Sierra Club v (2005) 128 CA4th 690, 27 CR3d 223: §11.92
Westcon Constr. Corp. v County of Sacramento (2007) 152 CA4th 183, 61 CR3d 89: §13.47
Western Aggregates, Inc. v County of Yuba (2002) 101 CA4th 278, 130 CR2d 436: §8.74
Western Air Lines, Inc., City & County of San Francisco v (1962) 204 CA2d 105, 22 CR 216: §1.23
Western Oil & Gas Ass'n v Monterey Bay Unified Air Pollution Control Dist. (1989) 49 C3d 408, 261 CR 384: §1.39
Western Placer Citizens for an Agric. & Rural Env't v County of Placer (2006) 144 CA4th 890, 50 CR3d 799: §11.98
Western States Petroleum Ass'n v Superior Court (1995) 9 C4th 559, 38 CR2d 139: §§11.75, 13.3, 13.5, 13.9, 13.21
Westfield-Palos Verdes Co. v City of Rancho Palos Verdes (1977) 73 CA3d 486, 141 CR 36: §5.60
Westinghouse Elec. Corp. v County of Los Angeles (1982) 129 CA3d 771, 181 CR 332: §7.122
Wheeler v County of San Bernardino (1978) 76 CA3d 841, 143 CR 295: §§13.29, 13.45, 13.69-13.70
Whispering Pines Mobile Home Park, Ltd. v City of Scotts Valley (1986) 180 CA3d 152, 225 CR 364: §§9.51, 9.57
White v City of Norwalk (9th Cir 1990) 900 F2d 1421: §§1.224, 2.16-2.18, 2.20, 2.22, 2.24, 2.27, 2.81, 9.121, 13.116
White v City of Sparks (9th Cir 2007) 500 F3d 953: §9.128
White v County of Orange (1985) 166 CA3d 566, 212 CR 493: §13.132
White v County of Sacramento (1982) 31 C3d 676, 183 CR 520: §4.296
White v Frank (2d Cir 1988) 855 F2d 956: §13.133
White v State (2001) 88 CA4th 298, 105 CR2d 714: §§1.5, 5.279
White v Superior Court (1990) 225 CA3d 1505, 275 CR 706: §13.45
White v Washington Pub. Power Supply Sys. (9th Cir 1982) 692 F2d 1286: §4.261
White, E.L., Inc. v City of Huntington Beach (1978) 21 C3d 497, 146 CR 614: §§7.217, 7.310-7.311, 13.180
Whiteley v Philip Morris, Inc. (2004) 117 CA4th 635, 11 CR3d 807: §13.104
Whitmire v City of Eureka (1972) 29 CA3d 28, 105 CR 185: §1.242
Widders v Furchtenicht (2008) 167 CA4th 769, 84 CR3d 428: §§2.216, 3.83, 3.86, 3.109, 3.117
Wilkins v City of San Bernardino (1946) 29 C2d 332, 175 P2d 542: §§13.10, 13.25
Wilkinson v Lund (1929) 102 CA 767, 283 P 385: §1.2
Wilkinson v Times Mirror Corp. (1989) 215 CA3d 1034, 264 CR 194: §§4.99-4.100, 4.112
Wilkinson, People v (1967) 248 CA2d Supp 906, 56 CR 261: §9.155
Willard v City of Los Angeles (9th Cir 1986) 803 F2d 526: §13.160
William Inglis & Sons Baking Co. v ITT Continental Baking Co. (9th Cir 1975) 526 F2d 86: §13.148
William R. Clarke Corp. v Safeco Ins. Co. (1997) 15 C4th 882, 64 CR2d 578: §7.120
William S. Hart Union High Sch. Dist. v Regional Planning Comm'n (1991) 226 CA3d 1612, 277 CR 645: §10.216
Williams v _____ (*see* name of defendant)
Williams, City of Oakland v (1940) 15 C2d 542, 103 P2d 168: §1.76
Williams, People v (1944) 24 C2d 848, 151 P2d 244: §12.64
Williams Communications, LLC, Williams v v City of Riverside (2003) 114 CA4th 642, 8 CR3d 96: §6.90
Williams, D.H., Constr., Inc. v Clovis Unified Sch. Dist. (2007) 146 CA4th 757, 53 CR3d 345: §7.20, 7.229
Williamson County Reg'l Planning Comm'n v Hamilton Bank (1985) 473 US 172, 87 L Ed 2d 126, 105 S Ct 3108: §§10.369, 10.374, 10.376, 10.379, 10.404, 10.423
Willingham Bus Lines, Inc. v Municipal Court for the San Diego Judicial Dist. of San Diego County (1967) 66 C2d 893, 59 CR 618: §5.95
Willmon v Powell (1928) 91 CA 1, 266 P 1029: §5.2
Willner v Thornburgh (DC Cir 1991) 928 F2d 1185, cert denied (1991) 502 US 1020: §4.100
Wilms v Hand (1951) 101 CA2d 811, 226 P2d 728: §9.160
Wilson v City of Laguna Beach (1992) 6 CA4th 543, 7 CR2d 848: §13.177
Wilson v Garcia (1985) 471 US 261, 85 L Ed 2d 254, 105 S Ct 1938: §§4.159, 13.152
Wilson v Layne (1999) 526 US 603, 143 L Ed 2d 818, 119 S Ct 1692: §13.116

Wilson v San Francisco Redev. Agency (1977) 19 C3d 555, 138 CR 720: §13.36
Wilson v Seiter (1991) 501 US 294, 115 L Ed 2d 271, 111 S Ct 2321: §13.139
Wilson v Superior Court (1996) 51 CA4th 1136, 59 CR2d 537: §2.241
Wilson v Tri-City Hosp. Dist. (1990) 221 CA3d 441, 270 CR 436: §13.46
Wiltshire v Superior Court (1985) 172 CA3d 296, 218 CR 199: §§1.27, 3.108, 3.112
Winkelman v City of Tiburon (1973) 32 CA3d 834, 108 CR 415: §§5.279, 8.80
Winn v Board of Pension Comm'rs (1983) 149 CA3d 532, 197 CR 111: §§4.39, 4.369
Winslow v City of Pasadena (1983) 34 C3d 66, 192 CR 629: §4.39
Winson, People v (1981) 29 C3d 711, 175 CR 621, cert denied (1981) 455 US 975: §12.63
Winter v Natural Resources Defense Council, Inc. (2008) ___ US ___, 172 L Ed 2d 249, 129 S Ct 365: §11.283
Wisconsin Pub. Intervenor v Mortier (1991) 501 US 597, 115 L Ed 2d 532, 111 S Ct 2476: §§1.33-1.34
Witt v Morrow (1977) 70 CA3d 817, 139 CR 161: §2.130
Witt Home Ranch, Inc. v County of Sonoma (2008) 165 CA4th 543, 81 CR3d 123: §10.160
Wolfe v City of Fremont (2006) 144 CA4th 533, 50 CR3d 524: §§2.40-2.41
Wollam v City of Palm Springs (1963) 59 C2d 276, 29 CR 1: §§9.108, 9.111
Woodland Hills Residents Ass'n v City Council (1980) 26 C3d 938, 164 CR 255: §10.416
Woodland Hills Residents Ass'n v City Council (1979) 23 C3d 917, 154 CR 503: §§13.163, 13.165
Woods v New York (SD NY 1979) 469 F Supp 1127, aff'd (2d Cir 1979) 614 F2d 1293: §4.150
Woodward v City of Worland (10th Cir 1992) 977 F2d 1392: §4.210
Woodward Park Homeowners Ass'n, Inc. v City of Fresno (2007) 150 CA4th 683, 58 CR3d 102: §11.37
Woodward Park Homeowners Ass'n, Inc. v Garreks, Inc. (2000) 77 CA4th 880, 92 CR2d 268: §11.76
Woosley v State (1992) 3 C4th 758, 13 CR2d 30: §9.4
Workers' Compensation Appeals Bd. (Engler), City & County of San Francisco v (1968) 267 CA2d 771, 73 CR 429: §4.371
Wozniak v Peninsula Hosp. (1969) 1 CA3d 716, 82 CR 84: §13.74
Wright v Compton Unified Sch. Dist. (1975) 46 CA3d 177, 120 CR 115: §5.291
Wright v Issak (2007) 149 CA4th 1116, 58 CR3d 1: §§7.215, 7.229
Wrightsell v City of Chicago (ND Ill 1988) 678 F Supp 727: §4.102
Wunderlich v State Dep't of Pub. Works (1967) 65 C2d 777, 56 CR 473: §§7.106-7.108
Wyatt v Municipal Court (1966) 242 CA2d 845, 51 CR 862: §12.35
Wygant v Jackson Bd. of Educ. (1986) 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842: §§4.9-4.10

X

Xiloj-Itzep v City of Agoura Hills (1994) 24 CA4th 620, 29 CR2d 879: §8.153

Y

Yanowitz v L'Oreal U.S.A., Inc. (2005) 36 C4th 1028, 32 CR3d 436: §4.180
Yarber v Oakland Unified Sch. Dist. (1992) 4 CA4th 1516, 6 CR2d 437: §§13.93, 13.106
Ybarra v Reno Thunderbird Mobile Home Village (9th Cir 1984) 723 F2d 675: §13.142
Yee v City of Escondido (1992) 503 US 519, 118 L Ed 2d 153, 112 S Ct 1522: §§9.60, 10.400, 13.118
Yee v Mobilehome Park Rental Review Bd. (1993) 17 CA4th 1097, 23 CR2d 1: §9.51
Yellow Freight Sys., Inc. v Donnelly (1990) 494 US 820, 108 L Ed 2d 834, 110 S Ct 1566: §4.248
Yeutter, Sierra Club v (5th Cir 1991) 926 F2d 429: §11.265
Yin v State (9th Cir 1996) 95 F3d 864: §4.236
Yost v Thomas (1984) 36 C3d 561, 205 CR 801: §§3.86, 3.119, 10.73, 10.285, 10.299
Young v American Mini Theatres, Inc. (1976) 427 US 50, 49 L Ed 2d 310, 96 S Ct 2440: §§9.9, 10.131, 10.442
Young v City of Inglewood (1979) 92 CA3d 437, 154 CR 724: §13.98
Young, Ex Parte (1908) 209 US 123, 52 L Ed 714, 28 S Ct 441: §13.127
Youngblood v Board of Supervisors (1978) 22 C3d 644, 150 CR 242: §10.158
Younger, People ex rel v County of El Dorado (1971) 5 C3d 480, 96 CR 553: §1.2
Younger, People ex rel v County of El Dorado (1979) 96 CA3d 403, 157 CR 815: §§6.170-6.171
Younger, People ex rel v Superior Court (1976) 16 C3d 30, 127 CR 122: §11.156
Younker v County of San Diego (1991) 233 CA3d 1324, 285 CR 319: §13.87
Yuen v Municipal Court (1975) 52 CA3d 351, 125 CR 87: §9.105

Z

Zack v Marin Emergency Radio Auth. (2004) 118 CA4th 617, 13 CR3d 323: §10.276
Zack's, Inc. v City of Sausalito (2008) 165 CA4th 1163, 81 CR3d 797: §10.339
Zamora, People v (1976) 18 C3d 538, 134 CR 784: §2.173
Zamudio v State (1998) 62 CA4th 673, 73 CR2d 79: §13.88
Zarcone v Perry (2d Cir 1978) 572 F2d 52: §13.144
Zazueta v County of San Benito (1995) 38 CA4th 106, 44 CR2d 678: §4.308
Zelig v County of Los Angeles (2002) 27 C4th 1112, 119 CR2d 709: §13.94
Zeron v City of Los Angeles (1998) 67 CA4th 639, 79 CR2d 130: §4.279
Zhizhuzza, In re (1905) 147 C 328, 81 P 955: §6.92
Zimmerman, People v (1993) 15 CA4th Supp 7, 19 CR2d 486: §9.124

Zinermon v Burch (1990) 494 US 113, 108 L Ed 2d 100, 110 S Ct 975: §13.140
Zisk v City of Roseville (1976) 56 CA3d 41, 127 CR 896: §10.137
Zurn Eng'rs v State (1977) 69 CA3d 798, 138 CR 478: §§7.109-7.110

Opinions of theCalifornia Attorney General

91 Ops Cal Atty Gen 25 (2008): §2.179
90 Ops Cal Atty Gen 24 (2007): §2.177
89 Ops Cal Atty Gen 97 (2006): §2.249
89 Ops Cal Atty Gen 159 (2006): §§1.205, 1.212-1.213
89 Ops Cal Atty Gen 110 (2006): §2.107
89 Ops Cal Atty Gen 107 (2006): §1.219
88 Ops Cal Atty Gen 62 (2005): §5.269
88 Ops Cal Atty Gen 218 (2005): §2.55
88 Ops Cal Atty Gen 172 (2005): §11.109
88 Ops Cal Atty Gen 16 (2005): §§2.36, 2.84
88 Ops Cal Atty Gen 153 (2005): §2.238
88 Ops Cal Atty Gen 136 (2005): §8.140
88 Ops Cal Atty Gen 106 (2005): §2.168
87 Ops Cal Atty Gen 96 (2004): §11.191
87 Ops Cal Atty Gen 30 (2004): §3.33
87 Ops Cal Atty Gen 181 (2004): §§2.36, 2.218
87 Ops Cal Atty Gen 102 (2004): §10.256
86 Ops Cal Atty Gen 133 (2003): §2.166
85 Ops Cal Atty Gen 40 (2002): §1.194
85 Ops Cal Atty Gen 21 (2002): §§10.311, 11.58
85 Ops Cal Atty Gen 210 (2002): §§1.216, 5.13
85 Ops Cal Atty Gen 151 (2002): §5.120
84 Ops Cal Atty Gen 71 (2001): §2.203
84 Ops Cal Atty Gen 66 (2001): §1.118
84 Ops Cal Atty Gen 13 (2001): §§1.258, 3.107
83 Ops Cal Atty Gen 82 (2000): §§1.77, 5.237
83 Ops Cal Atty Gen 24 (2000): §1.41
83 Ops Cal Atty Gen 153 (2000): §2.177
83 Ops Cal Atty Gen 139 (2000): §3.83
83 Ops Cal Atty Gen 124 (2000): §1.219
82 Ops Cal Atty Gen 74 (1999): §2.179
82 Ops Cal Atty Gen 6, 8 (1999): §1.185
82 Ops Cal Atty Gen 6 (1999): §1.196
82 Ops Cal Atty Gen 29 (1999): §2.84
82 Ops Cal Atty Gen 250 (1999): §3.96
82 Ops Cal Atty Gen 126, 129 (1999): §2.163
81 Ops Cal Atty Gen 189 (1998): §8.115
81 Ops Cal Atty Gen 156 (1998): §2.46
81 Ops Cal Atty Gen 134 (1998): §2.165
80 Ops Cal Atty Gen 74 (1997): §1.193
80 Ops Cal Atty Gen 308 (1997): §2.97
80 Ops Cal Atty Gen 146 (1997): §1.194
80 Ops Cal Atty Gen 127 (1997): §2.201
80 Ops Cal Atty Gen 119 (1997): §1.212
70 Ops Cal Atty Gen 105 (1987): §9.182
79 Ops Cal Atty Gen 69 (1996): §2.46
79 Ops Cal Atty Gen 21 (1996): §1.188
78 Ops Cal Atty Gen 327 (1995): §2.55
78 Ops Cal Atty Gen 224, 226 (1995): §2.16
78 Ops Cal Atty Gen 224 (1995): §§2.17, 2.80
78 Ops Cal Atty Gen 181 (1995): §8.98
78 Ops Cal Atty Gen 143 (1995): §9.86
78 Ops Cal Atty Gen 137 (1995): §11.294
77 Ops Cal Atty Gen 235 (1994): §9.13
77 Ops Cal Atty Gen 170 (1994): §4.5
77 Ops Cal Atty Gen 147 (1994): §§1.41, 9.96
76 Ops Cal Atty Gen 289 (1993): §2.117
76 Ops Cal Atty Gen 281 (1993): §1.61
76 Ops Cal Atty Gen 227 (1993): §1.153
76 Ops Cal Atty Gen 126 (1993): §7.192

76 Ops Cal Atty Gen 1 (1993): §1.194
76 Ops Cal Atty Gen 118 (1993): §§2.168, 2.170
76 Ops Cal Atty Gen 11 (1993): §11.193
75 Ops Cal Atty Gen 89 (1992): §2.19
75 Ops Cal Atty Gen 86 (1992): §5.53
75 Ops Cal Atty Gen 47 (1992): §§5.116, 6.149, 10.259
75 Ops Cal Atty Gen 20 (1992): §1.217
75 Ops Cal Atty Gen 14 (1992): §2.92
74 Ops Cal Atty Gen 89, 96 (1991): §7.102
74 Ops Cal Atty Gen 26 (1991): §1.194
74 Ops Cal Atty Gen 174 (1991): §6.174
73 Ops Cal Atty Gen 357 (1990): §1.198
73 Ops Cal Atty Gen 354 (1990): §1.193
73 Ops Cal Atty Gen 255, 266 (1990): §§3.220, 3.222
73 Ops Cal Atty Gen 191 (1990): §2.177
73 Ops Cal Atty Gen 13, 20 (1990): §8.167
72 Ops Cal Atty Gen 86 (1989): §7.198
72 Ops Cal Atty Gen 63 (1989): §1.191
72 Ops Cal Atty Gen 149 (1989): §6.173
71 Ops Cal Atty Gen 235 (1988): §§2.230, 2.245
71 Ops Cal Atty Gen 213 (1988): §10.258
70 Ops Cal Atty Gen 271 (1987): §§2.164, 2.175
70 Ops Cal Atty Gen 220 (1987): §10.299
69 Ops Cal Atty Gen 300 (1986): §7.85
69 Ops Cal Atty Gen 255 (1986): §2.166
68 Ops Cal Atty Gen 73 (1985): §2.246
68 Ops Cal Atty Gen 7 (1985): §2.179
68 Ops Cal Atty Gen 310-311 (1985): §1.85
68 Ops Cal Atty Gen 175 (1985): §7.191
68 Ops Cal Atty Gen 114, 118 (1985): §1.105
68 Ops Cal Atty Gen 101 (1985): §8.156
67 Ops Cal Atty Gen 81 (1984): §1.194
67 Ops Cal Atty Gen 459 (1984): §1.192
67 Ops Cal Atty Gen 349, 352 (1984): §1.49
67 Ops Cal Atty Gen 1, 7 (1984): §8.169
67 Ops Cal Atty Gen 1, 5 (1984): §8.168
67 Ops Cal Atty Gen 1 (1984): §8.168
66 Ops Cal Atty Gen 376 (1983): §§2.166, 2.209
66 Ops Cal Atty Gen 293 (1983): §2.179
66 Ops Cal Atty Gen 156 (1988): §2.165
66 Ops Cal Atty Gen 120 (1983): §10.215
65 Ops Cal Atty Gen at 523: §1.208
65 Ops Cal Atty Gen 88 (1982): §§10.303, 10.305
65 Ops Cal Atty Gen 63, 66 (1982): §2.54
65 Ops Cal Atty Gen 63 (1982): §2.54
65 Ops Cal Atty Gen 606 (1982): §2.179
65 Ops Cal Atty Gen 517, 524 (1982): §1.208
65 Ops Cal Atty Gen 517, 521 (1982): §§1.208, 1.217
65 Ops Cal Atty Gen 493, 498 (1982): §3.194
64 Ops Cal Atty Gen 795, 797 (1981): §2.174
64 Ops Cal Atty Gen 317, 326 (1981): §2.265
64 Ops Cal Atty Gen 288 (1981): §2.178
63 Ops Cal Atty Gen 874 (1980): §6.173
63 Ops Cal Atty Gen 868 (1980): §2.165
63 Ops Cal Atty Gen 820 (1980): §2.54
63 Ops Cal Atty Gen 607 (1980): §2.179
63 Ops Cal Atty Gen 19 (1980): §2.165
62 Ops Cal Atty Gen 701 (1979): §9.71
62 Ops Cal Atty Gen 332 (1979): §7.194
60 Ops Cal Atty Gen 59 (1977): §7.297
59 Ops Cal Atty Gen 604, n 18 (1976): §2.168
59 Ops Cal Atty Gen 604, 617 (1976): §2.162
59 Ops Cal Atty Gen 604 (1976): §2.141
59 Ops Cal Atty Gen 557 (1976): §9.178
58 Ops Cal Atty Gen 670 (1975): §§2.140, 2.166

57 Ops Cal Atty Gen 307 (1974): §2.269
57 Ops Cal Atty Gen 11 (1974): §1.209
56 Ops Cal Atty Gen 557, 558 (1973): §2.177
56 Ops Cal Atty Gen 556, 557 (1973): §2.177
55 Ops Cal Atty Gen 157 (1972): §12.71
54 Ops Cal Atty Gen 112 (1971): §1.212
53 Ops Cal Atty Gen 72 (1970): §7.199
53 Ops Cal Atty Gen 292 (1970): §5.26
50 Ops Cal Atty Gen 87 (1967): §1.213
48 Ops Cal Atty Gen 109 (1966): §5.55
47 Ops Cal Atty Gen 40 (1966): §11.117
46 Ops Cal Atty Gen 74 (1965): §§2.164, 2.209
46 Ops Cal Atty Gen 16 (1965): §5.53
45 Ops Cal Atty Gen 89 (1965): §8.115
45 Ops Cal Atty Gen 122 (1965): §6.171
44 Ops Cal Atty Gen 170 (1964): §1.213
43 Ops Cal Atty Gen 79 (1964): §2.82
41 Ops Cal Atty Gen 39, 42 (1963): §6.170
40 Ops Cal Atty Gen 243, 244 (1962): §1.105
40 Ops Cal Atty Gen 238, 239 (1962): §2.177
38 Ops Cal Atty Gen 52 (1961): §2.75
38 Ops Cal Atty Gen 113 (1961): §2.176
33 Ops Cal Atty Gen 156 (1959): §1.77
32 Ops Cal Atty Gen 223 (1958): §7.188
30 Ops Cal Atty Gen 212, 221 (1957): §6.168
28 Ops Cal Atty Gen 215 (1956): §6.90
23 Ops Cal Atty Gen 75 (1954): §1.198
22 Ops Cal Atty Gen 83 (1953): §5.270
19 Ops Cal Atty Gen 21 (1950): §13.180
7 Ops Cal Atty Gen 143, 144 (1946): §12.35
5 Ops Cal Atty Gen 81 (1945): §4.31

© The Regents of the University of California

Table of References

Abrahams, Daniel B, Sandra J. Boyd, Gilbert J. Ginsburg, & Shlomo D. Katz. Fair Labor Standards Handbook for States, Local Governments and Schools. Washington, D.C., Thompson Publishing Group (updated regularly): §4.42
Advising California Employers and Employees. Multivolume (Cal CEB 2005): §§4.1, 4.3, 4.129, 6.1, 7.1
Advising California Nonprofit Corporations. Multivolume (3d ed Cal CEB 2009): §§2.1, 2.65, 2.68, 2.119, 2.217, 3.1, 5.1
American Law Institute. Restatement (Second) of Torts. Eagan, Minn., West Group, 1979: §6.39
American Jurisprudence. Rochester, N.Y., Lawyers Cooperative Publishing, 2d ed 1976: §§5.57, 7.190, 9.158
Avery, Michael, David Rudovsky, & Karen Blum. Police Misconduct Law and Litigation. Eagan, Minn., Thomson/West, 3rd ed 2005: §13.114
Bass, Ronald E., Albert I. Herson, & Kenneth M. Bogdan, CEQA Deskbook: A Step-by-Step Guide on How to Comply With the California Environmental Quality Act. Point Arena, Cal., Solano Press, 2d ed 1999 (updated periodically): §11.79
Black's Law Dictionary. St. Paul, Minn., West Publishing, 8th ed 2004: §1.226
Brown, Ernest C. California Public Works Projects: Managing Contracts and Resolving Disputes. Santa Rosa, Publishers Design Group, 1999: §7.26
California Administrative Hearing Practice (2d ed Cal CEB 1997): §§2.1, 2.33, 2.118-2.119, 2.217, 12.1, 13.1
California Administrative Mandamus. Multivolume (3d ed Cal CEB 2003): §§2.1, 2.31, 2.33, 2.118, 10.1, 13.1
California Attorney Fee Awards (3d ed Cal CEB 2010): §§13.1, 13.162-13.163
California Attorney General's Office, Division of Civil Law. Conflicts of Interest (2004): §2.217
California Civil Procedure Before Trial. Multivolume (4th ed Cal CEB 2004): §2.217
California Civil Writ Practice. Multivolume (4th ed Cal CEB 2008): §§2.1, 2.118, 13.1, 13.3, 13.16
California Debt Issuance Primer. California Debt and Investment Adivsory Commission (December 2005: §5.219
California Construction Contracts, Defects, and Litigation. Multivolume (Cal CEB 2008): §7.1
California Forms of Pleading and Practice, Indemnity. Albany, Matthew Bender (updated regularly): §§7.304, 7.311
California Government Tort Liability Practice. Multivolume (4th ed Cal CEB 1999): §§1.1, 2.1, 6.1, 7.219-7.220, 13.1, 13.28-13.30, 13.42, 13.49, 13.55, 13.59, 13.62-13.63, 13.66, 13.70, 13.79, 13.86-13.93, 13.95-13.101, 13.104-13.106, 13.109, 13.114, 13.122, 13.127, 13.139, 13.143, 13.154-13.155, 13.181
California Insurance Law and Practice. Albany, Matthew Bender, 2007: §§7.266, 7.271
California Jurisprudence. Eagan, Minn., West (Bancroft-Whitney editorial staff), 3d ed: §§1.100, 1.228, 8.176
California Land Use Practice. Multivolume (Cal CEB 2006): §§1.1, 2.33, 5.1, 6.1, 7.1, 8.1, 9.1, 10.1, 10.84, 10.407, 11.1, 12.1
California Landlord-Tenant Practice. Multivolume (2d ed Cal CEB 1997): §§9.1, 12.1
California Mechanics' Liens and Related Construction Remedies (3d ed Cal CEB 1998): §§7.1, 7.128
California Public Employee Relations Institute of Industrial Relations, University of California, Berkeley. Pocket Guide to the Firefighters Procedural Bill of Rights Act (1st ed 2008): §4.311
———. Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act (13th ed 2009): §4.294
California Real Property Remedies and Damages. Multivolume (2d ed Cal CEB 2002): §12.1
California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001): §§2.33, 5.1, 10.1, 10.148, 11.1
California Workers' Compensation Practice (4th ed Cal CEB 2000): §§4.1, 4.350
Commission on State Mandates. Guide to the State Mandate Process (2003): §5.262
Condemnation Practice in California. Multivolume (3d ed Cal CEB 2005): §§1.1, 5.1, 8.1
Coomes, Joseph, Gerald Ramiza, Iris Yang, T. Hawkins, & Ethan Walsh. Redevelopment in California. Point Arena, Cal., Solano Press, 2009: §5.439
Counseling California Corporations. Multivolume (3d ed Cal CEB 2008): §2.27
Curtin, Daniel J. & Cecily T. Talbert. California Land Use and Planning Law. Point Arena, Cal., Solano Press, 2003: §§1.135, 10.16, 10.84
Curtin, Daniel J. Subdivision Map Act Manual (Point Arena, Cal., Solano Press, 1998): §§10.148
Demeter, George. Demeter's Manual of Parliamentary Law and Procedure. Boston, Little Brown, rev ed 1969: §2.10
DiMugno, John K. & Paul E. B. Glad. California Insurance Law Handbook. Eagan, Minn., Thomson/West 2009: §7.256
Drafting Business Contracts: Principles, Techniques & Forms (Cal CEB 1994): §7.321
Durkee, Michael J., M. Thomas Jacobson, Thomas C. Wood, & Michael Zischke. Land Use Initiatives and Referenda in California. Point Arena, Cal., Solano Press, 1991: §10.200
Financing and Protecting California Businesses. Multivolume (Cal CEB 2006): §9.1
Forming California Common Interest Developments. Multivolume (Cal CEB 2004): §10.1
Gibson, Jack P., Donald S. Malecki, & Pete Ligeros. The Additional Insured Book. Dallas, International Risk Management Institute, Inc., 5th ed 2004: §7.283, 7.321
Gleick, Peter H. Waste Not, Want Not: The Potential for Urban Water Conservation in California (Pacific Institute, 2003): §6.6
Goldfarb & Lipman, Legal Aspects of California Redevelopment Practice. California Redevelopment Association: §5.439
Governor's Office of Planning and Research. General Plan Guidelines (2003): §10.16
Guide to Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000. Assembly Committee on Local Government,

2005): §§1.108, 1.135, 1.149, 1.168
Handbook for Habitat Conservation Planning and Incidental Take Permitting Process. U.S. Fish and Wildlife Service and National Marine Fisheries Service (Nov. 1996): §11.273
Hanna, Warren L. California Law of Employee Injuries and Workers' Compensation. Albany, Matthew Bender, originally published 1966, updated with revisions: §4.350
Herlick, Stanford D. California Workers' Compensation Law. Austin, Butterworth Legal Publishers, 5th ed 1994: §4.350
Institute for Local Government. An Ounce of Prevention: Best Practices for Making Informed Land Use Decisions (2006): §10.362
———. Ethics Law Reference for Local Officials (2007): §§1.223, 1.225, 2.217
Josephson, Michael. Making Ethical Decisions. Los Angeles, Josephson Institute, 2002: §2.217
Koven, Adolph M. & Susan L. Smith. Just Cause: The Seven Tests (Arlington, Va., BNA Books, 2d ed 1992): §4.271
Labor and Employment Law Section, State Bar of California. California Public Sector Labor Relations. Kirsten L. Zerger & Peter A. Janick, eds. Albany, Matthew Bender, 1989: §§4.344-4.345
Larson, Lex K. Larson's Workers' Compensation Law. Multivolume. Albany, Matthew Bender, 1952: §4.350
League of California Cities. A Compilation of Recent Cases Applying the Estoppel Doctrine to Government (Jenkins & Wiener, City Attorneys' Department League of California Cities Fall Annual Conference, 1988): §13.177
———. ARF: Animal Regulations and Forms (Susan Burns Cochran, League of California Cities Spring Conference, City Attorney's Department Session, 2000): §9.160
———. City Clerk's Handbook (2004) (overview of election process): §3.1
———. Current Adult Business Issues (City Attorneys' Department Meeting, May 1999): §9.16
———. Current Issues in Housing and Land Use (City Attorneys Continuing Education Seminar, February 2005): §10.362
———. Emergency Preparedness. (Jonathan Lowell, City Attorneys Continuing Education Seminar, September 2004): §6.180
———. Ethical Principles for City Attorneys (adopted 2005): §2.217
———. Evolving Issues for Water Supply Assessment in a Water Scarce California (Garcia, P., League of California Cities Annual Conference, 2008): §11.104
———. Legal Issues Associated with City Participation in Ballot Measure Campaigns (July 1996): §3.211
———. Legal Issues Associated with City Participation in Ballot Measure Campaigns (September 2001): §3.212
———. Memorandum re Ad Hoc Proposition 62 Advisory Committee (December 11, 1995): §1.145
———. Open and Public III, A User's Guide to the Ralph M. Brown Act: §2.118
———. Planning Commissioner's Handbook: §10.3
———. Practicing Ethics: A Handbook for Municipal Lawyers (2004): §2.217, 2.188
———. Primer on Local Campaign Regulations (Prasanna W. Rasiah, City Attorneys' Continuing Education Seminar, February 2008): §3.208
———. Proposition 209 Implementation Guide: §4.8
———. Proposition 218 Implementation Guide (2007): §§1.145, 5.110, 5.145, 5.162, 5.174, 6.42, 6.96
———. Regulation of Adult Businesses—Traps for the Unwary (City Attorney's Department Meeting, May 2000): §9.16
———. Show Me the Water (Hentschke, City Attorneys' Department Spring Conference, 2003): §11.110
———. Term Limitations for Council Members and A Primer on Election Contests (Armento, V., League of California Cities Annual Conference, City Attorneys Department Session, 1989): §3.124
———. The Basic Framework of Section 1983 Law (Weinstein, B. L., Continuing Education Seminar, Emerging Trends in 1983 Liability, 1990): §13.114
———. The New Substantive Due Process. (Larson, D. Continuing Education Seminar, February 1991): §10.422
———. The Public's Right to Know: Providing Advice Under the Brown Act and Public Records Act (Continuing Education Seminar Materials, February 1994): §2.118
———. Uniform Guidelines for the Implementation of Article XIIIB of The California Constitution (1991): §5.288
Levy, Neil M. California Torts. Albany, Matthew Bender, 2005: §§7.312, 13.90
Libonati, Michael E. & C. Dallas Sands, Local Government Law. Clark, Boardman, Calaghan: §7.190
Local Officials' Guide to the 1992 Cable Act (National League of Cities): §6.88
Littleworth, Arthur & Eric Garner, California Water. Point Arena, Cal., Solano Press, 1995: §10.334
Longtin, James. Longtin's California Land Use (2d ed 1987). Walnut Creek, Cal., Local Government Publications, 2d ed 1987: §§10.84, 10.148, 10.334, 10.341, 10.425, 11.79, 11.255, 11.236, 11.297
Manaster, Kenneth A. & Daniel P.Selmi, California Environmental Law and Land Use Practice. Albany, Matthew Bender (updated semiannually): §§11.79, 11.236, 11.255, 11.297
Miller, Starr, Regalia law firm. Miller & Starr California Real Estate. Eagan, Minn., West, 3d ed 2000: §§8.74, 8.140
McQuillin, Eugene. Municipal Corporations. Eagan, Minn., West, 3d rev ed 1988: §§1.15, 1.228, 1.245, 2.9, 2.14, 5.15, 9.1, 9.68, 9.82
Monahan, Michael, Richard Denney & John C. Mueller. California Environmental Law Handbook. Lanham, Md., Government Institutes, 9th ed 1995: §11.126
Municipal Election Handbook. Anaheim, Martin & Chapman: §3.1
Nahmod, Sheldon H. Civil Rights and Civil Liberties Litigation (Eagan, Minn., West, 4th ed 1997): §13.114
Practice Under the California Environmental Quality Act. Multivolume (2d ed Cal CEB 2008): §§5.1, 6.1, 10.1, 10.445, 11.1, 11.79, 11.236
Professional Licensing: Disciplinary Practice in California (Cal CEB 2008): §9.1
Remy, Michael H. Tina A. Thomas, James G. Moose, & Whitman F. Manley. Guide to the California Environmental Quality Act (CEQA). Point Arena, Solano Press, 11th ed 2007: §11.79
Rhyne, Charles S. The Law of Local Government Operations (Law of Local Government Operations Project, 1980): §1.27

Robert's Rules of Order Newly Revised. Cambridge, Persus Books Group, 2000: §§2.8, 2.11
Rypinski, Richard G. Eminent Domain: A Step-by-Step Guide to the Acquisition of Real Property. Point Arena, Cal., Solano Press, 2002): §8.8
Rynard, Thomas W. Insurance and Risk Management for State and Local Governments. Albany, Matthew Bender, 1991 (updated periodically): §7.266
Rhyne, Charles S. The Law of Local Government Operations. Washington, D.C., Law of Local Government Operations Project, 1980): §1.27
Schnidman, Frank, Stanley D. Abrams & John A. Delaney. Handling the Land Use Case. Eagan, Minn., West, 3d ed 2007: §11.297
Schwartz, Martin A., John E. Kirklin & George C. Pratt. Multivolume. Section 1983 Litigation. Aspen Publishers, 2d ed 2009: §13.114
Skillern, Frank F. Environmental Protection Deskbook. Eagan, Minn., West, 1995: §11.297
Smolla, Rodney A. Federal Civil Rights Acts. Eagan, Minn., West, 3d ed 2008: §13.114
Sobieski, John L., Jr. & Joseph G. Cook, Civil Rights Actions. Albany, Matthew Bender, 1997: §13.114
St. Clair, Sheldon C. California Workers' Compensation Law and Practice. California Compensation Seminars, 5th ed 1996: §4.350
Stanford Environmental Law Society. The Endangered Species Act. Stanford University Press, 2001: §11.297
State Controller's Office. Manual of Accounting and Audit Guidelines for Trial Courts (2009): §5.199
State of California, Department of Housing and Community Development, Division of Housing Policy Department. Housing Element Questions and Answers: A Guide to the Preparation of Housing Elements. (October 2006): §10.48
State of California, Office of Planning and Research. Bridging the Gap: Using Findings in Local Land Use Decisions (2d ed 1989): §13.16
———.The Planner's Guide to Specific Plans (1998): §10.16
Valle-Riestra, Paul. Telecommunications, the Governmental Role in Managing the Connected Community. Point Arena, Cal., Solano Press, 2002: §§5.193, 6.88
Water Supply and Development. Sacramento, Association of California Water Agencies, 2003: §11.104
Witkin, Bernard E. Summary of California Law. Multivolume. San Francisco, Bancroft-Whitne, 10th ed 2005: §§6.121, 7.226, 7.312, 8.69, 10.420, 10.426-10.427, 10.431-10.432, 10.441, 13.90-13.92, 13.94, 13.109-13.110, 13.114
Wrongful Employment Termination Practice. Multivolume (2d ed Cal CEB 1997): §4.1
Zerger, Kirsten L., Peter A. Janiak, Janice E. Johnson, & William F. Kay. California Public Sector Labor Relations. Albany, Matthew Bender, 1997): §§4.320, 4.344-4.345

© The Regents of the University of California

Index

A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

Abandonment
Cable television and video systems franchises, abandonment of, 6.62
Parkland, abandonment of. **Parkland**
Public works contracts, effect of abandonment claims on, 7.116
Vehicle abatement laws, 12.72

Abandonment of Animals. See **Animals**

Abuse of Discretion
LAFCO determinations and decisions, judicial inquiry limited to question of prejudicial abuse of discretion in, 1.129

Accidents, Drug Testing After. See **Drug Testing**

Acquisition of Property
Acceptance of interests in real property, 8.76
Adverse possession, 8.69
Bequest (see Gift, bequest, or devise, acquisition of real property by, below)
Debt limitation, effect on property acquisition, 8.75
Dedication, acquisition of real property by offer of. See **Dedication**
Devise (see Gift, bequest, or devise, acquisition of real property by, below)
Easements. See **Easements**
Eminent domain, acquisition by. See **Eminent Domain**
Gift, bequest, or devise, acquisition of real property by
Generally, 8.1, 8.65
Restrictions, 8.67
Tax consequences, 8.68
Terms of gift, bequest or devise, 8.66
Harbor property, acquisition of, 6.162
Hazardous materials. See **Hazardous Materials and Toxic Waste**
Homeowners and Private Property Protection Act, effect of, 8.31
Investor-owned electric utilities, acquisition of, 6.40-6.41
Lease. See **Leases**
Legal authority, 8.1
Lost and unclaimed property, 8.79
Negotiated purchase agreement. See **Negotiated Purchase Agreement**
Personal property, acquisition of, 8.77

Adjacent Property
Dangerous condition on, 13.102
Sidewalks, ordinance requiring adjacent property owners to repairs, 13.103

Adjourned Meetings. See **Open Meeting Laws**

Administrative Enforcement
See also **Civil Enforcement; Criminal Enforcement**
Abatement (see Administrative or summary abatement, below)
Administrative hearings and due process
Generally, 12.77
Conduct of hearing, 12.80
Impartial hearing body or officer required, 12.79
Notice, 12.78
Administrative or summary abatement
Generally, 12.66

Consent or court order for abatement work, 12.69
Evidence gathering and inspection warrants under administrative abatement, 12.67
Sign enforcement restrictions, 12.73
State Housing Law, demolition or repair by locality under, 12.70
Substandard residential buildings, procedures for, 12.71
Summary (emergency) abatement, determining necessity for, 12.68
Vacant residential property acquired through foreclosure (see Foreclosure, vacant residential property acquired through, below)
Vehicle abatement laws, 12.72
Due process (see Administrative hearings and due process, above)
Foreclosure, vacant residential property acquired through
Generally, 12.74
CC §2929.3, procedure for enforcement under, 12.75
Failure to maintain defined, 12.74
Fines, 12.74-12.75
Local ordinances, applicability of, 12.76
Hearings
Administrative hearings (see Administrative hearings and due process, above)
Mediation and office hearings, 12.81
Inspection warrants, 12.67
Notice
Generally, 12.78
Pending action, notice of, 12.83
Recordation of violation notices, 12.82
Recordation of violation notices, 12.82
Substandard residential buildings, procedures for, 12.71
Summary abatement (see Administrative or summary abatement, above)
Vacant residential property (see Foreclosure, vacant residential property acquired through, above)

Administrative Mandamus. See **Mandamus, Writ of**

Administrative Remedies
Exhaustion of. See **Exhaustion of Administrative Remedies**
Fair Employment and Housing Commission, administrative award of damages by, 4.266
Mandamus. See **Mandamus, Writ of**

Admissibility of Evidence. See **Evidence**

ADR. See **Alternative Dispute Resolution (ADR)**

Adult Businesses
Judicial review of regulations, 9.12
Location restrictions
Generally, 9.7
Content neutrality of regulations, 9.8
Narrow tailoring of regulations, 9.10
Reasonable alternative avenues available for communication, 9.11
Substantial government interest in regulations, 9.9
Zoning restrictions, 10.131-10.132
Nuisance regulations, 9.15
Permit requirements and operating restrictions, 9.12
Publications, adult
Display restrictions, 9.14
Newsrack restrictions, 9.13
Public nudity bans, 9.6
References for additional information about, 9.16
Time, place, and manner restrictions on adult entertainment, 9.132
Zoning restrictions, 10.131-10.132

Adverse Employment Actions
See also **Retaliation Against Employees**
Generally, 4.133
First Amendment rights of public employees, 4.2, 4.135
Political activities or affiliations of employees, prohibition against policies attempting to influence or control, 4.136

Adverse Possession, 8.69, 8.114

Advertising
Campaign advertisements, disclosure of funding sources, 3.201
Federally funded projects, formal advertising requirements for. See **Federally Funded Projects**
Public transportation vehicles, constitutional issues involving advertising on, 6.126
Signs. See **Signs and Billboards**

Advisory Body, Representation of. See **Government Lawyers, Ethical Obligations for**

Advisory Committees. See **Open Meeting Laws**

Aerosol Paint Cans
Preemption of local laws, 9.89

Affidavits and Declarations
Code enforcement, declaration in support of arrest warrant for violation of statute or ordinance, 12.50
Initiative and referenda petitions. See **Initiatives and Referenda**
Primary election, affidavit alleging grounds for contesting. See **Election Contests**
Public works contracts, non-collusion affidavit signed by bidder for, 7.44

Affirmative Action in Hiring Public Employees
Generally, 4.6
Affirmative defense, discriminatory practice resulting from affirmative action plan as, 4.185
Contractors and subcontractors
Equal Protection considerations and federally funded programs (see Equal Protection consideration and federally funded programs, below)
Locally- and state-funded programs (see Locally- and state-funded programs, below)
EEOC guidelines on adoption of permissible voluntary affirmative action programs, 4.11
Equal Protection considerations and federally funded programs
Federal challenges to state and local affirmative action programs, 7.34
Proposition 209 prohibitions, limitations on, 7.32
Supreme Court review of affirmative action programs, 7.33
Federally funded programs (see Equal Protection considerations and federally funded programs, above)
Legality of voluntary affirmative action
Federal monies, city programs involving, 4.9
Proposition 209, effect on statutory affirmative action programs, 4.8, 7.29, 7.32
Locally- and state-funded programs
Generally, 7.28
Data collection, 7.30
Federal challenges to state and local affirmative action programs, 7.34
Hi-Voltage Wire Works, Inc v City of San Jose, effect of, 7.29
Permissible preferences, 7.31
Reverse discrimination, affirmative action as, 4.6
Sources of affirmative action obligations, 4.7
State-funded programs (see Locally- and state-funded programs, above)
Subcontractors (see Contractors and subcontractors, above)
Supreme Court review of affirmative action programs, 7.33
Third parties' standing to challenge voluntary affirmative action plan, 4.10

Affirmative Defenses. See **Defenses**

Affordable Housing
See also **Housing Element of General Plans**
Generally, 10.162
Attached housing developments
Generally, 10.192
Affordable development requirement, 10.193
California Environmental Quality Act (CEQA) exemptions for, 10.197
Infill requirement, 10.194
Population requirements, 10.195-10.196
Attorney fees, non-prevailing party in project delay case subject to, 13.162
Coastal communities, special requirements for, 10.198, 10.308
Concessions (see Incentives and concessions with density bonuses, below)
Conditional use permits, limitations on authority to require for

Generally, 10.191
Attached housing developments (see Attached housing developments, above)
Definitions
Affordable (housing development), 10.193
Attached housing development, 10.192
Infill, 10.194
Urban growth boundary, 10.195
Density bonuses
Generally, 10.172
Applicability of (see Density bonuses, applicability of, below)
Durational requirements for grant of, 10.188-10.190
General plans and zoning, consistency with, 10.187
Incentives and concessions (see Incentives and concessions with density bonuses, below)
Parking requirements, limitations on, 10.186
Percentage increase (see Percentage increase of density bonuses, below)
Waiver or modification of development standards, 10.185
Density bonuses, applicability of
Generally, 10.173
Child care facilities included in proposal, 10.177
Land donated for low-income housing, 10.175
Percentage of units reserved for low-income housing, 10.174
Senior housing, 10.176
Elections required for certain low-income housing projects, 10.164
General plans for land use, consideration of, 10.35, 10.39, 10.80
Gift of public funds prohibition not applicable to construction of low or moderate income housing, 5.279
Incentives and concessions with density bonuses
Denial of, grounds for, 10.184
Number allowed, 10.183
Types allowed, 10.182
Parking. See **Parking**
Percentage increase of density bonuses
Generally, 10.178
Additional density bonus by local ordinance, 10.181
Basic density bonus, amount, 10.179
Incremental increases to basic density bonus, 10.180
Redevelopment issues. See **Redevelopment Housing Requirements**
Rejection of projects, findings required, 10.163
Rent control. See **Rent Control**
Requirement to provide, 10.162
Second units
Generally, 10.166
Approval ministerial if no local ordinance, 10.166, 10.171
Discretion in local ordinances allowed, 10.167
Less restrictive requirements allowed, 10.170
Parking requirements, 10.169
Unit size standards, 10.168
Surplus real property sold or leased for development of low- or moderate-income housing, 8.87-8.88
Zoning
Density bonuses, consistency with zoning, 10.187
Density reductions, requirement of findings based on substantial evidence, 10.165

Age Discrimination
Age Discrimination Act of 1975, scope of, 4.147
Govt C §11135, discrimination prohibited under, 4.169
State personnel laws prohibiting age discrimination, 4.170

Age Discrimination in Employment Act (ADEA)
Generally, 4.144
Back pay, recovery of, 4.259
Enforcement of
EEOC's enforcement of, 4.249
Jurisdiction over ADEA lawsuits, state and federal courts sharing, 4.248
Time limit for filing lawsuit after filing EEOC charge, 4.249
Exclusion from coverage under ADEA, 4.145
Injunctive relief for violation of, 4.264

Liquidated damages, recovery of, 4.262
Retaliation against employee for filing discrimination charges under ADEA, 4.180
Settlement of claims, compliance with special requirements of Older Workers Benefit Protection Act, 4.249
Waiver of ADEA rights, restriction on, 4.146

Agencies
CEQA. See **California Environmental Quality Act (CEQA)**
Joint powers agencies. See **Joint Powers Agencies**
Land use responsibilities, agencies to carry out, 10.4
Public agency defined, 4.43, 7.300
State agency defined, 2.223

Agendas for Meetings
Advisory or standing committee's meeting, effect of posting agenda 72 hours in advance of, 2.47
Closed sessions. See **Closed Session Meetings**
Emergency meetings
Closed sessions, 2.69
Exception to agenda posting requirement, legislative body voting to discuss and take action on emergency situation, 2.61
Media's request for notice of special meeting, effect of, 2.68
Written notice or posting of emergency meeting, no requirement of, 2.68
Exceptions to agenda posting requirement for regular meetings
Brief or limited communications on matters not appearing on posted agenda, Brown Act allowing, 2.60
Emergency situation, legislative body voting to discuss and take action on, 2.61
Immediate action, necessity of, 2.62
Prior meetings, items on agendas for, 2.63
Prior meetings
Additional public comment for items continued from prior meeting, no requirement of, 2.64
Exception to posting requirement for agenda items from prior meeting, 2.63
Public record, agenda as, 2.76
Regular meetings
ADA requirements for agendas and agenda packets, 2.58
Contents of agenda, 2.56
Exceptions to agenda posting requirement (see Exceptions to agenda posting requirement for regular meetings, above)
Item not appearing on agenda, prohibition against discussion of, 2.59
Mailing of agendas, 2.57
Public comment or testimony, agenda providing for, 2.64
72 hour posting requirement for agenda, 2.55
Special meetings
Closed session, special meeting agenda describing matters for discussion in, 2.83
Discussion or action on matters not covered by special meeting notice prohibited, 2.66
Licensee's personal financial date, 2.248
Media's request for notice of special meeting, effect of, 2.68
Public comment or testimony, opportunity for, 2.67
24 hour posting and personal notice requirements, 2.65
Teleconferenced meetings, requirement for agenda, 2.72

Agreements
See also **Contracts**
Closed session meetings, approval of agreements at. See **Closed Session Meetings**
Collective bargaining agreements. See **Collective Bargaining Agreements**
Joint powers agreement. See **Joint Powers Agencies**
Metered Subsystem Agreement (MSS Agreement) available to municipal utilities, 6.32
Negotiated purchase agreement. See **Negotiated Purchase Agreement**
Streets, highways, and service easements, agreement not to vacate, 8.141
Waiver of landowner's protest rights, effect of annexation agreement requiring, 1.153

Agricultural Lands
LAFCO approval of proposals resulting in farmland security zone annexation, limits on, 1.115
Land preservation. See **Williamson Act (Agricultural Preserves)**
Lease of city property for agricultural purposes, 8.116

AIDS and HIV
Employer prohibited from making hiring decision based on HIV test results, 4.24, 4.171
Liability for improper disclosure of HIV tests to third parties, 4.132

Airports
Closing airports, 6.153
Constitutional law. See **Constitutional Law**
Federal preemption over airports
Generally, 6.140
Noise regulation, 9.112
Prohibited revenue diversion, 6.142
Rates and charges, 6.141
Fees, 6.151
Free speech regulations in airports, 6.154
Funding requirements, 6.151
Heliports, 6.152
Land use regulations (see Zoning and land use regulations, below)
Lease of city property to airport, 8.116
Noise and access regulation
City as airport proprietor, 6.143-6.144
Commerce Clause, noise restrictions limited by, 6.145
Federal Aviation Administration (FAA) restrictions, 6.146
Federal preemption of noise regulation, 9.112
Operation and regulation of airports
Generally, 6.139
Federal preemption over airports (see Federal preemption over airports, above)
Noise and access regulation (see Noise and access regulation, above)
Permissible areas of local control, 6.143
Zoning and land use regulations relating to airports (see Zoning and land use regulations, below)
Regional planning issues
After airport land use compatibility plan (ALUCP) creation, 10.256-10.258
Airport land use compatibility plans (ALUCP), creation of, 10.254
Before airport land use compatibility plan (ALUCP) creation, 10.255
City override of adverse determination by airport land use commission (ALUC), 10.259
Local regulations, 10.260
Regulation of (see Operation and regulation of airports, above)
Rents, 6.151
Security in airports, 6.155
Tenant requirements, 6.151
Zoning and land use regulations
Airport land use commissions (ALUC), 6.149
Expansions, 6.150
Power to zone over airports, 6.147
Regional planning issues (see Regional planning issues, above)
Takings issues on flight height restrictions, 6.148

Air Quality
Abatement orders
Effect of orders, 11.221
Issuance, notice and hearing required, 11.220
Violations of orders, penalties and injunctions, 11.222-11.223
Air pollution control districts (APCD) or air quality management districts (AQMD)
Attainment plans (see Air quality attainment plans, below)
Definition of person for air pollution control districts, 11.215
Duties of, 11.188
Governing boards for, 11.187
Limits on powers of (see Limits on powers of APCDs and AQMDs, below)
Permits issued by (see Permits, below)
Rule adoption by (see Rule adoption by APCDs and AQMDs, below)
Air quality attainment plans
Federal state implementation plans, 11.189, 11.191, 11.212
Five-percent annual reduction goal for, 11.190
Implementation of plan, adoption of locally effective regulations, 11.191
Indirect source regulation, 11.191
Procedural requirements for adoption, 11.197
Transportation control measures, 11.191
When required, 11.189
Appeals (see Permit appeals, below)
California Air Resources Board

Air quality attainment plans, submission to Board, 11.189
California Ambient Air Quality Standards, adoption of, 11.186, 11.206
Composition of, 11.208
Emission standards for new motor vehicles, set by, 11.206, 11.214
Programs carried out by, 11.207
Responsibilities of, 11.186
California Ambient Air Quality Standards, adoption of, 11.186, 11.206
City authority
Generally, 11.202
Implementation of air quality attainment plan measures by, 11.203
Permit checks required by cities, 11.204
Schools, facilities with risk management and prevention plans cannot locate near, 11.205
Clean Air Act (see Federal law, below)
Definitions
Air contaminant, 11.226
Indirect source, 11.191
Offset, 11.227
Person, 11.215
Enforcement
Abatement orders (see Abatement orders, above)
Citizen suits, 11.224
Civil penalties from state allowed, 11.215
Federal enforcement actions, 11.223
Variances (see Variances, below)
Environmental Protection Agency (see Federal law, below)
Federal law
Generally, 11.184, 11.209-11.210
Emission standards for new sources and hazardous pollutants, 11.213
Enforcement, 11.223
Federal implementation plans, 11.184, 11.212
National Ambient Air Quality Standards (NAAQS) set under, 11.211
State implementation plans, requirement for, 11.189, 11.191, 11.212
State permit programs, setting minimum standards for, 11.214
Global warming considerations, 11.235
Hazardous waste facilities, compliance with air quality regulations required, 11.249
Hearing (see Notice and hearing, below)
Judicial review of decisions by hearing boards, 11.219
Limits on powers of APCDs and AQMDs
Federal preemption of motor vehicle emissions, 11.196
Land use, lack of authority over, 11.192
New control measures, costs and benefits analysis required to implement, 11.195
Parking regulations, 11.194
Permitting requirements (see Permits, below)
Trip reduction program implementation, limits on, 11.194
Notice and hearing
Abatement orders, issuance of, 11.220
Rule adoption by APCDs and AQMDs, 11.199
Penalties
Abatement orders, violation of, 11.22-11.223
Regulation enforcement, penalties for, 11.215
Permit appeals
Denial of issuance, 11.232
Exhaustion of remedies requirement, 11.234
Issuance, appeal of conditions on permit, 11.233
Permits
Generally, 11.193
Appeals (see Permit appeals, above)
Cities requiring permit for development or building, 11.204
District action on permits, non-vehicular sources, 11.225-11.226
Duration of permits, 11.228
Federal minimum standards for state permit programs, 11.214
Fees for, 11.228, 11.231
Market-based incentives for permits encouraged, 11.229
New source review programs, 11.227
Offsets, 11.227

Other laws, effect on, 11.230
References for additional information about, 11.236
Regional air quality management
Districts for (see Air pollution control districts (APCD) or air quality management districts (AQMD), above)
Geographical basins for, 11.187
Rule adoption by APCDs and AQMDs
Authority for, 11.198
Changes to proposed rules, 11.200
Findings and record requirements, 11.201
Notice and hearing requirements, 11.199
State role in
Agencies involved in, 11.185-11.186
California Air Resources Board (see California Air Resources Board, above)
Enforcement (see Enforcement, above)
Programs carried out by, 11.207
Timing considerations
Air quality attainment plans, review of, 11.189
Air quality districts, notice of hearing, 11.199
Judicial review of board decisions, time to file for, 11.219
Permit denials or conditions, appeal of, 11.232, 11.234
Variances
Decisions of board, discretion of, 11.218
Hearing boards for granting, 11.216
Judicial review of decisions on, 11.219
Procedures and findings for granting, 11.217

Alcohol and Drugs
See also **Drug Testing**
ADA excluding illegal drug use from definition of disability, 4.118
Business regulation
Generally, 9.17
Consumption versus possession, 9.19
Gasoline sales with beer or wine, 9.20
Licensing for sale of alcohol, 9.21
Nuisance associated with, 9.18
Cost recovery for responding to emergency caused by person under influence of drugs and alcohol, 5.167
Disabled persons. See **Disabled Persons**
Drug Free Workplace Act of 1988
Generally, 4.115
ADA requiring employers to conform to, 4.237
Drug House Abatement Act. See **Drug House Abatement Act**
Drugs and drug paraphernalia, personal conduct regulation, 9.78-9.79
Medical marijuana, no duty to reasonably accommodate use of, 4.224
Payroll taxes allowed on alcoholic beverage sellers, 5.34
Public intoxication, 9.77
Valid overlapping state and local regulation, drug laws as example of, 1.41
Zoning issues for alcohol sales, 10.138

Alternative Dispute Resolution (ADR)
See also **Arbitration; Mediation**
Eminent domain law authorizing alternative dispute resolution, 8.55
Public works contracts, ADR in. See **Public Works Contracts**

Ambulances
Generally, 9.22
Authority for, 9.23-9.24
Pre-hospital emergency medical services, 9.25

Amendments and Modifications
Ballot title or summary, writ of mandate seeking amendment to correct false or misleading information in, 3.83
Charter, amendment of, 1.13
Density bonuses for affordable housing, modification of development standards, 10.185
General plan, amendment of, 10.80
Initiative adopted by city council or voters, amendment of, 3.92
Initiatives. See **Initiatives and Referenda**

LAFCO, sphere of influence amended by, 1.120
Ordinance, amendment or repeal of, 1.242
Pension plan, restrictions on amendment of, 4.36
Public works contracts, amendment or modification of, 7.62
Statement of contest, amendment of, 3.129
Uniform codes applying to building permits, modifications of, 10.238
Voting Rights Act, amendments to. See **Voting Rights Act (Federal)**

Americans with Disabilities Act (ADA)
See also **Disabled Persons**
Agendas for regular meetings, ADA requirements for, 2.58
Alcohol and drug use, permissibility of employer's restrictions about, 4.237
Confidentiality of medical information under, 4.124
Defenses to discrimination charge under, 4.239
Definition of disability under ADA, 4.223
Drug testing. See **Drug Testing**
EEOC guidelines on enforcing performance standards under ADA, 4.215
Enforcement of ADA. See **Discrimination Laws, Enforcement of**
Equal protection analysis, effect of ADA on, 4.241
Exhaustion of administrative remedies, no requirement before filing action under ADA, 4.240
Federal preemption of other disability discrimination laws by, 4.239
Hiring restrictions under, 4.20, 4.221
Illegal drug use, ADA excluding from definition of disability, 4.118
Injured employee's cause of action under, 4.398
Legislative body distributing documents in alternative format in compliance with ADA, 2.77
Obesity not disability per se, 4.226
Reasonable accommodation under ADA. See **Reasonable Accommodation for Disabled Persons**
Streets, roads, or walkways
Barden v City of Sacramento, effect of, 8.181
Curb ramps, 8.179-8.180, 8.184
Existing facilities, 8.179
New construction and alterations, 8.180
Requirements and deadlines, 8.182
Transition plans, 8.179, 8.183

Animals
Abandonment and mistreatment
Foreclosed-on homes, pets abandoned in, 9.181
Willful abandonment of animals, 9.180
Animal control officers, authority of, 9.174
Definitions
Domestic animal, 9.158
Wild animal, 9.178
Diseases dangerous to humans, 9.183
Dogs
Assistance dogs, use as, 9.182
Attacks by dogs on people or livestock, 9.168-9.169
Authority for, 9.161
Impounding or destruction of dogs, 9.163, 9.165
Licensing requirements for, 9.162
Nuisance, barking as, 9.160
Spay, neuter, or breeding requirements for certain breeds, 9.167
Vicious or potentially dangerous dogs, 9.164-9.166
Domestic animals
Generally, 9.158
Cats, 9.170
Definition of domestic animal, 9.158
Dogs (see Dogs, above)
Nuisances caused by, 9.160
Species other than dogs and cats, 9.171
Zoning regulation for control of, 9.159
Endangered species. See **California Endangered Species Act (CESA); Endangered Species Act (ESA)**
Liability issues of public officers for death or injuries to animals, 9.173
Mistreatment (see Abandonment and mistreatment, above)
Police power authority for, 9.157-9.158, 9.163

Relinquishment and redemption of animals, 9.172
Service animals, 9.182
Shelters for animals, 9.175-9.176
Wild animals
Generally, 9.177
Definition of wild animal, 9.178
Ownership issues, 9.179

Annexation
Generally, 1.149-1.150
Application by resolution for annexation, LAFCO approval mandatory for, 1.125
Appropriateness of annexation, determining, 1.151
Approval or disapproval by LAFCO
With notice and hearing, 1.156
Without notice or hearing, 1.155
Creation of islands, 1.124
Effect of annexation
Acceptance of county roads and highways, 1.162
Charges for property use, 1.160
Jurisdiction, 1.158
Previously authorized taxes, assessments, fees, or charges, 1.163
Responsibility for bonds, 1.161
Service provision, 1.159
Elections on annexation, 1.157
Farmland security zone annexation, limits on LAFCO approval of proposals resulting in, 1.115
Hearing (see Approval or disapproval by LAFCO, above)
Non-contiguous territory, 1.124
Notice (see Approval or disapproval by LAFCO, above)
Prezoning land for annexation, 1.123
Property tax negotiations, 1.152-1.153
State tidelands and submerged lands, 1.124
Waiver of landowner's protest rights, effect of annexation agreement requiring, 1.153

Anti-Kickback Act. See **Copeland Anti-Kickback Act**

Antitrust
Electric utility, effect of federal or state antitrust challenge, 6.39
Immunity of local government from, 13.153

Appeals
See also **Judicial Review**
Air quality permits. See **Air Quality**
California Coastal Act. See **California Coastal Act**
California Environmental Quality Act (CEQA), appeal of final environmental impact reports, 11.43
Closed session disclosure report on appellate review, 2.103
Conditional use permits, 10.102
Disability retirement claims, appeal hearings for, 4.39
Election contest, appealing trial court's decision in, 3.136
Election recount, nonappealability of court's judgment, 3.145
Firefighters Procedural Bill of Rights Act, administrative appeals under, 4.318
Frivolous appeals
Attorney fees for, 13.162
California Coastal Commission, time for determining if appeal frivolous, 10.321
Government Claims Act, appealability of relief from requirements determination, 13.84-13.85
Hazardous waste facilities, appeal of decision on application to build, 11.247
Mandamus, appeal of orders from, 13.15
Parking fines and forfeitures, trial de novo, 5.208
Permit Streamlining Act (PSA), land use project approvals, 10.15
Police officer's right to appeal punitive action, 4.309
Public Records Act, appealing order under. See **Public Records Act (California)**
Water quality, appeal of state or regional board decisions, 11.152-11.153

Appraisals
See also **Valuation**
Eminent domain actions. See **Eminent Domain**

Negotiated purchase agreement, use of appraisals in, 8.8-8.9, 8.30

Arbitration
See also **Alternative Dispute Resolution (ADR); Mediation**
Binding arbitration. See **Meyers-Milias-Brown Act**
Contractual provision, 7.231
Public works contracts. See **Public Works Contracts**

Architects and Engineers
Preparation of engineer's report, 5.138
Public Records Act, exemption from disclosure of architectural and engineering plans, 2.256

Army Corps of Engineers
Generally, 10.352
Definitions
Waters, 10.357
Wetlands, 10.356, 11.175
Permits
Individual permits for specific activities, 10.359
Nationwide permits for dredging or filling, 10.358
Statutory authority to regulate activities in waters
Generally, 10.353
Clean Water Act, 10.354
Rivers and Harbors Act of 1899, 10.355

Arrests and Criminal Records
Restrictions on employers asking potential employees about, 4.22-4.23
Warrant for arrest. See **Criminal Enforcement**

Assessments
Benefit assessments and assessment districts. See **Benefit Assessments and Assessment Districts**
Special taxes compared, 5.73
Stand-by charges, 5.176

Assignments, Contractual Provision for
Generally, 7.230
Public works contracts, provisions for assignment of unfair business practice claims in, 7.42

At-Large Elections. See **Elections**

Attached Housing Developments. See **Affordable Housing**

Attendance at Meetings. See **Open Meeting Laws**

Attorney-Client Privilege
Government lawyers, applicability of privilege to, 2.203
Public meeting document, exception for attorney-client privileged written communication, 2.79
Waiver of privilege by majority of legislative body, 2.109

Attorneys
City attorney. See **City Attorney**
Fees. See **Attorneys' Fees**
Government lawyers. See **Government Lawyers, Ethical Obligations for**
Post-disciplinary evidentiary hearing, right to representation at, 4.288
Workers' compensation law as specialized area of practice, 4.351

Attorneys' Fees
Affordable housing delays, non-prevailing plaintiff subject to claim for fees, 13.162
Arbitrary or capricious administrative actions, liability of municipality for attorney fees, 13.157
Bad faith or frivolous actions, 13.162, 13.166, 13.169
Cable operators, recovery of attorney fees by, 6.85
California Voting Rights Act, recovery of fees under, 3.77
Civil rights actions
Generally, 13.158
Calculation of fee award amount, 13.160

Contingent-fee contracts not invalidated by award amount, 13.160
Section 1983 actions (see Section 1983 actions, below)
Successful party, 13.159
Civil Rights Act of 1991, recovery of fees under, 4.155
Closed session in violation of Brown Act, award of fees in action over, 2.116
Contracts, prevailing party may recover attorney fees if provided in contract, 7.242, 13.162, 13.172
Definitions
Lodestar figure, 13.159
Prevailing party, 13.159
Discrimination action, prevailing party's recovery of fees in, 4.263
Eminent domain, municipal liability for attorney fees, 13.161
Fair Labor Standards Act (FLSA), recovery of fees under, 4.90
Frivolous appeals, fee award for, 13.162
Implied indemnity, attorneys' fees for prevailing on claim for, 13.171
Inverse condemnation, municipal liability for attorney fees, 13.161
Mandamus actions, municipal liability for attorney fees, 13.161
Open meetings, attorney fees for cases alleging violations of Ralph M. Brown Act, 13.162
Political Reform Act compliance, attorney fee awards for, 13.162
Private attorney general doctrine. See **Private Attorney General Doctrine**
Public Records Act, recovery of fees under, 2.263, 13.162
Public Safety Officers Procedural Bill of Rights Act, recovery of fees under, 4.310
Recovery of fees by municipality
Generally, 13.166
Contract claims, prevailing party recovering fees on, 13.172
Criteria for granting motion for fees, 13.167
Discovery costs, award against losing party in discovery motions, 13.170
Implied indemnity claims, fee award for prevailing entity, 13.171
Sanctions for frivolous or improper action, 13.169
Timing of motion for fees, 13.168
Section 1983 actions
Authority for attorney fee awards, 13.114, 13.145, 13.149
Supplemental jurisdiction of federal court over related state claim, 13.159

Auctions
State preemption of regulation of auctions, 9.26

Audiorecording. See **Video- and Audiorecording**

Audits
Contractual provision requiring audit, 7.238
Goods and services, contracting for. See **Goods and Services, Contracting for**

Automatic Stay. See **Bankruptcy and Insolvency**

Back Pay
Discrimination action, recovery of back pay in, 4.259
Public Safety Officers Procedural Bill of Rights Act, recovery of back pay as remedy for violation of, 4.310
Skelly violations, award of back pay for, 4.284
Workers' compensation, retroactive pay and benefits for worker discharged in retaliation for filing, 4.379

Bad Faith
Attorney fee award for, 13.162, 13.166, 13.169

Bail Forfeiture, 5.196, 5.201

Ballot Measures
See also **Initiatives and Referenda**
City's participation in ballot measures. See **Ballot Measures, City's Participation in**
Corporation or other organizations making contributions to help pass or defeat ballot measure, 3.178
Defined, 3.212
Disclosures
Campaign advertisements, disclosure of funding sources, 3.201
Donors of more than $50,000 to ballot measure campaigns, disclosure requirements for, 3.201
Election contest over ballot measures, 3.137

Length of ballot measure, 3.50

Ballot Measures, City's Participation in
Analysis of city ballot measures by city attorney
Impartial analysis by city attorney, 3.223
Remedies for imperfect analysis by city attorney, 3.224
City attorney (see Analysis of city ballot measures by city attorney, above)
Constitutional issues (see Prohibited expenditures to support or defeat ballot measure, below)
Drafting ballot measures
Campaigning, drafting ballot measure not constituting, 3.221
Local government spending public funds to draft and find sponsor for initiative, 3.220
Qualification of ballot measure, local government prohibited from spending public funds for, 3.222
Expenditures
Definition of expenditure, 3.212
Permissible public expenditures (see Permissible public expenditures, below)
Prohibited expenditures (see Prohibited expenditures to support or defeat ballot measure, below)
Permissible public expenditures
Drafting ballot measures (see Drafting ballot measures, above)
Informational expenses, 3.214
Local legislative bodies going on record at public meetings in favor or opposed to particular measure, 3.215
Voter registration expenses, 3.216
Prohibited expenditures to support or defeat ballot measure
Generally, 3.211
Equal protection clause, government expenditures to support ballot measure as violation of, 3.213
Qualification of ballot measure, local government prohibited from spending public funds for, 3.222
Statutory prohibition against city officer, employee, or consultant from spending city funds to support or oppose ballot measure, 3.212
Proposition 218 ballot and protest procedures not constituting ballot measure, 3.211

Ballots
See also **Elections**
Benefit assessments and assessment districts ballots, 5.148-5.149
Blank space on ballot, 3.47
Contents of ballots
Generally, 3.37
Headings, 3.38
Names of candidates (see Names of candidates, below)
Order of offices and initiatives appearing on ballot, 3.44
Status or principal profession of candidate, ballot listing, 3.42
Voter instructions, 3.43
Counting ballots. See **Elections**
Initiatives and referenda. See **Initiatives and Referenda**
Mailed ballot elections
Conduct of municipal mailed ballot election, 3.59
Dates for, 3.61
Small city mailed ballot election, statute authorizing, 3.60
Names of candidates on ballot
Generally, 3.39
Change in candidate's name within 1 year of election, effect on listing name on ballot, 3.40
Order of names on ballot, 3.44
Similar names, candidates with, 3.41
Political affiliation or party of candidate, listing on ballot, 3.46
Provisional ballots, use and verification of, 3.25
Recall election, ballot for. See **Recall**
Sample ballots, time limit for mailing, 3.58
Stubs and numbering of ballots, 3.48
Terms of office, ballot specifying, 3.49
Translation of ballot into foreign language, requirements under federal Voting Rights Act, 3.45, 3.67
Voters' pamphlets. See **Voters' Pamphlets**

Bankruptcy and Insolvency
Authority for (see Statutory authority for municipal bankruptcy, below)
Automatic stay
Application for, 5.449-5.450
Fees, effect of automatic stay on collection from debtor by city, 5.173

Commencement of case
Designation of judge, 5.446
Dismissal, creditors seeking, 5.447
Filing procedures and publication requirements, 5.445
Jurisdiction of bankruptcy court over municipal bankruptcy, 5.446
Retention of state or municipal control, 5.448
Definitions
Impaired claim, 5.453
Municipality, 5.442
Labor contracts, special issues involving, 5.455-5.456
Plan confirmation
Generally, 5.451
Contents of plan, 5.453
Persons eligible to file plan, 5.452
Requirements for confirmation, 5.454
Pledged special revenues, exclusion of, 5.450
Statutory authority for municipal bankruptcy
Cash flow, insolvency evaluation based on, 5.444
Definition of municipality, 5.442
Eligibility requirements for filing, 5.441
Historical background, 5.440
State authorization of municipal bankruptcy, 5.443

Banks and Financial Corporations
Tax exemptions for, 5.103-5.104

Beaches. See **Coastal Areas; Tidelands, Beaches, and Streams**

Benefit Assessments and Assessment Districts
Generally, 5.121
Annual assessments compared with installment assessments, 5.122
Bonds for
Generally, 5.227
Installment assessments, generally, 5.122
Issuance of, 5.141-5.142
Laws authorizing bonds, 5.131, 5.133
Refund of assessment bonds exempt from Proposition 218 requirements, 5.154
Definition of assessment district, 5.123
Federal government property, immune of, 5.150
Fees compared, 5.125
Formation procedure for assessment districts
Generally, 5.137
Assessment roll recordation, 5.141
Bonds, issuance of, 5.141-5.142
Boundary map recordation, 5.139
Engineer's report, preparation of, 5.138
Geographic scope of assessment, 5.123
Notice, protest, and hearing requirements, 5.140
Proposition 218 issues. See **Proposition 218**
Resolution of intention, 5.139
Subsequent proceedings, 5.143
Gann Limit, 5.286
Geographic scope of assessment, 5.123
Laws for assessments
Generally, 5.121, 5.126
Benefits Assessment Act of 1982, 5.135
Improvement Act of 1911, 5.131
Improvement Bond Act of 1915, 5.133
Landscaping and Lighting Act of 1972, 5.134
Municipal Improvement Act of 1913, 5.132
Parking and Business Improvement Area Law of 1989, 5.136
Property and Business Improvement District Law of 1994, 5.136
Proposition 218. See **Proposition 218**
Ralph M. Brown Act, 5.130
Special Assessment Investigation, Limitation and Majority Protest Act of 1931, 5.129

Str & H C §§3310-3117.5, 5.127
Property-based compared with business-based assessments, 5.124
Proposition 218. See **Proposition 218**
Statute of limitations, actions challenging validity of assessment, 5.152
Taxes compared, 5.125

Benefit Plans
See also **Compensation Plans**
Generally, 4.30
City council providing health benefits for members, 1.219
Retirement benefits. See **Retirement and Pension Plans**

Benefits Assessment Act of 1982, 5.135

Bequest, Acquisition of Real Property by. See **Acquisition of Property**

Bias and Prejudice
Code enforcement proceedings, impartial administrative hearing body or officer required for, 12.79
Due process requiring fair and impartial participation in quasi-judicial proceedings by decision-maker, 2.180
LAFCO determinations and decisions, judicial inquiry limited to question of prejudicial abuse of discretion in, 1.129

Bicycles, Roller Skates, and Skateboards
Bicycle lanes, 8.172
Bicycle parking, 8.172
Motorized scooters, 8.175
Nonmotorized scooters, 8.174
Operation of bicycles and electric carts on sidewalks, 8.171
Roller skates, 8.173
Segways and other mobility devices, 8.175
Skateboarding, 8.174

Bidding for Public Works Contracts
Generally, 7.3
Additive and deductive bids, 7.17
Awarding contracts
Bid protests, 7.20
Lowest responsible bidder (see Lowest responsible bidder, below)
Charter cities, 7.171-7.172
Competitive bidding requirement, exceptions to
Generally, 7.5
Design-build, 7.9
Emergency, 7.6
Professional services contracts, 7.7
Special services, 7.8
Consent to withdrawal of bid, 7.23
Federally funded projects, competitive sealed bids for. See **Federally Funded Projects**
Internet submissions, 7.14
Invitation to bid, 7.36
Lowest monetary bidder, 7.16
Lowest responsible bidder
Generally, 7.15
Additive and deductive bids, 7.17
Lowest monetary bidder, 7.16
Responsible bidder, 7.19
Responsive bid, 7.18
Mistakes
Changing bid, 7.22
Clerical errors, 7.79
Consent to withdrawal, 7.23
Legal action for relief, 7.24
Prohibition to further bidding, 7.25
Non-collusion affidavit signed by bidder, 7.44
Notice
Nonresponsive bidder, notice to, 7.20
Notice inviting bids (see Notice inviting bids, below)

Notice inviting bids
Bid addenda, 7.11
Contents of notice, 7.10
Mandatory pre-bid conference or job walk, 7.12
Presentation of bid and security, 7.13, 7.49
Public project defined, 7.4
Rejection of bids, 7.20-7.21, 7.37
Responsible bidder, 7.19
Responsive bid, 7.18
Specific bidding and contract provisions, 7.35
Subletting and Subcontracting Fair Practices Act, effect of. See **Subletting and Subcontracting Fair Practices Act**
Waiver of competitive bidding requirement (see Competitive bidding requirement, exceptions to, above)

Billboards. See **Signs and Billboards**

Bingo Games
Business and occupational regulation of, 9.27
Redevelopment assistance prohibited for projects involving bingo, 5.370

Boards. See **Commissions and Boards**

Boating and Waterways, Department of
Authority of, 10.361
Governing law, 6.157

Bonds
Annexation, responsibility for bonds after, 1.161
Bankruptcy publication requirements, 5.445
Benefit assessments and assessment districts. See **Benefit Assessments and Assessment Districts**
Consent calendar, inapplicability to bond issues over $100,000, 5.245
Debt limit issues, 5.224, 5.292, 5.295
Disclosure obligations of cities. See **Debt Financing**
General obligation bonds, 5.220-5.221
Limited obligation bonds
Generally, 5.222
Assessment bonds. See **Benefit Assessments and Assessment Districts**
Mello-Roos Community Facilities Act of 1982. See **Mello-Roos Community Facilities Act of 1982**
Revenue bonds. See **Revenue Bonds**
Tax increment bonds, 5.228, 5.394
Mark-Roos public financing authority bonds. See **Marks-Roos Local Bond Pooling Act of 1985**
Municipal Improvement Bond Act of 1901, 5.295
Revenue bonds. See **Revenue Bonds**
Surety bonds. See **Surety Bonds**
Taxable status of debt financing, 5.241
Transient occupancy taxes, use to secure redevelopment financing, 5.398

Borrowing. See **Loans**

Bradley-Burns Uniform Local Sales and Use Tax Law. See **Taxes**

Broughton Act, 5.188, 5.190

Brown Act. See **Open Meeting Laws**

Budgets, 5.264

Building Codes, Enforcement of. See **Code Enforcement**

Building Permits
Generally, 10.231
Air quality issues, 11.204
Applications for permits, 10.234-10.235
Authority for, 10.232
Due process claim if nondiscretionary permit denied after owner's compliance with requirements, 10.428
Duration and revocation of

Beginning and completing work, time frames for, 10.242
Extensions of time for, 10.243
Revocation of permit, 10.245
Suspension of permit, 10.244
Excise tax for, 5.60
Hazardous waste site, determination required before development, 11.253
Incomplete work, remedies for, 10.246-10.249
Issuance, effect of
Conditions imposed on issuance, 10.234, 10.236
Invalid permits, no vested rights from, 10.240
Limits on vested rights, 10.241
Taking, delay in or denial of issuance as, 10.384, 10.396
Vested rights, creation of, 10.239
Mandamus, application of writ to building permit decisions, 13.4
Reasonable relationship between expenses and public interests required, 10.233
Uniform codes applying to
Modifications to uniform codes, 10.238
State standards from Housing and Community Development (HCD), 10.237

Burden of Proof
See also **Proof**
Age discrimination action, burden of proof in, 4.144
California Voting Rights Act, burden of proof in action for violations of, 3.76
Election contest, burden of proof on contestant at trial, 3.133
Endangered Species Act. See **Endangered Species Act (ESA)**
Government Claims Act. See **Government Claims Act**
Housing obligations for regional needs, 10.207
Lab C §2810 violation, rebuttable presumption affecting burden of proof regarding, 7.58
Mandamus. See **Mandamus, Writ of**
Mitigation of damages in discrimination action, employer's burden of proof in showing employee's failure regarding, 4.259
Post-disciplinary evidentiary hearing, employer's burden of proof at, 4.288
Public nuisance, burden of proof requirements, 12.2
Public Records Act, agency's burden of proof in withholding record requested under, 2.240, 2.250
Workers' compensation, employee's burden of proving injury work-related, 4.355

Business and Occupational Regulation
Generally, 9.1
Alcoholic beverages. See **Alcohol and Drugs**
Ambulances. See **Ambulances**
Auctions, state preemption of, 9.26
Authority for, 9.2
Bingo, 9.27
Constitutional limitations (see Limitations on, below)
Dance halls, 9.28
Gambling establishments, regulation of. See **Gambling**
Hot air balloons, 9.33
Junk dealers and recyclers, 9.46
Limitations on
Commerce Clause prohibiting regulations that interfere with interstate commerce, 9.4
First Amendment, 9.5
Preemption of local laws, 9.3
Limousines, 9.34
Massage parlors, 9.35
Pawnbrokers, 9.36
Rent control. See **Rent Control**
Security patrols and security guards. See **Security Patrols and Security Guards**
Shopping and laundry carts, 9.40
Taxicabs. See **Taxicabs**
Tow trucks, 9.44
Vendors and solicitors, 9.45

Business Entities. See **Political Reform Act of 1974**

Cable Television and Video Systems Franchises

Abandonment of franchise, 6.62
Constitutional challenges to regulation, 6.87
Definition of video service, 6.59
Equipment, regulation of, 6.63, 6.83
Federal cable television law
Generally, 6.69
Definitional scheme, 6.70
Delegation of regulation of activities to city (see Federal delegation of regulation of activities to city, below)
Internet access provided over cable systems, effect of, 6.73
Limitations imposed by, 6.58
Miscellaneous telecommunications services, cable operators providing, 6.73
Nonexclusivity of franchises, 6.71
Telephone companies providing video programming, 6.74
Termination of franchise, 6.72
Federal delegation of regulation of activities to city
Attorney fees, 6.85
Channel capacity requirements, 6.80
Customer service regulation, 6.84
Facility and equipment regulation, 6.83
Immunity of city from damages, 6.85
Program notice requirements, 6.82
Program restrictions, permissibility of, 6.81
Rates: billing and rate uniformity, 6.79
Rates: controlled by federal standards, 6.77
Rates: rate regulation and effective competition, 6.76
Rates: revocation of certification and non-certification, 6.78
Rates: use of rights-of-way, 6.75
Remedies, 6.85
Sale, transfer, or change of control, 6.86
Fees
Attorney fees, 6.85
Delinquency fees, 6.64
Maximum fees, 6.61, 6.67
Open video system provided, fees imposed on, 6.74
Video franchises, 5.193
Local cable television franchises
Generally, 6.60
Delinquency fees, availability of, 6.64
Equal access to cable services required, 6.62
Jurisdiction of CPUC, 6.63
Maximum fees, 6.61
Multiple franchises, 6.63
Potential franchise rights to be granted, 6.61
Rates (see Federal delegation of regulation of activities to city, above)
References, 6.88
State law
Limitations imposed by, 6.59
Local cable television franchises (see Local cable television franchises, above)
Statewide video franchises (see Statewide video franchises, below)
Statewide video franchises
Generally, 6.65
Anti-discrimination and build-out requirements, 6.68
Digital Infrastructure and Video Competition Act of 2006 providing streamlined process for granting statewide video franchises, 6.65
Existing cable franchisees, effect of new statewide franchise on, 6.66
Maximum franchise fee, 6.67
Public, educational, and governmental channels, required support for, 6.67
Telephone rate limitations, 6.68

California Air Resources Board. See **Air Quality**

California Coastal Act
Appeals from post-certification local government permit decisions
Grounds for appeal, 10.318
Judicial review of (see Judicial review of California Coastal Commission actions, below)

Jurisdictional issues, 10.316-10.317
Persons eligible to file appeal, 10.319
Procedures for appeal, 10.321
Scope of review, 10.318
Timing of appeal, 10.320, 10.322
Cease and desist authority of California Coastal Commission
Certified local coastal plans and port master plans, applicability of cease and desist orders, 10.328
Penalties for violations of, 10.330
Permit violations, 10.327
Terms and conditions of, 10.329
Coastal Commission permit procedures
Generally, 10.310
De minimis and emergency exceptions to, 10.310
Hearing requirements, 10.312
Preliminary approval from other agencies required for permit application, 10.311
Pre-local coastal program certification, 10.313
Revocation, reapplication, or reconsideration of permits, 10.314
Coastal policies to protect resources, 10.281
Coastal zone, areas constituting, 10.280
Definitions
Aggrieved person, 10.319
Amendment of certified local coastal program, 10.299
Coastal zone, 10.280
Development (California Coastal Act), 10.304-10.305
Person (for coastal development permits), 10.301
Wetlands, 10.306
Discretion (see Local discretion for local coastal programs, below)
Enforcement of Act
Generally, 10.326
Cease and desist authority (see Cease and desist authority of California Coastal Commission, above)
Penalties for violations of, 10.330-10.332
Restoration ordered, 10.333
Establishment of California Coastal Commission, 10.278-10.279
Harbors, applicability to, 6.176
Hearings
Coastal Commission permit procedures, hearing requirements for, 10.312
Land use plan certification (see Land use plan certification, below)
Land use plan submittal to Coastal Commission, time for hearing, 10.290-10.291
Interpretive guidelines, APA exemption for, 10.282
Judicial review of California Coastal Commission actions
Bonds not required, 10.323
Collateral attack immunity if no judicial review sought, 10.324
Mandate for, 10.322
Ripeness requirement, 10.325
Land use plan certification
Commission hearing procedure, 10.290
Denial of, 10.294-10.295
Effect of, 10.293
Public hearing required if substantial issues raised, 10.291
Standard for, 10.289
Local coastal programs
Generally, 10.283
Adequacy of program, evaluated against coastal policies, 10.281
Amendment of, 10.299
Certification of local coastal programs, effect of, 10.292-10.293, 10.303, 10.308-10.309
Denial of certification of land use plan, findings and modifications, 10.294-10.295
Land use plan certification (see Land use plan certification, above)
Local discretion in (see Local discretion for local coastal programs, below)
Periodic review required, 10.300
Zoning and other implementing actions (see Zoning and other implementing actions for land use plans, below)
Local discretion for local coastal programs
Generally, 10.284
California Environmental Quality Act (CEQA), limited application of, 10.288
Delay in submittal, consequences of, 10.287
General plans and zoning ordinances, changes to conform with local coastal programs, subject to referendum or initiative,

10.285
Permit authority delegated to local governments after local coastal program certification, 10.303
Submittal for Coastal Commission review, 10.286
Permits for coastal development
Generally, 10.301
Appeals (see Appeals from post-certification local government permit decisions, above)
Cease and desist order if permit not obtained, 10.327
Coastal Commission procedures for (see Coastal Commission permit procedures, above)
Development subject to permit requirement, 10.304-10.305
Enforcement of (see Enforcement of Act, above)
Housing issues with permits, 10.308
Issuance, agency for, 10.302-10.303
Post-certification of local coastal programs, 10.315
Pre-certification of local coastal programs (see Coastal Commission permit procedures, above)
Public access issues with permits, 10.307
Statutory exemptions from permits, 10.309
Wetlands issues with permits, 10.306
Purpose of Act, 10.277
Timing considerations
Appeal to California Coastal Commission, time to determine if frivolous, 10.321
Cease and desist orders, duration, 10.329
Certification of land use plan with modifications, expiration of, 10.294
Land use plan submittal to Coastal Commission, time for hearing, 10.290-10.291
Local coastal programs, time for periodic review, 10.300
Permits for coastal development, 10.312
Zoning and other implementing actions for land use plans, time for Coastal Commission rejection, 10.296-10.297
Zoning and other implementing actions for land use plans
Commission decisions, 10.297
Modifications, refusal of by local governments, 10.298
Standard for, 10.296

California Coastal Commission. See **California Coastal Act**

California Emergency Services Act
Generally, 6.183
Disaster liability immunity under Act
Generally, 6.191
Disaster malpractice, 6.194
Extraterritorial immunity, 6.192
Inmates endangered by disaster, 6.193
Volunteers and conscripted emergency workers, 6.192
Duties (see Powers and duties under Act, below)
Powers and duties under Act
Declarations of emergency, 6.184
Emergency government after disaster, 6.187
Emergency powers, 6.186
Extraterritorial service after disaster, 6.190
Local disaster councils, establishment of, 6.185
Meeting procedures after disaster, 6.188
Mutual aid regions, establishment of, 6.189
Press access in emergency, 6.186
State aid, providing, 6.185
Temporary housing, procurement of, 6.189
Test exercises conducted by cities, 6.189

California Endangered Species Act (CESA)
See also **Endangered Species Act (ESA)**
Generally, 11.257, 11.288
Definitions
Candidate species, 11.290
Endangered species, 11.289
Take, 11.294
Threatened species, 11.289
Listing under Act
Animals, species included, 11.293

Natural community conservation plans prior to listing, 11.296
Plants, species included, 11.292
Procedure for, 11.291
Time for review of petition for listing, 11.291
References for additional information about, 11.297
Species protected under
Candidate species, 11.290
Listing (see Listing under Act, above)
Sensitive, species considered as, 11.296
Threatened and endangered, 11.289
Take prohibition
Definition of take, 11.294
Enforcement of, 11.296
Incidental take permits, issuance of, 11.295

California Environmental Quality Act (CEQA)
Acquisition of property by public agency, compliance with CEQA as precondition, 8.6, 8.32
Administrative records
Contents required, 11.69
Procedure for preparation of, 11.68
Statement of issues required, 11.70
Agencies
Lead agency, identification of, 11.15
Roles of each type of agency, 11.16
Timing issues for compliance by, 11.17
Types of agencies involved, 11.14
Airports, review of regulatory actions involving, 6.155
Air quality permits, issues with, 11.230
Approval of project (see Project approval, below)
California Coastal Act, limited application to, 10.288
Certification of environmental impact reports
Evidentiary support for project approval findings, 11.52
Findings required for project approval, 11.49-11.51
Process for, 11.43
Challenges to CEQA
Exhaustion of administrative remedies required, 11.41, 11.62
Mandamus proceedings, types of, 11.73, 11.75
Procedural requirements (see Procedural requirements for challenging CEQA decision, below)
Remedies, 11.76
Standard of review for, 11.73-11.75
Standing requirement (see Standing to challenge CEQA, below)
Statutes of limitations (see Statutes of limitations, below)
Definitions
Approval of project, 11.18
Discretionary projects, 11.20
Lead agency, 11.14
Ministerial projects, 11.20
Mitigated negative declaration, 11.30
Project, 11.19
Responsible agency, 11.14
Significant effect on environment, 11.29
Trustee agency, 11.14
Environmental impact reports (EIRs)
Generally, 11.35
Addenda to EIR, 11.46
Adequacy of analysis and evidence in, 11.39
Appeal of final reports, 11.43
Baseline conditions required in report, 11.37
Certification of report (see Certification of environmental impact reports, above)
Climate change considerations, inclusion in, 11.38
Contents of and analysis in, 11.38, 11.82
Drafting motion for protective order, 11.41
Draft report, public review of, 11.40, 11.42
Final report, certification of, 11.43
Lead agency responsible for, 11.16

Master EIRs, 11.44
Notice of preparation, 11.36
Program environmental impact reports, 11.44
Response to comments, writing required, 11.41
Statute of limitations for challenging project approval, EIR certification not triggering, 11.43, 11.60
Subsequent EIRs, 11.45
Tiering, 11.44
Time limits for, 11.57
Water supplies, consideration of. See **Water Supplies**
Exemptions from Act
Affordable housing exemption under, 10.162
Attached housing developments, exemptions for, 10.197
Categorical exemptions, application of, 11.22
Common sense exemptions, 11.23
Procedures for exemptions, 11.24
Statute of limitations for challenges, 11.61
Statutory exemptions, 11.21, 11.93
Findings required for project approval
Generally, 11.47
Certification of environmental impact reports, findings and evidentiary support required after, 11.49-11.52
Negative declarations adoption, required findings after (see Negative declarations, below)
Guidelines for CEQA
Importance of, 11.12
Local guidelines, adoption required, 11.13
Initial studies
Environmental checklist forms for, 11.26-11.27
Fair argument standard of review, 11.29
Purpose and contents of, 11.25
Significance determinations of issues raised by public, 11.27
Significant environmental effects of project, determination of, 11.29
Time for completion of, 11.28, 11.55
Initiatives, applicability of CEQA to, 3.121
Issuance and approval of lease by city as project under CEQA, 8.115
LAFCO determinations deemed projects within meaning of CEQA, 1.122
Land use decisions
Challenges to land use decision, CEQA as basis for, 10.445
Due process requirements for land use decisions, 10.412
Procedural due process for land use decisions. See **Due Process**
Legislative intent of Act, 11.11
National Environmental Policy Act (NEPA)
Coordination with federal government if NEPA applies, 11.78
Persuasive authority for CEQA proceedings, 11.77
Negative declarations
Addenda to negative declarations, 11.46
Adoption, findings required for, 11.34
Challenges to negative declaration, statute of limitations for, 11.60
Completion and adoption, time limits for, 11.56
Contents required, 11.32
Duty to investigate potential impacts, 11.31
Mitigated negative declarations, 11.30
Notices of determination required after project approval with negative declaration, 11.54
Preparation of, 11.30
Project approval, findings required after adoption of negative declaration, 11.48
Public review, notice requirements, 11.33
Subsequent negative declarations, 11.45
Notice
Environmental impact reports, notice of preparation, 11.36
Negative declarations (see Negative declarations, above)
Procedural requirements for challenging CEQA decision
Generally, 11.66
Administrative record requirements (see Administrative records, above)
Briefing and hearing on issues, 11.72
Service of petition, requirements, 11.67
Settlement negotiation participation, 11.71
Project approval

Generally, 11.18
Certification of environmental impact reports distinguished, 11.43
Feasible alternatives substantially lessoning environmental effects, effect of, 11.50
Findings required (see Findings required for project approval, above)
Mitigation measures, 11.50-11.51
Mitigation monitoring programs, 11.53
Notices of determination required after negative declaration, 11.54
Standard of review for, 11.50-11.51
Records (see Administrative records, above)
Redevelopment plans
Adoption subject to Act, 5.316, 5.338
Compliance with Act, requirement of, 5.364
Exclusive negotiation agreement terms and CEQA compliance, 5.361
References for additional information about, 11.79
Remedies for violations of, 11.76
Rent control regulations, compliance with, 9.49
Scope of Act
Discretionary projects, application of act, 11.20
Exemptions (see Exemptions from Act, above)
Ministerial projects, application of Act, 11.20
Project, definition of, 11.19
Standing to bring action under
Generally, 11.63
Beneficial interest showing requirements, 11.64
Zone of interest requirement, 11.65
Statutes of limitations
Generally, 11.59
Challenging agency decision, 11.24, 11.43, 11.60-11.61
Environmental impact reports issues, 11.43, 11.60
Exemption determination challenges, 11.61
Timing considerations
Administrative records, time for preparation, 11.68
Briefing and hearing request on challenges, 11.72
Completion of process, 11.17
Draft environmental impact reports, public review period for, 11.40
Environmental impact reports for private projects, time limits for, 11.57
Initial studies, completion of, 11.28, 11.55
Negative declarations (see Negative declarations, above)
Permit Streamlining Act (PSA) time limits, CEQA's interaction with, 10.13, 11.58
Response to comments, writing required, 11.41
Service of mandate petition, 11.67
Statement of issues, time for filing, 11.70

California Integrated Waste Management Act of 1989. See **Solid Waste and Recycling**

California Public Records Act. See **Public Records Act (California)**

California Public Utilities Commission (CPUC)
Generally, 1.98
Cable television equipment, CPUC's authority to regulate, 6.63
Cellular siting, authority over, 1.100
Electric utilities, jurisdiction over
California Energy Commission (CEC) jurisdiction, 6.38
EMF. See **Electromagnetic Fields (EMF)**
Extraterritorial retail service and potential challenges, 6.39
FERC's jurisdiction under Federal Power Act preempting CPUC from regulating interstate transmission or sales, 6.25
Investor-owned facilities, acquisition of, 6.40-6.41
Rates, 6.35
Rate-setting, 6.42-6.43
Siting of transmission facilities, 6.37
Uniform system of safety regulation, 6.36
Overriding authority, 1.99
Video service providers, CPUC as franchising authority. See **Cable Television and Video Systems Franchises**

Campaign Regulations

Constitutional issues involving contribution limits
Generally, 3.176
Committees making independent expenditures, limits on contributions to, 3.181
Distinction between expenditure limits and restrictions on contributions, 3.182
Dollar amount of contribution limits, 3.180
Organizational contribution limits (see Organizational contribution limits, below)
Constitutional issues involving expenditure limits
Generally, 3.182
Distinction between expenditure limits and restrictions on contributions, 3.182
First Amendment issues (see Constitutional issues involving contribution limits, above)
Independent expenditure limits, meaningful government interest required for, 3.183
Organization expenditure limits, 3.184
Personal funds of candidate, expenditure limits conditioned on acceptance of public funds, 3.182, 3.185
Contributions
City council member receiving campaign contributions from applicant seeking quasi-judicial land use decision, no automatic disqualification on grounds of bias, 2.180
Limits on contributions (see Limits on contributions, below)
Organizational contribution limits (see Organizational contribution limits, below)
Political Reform Act. See **Political Reform Act of 1974**
Corporations (see Organizational contribution limits, below)
Distinguishing between lobbying and campaigning, 3.219
Expenditure limits (see Constitutional issues involving expenditure limits, above)
Land use permit application, effect of city council member receiving campaign contribution from developer, 10.416
Limits on campaign contributions
Commissioners and other appointed officials involved in discretionary proceeds, limits on contributions to, 3.203
Constitutional issues (see Constitutional issues involving contribution limits, above)
Local regulations
Generally, 3.208
Authority of city to enact contribution and disclosure laws, 3.209
Public funds for candidates in municipal elections, 3.210
Organizational contribution limits
Generally, 3.177
Ballot measure contribution bans, 3.178
Candidates, ban on corporate contributions to, 3.179
Organization expenditure limits, 3.184
Political Reform Act. See **Political Reform Act of 1974**
Public funds
Candidates in municipal elections, public funds for, 3.210
Personal funds of candidate, expenditure limits conditioned on acceptance of public funds, 3.182, 3.185
Unions (see Organizational contribution limits, above)

Camping
Parks, camping in
Generally, 9.61
Equal protection, 9.62
Vagueness in definition of camping, 9.63
Transient occupancy taxes and campgrounds, 5.53

Candidates. See **Elections**

Casinos. See **Gambling; Indian Casinos**

Cease and Desist Orders
California Coastal Act, cease and desist orders under. See **California Coastal Act**
Water quality, cease and desist orders and injunctions to enforce, 11.157, 11.159

Cellular Facilities
California Public Utilities Commission (CPUC) authority over cellular siting, 1.100

CEQA. See **California Environmental Quality Act (CEQA)**

CERCLA. See **Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERLA)**

Ceremonial Meetings
Open meeting laws, exception for ceremonial meetings, 2.45

Certificates and Certification
Bus drivers, certification of, 6.128
California Coastal Act. See **California Coastal Act**
Certificates of participation. See **Debt Financing**
Dangerous condition of public property, requirement of certificate of review before filing action, 13.106
Deeds conveying interest in real property, certificate of acceptance by city council required before recording, 8.76
Election, certification of, 3.26
Environmental impact report, certification of. See **California Environmental Quality Act (CEQA)**
General plans, review and certification of, 10.49
Insurance, certificates of, 7.284
Prevailing wage law, contractor or subcontractor certifying accuracy of payroll records under, 7.54, 7.93
Public convenience and necessity, certificate of (CPCN), 6.37

CESA. See **California Endangered Species Act (CESA)**

Charges
See also **Fees**; **Rates**
Generally, 5.158
Amount of charge, 5.172
Authority for, 5.159, 5.172
Property-related fees and charges. See **Proposition 218**

Charitable Contributions
Gifts to city, charitable deduction for, 8.68
Political Reform Act of 1974, disclosure requirements affecting charitable fund raising, 2.159

Charter Cities
See also **General Law Cities**
Generally, 1.11, 1.13
Amendment of charter, 1.13
Corporate power
Generally, 1.28
Constitutional basis of municipal affairs doctrine, 1.29
Definition of municipal affairs, 1.30
Preemption, relationship to, 1.31
Counties
Distinguishing charter counties and charter cities, 1.7
Tax assessment and equalization functions, charter cities contracting with county for, 7.181
Elections, charter cities establishing own rules for, 3.1
Finances of. See **Finances**
Franchise fees not affected by statutory restrictions, 5.190
Goods and services, contracting for. See **Goods and Services, Contracting for**
Home rule provision, applicability of, 1.13
Investments permitted by charter cities, 5.266
Parklands, control of, 8.95
Prevailing wage law, applicability of, 7.84, 7.173
Proposition 62, inapplicability to charter cities, 5.105
Proposition 73's prohibition on expending or accepting public monies to seek elective office, inapplicability to charter cities, 3.210
Public funds, charter city exception to prohibition against gifts of, 1.44, 5.13
Public works
Bidding, 7.171-7.172
Charter provisions, 7.172
Prevailing wages, payment of, 7.84, 7.173
Public Contract Code, effect of, 7.170
Qualifications of city council members, 1.185
Retroactive compensation limitation application to charter cities, 5.280
Statutory schemes for initiatives and referenda, inapplicability to charter cities, 3.102
Taxation
Authority of charter city for, 5.6
Contracting with county for tax assessment and equalization functions, 7.181
Term limit measures in, 3.36
Zoning ordinances and consistency with general plan, 10.88-10.89

Charts, Checklists, Questionnaires, and Tables
Calculation of overtime pay for police and firefighters, table showing maximum hours standards, 4.75

Environmental checklist forms for initial studies, 11.26-11.27
Tort liability. See **Liability**

Childbirth. See **Pregnancy and Childbirth**

Child Care Facilities
Affordable housing, child care facilities in, 10.177

Children
See also **Minors; Parent and Child**
Affordable housing, child care facilities in, 10.177
Fair Labor Standards Act (FLSA), child labor provisions of. See **Fair Labor Standards Act (FLSA)**
Screening job applicants seeking position working with children, 4.25

Choice of Law
Contractual provision governing choice of law, 7.239

City Attorney
Ballot measures, city attorney providing impartial analysis of. See **Ballot Measures, City's Participation in**
City council meetings. See **City Council Meetings**
Conflict of interest disclosure statements. See **Political Reform Act of 1974**
Destruction of records, city attorney approving, 2.268
E-mail, city attorney drafting policy governing use of, 2.229
Ethical obligations. See **Government Lawyers, Ethical Obligations for**
Hazardous materials, city attorney's analysis of indemnification agreement, 7.314
Indemnification, city attorney's right to, 2.210
Initiatives. See **Initiatives and Referenda**
Pending litigation closed session, city attorney writing memorandum justifying, 2.92
Powers and duties, 1.256

City Clerk
Election official, city clerk as, 3.2
Notice of intent to recall, filing with city clerk, 3.153
Petition protesting adoption of ordinance, time limit for submitting after adopted referendum attested by city clerk, 3.97
Powers and duties, 1.257
Publication of ordinance, 1.239
Recall petition. See **Recall**
Referendum, filing petition with city clerk, 3.97
Speaker's card for city council meeting, submitting to city clerk, 2.18

City Council
At-large or district elections, 1.186
Benefits, 1.219
Campaign contributions received from applicant seeking quasi-judicial land use decision, no automatic disqualification on grounds of bias, 2.180
City manager form of government. See **City Manager**
City treasurer, appointment of. See **City Treasurer**
Commissions and boards appointed by city council. See **Commissions and Boards**
Compensation
Generally, 1.211
Attendance beyond certain meetings, compensation for, 1.214
Ethics training, 1.210
Gifts of public funds, 1.209
Other commissions, committees, boards, or authorities, compensation for service on, 1.213
Salary adjustments, 1.212
Strict construction of rules governing, 1.208-1.210
Conduct of council members
Censure, 1.226
Enforcement of decorum, 1.225
Public decorum, 1.224
Rights and roles of council members, 1.223
Council/administrator form of government, 1.181
Criminal conviction, effect of, 1.196
De facto officers, 1.201
Ethics training, 1.210

Expenses
Generally, 1.215
Flat expense allowances, permissibility of, 1.218
Meals for third parties, no reimbursement for, 1.216
Spouses of council members, no reimbursement of expenses of, 1.217
Filling vacancies
Generally, 1.197
Limits on appointment power, 1.198
Result of appointment, 1.199
Fire chief, appointment of, 1.260
Free transportation, acceptance of, 1.194
Gifts of public funds, 1.209
Immunity from Section 1983 actions, 13.125
Incompatible offices, effect of common law doctrine of, 1.193
Investment authority of council, 5.269
Legislative authority, exercise of
Generally, 1.227
Minute order or motion, 1.248
Ordinances. See **Initiatives and Referenda**
Resolutions (see Resolutions, below)
Mayor, selection of. See **Mayors**
Meetings. See **City Council Meetings**
Non-residence of city council member, effect of, 1.191
Oath of office, 1.187
Qualification of members
Generally, 1.183
Charter cities, 1.185
General law cities, 1.184
Recall. See **Recall**
Reimbursement of expenses (see Expenses, above)
Resolutions
Adopting resolutions, procedure for, 1.246
Effective date, 1.247
Necessity, resolution of. See **Eminent Domain**
Ordinances distinguished, 1.228, 1.243
Ordinances, resolutions as, 1.244
Permissible subjects, 1.245
Vacation of easement, 8.131, 8.149
Right to hold office, challenges to, 1.200
Right to hold office, limitations on
Generally, 1.220
Analyzing limitations, 1.221
Term limitations, 1.222
Section 1983 actions, causation as defense for employee involved in permit application denied by city council, 13.142
Spouses
Effect of spouse serving on city council and appointed commission, 2.179
Reimbursement of spouse's expenses prohibited, 1.217
Subsidiary districts. See **Subsidiary Districts**
Termination of office (see Vacancies and termination of office, below)
Terms of office, 1.146
Vacancies and termination of office
Generally, 1.188
Abandonment, 1.192
Accepting free transportation, 1.194
Criminal conviction, 1.196
Definition of vacancy, 1.189
Filling vacancies (see Filling vacancies, above)
Incompatible offices and activities, 1.193
Non-residence, 1.191
Recall. See **Recall**
Resignation, 1.190

City Council Meetings
City attorney
Balancing council's right to keep order and individuals' rights to petition government, city attorney advising council on, 2.15

Parliamentarian for city council, city attorney acting as, 2.14
Role of, 2.3
Constitutional considerations
Due process (see Due process requirements, below)
Regulating public speech (see Regulating public speech, procedures for, below)
Decorum (see Procedure and decorum, rules of, below)
Due process requirements
Generally, 2.31
Legislative actions, presumption affecting validity of, 2.32
Public hearings, requirement of, 2.34
Quasi-judicial actions, 2.33
Mayor as presiding officer
Generally, 2.7
Duties of presiding officer, 2.9
Powers of presiding officer, 2.8
Special meeting, mayor's authority to call, 2.48
Time limit for speakers, mayor's enforcement of, 2.19
Minutes of, 2.6
Parliamentary rules of procedure
Failure to follow rules, effect of, 2.13
Judicial review of parliamentary procedures, 2.14
Object of rules, 2.12
Presiding officer referring to, 2.8
Purpose and function of, 2.10
Source of rules, 2.11
Place of meeting, Brown Act requiring legislative body provide, 2.35
Presiding officer (see Mayor as presiding officer, above)
Procedure and decorum, rules of
Authority of city council to promulgate rules of procedure and decorum, 2.4
City attorney, role of, 2.3
Enforcement of rules of decorum, 2.15
Regulating public speech (see Regulating public speech, procedures for, below)
Sergeant at arms, city council's designation of, 2.15
Public conduct, rules regulating
Generally, 2.26
Disorderly conduct, exclusion or expulsion of persons from meeting for, 2.27
Journalists, rules affecting, 2.28
Punishment for disorderly behavior, 2.30
Readmission of individuals, city council establishing procedure for, 2.29
Public hearings. See **Hearings**
Quorum and voting requirements, 2.2
Regular meetings, procedures for
Brown Act, minimum procedural requirements under, 2.5
Order of business, 2.6
Regulating public speech, procedures for
Content-oriented regulations, 2.23-2.25
Criticism of policies, procedures, programs, or services of agency, no limitations on, 2.23
Disruptive speech, limits on, 2.24
Intra-council speech, no limits on, 2.25
Out of order, city council declaring speaker as, 2.22
Permissible forms of regulation, 2.17-2.22
Public's right to address city council, 2.16
Reasonable time, place, and manner regulations, 2.17
Repetitious or irrelevant comments, limits on, 2.20
Speaker's card, submitting to city clerk, 2.18
Spokesperson for group, city council requesting selection of, 2.21
Total amount of time on particular issue, city council regulating, 2.19
Time
Brown Act requiring legislative body provide time and place of regular meeting, 2.35
Mayor's enforcement of time limits for speakers, 2.19
Restrictions on time (see Regulating public speech, procedures for, above)

City Manager
Generally, 1.180
Investment authority of manager, 5.270-5.271

Powers and duties, 1.255

City Treasurer
Investment authority of treasurer, 5.270
Powers and duties, 1.258
Reporting on investments to legislative body, 5.272

Civil Enforcement
See also **Administrative Enforcement; Criminal Enforcement**
Civil penalties and cost recovery
Generally, 12.19
Local civil penalties ordinances, 12.25
Nuisance abatement actions, cost recovery in, 12.22-12.24
State Housing Law, 12.7, 12.20
Unfair Competition Act, 12.12, 12.21
Contempt (see Remedies, below)
Drug House Abatement Act. See **Drug House Abatement Act**
Nuisance, abatement of. See **Nuisance, Abatement of**
Penalties (see Civil penalties and cost recovery, above)
Remedies
Civil contempt, 12.17
Civil penalties and cost recovery (see Civil penalties and cost recovery, above)
Criminal contempt, 12.18
Injunctive relief, 12.2, 12.4, 12.16
Punitive damages, 12.26
Receiver, appointment of, 1.29, 12.27
Red Light Abatement Act, enforcement and remedies, 9.15, 12.13-12.16
Treble damages for repeat violations, 12.26
Unfair Competition Act, remedies under, 12.12
State Housing Law. See **State Housing Law**
Unfair Competition Act
Civil penalties and cost recovery under, 12.12, 12.21
Code violations as unfair competition, 12.10
Procedural requirements under Act, 12.11
Remedies under Act, 12.12, 12.21

Civil Rights (Generally)
Attorney fees. See **Attorneys' Fees**
Defamation action, requirement that claim include denial of right expressly protected in constitution, 13.112
Immunity
Civil Rights Act of 1871, municipalities' lack of immunity for actions taken under official policy, practice, or custom, 4.158
Civil Rights Act of 1991, applicability of absolute and qualified immunity to actions brought under, 4.153
Section 1983 actions. See **Section 1983 Actions**
Land use decisions, challenges based on, 10.444
Statutes of limitations
Civil Rights Act of 1871, statute of limitations for bringing action under, 4.159
Civil Rights Act of 1991, statute of limitations for bringing action under, 4.154
Section 1983 actions, 13.152

Civil Rights Act of 1871
Section 1983
Generally, 4.156
Official policy, practice, or custom, municipalities' lack of immunity for actions taken under, 4.158
Persons eligible to sue under, 4.157
Qualified immunity of public officials, 4.158
Remedies, 4.160
Statute of limitations for bringing action under, 4.159
Section 1983. See **Section 1983 Actions**
Section 1985, protections under, 4.161
Section 1988 for civil rights actions. See **Attorneys' Fees**
State remedies, no requirement of pursuing before filing action under Civil Rights Act of 1871, 4.159

Civil Rights Act of 1964. See **Title VII of Civil Rights Act of 1964**

Civil Rights Act of 1991

Generally, 4.150
Absolute and qualified immunities, applicability to actions brought under Act, 4.153
Compensatory and punitive damages, limits on recovery of, 4.154-4.155, 4.261
Distinctions between Civil Rights Act of 1991 and Title VII of Civil Rights Act of 1964, 4.154
Persons eligible to file discrimination claim under, 4.151
Remedies under, 4.154-4.155
Scope of Act, 4.152
Statute of limitations for action under, 4.154

Class Actions
Fair Labor Standards Act (FLSA), no class action under CCP §382 for violation of, 4.88
Government Claims Act, claims subject to, 13.29, 13.54
Tax refunds, issue unresolved, 5.93

Clean Air Act. See **Air Quality**

Clean Water Act
Army Corps of Engineers, authority under, 10.354
Water quality issues. See **Water Quality**

Clerk. See **City Clerk**

Closed Session Meetings
See also **Open Meeting Laws**
Generally, 2.82
Action and vote disclosure in open session after closed session
Contents of closed-session disclosure report (see Contents of closed-session disclosure report, below)
Governing statutes, 2.100
Public employees, disclosure report on actions affecting employment status of, 2.107
Agenda
Public's right to comment on closed session agenda before legislative body goes into closed session, 2.80
Regular meetings, appearance of closed sessions on agenda for, 2.73, 2.83
Appointment, employment, performance evaluation, discipline, or dismissal of public employee, closed session to consider
Generally, 2.95
Covered employees, 2.96
Public hearing of charges, notifying employee of right to, 2.98
Specific complaints or charges against employee, notifying employee before closed session of, 2.88
Specific individuals, requirement that closed session discuss, 2.97
Attendance at closed session, limits on, 2.84
Attorney-client communications, disclosure of, 2.109
Civil action for Brown Act violations
Generally, 2.113
Costs and attorney fees, award of, 2.116
Injunctions (see Injunctions, below)
Judicial determination that action taken in closed session null and void, 2.114
Remedies available, 2.113
Written demand that legislative body cure violation, 2.115
Confidentiality
Injunction against disclosure of confidential information acquired at closed session, 2.117
Minute book confidentiality, 2.110
Contents of closed-session disclosure report
Generally, 2.101
Initiation of or intervention in litigation, approval of, 2.104
Joint powers agency claims, disclosure report on disposition of, 2.106
Labor negotiations, disclosure report on approval of agreements concluding, 2.108
Litigation defense, appellate review, or amicus curia participation, disclosure report on approval of, 2.103
Real estate negotiations, disclosure report on approval of agreements concluding, 2.102
Settlement of pending litigation, disclosure report on approval of, 2.105
Criminal law. See **Criminal Law**
Defined, 2.82
Disciplinary actions (see Appointment, employment, performance evaluation, discipline, or dismissal of public employee, closed session to consider, above)
Dismissal of employee (see Appointment, employment, performance evaluation, discipline, or dismissal of public employee, closed session to consider, above)
Disqualified public official's required absence from closed session, 2.141

Emergency situation, legislative body meeting in closed session regarding, 2.69
Evaluation of employee (see Appointment, employment, performance evaluation, discipline, or dismissal of public employee, closed session to consider, above)
Injunctions
Confidential information acquired at closed session, injunction against disclosure of, 2.117
Future violations of Brown Act, injunction to prevent, 2.113
Judicial determination that action taken in violation of Brown Act null and void, 2.114
Labor negotiations
Announcement in open session of, 2.89
Disclosure report on approval of agreements concluding, 2.108
Litigation (see Pending litigation, below)
Negotiations
Instructing negotiators (see Reasons for permissible closed sessions, below)
Labor negotiations (see Labor negotiations, above)
Subject matter of closed session (see Subject matter of closed session, announcement in open session of, below)
Notice (see Appointment, employment, performance evaluation, discipline, or dismissal of public employee, closed session to consider, above)
Pending litigation
Actions and proceedings constituting, 2.93
Agency's attorney, closed session for purposes of discussing pending litigation with, 2.92
Announcement in open session of, 2.87
Disclosure report (see Contents of closed-session disclosure report, above)
Facts and circumstances justifying significant exposure to litigation, 2.94
Performance of employee (see Appointment, employment, performance evaluation, discipline, or dismissal of public employee, closed session to consider, above)
Public employees
Disclosure report on action affecting employment status of, 2.107
Reasons for closed sessions (see Reasons for permissible closed sessions, below)
Real property
Announcement of real estate negotiations before conducting closed session, 2.86
Disclosure report on approval of agreements concluding real estate negotiations, 2.102
Instructing negotiators of real property transactions as permissible reason for closed session, 2.90
Reasons for permissible closed sessions
Appointment or employment of public employee (see Appointment, employment, performance evaluation, discipline, or dismissal of public employee, closed session to consider, above)
License applications and public security topics, 2.99
Pending litigation (see Pending litigation, above)
Real property transactions, instructing negotiators of, 2.90
Represented and unrepresented employees, instructing negotiators meeting with, 2.91
Reports (see Contents of closed-session disclosure report, above)
Subject matter of closed session, announcement in open session of
Generally, 2.85
Labor negotiations, announcement of, 2.89
Pending litigation, announcement of, 2.87
Real estate negotiations, announcement of, 2.86
Specific complaints or charges against employee, notice to employee before closed session on, 2.88
Violations of Brown Act in closed sessions
Generally, 2.111
Civil action for Brown Act violation (see Civil action for Brown Act violations, above)
Confidential information acquired at closed session, prohibition on disclosure of, 2.117
Misdemeanor, member's attendance at legislative body meeting with intent to deprive public of information constituting, 2.112
Remedies for violation, 2.113
Vote disclosure (see Action and vote disclosure in open session after closed session, above)

Coastal Areas
See also **Tidelands, Beaches, and Streams**
Affordable housing, special requirements for, 10.198, 10.308
California Coastal Act. See **California Coastal Act**
Development projects, public access to coastline in, 10.343
Land use general plans, consideration in, 10.53
Public access to coast, exactions for, 10.307
Tidelands, beaches, and streams. See **Tidelands, Beaches, and Streams**
Urgency zoning ordinances in coastal zones, 10.93

Coastal Commission (California)

Generally, 1.101
LAFCO conditionally approving change of organization or reorganization subject to certification by California Coastal Commission, 1.116

Code Enforcement
Generally, 12.1
Administrative enforcement. See **Administrative Enforcement**
Civil enforcement. See **Civil Enforcement**
Criminal enforcement. See **Criminal Enforcement**

COG. See **Council of Governments (COG)**

Collateral Estoppel
Section 1983 actions, collateral estoppel issues in, 13.128

Collective Bargaining Agreements
Amount of compensation for public employees, collective bargaining agreement specifying, 4.28
Bankruptcy of municipality, treatment of labor contracts in, 5.455-5.456
Meyers-Milias-Brown Act creating mandatory collective bargaining system for California local government, 4.322

Colleges. See **Universities and Colleges**

Commerce Clause. See **Constitutional Law**

Commission on State Mandates. See **Cost Reimbursements From State**

Commissions and Boards
Airport land use commissions (ALUC), 6.149
Appointed commissions and boards
Generally, 1.249
Compensation, 1.253
Delegation of authority, 1.254
Methods of selecting members, 1.250
Qualifications, 1.251
Removal, 1.252
Spouse serving on city council and appointed commission, effect of, 2.179
Civil Service Commission versus advisory body, distinction in representation of, 2.200
Coastal Commission. See **Coastal Commission (California)**
Community redevelopment commission, member's disclosure of financial interest in property within project area of, 2.182
Compensation for city council members serving on other commissions, committees, boards, or authorities, 1.213
CPUC. See **California Public Utilities Commission (CPUC)**
Fair Political Practices Commission. See **Fair Political Practices Commission**
LAFCOs. See **Local Agency Formation Commissions (LAFCOs)**
State Lands Commission's responsibility for oil and gas drilling production and operations, 1.101
State mandates. See **Cost Reimbursements From State**

Committees
Open meeting laws. See **Open Meeting Laws**
Project area committees, application of laws to, 5.388, 5.433

Common Carriers. See **Public Transportation**

Common Law
Conflicts of interest, common law doctrine against, 2.174
Distinction between election contest and common law remedy of quo warranto, 3.124
Easements, 8.78
Exactions, authority for, 10.213
Incompatibility of holding multiple public offices, common law rule on. See **Ethical Considerations**
Liability under common law, abolished by Government Claims Act, 13.94
Public trust doctrine. See **Public Trust Doctrine**

Community Facilities Districts. See **Mello-Roos Community Facilities Act of 1982**

Community Redevelopment Commission. See **Redevelopment**

Community Redevelopment Law. See **Redevelopment**

Compensation Plans
See also **Benefit Plans; Salaries and Compensation**
Amount of compensation, 4.28
Constitutional prohibition against granting extra compensation or allowance after services rendered, 4.29
Employee recognition plans, 4.31
Establishment of, 4.27
Pension plans. See **Retirement and Pension Plans**
Retroactive pay increases, permissibility of, 4.29
Volunteer services, nominal stipend for, 4.45

Competitive Bidding
Defective bidding process, consequence of, 7.245
Goods and services, contracting for. See **Goods and Services, Contracting for**
Public works contracts. See **Bidding for Public Works Contracts**

Complaints
Eminent domain complaint, filing procedures, 8.45
Government Claims Act, complaints not serving as claim under act, 13.48

Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 6.100, 11.239, 11.250

Compromise. See **Settlement and Compromise**

Condemnation
See also **Eminent Domain; Inverse Condemnation**
Harbor property acquired by condemnation, 6.162

Conditional Use Permits
Generally, 10.99
Affordable housing, limits on authority to require permits for. See **Affordable Housing**
Due process requirements
Findings and decisions, 10.104
Notice and hearing, 10.103
Issuance and denial standards
Criteria for use in, 10.105-10.107
Renewals of permits, standard for, 10.108
Issuance procedures
Appeals of permit decisions, 10.102
Decision makers for applications, 10.101
Quasi-judicial action, consideration of permit as, 10.100
Noncompliance with conditions imposed, 10.112
Nuisances. See **Nuisance, Abatement of**
Revocation or termination, 10.111
Rights granted
Conditions, nature of, 10.109
Running with the land by use permits, 10.110

Conferences and Seminars
Open meeting laws, exception for attendance at conferences and seminars, 2.42

Confidentiality
Americans with Disabilities Act (ADA), confidentiality of medical information under, 4.124
Closed session meetings. See **Closed Session Meetings**
Medical reports. See **Medical Reports**
Whistle-blowing statute permitting attorney to disclose confidential information, 2.203

Conflicts of Interest
Common law doctrine against, 2.174
Contractual provision prohibiting, 7.232
Disposition of property, conflicts of interest precluding, 8.113
Government lawyers. See **Government Lawyers, Ethical Obligations for**
Political Reform Act. See **Political Reform Act of 1974**
Project area committees, application of laws to, 5.388, 5.433

Redevelopment agencies, application of laws to, 5.433-5.435
Remote interests and noninterests in contract, conflict of interest not created by, 2.167
Section 1983 actions, government lawyers' conflict of interest, 13.143

Consent
Code enforcement, consent for abatement work, 12.69
Easement by implied dedication with consent, 8.74
Government lawyer representing multiple clients, obtaining consent for. See **Government Lawyers, Ethical Obligations for**
Public works contract, consent to withdrawal of bid for, 7.23
Voice tests, written consent required for using, 4.17

Conservation
General plans. See **General Plans**
Water. See **Water Service**

Consolidation
Defined, 1.168
Effects of consolidation
Civil and criminal liability, 1.172
Property rights and debts, 1.171
Taxation, 1.173
Types of consolidation
Cities, consolidation of, 1.169
Districts, consolidation of, 1.170

Constitutional Grants of Municipal Authority
Generally, 1.14
Corporate power. See **Corporate Power**
Eminent domain power, 1.22
Police power. See **Police Power**
Public works power. See **Public Works Power**
Taxing power. See **Taxing Power**

Constitutional Law
Access to information, California Constitution establishing public's right of, 2.218
Airports
Free speech regulations in airports, 6.154
Noise restrictions limited by Commerce Clause, 6.145
Alcoholic beverages, regulating possession of, 9.19
Ambulances, California constitutional authority for business regulation, 9.23
Anti-discrimination provisions of California Constitution, 4.164
Ballot measures. See **Ballot Measures, City's Participation in**
Binding arbitration for public employees, constitutionality of, 4.324, 4.342
Business and occupational regulation, constitutional limitations on. See **Business and Occupational Regulation**
Cable television, constitutional challenges to regulation of, 6.87
Campaign contribution and expenditure limits. See **Campaign Regulations**
Cities, constitutional foundation for, 1.9
City council meeting, constitutional considerations for. See **City Council Meetings**
City council rules of procedure and decorum respecting constitutional rights, 2.4
Commerce Clause
Business license fees and taxes, internal consistency test for, 5.43
Business regulation issues, 9.4
Section 1983 actions, clause as basis of, 13.116
Cost reimbursements. See **Cost Reimbursements From State**
Defamation action, requirement that claim include denial of right expressly protected in constitution, 13.112
Drug testing. See **Drug Testing**
Due process. See **Due Process**
Eighth Amendment
Loitering regulation as cruel and unusual punishment, 9.106
Section 1983 actions, as basis of, 13.116
Eleventh Amendment, governmental immunity under. See **Intergovernmental Relations (Federal)**
Equal protection. See **Equal Protection**
Extra compensation or allowance after services rendered, constitutional prohibition against granting, 4.29
Federal preemption doctrine. See **Federal Preemption**
Fifth Amendment

Limits on municipal authority, 1.66
Section 1983 actions, Amendment as basis of, 13.116
Finances, authority for. See **Finances**
First Amendment
Adult businesses. See **Adult Businesses**
Airports, free speech regulations in, 6.154
Business regulation, limits on, 9.5
Campaign contributions. See **Campaign Regulations**
City council meetings, regulating public speech at. See **City Council Meetings**
Conditional use permits involving First Amendment activity, standard for revocation, 10.111
Dance halls, nuisance abatement issues with, 9.28
Defamation issues. See **Defamation**
Door-to-door solicitors, regulation of, 9.45
"Fighting words", lack of constitutional protection for, 2.24
Limits on municipal authority. See **Constitutional Limits on Municipal Authority**
Local regulation of activities on streets and sidewalks, constitutionality of, 8.177
Loitering, free assembly and association issues with regulation of, 9.104
Noise regulation, freedom of speech issues with, 9.108
Political Reform Act of 1974, effect of disclosure requirements on First Amendment issues, 3.191
Prayer or silent meditation at beginning of meetings, constitutionality of, 2.6
Public employees, applicability of First Amendment protections to, 4.2, 4.135
Public lewdness, limitations on, 9.76
Religion, zoning issues and exercise of, 10.133-10.134
Section 1983 actions, 13.116
Speech regulation. See **Speech Regulation (Government as Property Owner); Speech Regulation (Government as Regulator)**
Taxes on First Amendment activities, 5.97, 9.153
Formation of municipal corporations, constitutional issues involved in
Generally. See **Formation of Municipal Corporations**
Grants of municipal authority. See **Constitutional Grants of Municipal Authority**
Limits on municipal authority. See **Constitutional Limits on Municipal Authority**
Fourteenth Amendment
Affirmative action programs, 14th Amendment requiring showing of actual prior discrimination by public employer to justify, 4.9
Equal protection. See **Equal Protection**
Limits on municipal authority. See **Constitutional Limits on Municipal Authority**
Section 1983 actions, 13.114, 13.116
Fourth Amendment
Drug test as search under, 4.94
Section 1983 actions, Amendment as basis of, 13.116
Fourth Amendment limits on municipal authority, 1.65
Grant of municipal authority. See **Constitutional Grants of Municipal Authority**
Harbors, constitutional restrictions on conveyance and use of tide and submerged lands, 6.163
Initiatives and referenda. See **Initiatives and Referenda**
Intergovernmental relations, constitutional issues regarding. See **Intergovernmental Relations (Federal); Intergovernmental Relations (State)**
Lease of public building to religious group, constitutionality of, 8.115
Limits on municipal authority. See **Constitutional Limits on Municipal Authority**
Loyalty oath in California Constitution, effect of applicant's religious beliefs on requirement of taking, 4.218
Mandamus. See **Mandamus, Writ of**
Municipal affairs doctrine, constitutional basis of, 1.29
Pension plans, constitutional validity of, 4.33
Political Reform Act of 1974. See **Political Reform Act of 1974**
Privacy rights in housing, 10.199
Proposition 1A. See **Proposition 1A**
Public transportation. See **Public Transportation**
Second Amendment issues involving weapons and firearms, 9.95
Seventh Amendment jury trial to taking by exactions, 10.218
Severance of unconstitutional portions of sign ordinances, 9.144
Sixth Amendment as basis for Section 1983 actions, 13.116
Speech (see First Amendment, above)
Supremacy clause, 1.85, 1.103
Taking. See **Taking**
Tenth Amendment drawing line between federal and local power. See **Intergovernmental Relations (Federal)**
Voter qualifications under California Constitution, 3.62

Voting Rights Act (California), constitutionality of, 3.74

Constitutional Limits on Municipal Authority
Additional compensation, 1.45
Contract limitations, 1.57
Debt limit. See **Debt Limit**
Federal preemption doctrine. See **Federal Preemption**
Fifth Amendment limits, 1.66
First Amendment limits
California Constitution, 1.59
Religion issues (see Religion issues, below)
United States Constitution, 1.58
Fourteenth Amendment limits
Generally, 1.67
Due process clause, 1.69
Equal protection clause, 1.68
Fourth Amendment limits, 1.65
Public funds, prohibition against gifts of. See **Public Funds**
Public purpose, police power required to be reasonably related to, 1.32
Religion issues
Establishment clause, 1.60
Free exercise clause, 1.64
Invocations, 1.61
Public aid to religious organizations, 1.63
Religious displays, 1.62
Tax and appropriations limits. See **Taxing Power**

Construction and Interpretation
See also **Definitions**
Access to information
Conduct of people's business, broad construction of statutes, court rules, and other authorities to further people's right to access information about, 2.36
Furthering people's right of access to information, broad construction of statutes, court rulings, and other authorities, 2.218
Compensation for official services, strict construction of rules governing, 1.208-1.210
Contracts, general rule of interpretation for, 7.200
Corporate veil, doctrine of piercing, 12.52
Dillon's Rule of powers of subordinate governments, 1.27
Federal preemption doctrine, 1.33
Incompatible offices, common law doctrine of, 1.193
Insurance policies, interpretation of, 7.254-7.255
Meyers-Milias-Brown Act. See **Meyers-Milias-Brown Act**
Municipal affair and statewide concern distinguished, 1.30
Nuisance per se doctrine, 12.4
Pension legislation, liberal construction in favor of employee, 4.34
Public purpose, liberal construction of, 1.43
Public trust doctrine, restrictions imposed on conveyance and use of tide and submerged lands by, 6.163
Scope of employment, 13.88
Special fund doctrine, 1.47
Substantial compliance for Government Claims Act, 13.45
Substantial compliance with statutory requirements, 2.73
Workers' compensation law. See **Workers' Compensation**

Constructive Discharge. See **Termination of Employment**

Contempt. See **Civil Enforcement**

Contesting Elections. See **Election Contests**

Continued Hearings. See **Open Meeting Laws**

Contractors and Subcontractors for Public Works Contracts
Affirmative action. See **Affirmative Action in Hiring Public Employees**
Bidding. See **Bidding for Public Works Contracts**
Contractual provision on status of contractor, 7.228
Indemnification. See **Indemnification**

License issues
Failure to have proper license, effect of, 7.37
Invitation to bid, public entity specifying type of license required in, 7.36
Verification of license, 7.38
Limitations on contractor claims
Abandonment, 7.116
False claims, 7.114
Total cost claims, 7.115
Major subcontractors
General requirements, 7.39
List of contractors and subcontractors debarred by state, 7.41
Requests for additional information, 7.40
Prequalification of contractors, 7.27
Prevailing wage law, effect of. See **Prevailing Wage Law**
Stop notices. See **Stop Notices**
Subletting and Subcontracting Fair Practices Act, effect of. See **Subletting and Subcontracting Fair Practices Act**
Surety bonds. See **Surety Bonds**

Contracts
See also **Agreements**
Agricultural preserves. See **Williamson Act (Agricultural Preserves)**
Attorney fees, prevailing party recovering if provided for in contract, 7.242, 13.162, 13.172
Claim requirement procedures different from Claims Act in municipal contracts, 13.41
Conditional zoning, contracts for, 10.128
Debt limit, service contracts as exception to, 5.293
Discrimination or preferential treatment in public contracting prohibited, 1.57
Electric utility, effect of inter-utility contracts challenge, 6.39
Environmental impact reports, time limits for contracts with consultants, 11.57
Execution of contracts
Defective bidding process, consequence of, 7.245
Enforceability, effect on, 7.243
Signature requirement, 7.244
Federally funded projects. See **Federally Funded Projects**
General rule of interpretation, 7.200
Goods and services, contracting for. See **Goods and Services, Contracting for**
Government Claims Act, contract actions subject to, 13.29, 13.154
Indemnity agreements. See **Indemnification**
Joint community facilities agreements, 5.80
Liability based on contract. See **Liability**
Prohibited contracts
Goods and services, contracts for. See **Goods and Services, Contracting for**
Govt C §1090, prohibited contracts under. See **Ethical Considerations**
Provisions in contract
Arbitration, 7.231
Assignment. See **Assignments, Contractual Provision for**
Attorney's fees, 7.242, 13.162, 13.172
Audit, 7.238
Choice of law, 7.239
Claim requirement procedures different from Claims Act in municipal contracts, 13.41
Compensation of contractor, basis for, 7.207
Conflict of interest, avoiding, 7.232
Discrimination, provision prohibiting, 7.235
Dispute clause, 7.206
Duties, description of, 7.203
Entire agreement, 7.240
Federally funded projects. See **Federally Funded Projects**
Indemnification. See **Indemnification**
Insurance. See **Insurance**
Liability. See **Liability**
License requirement, 7.229
Notice requirements, 7.227
Ownership interest, 7.236
Ownership of materials and documents, 7.233
Parties, identification of, 7.201
Records, maintenance of, 7.237

Reimbursement of expenses, 7.208
Responsible contract administrators, identification of, 7.205
Status of contractor, 7.228
Termination, 7.234
Time. See **Time**
Waiver, 7.241
Public works contracts. See **Public Works Contracts**

Contributions to Political Campaign. See **Campaign Regulations**

Conversion
Parkland converted to different municipal purpose, permissibility of, 8.95

Copeland Anti-Kickback Act
Federally funded projects under, 7.156, 7.167

Corporate Power
Generally, 1.26
Charter cities. See **Charter Cities**
General law cities, 1.27

Corporations
Ballot measure, corporation making contributions to help pass or defeat, 3.178
Campaign regulations. See **Campaign Regulations**
Code enforcement, corporate defendants, 12.52-12.53
Corporate power of municipal corporation. See **Corporate Power**
Counties as public corporations or quasi-corporations, 1.2
Criminal enforcement against corporate defendants. See **Criminal Enforcement**
Initiative, prohibition against submitting measure to board to name private corporation to perform function, 3.104

Correctional Facilities
California Emergency Services Act providing disaster liability immunity for local agencies regarding inmates, 6.193

Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000
Generally, 1.10
Annexation under. See **Annexation**
Assessment districts not subject to Act, 5.123
Consolidation under. See **Consolidation**
Detachment under. See **Detachment**
Dissolution and disincorporation under. See **Dissolution and Disincorporation**
Incorporation under. See **Incorporation**
LAFCOs. See **Local Agency Formation Commissions (LAFCOs)**
Special districts. See **Special Districts**

Cost Reimbursements From State
Commission on State Mandates
Controller issuance of claiming instructions, 5.258
Exclusive remedy for claim reimbursement, 5.259
Legislative determination not binding on Commission, 5.252
Members of, 2.256
Parameters and guidelines for seeking reimbursement created by, 5.257-5.258
Reconsideration ordered by Commission, 5.260
Role of commission, 2.256
Test claim process, 5.257
Constitutional requirements for reimbursement
Generally, 5.246
Exceptions, 5.250
Definitions
Costs mandated by state, 5.247
Test claim, 5.257
Unfunded mandate, 2.255
Exceptions to reimbursement requirement
Constitutionally-based exceptions, 5.250
Statutory exceptions, 5.251
Exhaustion of administrative remedies, 5.259-5.260

Injunction against enforcement of unfunded mandate, 5.261
Intent and scope of requirement, 5.248-5.249
Judicial review
Legislative funding refusal, 5.261
Reconsideration ordered by Commission on State Mandates, 5.260
Legislative process
Fiscal committee referrals, 2.253
Legislative Counsel role, 5.252
Reimbursement provisions required if mandate found, 2.254
Suspension of unfunded mandates, 2.255
Unfunded mandates, judicial review of failure of legislature to fund, 5.261
Redevelopment agencies, compliance with preliminary reports reimbursed, 5.324
References for additional information about, 5.262
State Mandates (see Commission on State Mandates, above)
Statute of limitations for test claims, 5.257
Statutory requirements for reimbursement, 5.247
Timing considerations, order on reconsideration petitions, 5.260
Unfunded mandates
Definition of unfunded mandate, 5.255
Judicial review of failure of legislature to fund, 5.261
Suspension by legislature, 2.255

Costs
See also **Expenses and Expenditures; Fees**
California Voting Rights Act, recovery of costs under, 3.77
Civil Rights Act of 1991, recovery of costs under, 4.155
Closed session in violation of Brown Act, award of costs in action over, 2.116
Code enforcement, cost recovery associated with
Civil enforcement. See **Civil Enforcement**
Criminal enforcement, 12.65
Confidentiality of medical reports, 4.384
Discrimination action, prevailing party's recovery of costs in, 4.263
Election contests. See **Election Contests**
Fair Labor Standards Act (FLSA), recovery costs under, 4.90
Indemnification clause, right to defense costs under, 7.306
Indemnification of state agency for litigation costs, 1.93
Mediation, parties sharing costs of, 4.349
Nuisance abatement actions, cost recovery in, 12.22-12.24
Public Records Act, recovery of costs under, 2.263
Public works contracts, cost records kept by public entity's engineer, 7.73
Reimbursements of state mandates. See **Cost Reimbursements From State**
Workers' compensation litigation, employer's liability for, 4.384

Council of Governments (COG)
Generally, 1.80-1.81
Proposed revisions to housing needs determination, 1.82
Transfers of percentage of regional housing needs to another city or county, 1.83

Counties
Charter cities. See **Charter Cities**
Election services rendered to city by county clerk, 3.23, 3.166
Ethical obligations of county counsel. See **Government Lawyers, Ethical Obligations for**
Goods and services. See **Goods and Services, Contracting for**
Incorporation, effect of county ordinances after, 1.145
Sheriff as separate client from county, 2.201
State agents, counties as, 1.2
Voting Rights Act, counties as covered jurisdictions under, 3.45

Criminal Enforcement
See also **Administrative Enforcement; Civil Enforcement**
Arrest warrant (see Field citation versus arrest warrant, below)
Corporate defendants
Filing criminal complaint against corporation, 12.53
Piercing corporate veil, 12.52
Cost recovery, 12.65

Due process requirements
Generally, 12.39
Notice of charges, 12.43
Notice of crime, 12.42
Probation revocation hearing, due process procedures for, 12.61
Field citation versus arrest warrant
Generally, 12.46-12.47
Criminal complaint option, 12.49
Declaration in support of arrest warrant, 12.50
Failure to appear, consequences of, 12.48
Notify warrant option, 12.51
Hearings
Probation revocation hearing, due process procedures for, 12.61
Show cause hearing, 12.60
Hybrid systems
Bail forfeiture and referrals, 12.35
Disadvantages of sliding scale system, 12.33
Discretionary penalty provision (wobbler), 12.34
Pleas in abeyance, 12.36
Sliding scale system, 12.32-12.33
Identification of proper defendants, 12.44
Infractions (see Misdemeanors versus infractions, below)
Misdemeanors versus infractions
Generally, 12.28
Ongoing violations, 12.30
Penalty provision, 12.29
Notice requirements
Arraignment letters or notify warrants, 12.51
Charges, notice of, 12.43
Crime, notice of, 12.42
Due process (see Due process requirements, above)
Overview of criminal justice process
Arraignment and plea, 12.40
Complaint, 12.39
Due process requirements (see Due process requirements, above)
Trial, 12.41
Probation
Extension of, 12.64
Revocation of (see Revocation of probation, below)
Terms of (see Sentencing and terms of probation, below)
Prosecutorial penalty options
Hybrid systems (see Hybrid systems, above)
Infractions and misdemeanors punishable by Penal Code, 12.31
Revocation of probation
Admissible evidence, 12.62
Confrontation of witnesses, 12.63
Due process requirements, 12.61
Grounds for revocation, 12.58
Procedure, generally, 12.59
Show cause hearing, 12.60
Standard of proof, 12.63
Sentencing and terms of probation
Conditional sentence or informal probation, 12.55-12.56
Infractions and probation, 12.57
Scope of probation, 12.54
State criminal statutes
Criminal nuisance, 12.38
State Housing Law violations, 12.37
Strict criminal liability, possibility of, 12.45

Criminal Law
See also **Law Enforcement Personnel**
Brown Act, criminal prosecution for violation of, 2.39
City council member's criminal conviction, effect of, 1.196
Closed sessions

License application by person with criminal record, closed session of legislative body to consider, 2.99
Misdemeanor, member's attendance at legislative body meeting with intent to deprive public of information constituting, 2.112
Code enforcement. See **Criminal Enforcement**
Consolidation, effect on civil and criminal liability, 1.172
Counterfeiting activities, abatement of buildings used for, 12.15
Drug House Abatement Act, enforcement and remedies under, 12.14-12.17
Endangered Species Acts, violations of, 11.282, 11.296
Ex-felons' right to vote, 3.64
Fair Labor Standards Act (FLSA), criminal sanctions for violation of, 4.85
Firefighter, additional requirements for interrogating about potentially criminal conduct, 4.316
Government lawyers. See **Government Lawyers, Ethical Obligations for**
Initiative petition, misdemeanor for circulator to misrepresent or make false statements about contents, purpose, or effect of, 3.84
Job applicant's criminal record, employer's inquiries about, 4.22-4.23
Loitering, preemption of criminalized conduct, 9.105
Penalties. See **Penalties**
Police officer, *Lybarger* warning preceding questioning about potentially criminal conduct, 4.301
Political Reform Act of 1974, criminal penalties for violation of, 2.160, 3.204
Prohibited contract under Govt C §1090, maximum penalties for, 2.172
Public Records Act, exemption from disclosure for arrest records, 2.249
Red Light Abatement Act, enforcement and remedies under, 9.15, 12.13-12.16
Reimbursements of state mandates when defining new crime or changing penalty, 5.251
Trespassing as personal conduct regulation, 9.154-9.156
Water quality, criminal penalties for violations, 11.159
Willful abandonment of animals, 9.180

Curfews
Generally, 9.64
Emergencies, curfews for public safety during, 9.71
Fundamental rights, limitations on regulation of, 9.66
Overbreadth challenges to regulation, 9.72
Police power authority for, 9.65
Time, place, and manner restrictions on public forum access, 9.134
Vagueness challenges to regulation, 9.73
Youth or juvenile ordinances, 9.67-9.70

Damages
Civil Rights Act of 1991, limits on recovery of damages under, 4.154-4.155, 4.261
Claims subject to claims presentation requirement. See **Government Claims Act**
Code violations, treble damages for, 12.26
Discrimination action, recovery of damages in. See **Discrimination**
Fair Employment and Housing Commission, administrative award of damages by, 4.266
Inverse condemnation, action for damages for failure of agency to timely condemn, 5.355
Liability
Apportionment of liability for economic damages, 13.182
Personal liability of officers and employees for punitive and compensatory damages, 13.155
Punitive damages, no municipal liability for, 13.155
Section 1983 actions. See **Section 1983 Actions**
Liquidated damages
Age Discrimination in Employment Act (ADEA), recovery of liquidated damages under, 4.262
Equal Pay Act (Federal), 4.262
Fair Labor Standards Act (FLSA), recovery of liquidated damages for employer's violation of. See **Fair Labor Standards Act (FLSA)**
Public works contract provisions for, 7.66
Personal liability of officers and employees for, 13.155
Public works contract provisions
Force majeure damages, limit on, 7.67
Liquidated damages provision, 7.66
Punitive damages. See **Punitive Damages**
Section 1983 actions. See **Section 1983 Actions**
Taking. See **Taking**
Vandalism or graffiti, applicability of treble damage provision, 12.5

Dance Halls

Business and occupational regulation of, 9.28

Dangerous Condition of Public Property. See **Liability**

Davis-Bacon Act
Federally funded projects
Contract provisions requiring compliance with Act, 7.157
Definitions used in Act, 7.165
Prevailing wages, payment of, 7.166

Death Benefits
Dependents of employee dead from work-related injury or illness, entitlement to receive death benefits, 4.373

Debt Financing
Generally, 5.219
Bonds (see Disclosure obligations of cities, below)
Certificates of participation
Generally, 5.230
Installment sales transactions, 5.232
Lease-back agreements as part of (see Lease-back agreements, below)
Lease transactions, 5.231
Mark-Roos Public Financing Authority Bonds. See **Bonds**
References for additional information about, 5.233
Disclosure obligations of cities
Generally, 5.242
Consent calendar, inapplicability to bond issues over $100,000, 5.245
Continuing disclosure, 5.244
Counsel, retaining to meet obligations, 5.244
Original disclosure, 5.243
Economic development, using debt financing for, 5.298
Lease-back agreements
Generally, 5.234
Debt limit issues, 5.235-5.236
Equipment leases, 5.236
Mark-Roos Public Financing Authority Bonds. See **Marks-Roos Local Bond Pooling Act of 1985**
Requirements for transactions, 5.235
Taxable status of debt financing, 5.241

Debt Limit
Generally, 1.46, 5.12, 5.289
Acquisition of property, effect of debt limitation on, 8.75
Bonds, debt limit issues with, 5.224, 5.292, 5.295
Budgets as useful to plan expenditures, 5.264
Election issues for voting on indebtedness, 5.296
Exceptions to debt limit
Appropriation, 1.50
Contingencies, 1.49
Excluded entities, 5.294
Leases, 5.293
Obligations imposed by law, 5.291
Service contracts, 5.293
Special fund doctrine, 1.47, 5.292
Lease-back agreements, structuring to avoid debt limit issues, 5.235-5.236
No pledge of revenue beyond 1 year, 1.48
Purpose of, 5.290
Revenue bonds, exception to debt limit, 5.224
Statutory provisions for general obligations, 5.295

Declarations. See **Affidavits and Declarations**

Declaratory Relief
Government Claims Act, actions not subject to, 13.32
Initiative petition, city council filing declaratory relief action to remove from ballot, 3.86
Public Records Act, declaratory relief for improper withholding of records under, 2.258
Scope of employment, declaratory relief for employer funded defense, 13.88

Dedication
Acquisition of real property by offer of dedication
Generally, 8.65
Restrictions, 8.67
Tax consequences, 8.68
Terms, 8.66
Constitutional requirements, 10.219
Easements by implied dedication
Generally, 8.71
Consent, implied dedication with, 8.74
Gion, applicability of, 8.73
Statutory constraint, 8.72
Exactions. See **Exactions**
Parkland. See **Parkland**
Subdivision maps. See **Subdivisions and Subdivision Map Act**

Deeds
Certificate of acceptance by city council required before recording deeds conveying interest in real property, 8.76

Defamation
Definition of publication, 13.110
Liability for
Civil rights actions, claim including denial of right expressly protected in constitution, 13.112
Discharge of official duty, immunity for statements made during, 13.111
Legislative or other official proceedings, 13.110
Sexual harassment, false claim resulting in defamation action, 4.209

Defenses
Affirmative defenses
Dangerous condition of public property, affirmative defenses to action for, 13.106
Discrimination allegations, affirmative defenses to. See **Discrimination**
Mandamus, waiver issues with, 13.13
Sexual harassment by supervisor, employer's affirmative defenses against vicarious liability for, 4.198
Disability discrimination claims. See **Disabled Persons**
Electromagnetic fields, defenses to claims based on, 6.47
Fair Labor Standards Act (FLSA), employer's defenses under, 4.92
Immunity. See **Immunity**
Prohibited contracts under Govt C §1090, reliance on legal advice from city attorney as inadequate defense, 2.171
Section 1983 actions. See **Section 1983 Actions**
Sexual harassment. See **Sexual Harassment**
Work-related injuries, defenses to. See **Workers' Compensation**

Definitions
See also **Construction and Interpretation**
Active deposit, 5.273
Actual notice, 13.105
Adjudicatory act, 13.2, 13.5
Admitted surety insurer, 7.100
Adverse comment, 4.298
Affirmative action, 4.6
Affordable (housing development), 10.193
Affordable housing cost, 5.404
Agency shop agreement, 4.332
Agent, 2.152
Aggregate limit (on liability insurance policies), 7.273
Aggrieved person, 10.319
Air contaminant, 11.226
Amendment of certified local coastal program, 10.299
Annexation, 1.149
Appropriation, 5.264, 5.274
Approval of project, 11.18
Assessment district, 5.123
Attached housing development, 10.192
Ballot measure, 3.212
Basic aid school districts, 5.327

Benefits, 4.30
Bid peddling, 7.76
Bid shopping, 7.76
Big box retailer, 5.299, 5.371
Blight, 5.319
Building intensity, 10.21
California Public Utilities Commission (CPUC), 1.98
Candidate species (CESA), 11.290
Candidate species (ESA), 11.261
Censure, 1.226
Charge, 5.175
Charter, 1.13
City, 1.12
Clearly established, 13.126
Closed sessions, 2.82
Coastal zone, 10.280
Color of law, 13.132
Community, 5.306
Conflicting financial interest, 2.120
Consolidation, 1.168
Constructive notice, 13.105
Costs mandated by state, 5.247
Council of governments (COG), 1.80
Covered officer, 2.152
Covered proceeding, 2.152
Critical habitat (ESA), 11.263
Dangerous condition, 13.101
Dedication, 10.212
Designated or limited public forum, 9.121
Design-build, 7.9
Design professional, 7.300
Detachment, 1.149
Developed, 5.412
Development (California Coastal Act), 10.304-10.305
Development fee, 5.163
Disability, 4.223
Discretionary project, 11.20
Displaced person, 5.356, 8.16
Dissolution, 1.168
Domestic animal, 9.158
Domicile, 3.63
Elector, 3.34
Electric utility, 6.38
Employee, 2.91, 4.43, 13.94
Employer, 4.43
Employment, 4.59
Enactment, 13.98
Endangered species (CESA), 11.289
Endangered species (ESA), 11.260
Excess surplus, 5.432
Excise tax, 5.57
Excusable neglect, 13.73
Existing obligation, 5.425
Expenditure, 3.212, 5.264
Extremely low income household, 5.404
Facial taking claim, 10.372
Failure to maintain, 12.74
Fee, 5.175, 10.211
Field (preemption), 1.40
Fighting words, 9.136
First responders, 4.57
Front pay, 4.260
Full cash value, 1.52
Fundamental right, 10.439
General tax, 5.16, 5.71, 5.111

Gift, 2.155
Graffiti, 9.87
Harbor, 6.156
Harm (ESA), 11.265
Hazardous waste (RCRA), 11.238
Hazardous waste (state), 11.241
Honorarium, 2.154
Immediate family, 2.135
Impaired claim, 5.453
Impasse in bargaining, 4.341
Implied powers, 1.27
Inactive deposit, 5.273
Incorporation, 1.135
Increase (taxes), 5.51, 5.114
Independent expenditure, 3.196
Indirect source, 11.191
Infill, 10.194
Initiative, 3.80
Injury, 13.32
Inverse condemnation challenge, effect of, 6.39
Job performance standard, 4.269
Lead agency, 11.14
Legal cause, 13.104, 13.141
Legal nonconforming use, 10.121
Legal residence, 1.191
Legislative act, 13.2, 13.5
Legislative bodies, 2.37
Lewd or dissolute conduct, 9.75
Local agency, 1.105, 2.223
Lodestar figure, 13.159
Lower-income household, 5.404
Meeting, 2.40
Ministerial act, 13.2, 13.4
Ministerial project, 11.20
Mitigated negative declaration, 11.30
Moderate-income household, 5.404
Municipal affairs, 1.30
Municipal corporation, 1.1
Municipality, 5.442
Municipal separate storm sewer systems (MS4), 11.141
Natural resource, 10.54
Nonpublic forum, 9.122
Nuisance, 9.114
Occasional or sporadic work, 4.55
Offset, 11.227
One year, 13.56
Open meeting laws. See **Open Meeting Laws**
Open video system, 6.74
Parliamentary law, 2.10
Participant, 2.152, 5.351
Party, 2.152
Person (for air pollution control districts), 11.215
Person (for coastal development permits), 10.301
Person (public entity as), 13.173
Physical taking, 10.365
Piggy-back purchasing, 7.196
Plaintiff, 13.173
Point source, 11.137
Police power, 1.15
Policy-maker, 13.137
Population density, 10.21
Presentation of claim, 13.49, 13.62
Prevailing party, 13.159
Private patrol operators, 9.37
Progressive discipline, 4.272

Project, 11.19
Property ownership, 5.175
Property-related service, 5.175
Protected class, 3.75
Public agency, 4.43, 7.300
Publication, 13.110
Public entity, 13.94
Public monies, 3.210
Public nuisance, 9.115
Public official, 2.127, 2.164
Public project, 7.4
Public records, 2.224
Public works, 5.363, 7.85
Punitive action, 4.296-4.297
Qualified individual with disability, 4.222
Reasonable accommodations, 4.229
Record, 2.265
Recycled water, 11.181
Redevelopment, 5.301
Referendum, 3.80
Regular election, 3.3
Regulatory taking, 10.365
Reorganization (LAFCOs), 1.109
Responsible agency, 11.14
Responsible bidder, 7.19
Responsive bid, 7.18
Reuse value, 5.362
Right-of-way management, 10.139
Sales tax, 5.27
Service animal, 9.182
Sexual harassment, 4.187
Significant effect on environment, 11.29
Six months, 13.56
Solid waste, 11.238
Special districts, 1.8, 1.72
Special reorganization (LAFCOs), 1.109
Special tax, 5.16, 5.71, 5.111
Sphere of influence, 1.117
Spouse, 2.135
State agency, 2.223
Subdivision, 10.148
Substantial rehabilitation, 5.412
Sufficient water supply, 11.106
Suspect classification, 10.440
Take (CESA), 11.294
Take (ESA), 11.264
Tax increment, 5.392
Test claim, 5.257
Threatened species (CESA), 11.289
Threatened species (ESA), 11.260
Traditional public forum, 9.120
Trustee agency, 11.14
Unfair competition, 12.10
Unfunded mandate, 2.255
Urban growth boundary, 10.195
Urban water suppliers, 11.93
Use tax, 5.27
Vacancy, 1.189
Vacancy control, 9.60
Vacancy, in mobile home parks, 9.60
Variance, 10.113
Vehicle dealer, 5.299, 5.371
Very-low-income household, 5.404
Video service, 6.59
Warrant, 5.275

Waste, 11.180
Waste discharge requirement, 11.115
Waters, 10.357
Wetlands (Army Corps of Engineers), 10.356, 11.175
Wetlands (California Coastal Commission), 10.306
Wild animal, 9.178
Wobbler, 12.34
Zoning, 10.84

Density Bonuses. See **Affordable Housing**

Deposits of Probable Compensation. See **Eminent Domain**

Design Professionals
Indemnity provisions in contracts limited by statute, 13.180

Detachment
Generally, 1.149, 1.154
Approval or disapproval by LAFCO
With notice and hearing, 1.156
Without notice or hearing, 1.155
Effect of detachment
Interest and principal on debts, 1.165
Jurisdiction, 1.164
Public employees in special reorganizations, 1.167
Taxing authority, 1.166
Elections on detachment, 1.157
LAFCO (see Approval or disapproval by LAFCO, above)
Notice and hearing (see Approval or disapproval by LAFCO, above)
Timelines applicable to petitions for detachment, 1.136

Devise, Acquisition of Real Property by. See **Acquisition of Property**

Disabled Persons
See also **Americans with Disabilities Act (ADA); Incompetent Person**
Alcohol and drugs
ADA, permissibility of restrictions on drug and alcohol use under, 4.237
Definition of "disabled", alcoholics and drug abusers outside, 4.117, 4.148, 4.224
Participation in alcohol or drug rehabilitation by employee, employer's reasonable accommodation of, 4.120
Corrective measures, assessment of disability without regard to, 4.224
Defenses
Americans with Disabilities Act (ADA), defense to discrimination charge under, 4.239
Employer, defenses to disability discrimination claims against, 4.233
Definitions (see Discrimination against, below)
Discrimination against
Generally, 4.221
ADA. See **Americans with Disabilities Act (ADA)**
Disability defined, 4.223
Exceptions to definition of disability, 4.224
Exhaustion of administrative remedies, no requirement before filing discrimination complaint, 4.240
FEHA. See **Fair Employment and Housing Act (FEHA)**
Miscellaneous disability discrimination laws, 4.239
Qualified individual (see Qualified individual with disability, below)
Reasonable accommodation. See **Reasonable Accommodation for Disabled Persons**
Rehabilitation Act of 1973, alcoholics and drug abusers outside definition of "disabled" under, 4.117, 4.148, 4.224
Drugs (see Alcohol and drugs, above)
Family Rights Act, disability compensation under, 4.172
FEHA. See **Fair Employment and Housing Act (FEHA)**
Government Claims Act, grounds for relief in late claims, 13.75
Medical examination of disabled job applicant (see Pre- and post-employment inquiries and medical examinations, below)
Pension, disability resulting in right to receive, 4.39
Pre- and post-employment inquiries and medical examinations
Generally, 4.216
Americans with Disabilities Act (ADA) allowing employment offer conditioned on results of medical examination, 4.20
Post-employment exam and inquiries, restrictions on, 4.236

Post-offer examination and inquiry, 4.235
Pre-offer medical examination and inquiry, 4.234
Public transportation. See **Public Transportation**
Qualified individual with disability
Defined, 4.222
Essential functions of job, 4.225
Obesity not disability per se, 4.226
Types of discrimination prohibited, 4.227
Reasonable accommodation. See **Reasonable Accommodation for Disabled Persons**
Service animals, discrimination based on use of prohibited, 9.182
Workers' compensation law, disability benefits under. See **Workers' Compensation**

Disaster Preparedness and Response
Generally, 6.180
California Disaster Assistance Act, effect of, 6.199
California Emergency Services Act. See **California Emergency Services Act**
Chief executive powers, 6.199
Due process in disaster situations, 6.181
Elements of local emergency plan, 6.195
Expenditure of funds, 6.199
Hazardous material transportation or spills, 6.199
Joint powers agreements establishing disaster preparation and response agencies, 6.199
Police chief powers, 6.199
Public employees as disaster service workers, 6.199
Ralph M. Brown Act (Brown Act) emergency meeting provisions. See **Open Meeting Laws**
Shelter crisis, use of public facilities to address, 6.199
Sheriff powers, 6.199
Statutory powers in disaster situations
California Emergency Services Act. See **California Emergency Services Act**
State constitutional disaster authorizations, 6.182
Workers' compensation, special rules on, 6.199

Disciplinary Actions Against Employee
Closed session meeting to consider. See **Closed Session Meetings**
Court's deference to city's selection of appropriate penalty or discipline, 4.277
Due process
Liberty interest (see Liberty interests in pursuing employment, below)
Post-disciplinary evidentiary hearing, employee's right to, 4.288
Property interest in continued employment (see Property interest in continued employment, employee's due process rights, below)
Firefighters. See **Firefighters Procedural Bill of Rights Act**
Grievances. See **Grievances, Employee Filing**
Hearings
Name clearing hearing before imposition of discipline, 4.287
Post-disciplinary evidentiary hearing, 4.288
Skelly conference, 4.281
Just cause as standard for determining propriety of discipline, 4.271
Liberty interests in pursuing employment
Generally, 4.285
Denial of due process based on deprivation of liberty interest, 4.286
Name clearing hearing before imposition of discipline, 4.287
Lubey rights (see Liberty interests in pursuing employment, above)
Police officers. See **Public Safety Officers Procedural Bill of Rights Act**
Post-disciplinary proceedings, 4.288
Progressive discipline
Defined, 4.272
Demotion of employee, 4.275
Discharge of employee, 4.276
Suspension of employee, 4.274
Warnings, 4.273
Property interest in continued employment, employee's due process rights
Generally, 4.278
Hearing, requirements for, 4.281
Pre-disciplinary *Skelly* rights, 4.280
Property interest in continued employment, protection for, 4.279

Remedies for *Skelly* violations, 4.284
Skelly conference, 4.281
Types of discipline not triggering procedural due process rights, 4.283
Types of discipline triggering procedural due process rights, 4.282
Skelly rights (see Property interest in continued employment, employee's due process rights, above)

Disclaimer
Public works contracts, effect of disclaimer clauses in, 7.107-7.108

Disclosures
Ballot measures. See **Ballot Measures**
Closed-session disclosure report, contents of. See **Closed Session Meetings**
Conflict of interest disclosure statements, 5.387, 5.433
Debt financing disclosure requirements. See **Debt Financing**
Document distributed to majority of legislative body, disclosure of, 2.76
Eminent domain proceedings, disclosure of just compensation in, 8.34
Ethical considerations
Community redevelopment commission, member's disclosure of financial interest in property within project area of, 2.182
Redevelopment agency's officers and employees, requirement of disclosing property owned and direct or indirect financial interests in property within redevelopment project area, 2.181
HIV tests, liability for improper disclosure to third parties, 4.132
Political Reform Act of 1974. See **Political Reform Act of 1974**
Public Records Act. See **Public Records Act (California)**
Section 1983 actions, disclosure to employees of exposure to punitive damages, 13.143, 13.156

Discovery
Attorney fee award against losing party of discovery motion, 13.170
Section 1983 actions, discovery considerations for removal to federal court, 13.151
Subpoenas. See **Subpoena and Subpoena Duces Tecum**
Title VII of Civil Rights Act, discoverability of personnel files under, 4.128
Workers' compensation litigation, discovery in, 4.387

Discretion
Air quality board's discretion to allow variances, 11.218
California Coastal Act. See **California Coastal Act**
CEQA, discretionary projects under, 11.20
City council's discretion, electorate prohibited from exercising power of initiative or referendum on matters assigned by legislature to, 3.110
Immunity of employee for discretionary acts, 13.97
LAFCO determinations and decisions, judicial inquiry limited to question of prejudicial abuse of discretion in, 1.129
Liability for discretionary acts. See **Liability**
Mandamus. See **Mandamus, Writ of**
Parade, discretion by permitting official, 9.148
Second units, discretion in local ordinances allowing, 10.167
Section 1983, discretionary acts versus policy, 13.138
Water supplier's substantial discretion, 11.103

Discrimination
Affirmative action. See **Affirmative Action in Hiring Public Employees**
Affirmative defenses to discrimination allegations
Affirmative action plan or court order, effect of discriminatory practice resulting from, 4.185
Bona fide occupational qualification, 4.181
Business necessity, 4.182
Essential function of job, employer showing questioned practice related to, 4.183
Security regulations, effect of discriminatory practices conforming with established, 4.184
Age discrimination. See **Age Discrimination**
Authorization for release of confidential medical information, prohibition against discrimination based on employee's refusal to sign, 4.114
Civil Rights Act of 1991, persons eligible to file discrimination claim under, 4.151
Contractual provision prohibiting, 7.235
Damages (see Monetary relief under federal laws, below)
Defenses (see Affirmative defenses to discrimination allegations, above)
Disability, discrimination based on. See **Disabled Persons**
Donated land, invalidity of discriminatory deed restrictions, 8.121
Enforcement of discrimination laws. See **Discrimination Laws, Enforcement of**

Federal laws
Age Discrimination Act of 1975, scope of, 4.147
Age discrimination. See **Age Discrimination in Employment Act (ADEA)**
Americans with Disabilities Act (ADA), hiring restrictions under, 4.20
Civil Rights Act of 1871. See **Civil Rights Act of 1871**
Civil Rights Act of 1991. See **Civil Rights Act of 1991**
Equal Pay Act of 1963. See **Equal Pay Act (Federal)**
Fair Labor Standards Act. See **Fair Labor Standards Act (FLSA)**
Family and Medical Leave Act of 1993, protections under, 4.162
Immigration Reform and Control Act of 1986 prohibiting discrimination against applicants and employees based on citizenship or national origin, 4.12, 4.149
Rehabilitation Act of 1973. See **Rehabilitation Act of 1973**
Title VII. See **Title VII of Civil Rights Act of 1964**
Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 4.163
Federal remedies for violating anti-discrimination laws
Affirmative relief, 4.265
Equitable relief, 4.264
Monetary relief (see Monetary relief under federal laws, below)
Gender identity, employee's right to dress in manner consistent with, 4.176
Hiring. See **Recruitment and Qualifications of Public Employees**
Initiative constituting discriminatory regulation, effect of, 3.113
Land use decisions
General plan for land use, as factor to consider, 10.42
Statutes prohibiting discrimination in, 10.443
Meyers-Milias-Brown Act, prohibition against discrimination against employee exercising rights under, 4.326
Monetary relief under federal laws
Attorney fees, prevailing party's recovery of, 4.263
Back pay, 4.259
Civil Rights Act of 1991, recovery of compensatory damages under, 4.154-4.155
Compensatory and punitive damages, 4.261
Future lost earnings (front pay), recovery of, 4.260
Liquidated damages for willful violation of Age Discrimination in Employment Act and Equal Pay Act, 4.262
National origin. See **National Origin, Discrimination Based on**
Posters in workplace. See **Posters in Workplace**
Public contracting, prohibition against discrimination in, 1.57
Racial discrimination. See **Racial Discrimination**
Redevelopment plan, nondiscrimination covenants required for disposition documents, 8.110
Religious discrimination. See **Religious Discrimination**
Remedies for violation of anti-discrimination laws
Federal remedies (see Federal remedies for violating anti-discrimination laws, above)
State remedies (see State remedies, below)
Residential developments or emergency shelters, discrimination against prohibited, 10.161
Sex discrimination. See **Sex Discrimination**
Sexual harassment. See **Sexual Harassment**
State laws
California Constitution, anti-discrimination provisions of, 4.164
Equal Pay Act, protections under, 4.167
Family Rights Act, scope of, 4.172
FEHA. See **Fair Employment and Housing Act (FEHA)**
Govt C §11135, discrimination prohibited under, 4.169
HIV test results, prohibition against employer making hiring decision based on, 4.24, 4.171
"Kin care" use of sick leave, 4.173
Miscellaneous leave requirements, 4.175
Pregnancy disability leave, 4.174
Ralph Civil Rights Act, 4.168
State personnel laws, 4.170
Unruh Civil Rights Act, 4.168
State remedies
Fair Employment and Housing Commission, administrative award of damages by, 4.266
Judicial remedies, 4.267
Subpoenas. See **Subpoena and Subpoena Duces Tecum**
Testing. See **Testing for Hiring, Promotion, or Retention of Employees**
Theories of discrimination
Disparate impact. See **Disparate Impact or Disparate Treatment Discrimination**
Retaliation against employee. See **Retaliation Against Employees**

Video franchisees, anti-discrimination requirements for, 6.68
Workers' compensation penalties for discrimination against injured employee. See **Workers' Compensation**

Discrimination Laws, Enforcement of
ADA (see Title VII and ADA, below)
Age Discrimination in Employment Act. See **Age Discrimination in Employment Act (ADEA)**
Department of Fair Employment and Housing, enforcement of state discrimination laws by. See **Fair Employment and Housing, Department of (DFEH)**
Determination by EEOC
Conciliation of parties, EEOC attempting, 4.247
No cause determination by EEOC, dismissal of charge after, 4.247
Right to sue notice (see Right to sue notice, below)
Equal Pay Act (Federal), 4.250
Filing charge with EEOC
Generally, 4.242
Notifying employer of charge filed, 4.245
Standing to file charge with EEOC, 4.243
Timeliness of filing charge with EEOC, 4.244
Investigations
Department of Fair Employment and Housing's investigation of discrimination complaint, 4.254
EEOC's investigation of complaints filed under Title VII or ADA, 4.245
Notice
EEOC notifying employer of charge filed, 4.245
Right to sue notice (see Right to sue notice, below)
Right to sue notice
Age Discrimination in Employment Act, right to sue notice not prerequisite for filing action under, 4.249
Charging party requesting EEOC issue, 4.246
Department of Fair Employment and Housing issuing, 4.256
Time limit for bringing private civil lawsuit against defendant after issuance of, 4.248
State procedures for enforcing discrimination laws
Civil lawsuit, time limit for filing, 4.257
Department of Fair Employment and Housing. See **Fair Employment and Housing, Department of (DFEH)**
Exhaustion of administrative remedies not prerequisite to filing FEHA claim, 4.258
Title VII and ADA
Civil lawsuit to enforce discrimination laws, 4.248
Determination by EEOC (see Determination by EEOC, above)
Filing charge with EEOC (see Filing charge with EEOC, above)
Investigation of charge, 4.245
Notice (see Notice, above)

Disincorporation. See **Dissolution and Disincorporation**

Dismissal of Actions
Bankruptcy case, creditors seeking dismissal of, 5.447
EEOC's no cause determination, dismissal of charge after, 4.247

Dismissal of Employee. See **Termination of Employment**

Disorderly conduct
Generally, 9.74
Definition of lewd or dissolute conduct, 9.75
Public intoxication, 9.77
Public lewdness, 9.75-9.76

Disparate Impact or Disparate Treatment Discrimination
Generally, 4.177-4.179
Age Discrimination in Employment Act (ADEA), plaintiff alleging either disparate treatment or disparate impact under, 4.144
Business necessity affirmative defense in disparate impact case, 4.182
Employment tests resulting in, 4.15

Disposition of Property
Government grant funds, property purchased with
Generally, 8.104
California Park and Recreational Facilities Act of 1984, effect of, 8.106
Federal community development block grant (CDBG) funds, 8.105

Optional procedure for disposition of real property
Findings that public interests and convenience require sale, 8.81
Protests to sale, overriding, 8.84
Publication of resolution, 8.83
Resolution of intent to dispose of property, content of, 8.82
Parkland. See **Parkland**
Personal property
Generally, 8.102
Restrictions applicable to disposal of (see Restrictions applicable to disposal of real and personal property, below)
Real property
Generally, 8.80
Optional procedure (see Optional procedure for disposition of real property, above)
Parkland. See **Parkland**
Restrictions applicable to disposal of (see Restrictions applicable to disposal of real and personal property, below)
Surplus property. See **Surplus Property**
Redevelopment. See **Redevelopment**
Restrictions applicable to disposal of real and personal property
Adverse possession, 8.69, 8.114
Conflicts of interest, 8.113
Donations of land. See **Donations of Land**
Government grant funds (see Government grant funds, property purchased with, above)
Redevelopment. See **Redevelopment**
Streets and highways owned in fee, 8.103
Surplus property. See **Surplus Property**

Disqualification of Attorney
Public lawyer with multiple clients having adverse interests, disqualification of, 2.192

Disqualification of Public Officials
City council member receiving campaign contributions from applicant seeking quasi-judicial land use decision, no automatic disqualification on grounds of bias, 2.180
Political Reform Act. See **Political Reform Act of 1974**

Dissolution and Disincorporation
See also **Incorporation**
Defined, 1.168
Effects of dissolution and disincorporation
Generally, 1.178
Payment of debts, 1.175
Powers cease, 1.174
Return of public property, 1.177
Revenues to successor, 1.176

District Elections. See **Elections**

Documentary Transfer Taxes, 5.67, 5.98

Dogs and Domestic Animals. See **Animals**

Domicile. See **Residence and Domicile**

Donations of Land
Discriminatory deed restrictions, invalidity of, 8.121
Permissible donations under state law, 8.112
Public purpose, donations for, 8.111

Drug House Abatement Act
Generally, 9.78
Injunctive relief under, 12.13-12.17

Drug Testing
See also **Alcohol and Drugs**
Generally, 4.93
Accident, testing following
Generally, 4.109

Examples of cases not upholding testing after accident, 4.111
Examples of cases upholding testing after accident, 4.110
Americans with Disabilities Act (ADA)
Exclusion of drug use from ADA's definition of disability, 4.118
Permissibility of drug testing under, 4.238
Constitutional issues
California Constitution, effect of right to privacy under, 4.99
Government interests justifying mandatory testing, 4.95
Miscellaneous balancing factors, 4.98
New job applicants, constitutionality of drug tests for, 4.19, 4.93
Nexus between individual's job duties and nature of feared violation, requirement of, 4.96
Particular types of drug testing (see Particular types of drug testing, constitutionality of, below)
Reduced expectation of privacy on part of employee, effect of, 4.97, 4.100
Routine physical examination including drug test, constitutionality of, 4.102
Current employees, drug testing of, 4.93, 4.112
Federal laws on drug testing
Americans with Disabilities Act (ADA), exclusion of drug use from definition of disability, 4.118
Drug Free Workplace Act of 1988, scope of, 4.115
Omnibus Transportation Employee Testing Act of 1991, scope of, 4.116
Rehabilitation Act of 1973, challenging drug testing programs under, 4.117
Medical examination
Americans with Disabilities Act (ADA), test for illegal drug use not constituting medical examination under, 4.118
Constitutionality of routine physical examination including drug test, 4.102
New job applicants for public employment, requirements for drug testing of, 4.19, 4.93, 4.100, 4.113
Particular types of drug testing, constitutionality of
Accident (see Accident, testing following, above)
Cause, testing for, 4.103
Pre-employment testing, 4.19, 4.93, 4.100
Promotion procedure, testing as part of, 4.105
Random testing (see Random drug testing, constitutionality of, below)
Rehabilitation program, testing as part of, 4.104
Routine physical examination including drug test, 4.101
Penalties for violation of state and federal law
Drug Free Workplace Act of 1988, penalties for contractor's violation of, 4.115
State Drug Free Workplace Act of 1990, penalties for violation of, 4.119
Procedures for drug testing
Generally, 4.112
Confidentiality of medical information, 4.114
Meet and confer requirements for drug testing of current employees, 4.113
Public transit employees, drug and alcohol testing of. See **Public Transportation**
Random drug testing, constitutionality of
Generally, 4.106
Examples of jobs for which random drug testing not upheld, 4.108
Examples of jobs for which random drug testing upheld, 4.107
State laws on drug testing
Alcohol and Drug Rehabilitation Act, reasonable accommodation requirements under, 4.120
Department of Fair Employment and Housing regulations allowing job applicant right to provide independent medical opinion, 4.121
State Drug Free Workplace Act of 1990, scope of, 4.119
Taxicab drivers, 9.43

Due Process
Administrative enforcement. See **Administrative Enforcement**
Building permits, due process claim if nondiscretionary permit denied after owner's compliance with requirements, 10.428
California Environmental Quality Act (CEQA), timely preparation of environmental impact report, 11.57
City council meetings, due process requirements for. See **City Council Meetings**
Code enforcement, due process requirements for. See **Administrative Enforcement; Criminal Enforcement**
Conditional use permits. See **Conditional Use Permits**
Disability retirement claims, local agency providing necessary due process procedures, 4.39
Disaster situations, due process in, 6.181
Disciplinary actions, employee's due process rights. See **Disciplinary Actions Against Employee**
Fair and impartial participation in quasi-judicial proceedings by decision-maker, due process requiring, 2.180
Judicial review
Deferential judicial standard of review of land use regulations, 10.421
Standard of judicial review in absence of statutory standard, 10.413

Just compensation for owner of private property taken by government, due process requiring, 1.66
Land use decisions
Generally, 10.407, 10.419
Fair hearing requirements. See **Fair Hearing**
Procedural due process (see Procedural due process for land use decisions, below)
Substantive due process (see Substantive due process for land use decisions, below)
Loitering regulation, issues with, 9.102-9.103
Mandamus proceedings, substantive due process, 13.26
Personal conduct regulations, 9.81-9.83
Procedural due process for land use decisions
Generally, 10.407
Notice and hearing requirements, 10.5-10.9
Standard of judicial review in absence of statutory standard, 10.413
Statutory requirements (see Statutory due process requirements for land use decisions, below)
Quasi-judicial administrative procedure, two or more lawyers required to protect due process right of individual subject to, 2.208
Rent adjustment applications, due process for, 9.56
Section 1983 actions
Fourteenth Amendment as basis of, 13.116
State law remedies, interaction with Section 1983 claims, 13.140
Statutory due process requirements for land use decisions
Generally, 10.408
California Environmental Quality Act (CEQA) requirements, 10.412
Planning and Zoning Law requirements, 10.410
Ralph M. Brown Act requirements, 10.409
Standard of judicial review in absence of statutory standard, 10.413
Subdivision Map Act requirements, 10.411
Substantive due process for land use decisions
Generally, 1.69, 10.419-10.420
Companion claims, taking and civil rights common, 10.422
Deferential judicial standard of review of land use regulations, 10.421
Rational-basis test, 10.424-10.425
Rational-relationship test in equal protection cases, rational-basis as comparable, 10.425
Ripeness requirement. See **Taking**
Vested rights (see Vested rights issues, below)
Taxes. See **Taxes**
Vested rights issues
Generally, 10.426
Common law vested rights, 10.428
Extractive industries, special issues with, 10.429
No right to develop property or maintain zoning in place, 10.427
Statutes affecting vested rights doctrine, 10.430
Weapons and firearms confiscation procedures, 9.98
Zoning (see Vested rights issues, above)
Zoning issues involving
Conditional use permits, 10.103-10.104
Variances from zoning, 10.118

Easements
Common law and statutory easements, 8.78
Harbor-related easements, permissibility of, 6.168
Implied dedication, easements by. See **Dedication**
Prescription, easements by, 8.70
Vacation of service easements
Generally, 8.126
Nonsummary vacation procedure. See **Nonsummary Vacation of Streets, Highways, and Service Easements**
Summary vacation procedure. See **Summary Vacation of Streets, Highways, and Service Easements**

Economic Development
See also **Redevelopment**
Generally, 5.297
Definitions
Big box retailer, 5.299
Vehicle dealer, 5.299
Findings that should be made, 5.297

Prevailing wage law issues, 5.300
Statutory prohibitions against, 5.299
Types of assistance, 5.298

Education. See **Universities and Colleges**

EEOC. See **Equal Employment Opportunity Commission (EEOC)**

Eighth Amendment. See **Constitutional Law**

Election Contests
Generally, 3.124
Affidavits (see Primary elections, below)
Costs
General election contest, liability for costs of trial over, 3.135
Primary election, liability for costs of contesting, 3.140
General election, contests at
Answer, defendant filing, 3.131
Appealing trial court's decision, 3.136
Ballot measures, contests on, 3.137
Grounds for contest, 3.126
Persons eligible to contest local election, 3.125
Pretrial proceedings, 3.130
Statement of contest (see Statement of contest for general election, below)
Trial (see Trial of general election contest, below)
Judgment
Determination and judgment, 3.134
Hearing and judgment on primary election contest, 3.148
Service of judgment in recount of primary election, 3.145
Summary judgment, unavailability of, 3.134
Time limit for court to issue judgment after trial, 3.134
Primary elections
Costs, responsibility for, 3.140
Grounds for annulment or set-aside of primary election, 3.139
Grounds for contest, candidate contesting primary election by filing affidavit alleging, 3.138
Hearing and judgment on contest, 3.148
Miscellaneous grounds for contesting primary election, 3.146
Service of affidavit on defendant, 3.142, 3.147
Simple recount (see Simple recount, primary election contests involving, below)
Recount (see Simple recount, primary election contests involving, below)
Service of papers
Affidavit contesting primary election, service on defendant, 3.142, 3.147
Judgment in recount of primary election, service of, 3.145
Simple recount, primary election contests involving
Generally, 3.141
Appearance by defendant, 3.143
Judges, recount handled by, 3.144
Nonappealability of court's judgment, 3.145
Procedures for recount, 3.142
Statement of contest for general election
Amendment of, 3.129
Form requirements for statement, 3.127
Time limit for filing statement, 3.128
Time
Judgment, time limit for court to issue after trial, 3.134
Statement of contest, time limit for filing, 3.128
Trial of general election contest
Costs of trial, 3.135
Evidence and burden of proof, 3.133
Judgment (see Judgment, above)
Powers of trial court, 3.132

Elections
See also **Ballots; Voters**
Generally, 3.1

Affordable housing, elections required for certain low-income projects, 10.164
Annexation of territory, elections on, 1.157
At-large elections
Generally, 1.186, 3.29
Federal Voting Rights Act, challenges to at-large elections under, 3.68
Ballot measures. See **Ballot Measures**
Benefit assessments and assessment district ballots not constituting election, 5.149
Campaign contributions. See **Political Reform Act of 1974**
Campaign regulations. See **Campaign Regulations**
Candidates
Names of candidates on ballots. See **Ballots**
Nomination of (see Nomination of candidates, below)
Qualifications of (see Qualifications of candidates, below)
Voters' pamphlets, candidates' statements in, 3.52
Canvass of vote and declaration of results
Basic procedures on canvassing vote and declaring results, 3.21
Certification of results, 3.26
Mail, counting votes cast by, 3.23
Names written on ballot, counting of, 3.24
Oath of office, administration to elected officials, 1.187, 3.27
Precinct, counting votes at, 3.22
Provisional ballots, use and verification of, 3.25
Recordation of vote results, 3.27
Recount of votes, 3.28
Challenging elections
California Voting Rights Act. See **Voting Rights Act (California)**
Contests. See **Election Contests**
Federal Voting Rights Act. See **Voting Rights Act (Federal)**
Time limit for challenging election materials, 3.57
City clerk as election official, 3.2
Conduct of elections
Election day procedures at polling place, 3.20
Pre-election day procedures, 3.19
Contests. See **Election Contests**
Counting votes (see Canvass of vote and declaration of results, above)
County clerk, election services rendered to city by, 3.23, 3.166
Dates for elections
Municipal elections, 3.7
Regular elections, 3.4
Debt limit issues, 5.296
Declaration of results (see Canvass of vote and declaration of results, above)
Definitions
Elector, 3.34
Regular election, 3.3
Detachment of territory, elections on, 1.157
Distinction between election contest and quo warranto, 3.124
District elections
Generally, 1.186, 3.30
By district, holding election, 1.186, 3.31
Federal Voting Rights Act, challenges to district elections under. See **Voting Rights Act (Federal)**
From districts, holding election, 1.186, 3.32
Fees and charges, time for election, 5.181
Incorporation, elections to confirm, 1.143
Initiatives. See **Initiatives and Referenda**
Local Agency Formation Commission (LAFCO) initiating change of organization, confirmation election required if, 1.114
Mayor, direct election of, 1.202
Methods of election
At-large elections (see At-large elections, above)
District elections (see District elections, above)
Municipal elections
Advisory measures, city council submitting to electorate, 3.14
Consolidation of municipal elections with another governmental entity's elections, 3.8
Dates for municipal elections, 3.7
Notice of election (see Notice of municipal election, below)
Party affiliation in local government elections prohibited, 3.46

Publishing information about (see Publishing information about municipal elections, below)
Statutes governing, 3.6
Newspapers (see Publishing information about municipal elections, below)
Nomination of candidates
Circulators of nomination paper, requirements for, 3.18
Filing fees for nomination of candidate, 3.17
Nomination papers, voters signing, 3.15
Signatures needed for nomination of candidate, required number of, 3.16
Notice of municipal election
Contents of notice, 3.10
Posting notice of election in absence of newspaper of general circulation, 3.11
Publishing notice in newspaper of general circulation, 3.9
Voters' pamphlets, mailing with notice of election, 3.52
Public Records Act (California)
Exemption for election documents, 2.243
Initiative, referendum, and recall petitions, restrictions on inspection of, 2.227, 2.243
Publishing information about municipal elections
List of nominees, publication of, 3.12
List of polling places and precinct board members, publication of, 3.13
Notice of municipal election (see Notice of municipal election, above)
Synopsis of measures, publication of, 3.14
Qualifications of candidates
City council member, clerk, or treasurer, qualifications for, 3.35
Mayor, qualifications for elected, 3.34
Residency requirement, 3.33
Recall elections. See **Recall**
Recount of votes
Generally, 3.28
Election contests. See **Election Contests**
Regular elections
Dates for regular elections, 3.4
Defined, 3.3
Initiative, city council placing on ballot for next regular election, 3.91
Special elections
Generally, 3.5
Initiative, special election for, 3.90
Recall election. See **Recall**
Term limits, 1.222, 3.36
Time
Certification of results, time limit for, 3.26
Challenging election materials, time limit for, 3.57
Dates for elections (see Dates for elections, above)
Election contests. See **Election Contests**
Fees and charge, time for holding election to approve, 5.181
Initiative, timing of election for. See **Initiatives and Referenda**
Nomination papers, time limit for filing before election, 3.15
Recall elections. See **Recall**
Sample ballots, time limit for mailing, 3.58
Types of elections
Municipal elections (see Municipal elections, above)
Regular elections (see Regular elections, above)
Special elections (see Special elections, above)
Voters' pamphlets. See **Voter's Pamphlets**

Electric Utilities
See also **Utilities**
Generally, 6.24
Antitrust action by federal or state government, effect of, 6.39
Constitutional authority over electrical power, 6.17
Defined, 6.38
EMF. See **Electromagnetic Fields (EMF)**
Fees for electric service exempt from Proposition 218, 5.186
Franchises. See **Franchises**
Industry restructuring
Changes to restructuring program after 2000, 6.20

Energy crisis legislation, 6.22
Historical background, 6.18
Investor-owned utilities legislation, 6.22
Provision of electrical service under restructuring, 6.19
Recovery of California Department of Water Resources (CDWR) costs, 6.21
Intergovernmental agreements to construct and maintain electrical poles, 7.186
Investor-owned utilities
Acquisition of, 6.40-6.41
Legislation regarding, 6.22
Transmission services, ownership of, 6.23, 6.28
Jurisdiction
California Energy Commission (CEC) jurisdiction, 6.38
CPUC. See **California Public Utilities Commission (CPUC)**
FERC. See **Federal Energy Regulatory Commission (FERC)**
Rate-setting, 6.42-6.43
References on municipal retail electric utilities, 6.48
Types of ownership, 6.23

Electromagnetic Fields (EMF)
Generally, 6.44
Litigation
Generally, 6.45
Defenses to EMF claims, 6.47
Examples of personal injury litigation related to EMF, 6.46

Ellis Act, 9.58

E-Mail
Public records, e-mail as, 2.229

Emergencies
Ambulances, pre-hospital emergency medical services, 9.25
California Coastal Act, emergency exceptions to permit procedures, 10.310
California Emergency Services Act. See **California Emergency Services Act**
Competitive bidding requirement for public works contracts, emergency exception to, 7.6
Curfews for public safety during, 9.71
Disaster preparedness. See **Disaster Preparedness and Response**
Drugs and alcohol, cost recovery for responding to emergency caused by person under influence of, 5.167
Emergency shelters, 10.32, 10.161
Expenditure of funds in, 6.199
Harbors. See **Harbors**
Intergovernmental agreements for emergency assistance, 7.188
Meeting called to deal with emergency situation. See **Open Meeting Laws**
Meyers-Milias-Brown Act, emergency requiring decision on ordinance, rule, resolution, or regulation without giving prior notice, 4.334
Posted agenda, legislative body discussing and voting to take action on emergency situation not appearing on, 2.61
Shelter zone identification in general plans, 10.32
Sheriff's emergency powers, 6.199
Subletting and Subcontracting Fair Practices Act, emergency/necessity exception under, 7.80
Summary (emergency) abatement, determining necessity for, 12.68

EMF. See **Electromagnetic Fields (EMF)**

Eminent Domain
See also **Condemnation**
Acquisition offer
Generally, 8.26
Lessees, 8.29
Statement of basis for offer, 8.27
Statutory exceptions, 8.28
Acquisition of property by eminent domain, common prerequisites for
Generally, 8.2
CEQA, environmental review under, 8.6
Compliance with statutory and regulatory guidelines, 8.3
Environmental (contamination) assessment (see Environmental (contamination) assessment, below)

General plan, conformity with, 8.4
Notice of intent to appraise, 8.9
Offer (see Acquisition offer, above)
Preliminary work to ascertain property interests, 8.5
Relocation assistance. See **Relocation Assistance**
Title search, 8.7
Agency acquiring property from members or officers through eminent domain proceedings, 2.183
Alternative dispute resolution, 8.55
Appraisals
Deposit of probable compensation, written summary of basis of appraisal used for, 8.46
Exchange of appraisals before trial, 8.58-8.59
Litigation guarantee and appraisal, update of, 8.45
Notice of intent to appraise, 8.9
Attorney fees, municipal liability for, 13.161
Basis of eminent domain power, 1.22
CEQA, compliance with, 8.6, 8.32
Complaint, filing of, 8.45
Contamination (see Environmental (contamination) assessment, below)
Deposit of probable compensation
Generally, 8.46
Appraisal used for deposit, written summary of, 8.46
Interest on compensation awarded, 8.51
Interest on deposit, 8.52
Notice of application for withdrawal, 8.49
Order for possession, deposit prerequisite to, 8.46-8.47
Withdrawal by defendants, deposit available for, 8.46, 8.48
Withdrawal waiving all defenses except additional compensation, 8.50
Eminent Domain Law, effect of, 8.37, 8.41
Environmental (contamination) assessment
Generally, 8.10
Failure to perform assessment, consequences of, 8.13
Further assessment, 8.12
Purpose of assessment, 8.11
Goodwill, effect of loss of, 8.38, 8.46
Hearing (see Resolution of necessity, below)
Homeowners and Private Property Protection Act, effect of, 5.354, 8.31
Interest on probable compensation (see Deposit of probable compensation, above)
Joint powers agreement, eminent domain as delegated power under, 1.77
Judgment and payment of judgment, 8.63
Just compensation, setting of
Generally, 8.33
Disclosure, 8.34
Extent of compensation, 8.35
Goodwill, effect of loss of, 8.38
Limits on powers of public entity to condemn another public entity's property, 1.106
Lis pendens notice, recording of, 8.45
Necessity (see Resolution of necessity, below)
Notice
Appraise, notice of intent to, 8.9
Deposit of probable compensation, notice of application for withdrawal, 8.49
Lis pendens notice, recording, 8.45
Proposed adoption of resolution of necessity, notice of hearing on, 8.41
Orders
Condemnation, final order of, 8.64
Possession (see Possession, order for, below)
Possession, order for
Deposit of probable compensation as prerequisite, 8.46-8.47
Motion for order of possession, filing of, 8.54
Precondemnation negotiations, 8.40
Precondemnation offer
Generally, 8.36
Conditional offer, 8.37
Eminent Domain Law, effect of, 8.37
Required contents of offer, 8.38
Probable compensation, deposit of (see Deposit of probable compensation, above)

Proposition 99 limits on, 5.354, 8.31
Prosecution of eminent domain action
Alternative dispute resolution, 8.55
Appraisal exchange, 8.58-8.59
Final order of condemnation, 8.64
Final pretrial conference, 8.59
Judgment and payment of judgment, 8.63
Mandatory settlement conference, 8.60
Motions affecting compensation, 8.61
Preliminary court proceedings, 8.56
Statutory settlement offers, 8.60
Trial of legal issues, 8.57
Valuation trial, 8.62
Redevelopment agencies authority for use of, 5.304, 5.336, 5.347, 5.354-5.355
Relocation information to occupants, 8.39
Resolution of necessity
Adoption of, 8.43
Findings, 8.44
Hearing on proposed adoption of resolution of necessity, 8.42
Notice of hearing on proposed adoption of resolution of necessity, 8.41
Service of papers on record owners and occupants of property, 8.53
Settlement, 8.60
Time. See **Time**
Valuation
Appraisals, use of. See **Appraisals**
Goodwill, effect of loss of, 8.38, 8.46
Statement of valuation, contents of, 8.46
Time for valuation trial, 8.62
Withdrawal (see Deposit of probable compensation, above)

Employment Tests. See **Testing for Hiring, Promotion, or Retention of Employees**

Encumbrances. See **Liens and Encumbrances**

Endangered Species Act (ESA)
See also **California Endangered Species Act (CESA)**
Generally, 11.257
Burden of proof for federal enforcement
Criminal cases for illegal taking, 11.282, 11.296
Injunctions, 11.283
Procedural violations, review of agency actions for, 11.280
Taking provision violations, 11.281-11.282
Citizen suits (see Federal enforcement, below)
Consultations for federal and federal-nexus projects
Biological assessments and opinions, 11.268
Biological opinions, types of, 11.268
Examples of consultations, 11.269
Requirement for, 11.267
Definitions
Candidate species, 11.261
Critical habitat, 11.263
Endangered species, 11.260
Harm, 11.265
Take, 11.264
Threatened species, 11.260
Enforcement
Federal (see Federal enforcement, below)
State court litigation, 11.287
Federal enforcement
Generally, 11.276
Burden of proof (see Burden of proof for federal enforcement, above)
Injunctions, 11.279, 11.283
Jurisdiction and venue issues, 11.277
Legislative power, limits on, 11.278
National Environmental Policy Act (NEPA) claims, inclusion with ESA claims, 11.286

Notice requirements, 11.285
Standard of review, arbitrary and capricious as, 11.284
Standing under ESA, 11.279
Habitat conservation plans and incidental take permits for non-federal projects
Generally, 11.270
Contents of plans, 11.271-11.272
Handbook about plans, 11.275
Multi-species incidental take permits, 11.273
"No surprises" assurances during term of plan, 11.274
Permit revocation rule, 11.274
Scope of plans, 11.272
Transferability of permits, 11.275
Implementation of Act, 11.259
Importance of Act, 11.256
Permits (see Habitat conservation plans and incidental take permits for non-federal projects, above)
Purpose of, 11.258
References for additional information about, 11.297
Species protected under
Candidate species, 11.261
Critical habitat, protection of, 11.263
Modifications to protected or candidate species, petition for, 11.262
Threatened and endangered, 11.260
Taking of endangered or threatened species prohibition
Generally, 11.264
Burden of proof (see Burden of proof for federal enforcement, above)
Consultations (see Consultations for federal and federal-nexus projects, above)
Development projects affected by prohibition, 11.266
Harm, land use concerns with, 11.265
Incidental taking (see Habitat conservation plans and incidental take permits for non-federal projects, above)
Timing considerations. See **Time**

Engineers. See **Architects and Engineers**

Enterprise Zones
Surplus property located in enterprise zone, offer to sell or lease, 8.90

Environmental and Natural Resources Agencies, 1.101

Environmental Impact Reports (EIRs). See **California Environmental Quality Act (CEQA)**

Environmental Law
Air quality. See **Air Quality**
California Coastal Act. See **California Coastal Act**
CEQA. See **California Environmental Quality Act (CEQA)**
Coastal areas. See **Coastal Areas**
Eminent domain proceedings, environmental (contamination) assessment. See **Eminent Domain**
Endangered species. See **California Endangered Species Act (CESA)**; **Endangered Species Act (ESA)**
Federally funded projects, environmental law compliance, 7.161
Greenhouse gas emissions. See **Greenhouse Gas Emissions**
Importance of for municipalities, 11.1
National Environmental Policy Act (NEPA). See **National Environmental Policy Act (NEPA)**
Police power, limits on, 11.2
Preserving public interest in sensitive lands
Generally, 11.3
Conservancies for, 11.7
Joint powers agreements, 11.8
Public trust doctrine. See **Public Trust Doctrine**
Williamson Act. See **Williamson Act (Agricultural Preserves)**
Tidelands, beaches, and streams. See **Tidelands, Beaches, and Streams**
Water. See **Water Quality**

Environmental Protection Agency (EPA)
Air quality issues. See **Air Quality**
Hazardous materials and toxic waste. See **Hazardous Materials and Toxic Waste**
Water quality issues. See **Water Quality**

EPA. See **Environmental Protection Agency (EPA)**

Equal Employment Opportunity Commission (EEOC)
Affirmative action, EEOC guidelines on adoption of voluntary, 4.11
Americans with Disabilities Act (ADA), EEOC guidelines on enforcing performance standards under, 4.215
Enforcement of discrimination laws by EEOC. See **Discrimination Laws, Enforcement of**
Hiring of employees, effect of EEOC's nondiscriminatory guidelines on. See **Recruitment and Qualifications of Public Employees**
Reasonable accommodations, EEOC regulations defining, 4.229
Religious discrimination, EEOC compliance manual on, 4.215
Sexual favoritism in workplace, EEOC's position on, 4.192

Equal Pay Act (Federal)
Back pay, recovery of, 4.259
Enforcement of, 4.250
Liquidated damages, recovery of, 4.262
Scope of, 4.143
Statute of limitations for filing action under, 4.250

Equal Pay Act (State)
Scope of, 4.167

Equal Protection
Generally, 1.68
Affirmative action programs. See **Affirmative Action in Hiring Public Employees**
Americans with Disabilities Act (ADA), effect on equal protection analysis, 4.241
Camping in parks, ordinances against, 9.62
Dance halls, nuisance abatement issues with, 9.28
Definitions
Fundamental right, 10.439
Suspect classification, 10.440
District elections, challenge based on denial of equal protection under 14th Amendment, 3.70
Land use decisions
Generally, 10.419, 10.431
Application of equal protection principals in land use context, 10.432
Rational-relationship test (see Rational-relationship test in land use decisions, below)
Standard of review for challenges under, 10.432
Statutory provisions prohibiting discriminatory land use actions, 10.443
Strict scrutiny or compelling state interest test (see Strict scrutiny or compelling state interest test for land use decisions, below)
License tax, classifications for, 5.46
Loitering regulation, issues with, 9.101
Mandamus proceedings, equal protection issues with, 13.25
Personal conduct regulations, 9.84
Rational-relationship test in land use decisions
Generally, 10.433-10.434
"Class of one" cases, 10.437
Development and developers included subject to test, 10.436
Fundamental rights or suspect class, test not applicable, 10.435
Section 1983 actions, Fourteenth Amendment as basis of, 13.114, 13.116
Sexual harassment, equal protection clause guaranteeing employee's right to freedom from, 4.210
Statute permitting government expenditure to support ballot measure as violation of, 3.213
Strict scrutiny or compelling state interest test for land use decisions
Generally, 10.435, 10.438
Fundamental rights, 10.439
Incidental effect on fundamental right, 10.442
Independent review of classification by court, 10.441
Suspect classification, 10.440
Taxes, procedural requirements. See **Taxes**

Equipment
Cable equipment, regulation of, 6.63, 6.83
Contracting for, 7.195
Gas, electric, and water franchises, relocating equipment or facilities, 8.123
Leases, 5.236

Parking citations, equipment and registration tab violations added to, 5.212
Utilities relocating equipment. See **Utilities**

ESA. See **Endangered Species Act (ESA)**

Estoppel
Collateral estoppel, Section 1983 actions, 13.128
Equitable estoppel
Government Claims Act, equitable estoppel as ground for relief in late claims, 13.76
Land use, exceptional circumstances required, 13.175
Municipal plaintiffs. See **Municipal Plaintiffs**

Ethical Considerations
See also **Political Reform Act of, 1974**
Agency acquiring property from members or officers, restrictions on, 2.183
Bias, prohibition against participation by decision-maker with, 2.180
City council members, ethics training as prerequisite to receiving compensation, 1.210
Common law rule on holding multiple public offices (see Incompatibility of holding multiple public offices, below)
Conflicts of interest. See **Conflicts of Interest**
Contracts (see Prohibited contracts under Govt C §1090, below)
Disclosures. See **Disclosures**
Exceptions to prohibited contracts under Govt C §1090
Existing contracts, 2.170
Remote interests and noninterests in contract, conflict of interest not created by, 2.167
Rule of necessity, 2.168
Salary, per diem, or reimbursement for expenses from government entity as non-interest, 2.169
Government lawyers. See **Government Lawyers, Ethical Obligations for**
Incompatibility of holding multiple public offices
Generally, 2.176
Applicability of common law rule to offices, 2.176-2.177
Common law doctrine of, 1.193
Examples of incompatible offices, 2.179
Potential for conflict between offices, effect of, 2.178
Incompatible activities
Adoption by local agency of rules on, 2.175
Notice of prohibited activity, disciplinary action for engaging in prohibited activity, and procedure for appealing determination of violation, requirement of local rules containing, 2.184
Lobbying. See **Lobbying**
Multiple public offices (see Incompatibility of holding multiple public offices, above)
Prohibited contracts under Govt C §1090
Generally, 2.162
Exceptions (see Exceptions to prohibited contracts under Govt C §1090, above)
Financial interest of public official under Govt C §1090, 2.166
Making of contract broadly defined, 2.165
Penalties for willful violation of Govt C §1090, 2.172
Persons subject to Govt C §1090, 2.164
Reliance on legal advice from city attorney as inadequate defense, 2.171
Situations in which Govt C §1090 applies, 2.163
Statute of limitations under Govt C §1090, 2.173
Self-dealing (see Prohibited contracts under Govt C §1090, above)

Ethical Walls. See **Government Lawyers, Ethical Obligations for**

Evaluation of Employees
Closed session meeting to consider. See **Closed Session Meetings**
Performance evaluations, 4.270
Performance standards, 4.269

Eviction
Valid overlapping state and local regulation, eviction regulations as example of, 1.41

Evidence
Code enforcement
Administrative enforcement, evidence gathering for, 12.67
Criminal enforcement, admissible evidence at probation revocation hearing relating to, 12.62

Dangerous condition of public property, absence of prior accidents admissible to show site not dangerous, 13.101
Election contest, evidence at trial, 3.133
Environmental impact reports, adequacy of evidence in, 11.39
Fair hearing requirements for, 10.415
LAFO proceedings, evidence gathering for, 1.127
Mandamus, evidence admissible in writ of. See **Mandamus, Writ of**
Public Records Act, admissibility of document obtained under, 2.230
Water supplies, reliance on supplies not currently available, evidence, 11.107

Exactions
Authority for
Common law, 10.216
Police power, 10.213
Public works power, 10.214
Statutory provisions governing, 10.215
Building permits, exactions required for, 10.234, 10.236
Definitions
Dedication, 10.212
Fee, 10.211
Fees, statutory procedure for imposition of
Generally, 10.222
Exclusions for development agreements, 10.228
Findings required, 10.224
Nexus required, 10.223
Notice and hearing, 10.226
Relationship between fees and costs, 10.225
Statute of limitations for challenges to fees, 10.229-10.230
Taking limitations (see Taking limitations on, below)
Waiting period for fees, 10.227
Practice tips for implementation of, 10.230
Public access to coast, 10.307
Subdivisions, fees and dedications, imposition on, 10.157
Taking limitations on
Generally, 10.217, 10.391
Ad hoc factual inquiry conducted, 10.397
Dedications, 10.219
Diminution of value cases, 10.398
Fees, generally, 10.220
General rule for exaction constitutionality, 10.218
Housing units, fees to mitigate loss of, 10.395
Nexus test, 10.392, 10.399
Public improvements, fees for, 10.394
Rough proportionality of exaction to impact of development, 10.393
Tax issues, 10.221

Excise Taxes. See **Taxes**

Execution of Contracts. See **Contracts**

Exhaustion of Administrative Remedies
Air quality permit appeals, exhaustion of remedies required, 11.234
Americans with Disabilities Act (ADA), no requirement of exhausting administrative remedies before filing action under, 4.240
California Environmental Quality Act (CEQA), 11.41, 11.62
Civil Rights Act of 1871, no requirement of pursuing state administrative remedies before filing action under, 4.159
Cost reimbursement procedures, exhausting all remedies recommended, 5.259-5.260
Fair Labor Standards Act (FLSA), no requirement of exhausting administrative remedies before bringing action for violation of, 4.87
FEHA claims, exhaustion of administrative remedies not prerequisite to filing, 4.240, 4.258
Government Claims Act, time for exhaustion of remedies tolls presentation period, 13.59
Mandamus, exhaustion of remedies as jurisdictional requirement, 13.13
Section 1983 actions, exhaustion not usually required, 13.129
Sexual harassment, no requirement of exhausting administrative remedies before filing complaint with Department of Fair Employment and Housing, 4.199
Strikes, requirement that employer exhaust administrative remedies with California Public Employment Relations Board before seeking relief in court, 4.323

Taking, exhaustion of remedies requirement for ripeness test, 10.377
Title VII, no requirement of exhausting administrative remedies before filing action under, 4.154

Expenses and Expenditures
See also **Costs; Fees**
Appropriations, 5.264, 5.274
Ballot measures, city's expenditures on. See **Ballot Measures, City's Participation in**
Budgets as useful to plan expenditures, 5.264
Campaign regulations affecting expenditure limits. See **Campaign Regulations**
City council expenses. See **City Council**
Debt financing. See **Debt Financing**
Debt limit issues. See **Debt Limit**
Definitions
Appropriation, 5.264, 5.274
Expenditure, 5.264
Warrant, 5.275
Emergency, expenditure of funds in, 6.199
Gann Limit. See **Gann Limit**
Generally accepted accounting practices, use of, 5.264
Gifts. See **Public Funds**
Investments. See **Investments**
Lobbying expenditures. See **Lobbying**
Municipal purposes doctrine. See **Public Funds**
Redevelopment activities, funding may be used for, 5.397
Reimbursement. See **Reimbursement**
Retroactive compensation not authorized, 5.280
Warrants and payments, 5.275-5.276

Experts and Expert Witnesses
Civil Rights Act of 1991, recovery of expert witness fees under, 4.155
Workers' compensation case, effect of expert medical opinion, 4.384

Express Indemnity Agreements. See **Indemnification**

Extension of Time
Building permit, extension of time for duration or revocation of, 10.243
Department of Fair Employment and Housing, extension of time for filing complaint with, 4.253
General plan, extension of time to adopt. See **General Plans**
Public Records Act, extension of time for providing copy of record after receiving request under, 2.235

Fair Employment and Housing Act (FEHA)
See also **Fair Employment and Housing, Department of (DFEH)**
Generally, 4.165
Definition of disability under FEHA, 4.223
Exhaustion of administrative remedies not prerequisite to filing FEHA claim, 4.240, 4.258
Government Claims Act, employment discrimination cases not subject to act, 13.32
Hiring restrictions under, 4.21
Injured employee's cause of action under, 4.399
Obesity not disability per se, 4.226
Psychoactive substance disorders, inapplicability of FEHA to, 4.121
Public policy, discrimination claim under FEHA as basis for tortious violation of, 4.166
Reasonable accommodation. See **Reasonable Accommodation for Disabled Persons**
Retaliation against employee for filing or participating in FEHA action, 4.180
Right to sue notice, time limit for bringing private civil lawsuit against defendant after issuance of, 4.248
Sexual harassment, FEHA prohibiting, 4.186, 4.194, 4.199, 4.201
Sexual orientation, FEHA prohibiting discrimination based on, 4.165
Workers' compensation benefits, injured worker filing FEHA disability discrimination claim in addition to seeking, 4.380

Fair Employment and Housing Commission
Administrative award of damages by, 4.266

Fair Employment and Housing, Department of (DFEH)
See also **Fair Employment and Housing Act (FEHA)**
Drug test, DFEH's regulations allowing job applicant right to provide independent medical opinion, 4.121

Enforcement of state discrimination laws by
Generally, 4.251
Accusation against employer, DFEH issuing written, 4.255
Complaint, filing with DFEH, 4.252
Hearing on accusation, time limit for holding, 4.255
Investigation of complaint by DFEH, 4.254
Right to sue notice, DFEH issuing, 4.256
Statute of limitations for filing complaint with DFEH, 4.253
Sexual harassment, no requirement of exhausting administrative remedies before filing complaint with Department of Fair Employment and Housing, 4.199

Fair Hearing
Bias
Actual bias or the appearance of bias, 10.417
Advance knowledge of facts, 10.418
Campaign contributions, effect of, 10.416
Evidence relied by decision-maker, 10.415
Ex parte contacts, procedural due process issues, 10.414

Fair Labor Standards Act (FLSA)
Generally, 4.42
Child labor, FLSA prohibiting
Generally, 4.80
Department of Labor suing employer for violations of child labor provisions of FLSA, 4.83
Compensatory time off requirements
Generally, 4.76
Conditions for use, 4.78
Forcing employees to use compensatory time, 4.79
Limitations on accrual of, 4.77
Recordkeeping requirements (see Recordkeeping requirements, below)
Damages (see Liquidated damages, employer's liability for, below)
Definitions
Employee, 4.43
Employer, 4.43
Employment, 4.59
First responders, 4.57
Occasional or sporadic work, 4.55
Oppressive child labor, 4.80
Public agency, 4.43
Workweek, 4.70
Discrimination
Sex discrimination prohibited under FLSA, 4.81
Violation of Act, discrimination against employee for bringing suit prohibited, 4.89
Employee's action against employer for violation of Act
Generally, 4.86
Class action under CCP §382 prohibited, 4.88
Discrimination against employee for bringing suit prohibited, 4.89
Exhaustion of administrative remedies, no requirement of, 4.87
Enforcement of Act
Criminal sanctions for violation of Act, 4.85
Defenses available to employer, 4.92
Employee's action against employer (see Employee's action against employer for violation of Act, above)
Injunctive relief for violations of Act, 4.84
Investigations of FLSA violations by Department of Labor, 4.83
Judicial enforcement of Act, 4.84
Liquidated damages (see Liquidated damages, employer's liability for, below)
Monetary liability of employer for violating Act, 4.90
Statute of limitations for bringing action to enforce Act, 4.91
Equal Pay Act. See **Equal Pay Act (Federal)**
Exclusions from FLSA coverage
Generally, 4.44
First responders, inapplicability of overtime exemptions to, 4.57
Highly compensated employee, exemption for, 4.56
Independent contractors status, tests for determining, 4.46
Miscellaneous exemptions from FLSA overtime provisions, 4.56

Trainees and employees receiving training, distinction between, 4.47
Volunteers, 4.45
Exemptions from FLSA overtime pay and minimum wage provisions
Generally, 4.48
Occasional or sporadic work on part-time basis for same public agency, effect of employee performing, 4.55
Police and firefighters, partial exemption for (see Police and firefighters, partial overtime exemption for, below)
White-collar employees (see White-collar employees, exemption for, below)
Firefighters (see Police and firefighters, partial overtime exemption for, below)
Liquidated damages, employer's liability for
Generally, 4.90
Partial defense barring or reducing recovery of liquidated damages, 4.92
Minimum wage requirements
Generally, 4.58
Definition of employment under FLSA, 4.59
Employees residing on employer's premises, 4.64
Enforcement of (see Enforcement of Act, above)
Examples of miscellaneous compensable time, 4.65
Examples of noncompensable activities, 4.66
Exemptions (see Exemptions from FLSA overtime pay and minimum wage provisions, above)
Garnishment of wages, restrictions on, 4.68
"On-call" or "standby" time, compensation for, 4.60
Rest and meal periods, 4.61
Travel time, limits on compensability of, 4.62
Waiting and sleeping time, compensation for, 4.63
Minors (see Child labor, FLSA prohibiting, above)
Overtime pay requirements
Generally, 4.69
Averaging of hours over two or more workweeks prohibited, 4.70
Compensatory time off in lieu of overtime (see Compensatory time off requirements, above)
Enforcement of (see Enforcement of Act, above)
Exclusions (see Exclusions from FLSA coverage, above)
Exemptions (see Exemptions from FLSA overtime pay and minimum wage provisions, above)
Police and firefighters, partial exemption for (see Police and firefighters, partial overtime exemption for, below)
Regular rate of pay, calculation of, 4.71
Workweek for calculating overtime pay, definition of, 4.70
Police and firefighters, partial overtime exemption for
Generally, 4.72
Calculation of overtime pay for police and firefighters, 4.75
Firefighters' eligibility for exemption, 4.73
Law enforcement employees, exemption for, 4.74
Recordkeeping requirements (see Recordkeeping requirements, below)
Private right of action under, 4.42
Public entity coverage under, 4.43
Recordkeeping requirements
Generally, 4.82
Injunctive relief to enforce FLSA recordkeeping requirements, 4.84
Violations of Act (see Enforcement of Act, above)
White-collar employees, exemption for
Generally, 4.49
Duties test, effect of employee meeting criteria for "executive", "administrative" or "professional" employee, 4.54
Furloughs, 4.52
Improper deductions from exempt employee's salary, 4.53
Recordkeeping requirements (see Recordkeeping requirements, above)
Salary basis test, exemption based on, 4.50
Suspension of exempt employees, 4.51

Fair Political Practices Commission
Criminal violations of Political Reform Act, repeal of Commission's authority to prosecute, 3.204
Immunity reliance on written opinions of, 2.119, 2.160

Family and Medical Leave Act of 1993
Right of employees to take unpaid leave under, 4.162

Family Members. See **Children; Spouses**

Family Rights Act (California)
Scope of, 4.172

Farms and Ranches. See **Agricultural Lands**

Faxes
Public records, faxes as, 2.229

Federal Energy Regulatory Commission (FERC)
Electric utilities, jurisdiction over
Cogeneration and small power producers, regulation of, 6.33
Preemption of CPUC, 6.25
Transmission service (see Transmission service, below)
Wholesale electric rate regulation (see Wholesale electric rate regulation, below)
Natural gas, regulation of wholesale sales and transmission of, 6.34
Transmission service
California independent system operator (ISO), FERC jurisdiction over, 6.32
Expanded FERC authority, 6.29
Independent system operators, formation of, 6.31
Investor-owned utilities, 6.28
Limitations on FERC authority over municipal electric utilities, 6.30
Metered Subsystem Agreement (MSS Agreement) availability to municipal utilities, 6.32
Order 888 (Final Open Access Rule), effect of, 6.31
Rates, 6.28
Regional Transmission Organizations, formation of, 6.31
Wholesale electric rate regulation
Interstate transmission and sales, 6.25
Just and reasonable rates, 6.26
Setting rates, 6.27

Federal Fair Labor Standards Act. See **Fair Labor Standards Act (FLSA)**

Federally Funded Projects
Advertising (see Competitive sealed bids (formal advertising), below)
Affirmative action. See **Affirmative Action in Hiring Public Employees**
Authority to comply with federal requirements, 7.129
Bids (see Competitive sealed bids (formal advertising), below)
Competitive negotiation
Generally, 7.144
Award, 7.148
Contents of request for proposal, 7.146
Evaluation of proposals received, 7.147
Solicitation of responses, 7.145
Competitive sealed bids (formal advertising)
Generally, 7.138
Award, 7.142
Bid opening, 7.141
Information provided, 7.140
Rejection of bid, 7.143
Solicitation of responses, 7.139
Contract provisions
Generally, 7.151
Access to records, 7.160
Building requirements, 7.154
Copeland Anti-Kickback Act, compliance with, 7.156, 7.167
Davis-Bacon Act, compliance with, 7.157
Energy efficiency, 7.162
Environmental law compliance, 7.161
Executive order compliance, 7.155
Hours and safety standards, 7.158
Maintenance of contract administration system, 7.163
New inventions and materials, 7.159
Remedies, 7.152
Termination by grantee, 7.153
Davis-Bacon Act, compliance with. See **Davis-Bacon Act**

Formal advertising (see Competitive sealed bids (formal advertising), above)
Goods and services, authority to contract for, 7.190
Prevailing wages, payment of. See **Prevailing Wage Law**
Procurement method
Generally, 7.136
Competitive sealed bids (formal advertising) (see Competitive sealed bids (formal advertising), above)
Small purchase procedures, 7.137
Records
Contract provision governing access to records, 7.160
Payroll records, maintenance of, 7.168
Supplies, purchase of (see Use of federal grant funds to purchase supplies and services, below)
Use of federal grant funds to purchase supplies and services
Code of conduct for grantees, 7.133
Competitive negotiation (see Competitive negotiation, above)
Contracting with small and minority firms, women's business enterprise (WBE), and labor surplus area firms, 7.134
Contract pricing, 7.150
Contract provisions (see Contract provisions, above)
Grantee/grantor responsibility, 7.131
Grantor review of proposed contracts, 7.132
Method of procurement (see Procurement method, above)
Noncompetitive negotiation, 7.149
Selection procedures, 7.135
Uniform administrative regulations, standards and guidelines established by, 7.130

Federal Preemption
See also **Preemption of Local Laws**
Generally, 1.33
Airports, federal preemption over. See **Airports**
Americans with Disabilities Act (ADA), preemption of inconsistent state or local laws by, 4.239
Conflict with federal law, preemption due to, 1.35
Congressional intent, ascertaining for purposes of federal preemption analysis, 1.33-1.35
Defining preempted field, 1.40
Examples of valid overlapping state and local regulation, 1.41
Federal Power Act, FERC's jurisdiction preempting CPUC from regulating interstate transmission or sales under, 6.25
Motor vehicle emissions, air quality districts preempted from regulating, 11.196
Occupation of field, preemption due to, 1.34
Telecommunications. See **Telecommunications**

Federal Voting Rights Act. See **Voting Rights Act (Federal)**

Fees
See also **Charges**; **Costs; Expenses and Expenditures**; **Rates**
Generally, 5.158
Agency shop agreements, employees paying organization service fee for representation services under, 4.332
Airport fees, 6.151
Air quality permits, 11.228, 11.231
Amount of fee
Appropriations limit on, 5.11
General funds transfers of utility fees, 5.162
Indirect costs includable, 5.161
Relationship to costs required, 5.160
Assessments compared, 5.125
Attorney fees. See **Attorneys' Fees**
Authority for, 5.159
Bankruptcy, effect of automatic stay on collection of fees, 5.173
Business license fees and taxes. See **Taxes**
Cable television and video system franchises. See **Cable Television and Video Systems Franchises**
Challenges to lack of voter approval for charge imposed by city, city's burden of showing charge actually fee or general tax, 5.74
Civil Rights Act of 1991, recovery of expert witness fees under, 4.155
Definition of development fee, 5.163
Development fee requirements, 5.163
Development impact fees, development taxes compared, 5.60
Development processing fees, 5.164-5.165
Economic development, subsidy or reduction of fees as, 5.298
Electric service, exemption of fees from Proposition 218, 5.186

Enterprise districts, fees charged by, 1.75
Exactions. See **Exactions**
Fish and Game, Department of, 10.349
Franchise fees. See **Franchises**
Habitat maintenance, funding for, 11.296
Incident of property ownership, limit on amount of fee or charge imposed on parcel or person as, 5.176
Initiatives affecting property-related fees and charges, 5.120
Intergovernmental agreements for county to provide services, fees associated with, 7.189
New fees. See **Proposition 218**
Nomination of candidate, filing fee for, 3.17
Parade permits, 9.149
Police power authority for, 5.3
Property-related fees and charges. See **Proposition 218**
Public Records Act, fee for copying records requested under, 2.234
Public services, recovery of costs for providing, 5.167
Reimbursements of state mandates if fees charged, 5.251
Relationship to costs required, 5.160
Sewage disposal, fees and charges for, 6.12
Solid waste and recycling. See **Solid Waste and Recycling**
Special tax compared, 5.72, 5.160
State subventions. See **Revenues**
Storm water management fees, 6.16
Subdivisions, imposing on, 10.157
Taxes. See **Taxes**
Time. See **Time**
Vehicle registration, raising for air quality purposes, 11.191
Water, sanitation, and sewer fees, 5.166, 5.175, 5.180

FEHA. See **Fair Employment and Housing Act (FEHA)**

FERC. See **Federal Energy Regulatory Commission (FERC)**

Fiduciary Duties
Elected officials, fiduciary duty of, 2.174

Fifth Amendment. See **Constitutional Law**

Finances
Generally, 5.1
Authority for
Generally, 5.2
Appropriations limit, 5.11
Debt limit prohibition, 5.12
Delegation of taxing power not allowed, 5.14
Local taxation authority, 5.6
Police power, 5.3
Private possessory interest in government property tax authorized, 5.23
Proposition 13 limits on taxes, 5.8
Proposition 62, voter approval required for taxes, 5.9
Proposition, 218, 5.10
Public works power, 5.4
Vehicle license fees, 5.7
Bankruptcy of municipality. See **Bankruptcy and Insolvency**
Debt financing. See **Debt Financing**
Economic development. See **Economic Development**
Expenditures. See **Expenses and Expenditures**
Gifts of public funds prohibition. See **Public Funds**
Proposition 1A. See **Proposition 1A**
Redevelopment activities, 5.302
Revenues. See **Revenues**

Financial Interest, Conflict of Interest Involving. See **Political Reform Act of 1974**

Findings
Administrative mandamus, findings required for, 13.16

Affordable housing. See **Affordable Housing**
Air quality. See **Air Quality**
CEQA. See **California Environmental Quality Act (CEQA)**
Conditional use permits, findings and decisions, 10.104
Denial of certification of land use plan, findings and modifications, 10.294-10.295
Economic development, 5.297
Eminent domain, 8.44
Housing element of general plans, rebuttable presumption of validity after compliance finding, 10.50
Housing, findings required for limits on, 10.205-10.206
Infrastructure improvements, finding required for, 5.369
Optional procedure for disposition of real property, findings that public interests and convenience require sale, 8.81
Redevelopment agencies, finding required for changing from separate to legislative body agency, 5.309
Set-aside of funds for housing requirement, findings avoiding need for, 5.418-5.420, 5.422
Statutory procedure for imposition fee, findings required for, 10.224
Subdivision map, findings for denial of, 10.154
Variance, findings required for issuance of, 10.117
Workers' compensation judge issuing findings and award, 4.390
Zoning ordinances, 10.95-10.96

Fines. See **Penalties**

Firearms. See **Weapons and Firearms**

Fire Chief
Powers and duties, 1.260

Firefighters
Counties, contracting for fire protection services from, 7.184
Meyers-Milias-Brown Act. See **Meyers-Milias-Brown Act**
Overtime pay requirements, partial exemption for firefighters. See **Fair Labor Standards Act (FLSA)**
Public Safety Officers Procedural Bill of Rights Act, applicability to firefighters enforcing fire laws. See **Public Safety Officers Procedural Bill of Rights Act**
Special taxes for support of, 5.88-5.91
Strikes by firefighters, statutory prohibition against, 4.348

Firefighters Procedural Bill of Rights Act
Generally, 4.311
Administrative appeals, 4.318
Adverse comments in personnel file, time limit for firefighter to respond to, 4.313
Covered employees, 4.312
Excluded employees, 4.312
Imposition of discipline, 4.317
Interrogation of firefighters
Potentially criminal conduct, additional requirements for interrogating firefighter about, 4.316
Pre-interrogation requirements, 4.315
Procedures for, 4.314
Notifying firefighter of proposed disciplinary action, 4.317
Remedies for noncompliance, 4.319

First Amendment. See **Constitutional Law**

Fish and Game, Department of
Generally, 10.348
Fees collected by, 10.349
Navigation dredging permits, 10.351
Streambed alteration permits, 10.350

Flood Plains
Zoning for protection of property in, 10.137

Foreclosure
Pets abandoned in foreclosed-on homes, 9.181
Vacant residential property acquired through. See **Administrative Enforcement**

Foreign Languages. See **Translations**

Forfeitures. See **Penalties**

Formation of Municipal Corporations
See also **Organization and Reorganization of Municipalities**
Generally, 1.1, 1.3
Classes of cities
Generally, 1.11
Charter cities. See **Charter Cities**
General law cities. See **General Law Cities**
Definition of municipal corporation, 1.1
Legal foundation of cities
Classes of cities (see Classes of cities, above)
Constitutional foundation, 1.9
Governing laws, 1.10
Limitations on legislature's power over cities
Generally, 1.4
Delegation by legislature of municipal authority to private person or body prohibited, 1.6
Local or special legislation, prohibition against legislature enacting, 1.5

Forms of Government. See **Internal Organization of Cities**

Fourteenth Amendment. See **Constitutional Law**

Fourth Amendment. See **Constitutional Law**

Franchise Act of 1937, 5.189-5.190, 6.39, 6.49, 6.51

Franchises
Cable television and video systems franchises. See **Cable Television and Video Systems Franchises**
Electric franchises (see Gas, electric, and water franchises, below)
Fees from
Generally, 5.187
Broughton Act application for electric and telephone poles and wires, and gas and oil pipelines, 5.188
Charter cities not facing fee restrictions, 5.190
Franchise Act of 1937 for electrical, oil, gas, and water franchises, 5.189
Hazardous materials and toxic waste, 5.195
Oil pipelines, 5.192
Solid waste and recycling, 5.194-5.195
Surcharge in lieu of fees possible, 5.191
Utility franchise, public lands use surcharge for, 6.56
Video franchise fees. See **Cable Television and Video Systems Franchises**
Gas, electric, and water franchises
Broughton Act procedures, 6.39, 6.49-6.50
Franchise Act of 1937 procedures, 5.189-5.190, 6.39, 6.49, 6.51
Industrial gas or oil, oil pipelines and utility franchises for, 6.57
Ordinance granting franchise, provisions of (see Ordinance granting franchise, provisions of, below)
Public lands use surcharge, 6.56
Relocating equipment or facilities, 8.123
Ordinance granting franchise, provisions of
Generally, 6.52
Excavation procedures, compliance with, 6.55
Indemnification clause requirement, 6.55
Relocation requirement, 6.54
Term of franchise, 6.53
Solid waste and recycling. See **Solid Waste and Recycling Franchises**
Telecommunication franchises. See **Telecommunications**
Water franchises (see Gas, electric, and water franchises, above)

Fraud and Misrepresentation
LAFCO determinations and decisions, judicial inquiry limited to question of fraud in, 1.129

Freedom of Information Act (FOIA)
California Public Records Act compared, 2.220
Deliberative process privilege, 2.241

Frivolous Actions
Appeals. See **Appeals**
Attorney fees for, 13.162, 13.166, 13.169

Gambling
Establishments, regulation of
Generally, 9.29
Indian casinos. See **Indian Casinos**
Personal conduct regulation, 9.85
Redevelopment assistance prohibited for projects involving gambling, 5.370

Gangs
Personal conduct regulation, 9.80

Gann Limit
Generally, 1.53, 5.281
Formula to limit appropriations, 5.282
Pension contributions, 5.287
Redevelopment, 5.285
References for additional information about, 5.288
Special assessments, 5.286
Statutory provisions regarding limit, 5.283
Unemployment insurance coverage not subject to mandate, 5.284

Garbage Service. See **Solid Waste and Recycling**

Garnishment of Wages
Minimum wage, prohibition against garnishment of wages resulting in employee receiving less than, 4.68

Gas Service
See also **Oil and Gas**
Franchises. See **Franchises**
Proposition 218, fees for gas service exempt from, 5.186

Gender Discrimination. See **Sex Discrimination**

General Law Cities
See also **Charter Cities**
Generally, 1.11-1.12
Corporate power, 1.27
Finances of. See **Finances**
Goods and services, contracting for. See **Goods and Services, Contracting for**
Prevailing wage law, applicability of, 7.83
Public services, recovery of costs for providing, 5.167
Qualification of city council members, 1.184
Taxation by city, authority for, 5.6
Zoning ordinances and consistency with general plan, 10.87

General Plans
Generally, 10.16
Acquisition of real property by negotiated purchase or eminent domain, conformity with general plan required for, 8.4
Administration issues
Annual reports, 10.67
Capital improvement programs by other agencies, 10.69
Consistency of land use decisions with general plan requirement, 10.68
Adoption procedures and requirements for plan, 10.70-10.72
Affordable housing, 10.35, 10.39, 10.80
Amendments and updates to plan, 10.80
Conservation element
Generally, 10.54
Definition of natural resource, 10.54
Issues for consideration, 10.55
Water agency involvement for water issues, 10.56, 11.92
Definition of natural resource, 10.54

Density bonuses for affordable housing, consistency with, 10.187
Elements of plans
Generally, 10.17
Circulation element, 10.25
Conservation element (see Conservation element, above)
Consistency requirements, 10.19-10.20
Housing element. See **Housing Element of General Plans**
Land use element (see Land use element, below)
Noise element (see Noise element, below)
Open space element (see Open space element, below)
Safety element (see Safety element, below)
Extensions of time to adopt plan
Generally, 10.74
Challenges under previous general plan, 10.76
Conditions imposed, 10.78-10.79
Consistency with housing element required for projects approved during extensions, 10.77
Relief from plan requirements during extension, 10.75
Growth management, interaction with. See **Growth Management**
Initiative and referendum, plans subject to
Generally, 10.73
Local coastal programs, changes to comply with not subject to initiative or referendum, 10.285
Specific plans to implement general plans subject to referendum, 10.83
Initiatives and referenda's consistency with city's general plan, 3.114
Land use element
Generally, 10.18
Flooding and timber production, identification of, 10.22
Military facilities, impact on, 10.23
Population density and building intensity standards, inclusion of, 10.21
Urban form and design considerations, 10.24
Water demand, additional requirements for increases to, 10.71
Noise element
Generally, 10.61
Guidelines, consideration of, 10.63
Implementation and solutions requirement, 10.62
Open space element
Generally, 10.57
Action program for zoning, 10.59
Goals for and inventory of, 10.60
Mandating of open space element by state law, 10.58
Safety element
Generally, 10.64
Consultation with state agencies requirement, 10.66
Importance of, 10.65
Water supplies, consideration of, 11.92
Shelter zone identification in general plans, 10.32
Specific plans, adoption of, 10.83
Statute of limitations for challenges to, 10.81
Taking challenges, avoidance, 10.82
Zoning
Open space element, action program for zoning, 10.59
Planning and Zoning Law as basis for, 10.2
Zoning ordinances. See **Zoning Ordinances**

Gifts
Generally, 5.218
Charitable deduction of gifts to city, 8.68
Definition of gift, 2.155
Disqualification of public official based on interest in gift source, 2.125
Elected officeholder or employee of local agency, restrictions on acceptance of gifts by, 2.155
Pension plan not constituting gift, 4.33
Public funds, prohibition against gifts of. See **Public Funds**
Real property acquisition by gift. See **Acquisition of Property**

Good Faith
Fair Labor Standards Act (FLSA), effect of employer's good faith actions in suit for violation of, 4.92

Meyers-Milias-Brown Act, good faith requirement parties meet and confer, 4.339
Surplus property, good faith negotiations to purchase or lease, 8.94

Goods and Services, Contracting for
Audits
Local audit requirements, 7.248
State audit requirements, 7.249
Authority to contract
Generally, 7.174
Delegation of authority (see Delegation of authority, below)
Express grant of authority to enter into contracts, 7.178
Intergovernmental agreements, authority for (see Intergovernmental agreements, authority for, below)
Prohibited contracts (see Prohibited contracts, below)
Specific statutory authority to contract for special services, 7.175
Competitive bidding requirements
Generally, 7.193
Piggy-back purchasing, 7.196
Professional services, rule for certain kinds of, 7.7, 7.194
Supplies and equipment, contracting for, 7.195
Counties (see Intergovernmental agreements, authority for, below)
Delegation of authority
Caveat emptor, 7.177
Unlawful delegations of government functions, 7.176
Federally funded projects, rules governing, 7.190
Intergovernmental agreements, authority for
Assessment and equalization functions, alternative procedures for charter cities, 7.182
Cement facilities, 7.187
Charter city contracting authority, 7.181
Construction and maintenance of sewers and electrical poles, 7.186
County performance of general city functions, 7.180
Emergency assistance, mutual aid agreements to render, 7.188
Fees charged by county, 7.189
Fire protection services from counties, 7.184
Municipal services, contracts for, 7.183
Source of authority, 7.179
Water mains and sewers, 7.185
Local preferences
California Buy America Act, invalidity of, 7.199
California Preference Law, invalidity of, 7.199
Validity of, 7.198
Payment procedures
Audits (see Audits, above)
Charter cities, 7.247
Extra compensation for services already rendered, 7.250
General law cities, 7.246
Prohibited contracts
Job order contracts, 7.192
Police officers as security guards, 7.191
Purchase ordinance and regulation, 7.197

Goodwill, Loss of
Eminent domain action, effect of loss of goodwill, 8.38, 8.46

Government Claims Act
Generally, 13.28
Burden of proof
Late claim, grounds for relief from, 13.72
Petitions for relief from claims requirement, 13.81
Calculation of presentation period
Generally, 13.56
Accrual, general rule on, 13.56-13.57
Delay in accrual, 13.58
Common law liability abolished by, 13.94
Consideration of claim by public entity
Denial of claim versus rejection of claim, 13.67, 13.69

Insufficiency, notice of, 13.62
Notice of entity action on claim, 13.66
Rejection of claim, failure to timely act on claim as, 13.64
Time to act on claim, 13.63-13.64
Types of entity action on claim, 13.65, 13.68
Contracts, application of claims presentation requirements, 13.29, 13.154
Definitions
Excusable neglect, 13.73
Injury, 13.32
One year, 13.56
Presentation of claim, 13.49, 13.62
Six months, 13.56
Exemptions, actions for which claims not required
Generally, 13.30
Cross-complaints in actions filed by public entities, 13.38
Local claim requirements (see Local claim requirements, below)
Public entity action, no claim required for defenses to, 13.33
Relief other than money or damages, actions for, 13.32
Roster of Public Agencies (see Roster of Public Agencies, actions based on, below)
Statutory exemptions, 13.31
Grounds for relief in late claims
Generally, 13.72
Burden of proof, 13.72
Equitable estoppel, 13.76
Excusable neglect, 13.73
Incapacitated adults, 13.75
Minors, time limits and tolling, 13.59, 13.74
Immunity principles. See **Liability**
Incompetent persons. See **Incompetent Persons**
Insufficiency of claim (see Time, generally, below)
Late claims
Generally, 13.70
Action on applications for, 13.78
Evaluation of applications for, 13.77
Grounds for relief (see Grounds for relief in late claims, above)
Minors, late claims by, 13.71
Presentation deemed day application granted, 13.78
Time limitations for filing, generally, 13.71
Liability of municipality. See **Liability**
Local claim requirements
Generally, 13.39
Contracts, requiring claim procedures in, 13.41
Municipal plaintiffs, application to, 13.178
Ordinance or charter provision to impose, 13.40
Mandamus, writs for. See **Mandamus, Writ of**
Minors. See **Minors**
Municipal plaintiffs, application to, 13.178
Persons eligible to present claims
Generally, 13.49
Children's claims, 13.51
Class actions, 13.29, 13.54
Heirs, 13.50
Spouses, 13.52
Workers' compensation carrier, intervention in personal injury action, 13.53
Presentation procedures for claims
Contracts, application of claims presentation requirements, 13.154
Late claims (see Late claims, above)
Persons eligible to present claims (see Persons eligible to present claims, below)
Sufficiency of claims (see Sufficient claims, below)
Time for presentation of claims (see Time for presentation of claims, below)
Relief from claims requirement, petitions for
Generally, 13.79
Appealability of determination, 13.84-13.85
Burden of proof, 13.81
Grounds for, 13.81

Judicial review of determination on petition for relief, 13.83-13.85
Statute of limitations if petition granted, 13.82
Timing considerations, 13.80
Roster of Public Agencies, actions based on
Generally, 13.34
Agencies required to file information in roster, 13.35
Information required in filing, 13.36
Time for filing, 13.37
Statutes of limitations
Filing suit after claim, 13.64, 13.66, 13.67
For claims (see Time for presentation of claims, below)
Late claims (see Late claims, above)
No claim required, 13.68
Rejection versus denial of claims, 13.67, 13.69
Relief from claim, time to file suit if petition granted, 13.82
Tolling of statute (see Tolling of statute of limitations, below)
Waiver, avoiding, 13.62, 13.69
Sufficient claims
Generally, 13.42
Complaint not claims, 13.48
Contents required, 13.43
Local forms, requirements for use of, 13.44
Non-claims, examples, 13.47
Substantial compliance doctrine, 13.45, 13.62
Unconventional claims, examples held sufficient, 13.46
Untimely claims, notice of, 13.60
Tax refunds subject to Act unless other statute provides procedure, 5.93
Time for presentation of claims
Amendments to claims, timing of, 13.61
Calculation of presentation period (see Calculation of presentation period, above)
Exhaustion of administrative remedies as tolling presentation period, 13.59
Statute of limitations for claims presentation period, 13.55
Tolling of presentation period, 13.59
Untimely claims, notice of, 13.60
Time, generally
Insufficiency of claim, time for notice of, 13.42
Insufficient claims, time deadlines for notice and action on claim, 13.62
Late claims (see Late claims, above)
Presentation of claims (see Time for presentation of claims, above)
Public entity, time to act on claim, 13.63-13.64
Relief from claims requirement, petitions for, 13.80
Roster of Public Agencies, filing required within 70 days of accrual of cause of action, 13.37
Untimeliness of claim, notice of, 13.60
Tolling of statute of limitations
Police officers, tolling of statute while criminal charges pending against claimant, 13.67
Presentation period, tolling of, 13.59
Types of cases subject to act, 13.29

Government Lawyers, Ethical Obligations for
Generally, 2.188
Advisory body, evaluating conflicts of interests in representation of, 2.199
Attorney General prohibited from suing department after previously advising department, 2.201
Civil Service Commission versus advisory body, distinction in representation of, 2.200
Sheriff as separate client from county, 2.201
Applicability of California Rules of Professional Conduct to public lawyers, 2.191
Cal Rules of Prof Cond 3-310 governing conflicts of interest
Generally, 2.196
Advisory body (see Advisory body, evaluating conflicts of interests in representation of, above)
Ethical walls to avoid conflict in representation of lawyers in separate branches of publicly funded law offices, 2.202
References covering ethical considerations and conflict of interest issues, 2.217
Simultaneous representation of adverse interests, 2.197
Successive representation of client with interest adverse to former client, 2.198
Whistle-blowing statute permitting attorney to disclose confidential information, 2.203
Confidences of clients, attorney's duty to maintain, 2.203
Consent

Adverse interests, public lawyer requiring informed written consent for representation of multiple clients with, 2.192
Joint representation of entity and official or employee, written consent required for, 2.195
Option for avoiding conflict in representation of lawyers in separate branches of publicly funded law offices, informed written consent as, 2.202
Criminal law (see Prosecutors, special duties for, below)
Distinction between categorical ethics and professional and situational ethics, 2.189
Enhanced ethical duties for public attorneys
Furtherance of justice, 2.215
Statutes imposing duty on city attorneys to public, 2.216
Ethical walls
Lawyers in separate branches of publicly funded law offices, ethical walls to avoid conflict in representation of, 2.202
Newly-hired city attorney's representation of adverse party in litigation against city, ethical wall to allow city attorney to continue representing city, 2.205
Joint representation of employees and entity, conflict of interest in
Duty to defend, 2.206
Punitive damages, no conflict of result of plaintiff seeking, 2.207
Written consent required for joint representation of entity and official or employee, 2.195
Prohibited contracts under Govt C §1090, reliance on legal advice from city attorney as inadequate defense, 2.171
Prosecutors, special duties for
City attorneys as prosecutors, 2.211
Civil dispute, city attorney prohibited from threatening criminal charges to obtain advantage in, 2.213
Limitations on criminal defense practice by city attorney, 2.214
Objectivity, prosecutors maintaining, 2.212
Recusal, situations requiring, 2.212
Regulation of California attorneys, 2.190
Representation of government entities
Cal Rules of Prof Conduct 3-600(A) governing representation of entity as client, 2.192
Consent to representation of multiple clients (see Consent, above)
Explaining to government official attorney's duty to client entity, 2.194
Illegal activities, attorney's duty to report, 2.193
Section 1983 actions. See **Section 1983 Actions**
Special considerations for public sector
Defense and indemnification, city attorney's right to, 2.210
Due process right of individual subject to quasi-judicial administrative procedure, two or more lawyers required to protect, 2.208
Joint representation of employees and entity (see Joint representation of employees and entity, conflict of interest in, above)
Political Reform Act of 1974, city attorney's fee splitting arrangement with bond counsel for joint powers agency as violation of, 2.209
Simultaneous representation of adverse interests by public attorney, 2.204
Successive representation of adverse interests by public attorney, 2.205

Graffiti. See **Vandalism or Graffiti**

Grants (Federal and State)
Acceptance of grants, 1.95
Compliance with grants, 1.96, 5.217
Public works, federal grants for. See **Federally Funded Projects**

Greenhouse Gas Emissions
Mandatory greenhouse gas emission limits
Effective date of limits and emission reduction measures, 6.22
Urban sprawl, effect of reducing, 11.235

Grievances, Employee Filing
Case file, contents of, 4.292
Investigation of, 4.291
Types of grievances, 4.290
Written response to grievance, city filing, 4.293

Groundwater
Generally, 11.96-11.97, 11.106
Water quality. See **Water Quality**

Growth Management
Generally, 10.200

Housing obligations for regional needs
Generally, 10.204
Burden of proof, 10.207
Limits on housing, findings required for, 10.205-10.206
Public facilities planning
Generally, 10.201
Controls based on number, location, or mix of housing, 10.203
Expansion, limitations on, 10.202

Guidelines for CEQA. See **California Environmental Quality Act (CEQA)**

Guns. See **Weapons and Firearms**

Habitat Conservation Plans. See **Endangered Species Act (ESA)**

Habitat Maintenance Funding Act, 11.296

Harassment. See **Sexual Harassment**

Harbors
Generally, 6.156
Access restrictions (see Use and access restrictions, below)
Acquisition of harbor property, 6.162
California Coastal Act, applicability of, 6.176
Constitutional restrictions on conveyance and use of tide and submerged lands, 6.163
Defined, 6.156
Department of Boating and Waterways, 6.157
Disposition of harbor property, 6.163
Easements, permissibility of, 6.168
Emergency rules and regulations
Permissibility of emergency rules and regulations, 6.171
Small craft vessels and harbors, adoption of emergency rules and regulations governing, 6.199
Establishment and improvement of harbors, 6.158
Federal government, conveyance of tide or submerged lands to, 6.163
Financing of harbor activities, 6.161
Governance over harbors
Statutes authorizing harbor districts, 6.160
Structure of governance, 6.159
Leasing
Generally, 6.164
Proper harbor related lease purposes, 6.167
Terms of lease, 6.165
Tidelands and tidelands for waterfront and harbor facility development, leasing city property for, 8.116
Wharves and other structures, exception for leases of, 6.166
Local regulations and obligations
Establishment of harbor lines, 6.175
Rates, fees, and charges, permitted provision of, 6.175
Use and access restrictions (see Use and access restrictions, below)
McAteer-Petris Act, effect of, 6.179
Oil spill response and contingency planning, 6.177
Port and terminal protection and development corporations, 6.178
Public trust doctrine
Leasing, effect of (see Leasing, above)
Restrictions imposed on conveyance and use of tide and submerged lands by, 6.163
Use and access restrictions, public trust implications of, 6.169
Rivers and Harbors Act of 1899, Army Corps of Engineers' authority under, 10.355
Use and access restrictions
Emergency rules and regulations, permissibility of, 6.171
Floating homes, 6.173
Insurance requirements, 6.173
Jet skis, prohibition against, 6.174
Limits of public access to waterfront, 6.170
Marine sanitation issues, 6.172
Proper time-of-day restrictions, speed zones, and special use areas, 6.171

Public trust implications, 6.169
Recycling facilities required by state law, 6.174
Streets and highways, required access from, 6.169

Hazardous Materials and Toxic Waste
Acquisition of property, environmental (contamination) assessment before
Eminent domain, acquisition by. See **Eminent Domain**
Negotiated purchase agreement, acquisition by. See **Negotiated Purchase Agreement**
Applications to build hazardous waste facilities
Air quality regulations, compliance required, 11.249
Appeals of decisions on applications, 11.247
Notice of intent required, 11.245
Processing of applications, time limits, 11.246
Water quality regulations, compliance required, 11.248
Brownfields cleanup authorized, 11.254
Definitions
Hazardous waste (RCRA), 11.238
Hazardous waste (state), 11.241
Solid waste, 11.238
Emergency response to spills and releases, 6.199
Facilities planning and approval
Generally, 11.243
Applications to build facilities (see Applications to build hazardous waste facilities, above)
City implementation of county plan required, 11.244
Federal law
Generally, 11.237
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 6.100, 11.239, 11.250
Resource Conservation and Recovery Act (RCRA), 11.238, 11.251
Franchise fees, 5.195
Household hazardous waste planning requirements
Oil filters exemption, 11.241
Permits required for drop-off events and sites, 11.241
Regional plans for, 11.242
Waste management plans, household hazardous waste as element of, 10.263, 11.241
Indemnification agreements
Analysis by city attorney, 7.314
Beneficiary, determining identity of, 7.316
Control of defense and settlement, 7.320
Covered parties, 7.315
Impact of insurance, 7.319
Specific acts covered, 7.317
Statutory authority, 7.313
Types of acts covered, 7.318
Liability (see Obligations of property owners, below)
Notice
Applications to build hazardous waste facilities, requirement of notice of intent, 11.245
Release of hazardous substance, notice to buyers or renters of, 11.252
Obligations of property owners
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability, 11.250
Development, determination if site constitutes hazardous waste site, 11.253
Notice to buyers or renters of hazardous substance release required, 11.252
Resource Conservation and Recovery Act (RCRA) liability, 11.251
References for additional information about, 11.255
Regional hazardous waste plans, 11.242
State law on, 11.240
Time. See **Time**
Transportation and handling of hazardous materials, 6.199, 8.168-8.169
Unified programs for, 11.243
Water quality regulations, compliance required, 11.248
Zoning issues involving, 10.135

HCD. See **Housing and Community Development (HCD)**

Health and Safety Regulations
General plan, safety element of. See **General Plans**

Valid overlapping state and local regulation, safety regulations as example of, 1.41

Hearings
Air quality. See **Air Quality**
Annexation. See **Annexation**
California Coast Act. See **California Coastal Act**
CEQA decision, briefing and hearing on issues if challenging, 11.72
Code enforcement proceedings
Administrative enforcement. See **Administrative Enforcement**
Criminal enforcement. See **Criminal Enforcement**
Conditional use permit, hearing on, 10.103
Continuance of hearing to subsequent meeting, 2.51
Department of Fair Employment and Housing (DFEH), time limit for holding hearing on accusation, 4.255
Detachment. See **Detachment**
Disciplinary hearings. See **Disciplinary Actions Against Employee**
Eminent domain proceedings. See **Eminent Domain**
Fair hearing. See **Fair Hearing**
Fees, notice of hearing for imposition of, 10.226
Initiatives, inapplicability of hearing requirements to enactment of, 3.120
Land use decisions. See **Land Use**
Nonsummary vacation of streets, highways, and service easements, hearing procedure for. See **Nonsummary Vacation of Streets, Highways, and Service Easements**
Open meeting laws. See **Open Meeting Laws**
Pension plans. See **Retirement and Pension Plans**
Political Reform Act of 1974, hearing to determine violation of, 3.206
Primary election contest, hearing on, 3.148
Probation revocation hearing, right to confront witnesses at, 12.63
Proposition 218, notice and hearing requirements, 5.140, 5.147, 5.179
Public hearings
Generally, 2.34
Legislative acts by city council, no requirement of public hearing on, 2.32
Notifying employee of right to public hearing of charges, 2.98
Quasi-judicial action by city council, no requirement of public hearing on, 2.33
Redevelopment, hearing on disposition of property for purposes of, 8.108
Public Safety Officers Procedural Bill of Rights Act, evidentiary hearing satisfying requirements of, 4.309
Subletting and Subcontracting Fair Practices Act, substitution hearing under, 7.78

Highways. See **Sidewalks, Streets, Roads, and Highways**

Hiring of Public Employees. See **Recruitment and Qualifications of Public Employees**

Historical Background
Bankruptcy of municipality, 5.440
Electrical services industry restructuring, 6.18
Local agency formation commissions (LAFCOs), 1.108
Redevelopment law, 5.303

HIV. See **AIDS and HIV**

Homeless Persons
Loitering regulation as cruel and unusual punishment, 9.106

Homeowners and Private Property Protection Act (Proposition 99), 5.354, 8.31

Hostile Environment. See **Sexual Harassment**

Hot Air Balloon Rides
Business and occupational regulation of, 9.33

Housing
Affordable housing. See **Affordable Housing**
Council of governments determining regional housing needs. See **Council of Governments (COG)**
Debt limit, housing agencies excluded from, 5.294
Discrimination against residential developments or emergency shelters prohibited, 10.161
Floating homes, rules applicable to, 6.173

General plans for land use, consideration in. See **Housing Element of General Plans**
Growth management. See **Growth Management**
HCD. See **Housing and Community Development (HCD)**
Initiatives, applicability of growth control ordinances to, 3.122
Lease of city property to nonprofit corporation for housing development, 8.116
Privacy rights, 10.199
State Housing Law. See **State Housing Law**
Taking issues with fees for the loss of housing units, 10.395

Housing and Community Development (HCD)
Generally, 1.101
Housing element of general plans
Guidance for element, 10.48
Rebuttable presumption of validity after compliance finding, 10.50
Review and certification of plans, 10.49
Uniform building codes, state standards for, 10.237

Housing Authorities
Power of, 1.70
Purpose of, 1.70
Surplus real property, offer to sell or lease to housing providers, 8.87

Housing Element of General Plans
See also **Affordable Housing**
Generally, 10.26
Action program with implementation timeline
Generally, 10.37
Conservation of existing housing, 10.39
Consistency with other plan elements, 10.41
Discrimination considerations, 10.42
Forms of housing, provision of variety, 10.43
Governmental constraints, consideration of removal, 10.40
Identification of adequate sites, 10.38
Adoption procedures and requirements for plan, 10.72
Assessments of housing needs
Generally, 10.29
Affordable housing, consideration of decrease in, 10.35
Alternative regulations to increase housing availability, 10.31
Emergency shelter identification, 10.32
Energy conservation analysis, 10.34
Land inventory for, 10.30
Special housing needs, consideration of, 10.33
City review and revision of housing element of general plans, 10.51
Coastal provisions, 10.53
Community housing statements, objectives for, 10.36
Defective housing element, impact of, 10.52
Extensions of time to adopt plan, consistency required for projects adopted during extension, 10.77
Factors for consideration, 10.28
Housing and Community Development Department. See **Housing and Community Development (HCD)**
Housing share
Local allocation and distribution, 10.47
Local distribution of housing need, methodologies, 10.46
Regional housing needs determination and allocation, 10.44
Subregional entities, formation of, 10.45
Implementation timelines (see Action program with implementation timeline, above)
Mandated goals for, 10.27
Redevelopment plans
Affordable housing plan, adoption may be included in housing element, 5.415
Implementation plan, adoption every five years can correspond with housing element cycle, 5.368
Regional planning issues, 10.275
Timing considerations
Annual reports, timeline for, 10.67
Housing and Community Development (HCD) review, time for, 10.49
Local allocation and distribution, time before housing element update, 10.47
Methodologies for distributing regional housing need to cities, development of, 10.46

Regional housing needs determination and allocation, time for, 10.44
Review of housing element, time for, 10.51
Subregional entities, formation of, time before housing element update, 10.45

IGRA. See **Indian Gaming Regulatory Act (IGRA)**

Immigration
Drug testing by Immigration and Naturalization Service prohibited, 4.111
Immigration Reform and Control Act of 1986
Discrimination based on national original and citizenship, prohibition against, 4.12, 4.149
Persons without legal right to work in U.S., Act prohibiting hiring of, 4.12

Immunity
Generally, 13.91
Absolute immunity, 13.124-13.125
Benefit assessments, immunity of federal government property from, 5.150
Cable television and video system franchises, city's immunity from damages, 6.85
Civil rights. See **Civil Rights**
Design immunity, 13.106-13.107
Discharge of official duty, immunity for statements made during
Discretionary acts, employee immunity for, 13.97
Eleventh Amendment, immunity under. See **Intergovernmental Relations (Federal)**
Fair Political Practices Commission, immunity reliance on written opinions of, 2.119, 2.160
Government Claims Act, specific immunities in, 13.93
Indemnification of non-immune public employee by immune public entity, 13.91
Injunctions, inapplicability of immunity doctrine to, 13.91
Intergovernmental relations. See **Intergovernmental Relations (Federal); Intergovernmental Relations (State)**
Liability. See **Liability**
Mandamus proceedings, immunity doctrine does not apply, 13.91
Punitive damages, entity immunity from, 13.155
Qualified immunity, 13.124, 13.126
Sovereign immunity. See **Sovereign Immunity**
Tort immunities, 13.92
Transient occupancy taxes, federal employees immune from, 5.53

Impasse in Bargaining See **Meyers-Milias-Brown Act**

Implied Indemnity. See **Indemnification**

Improvement Act of 1911, 5.131

Improvement Bond Act of 1915, 5.133

Improvements
Agricultural preserves, public improvements on land subject to contract, 10.144
Capital improvement programs by other agencies, 10.69
Fees for public improvements, 10.394
Harbors, improvement of, 6.158
Infrastructure improvements, finding required for, 5.369

In Camera Review
Public Records Act, in camera review of records requested under, 2.261

Incentives for Affordable Housing. See **Affordable Housing**

Income
See also **Revenues**
Campaign contributions not constituting, 2.151

Income Tax, Federal
Employee recognition plans, tax consequences of, 4.31
Gifts to city deductible as charitable contribution, 8.68

Incompetent Persons

See also **Disabled Persons**
Government Claims Act
Claims subject to act, 13.29
Late claims, tolling period, 13.71

Incorporation
See also **Dissolution and Disincorporation**
Generally, 1.135
Conducting incorporation proceedings, 1.137
Deciding on incorporation
Generally, 1.138
Appropriations limits, 1.139
Approval or disapproval of proposal, 1.140
Elections to confirm incorporation, 1.143
Fiscal effect of incorporation, tax sharing to mitigate, 1.138
Proposal, decision on, 1.142
Reconsideration of decision on proposal, 1.141
Effect of incorporation
City council terms of office, 1.146
City jurisdiction, 1.144
County ordinances, effect of, 1.145
Property held in trust for city, effect on, 1.147
Services in first full fiscal year, 1.148
Initiating incorporation proceedings by petition, 1.136
Time
Approval or disapproval of proposal, time limits for, 1.140
Conducting proceedings, time considerations, 1.137
County ordinances, duration of effect of, 1.145
Initiating incorporation, 1.136
Proposal for incorporation, time for decision on, 1.142

Indemnification
Accrual of cause of action, 13.58
Attorney fees for prevailing on claim for implied indemnity, 13.171
City attorney's right to indemnification, 2.210
City liability for contractor acts
Generally, 7.218
Non-delegable duty, 7.219
Peculiar risk doctrine, effect of, 7.220
Contractual indemnity, entity entering into agreement for, 13.154, 13.180
Costs of litigation, effect of state agency's indemnification for, 1.93
Design professionals, contractual indemnity limited, 13.180
Equitable indemnity, 7.312
Establishment of indemnification, 7.217
Express indemnity agreements
Contract principles, applicability of, 7.298
Intentional acts (see Intentional acts, below)
Negligence. See **Negligence**
Government Claims Act, claims subject to, 13.29
Hazardous materials and toxic waste, indemnification agreements relating to. See **Hazardous Materials and Toxic Waste**
Immunity of entity but not employee, indemnity obligation, 13.91
Implied indemnity
Applicability of, 7.310
Attorney fees awarded to prevailing party on claim for, 13.171
Source of obligation, 7.311
Insurance
Automobile accident, indemnification not required if employee operating own insured vehicle, 13.87
Distinguishing insurance from indemnification, 7.104
Duty of insurer to indemnify, 7.257
Intentional acts
Availability of indemnification, 7.308
Future versus past acts, 7.309
Joint community facilities agreements, indemnification of city in contract, 5.80
Joint powers agreements, indemnity issues in, 13.181
Municipal plaintiffs, indemnity actions by. See **Municipal Plaintiffs**

Nature of indemnity, 7.296
Parade permits, indemnity requirements for, 9.150
Prevailing wages, indemnification of city required if subsidy triggers, 5.300
Public employees and officer
Defense of civil actions brought against employees and former employees, 13.86, 13.88
Duty to indemnify employees or former employees, 13.87
Public works contracts, limits on indemnification agreements in, 7.69
Punitive damages
Paying on behalf of employees, 13.87, 13.89, 13.147, 13.156
Timing considerations, 13.147
Reservation of rights, 13.88
Right to seek indemnification, 7.297
Scope of employment, interpretation of, 13.88
Scope of indemnification (see Type and scope of indemnification, below)
Section 1983 actions, application of duty to indemnify to, 13.87, 13.89, 13.147
Subrogation issues for municipality if found liable for employee's tort, 13.183
Time. See **Time**
Tortious acts by elected officials, special rules on, 13.87
Type and scope of indemnification
Generally, 7.221
Construction contracts, 7.223
Essential public service, indemnity as condition for rendering, 7.222
Trucking contracts, 7.224
Utility franchise ordinance, indemnification clause requirement, 6.55

Independent Contractors
Fair Labor Standards Act (FLSA), exclusion of independent contractors from coverage under, 4.46

Indian Casinos
Gambling establishments, regulation of, 9.30-9.32
Redevelopment assistance for projects that involve gambling, 5.370

Indian Gaming Regulatory Act (IGRA), 9.30-9.32

Industrial Development Authorities
Powers of, 1.70

Inferences. See **Presumptions and Inferences**

Infill Opportunity Zone
Surplus property, offer to sell or lease for purpose of developing property within infill opportunity zone, 8.92

Infractions. See **Criminal Enforcement**

Initial studies. See **California Environmental Quality Act (CEQA)**

Initiatives and Referenda
See also **Ballot Measures**
Amendments
Ordinance, amendment or repeal of, 1.242
Writ of mandate seeking amendment of ballot title or summary to correct false or misleading information, 3.83
Ballots
Form of ballot used for initiatives and referendum measures, 3.50
Order of initiatives appearing on ballot, 3.44
Polling stations, 3.51
Unlawful measure (Unlawful initiative or referendum, city's options about, below)
Writ of mandate (see Mandate, writ of, below)
Benefits assessments, initiatives to reduce or appeal, 5.157
California Constitution, provisions for powers of initiative and referenda in, 3.80
City attorney
Constitutionality of proposed initiative, city attorney seeking declaration on, 3.117
Impartial analysis of initiative, city council requesting city attorney prepare, 3.87
City council's action on initiative petition
Adoption of petition without change or submission of proposal to voters, 3.86
Declaratory relief action for writ of mandate to remove initiative from ballot, city council seeking, 3.86

Impartial analysis, city council's request for, 3.87
Report on fiscal impact, general and specific plan consistency, and other matters, city council referring petition to city agencies for, 3.88
Unlawful initiative (see Unlawful initiative or referendum, city's options about, below)
City council's action on referendum petition
Generally, 3.98
Election on ordinance, 3.100
Repeal of ordinance by city council, effect of, 3.99
Unlawful referendum (see Unlawful initiative or referendum, city's options about, below)
Constitutional law, generally
California constitutional provisions providing for initiatives and referendum, 3.80
City attorney seeking declaration that proposed initiative unconstitutional, 3.117
Consistency of initiatives and referenda with state and federal constitutional requirements, 3.115
Constitutional limitations on initiative
Naming individual to hold office or naming private corporation to perform function, prohibition against submitting measure to board, 3.104
Single-subject rule, effect on initiative measures, 3.103
Constitutional limitations on referenda, 3.105
Declarations
Initiative petition, declaration of person soliciting signatures for, 3.84
Referendum petition, attachment of circulator's declaration to, 3.95
Definitions, 3.80
Exemptions (see Procedural exemptions, below)
Gann Initiative. See **Gann Limit**
General plans. See **General Plans**
Judicial limitations on initiatives and referenda
Adjudicatory acts, examples of, 3.108
Arbitrary and discriminatory regulation, effect of initiative constituting, 3.113
Directing city council to perform legislative act prohibited, 3.109
Discretion of city council, electorate prohibited from exercising power of initiative or referendum on matters assigned by legislature to, 3.110
Essential government functions, power of initiative and referendum not extending to, 3.111
General plan, consistency of initiatives and referenda with, 3.114
Legislative acts, initiatives and referenda limited to, 3.106-3.107
Regulation of matters preempted by state prohibited, 3.112
State and federal constitutional requirements, consistency of initiative or referendum with, 3.115
Judicial review of, 3.123
Limitations on use of initiative and referendum
Constitutional limitations (see Constitutional limitations on initiative, above)
Constitutional limitations on referenda, 3.105
Judicial limitations (see Judicial limitations on initiatives and referenda, above)
Mandate, writ of
Amendment of ballot title or summary to correct false or misleading information, writ of mandate seeking, 3.83
Refusal of city to place measure on ballot, mandamus action to overturn, 3.118
Removal of initiative from ballot, city filing writ of mandate for, 3.86
Notice
Circulate initiative petition, notice of intent to, 3.83
Enactment of initiative, inapplicability of notice requirements to, 3.120
Ordinances (see Statutory procedures for city referenda (ordinances), below)
Petition for proposed initiative
Generally, 3.82
Circulation of petition, 3.84
City council's action (see City council's action on initiative petition, above)
Filing petition, time limit for, 3.85
Inspection of petition for initiative, restrictions on, 2.227, 2.243
Notice of intent to circulate petition, 3.83
Signatures (see Signatures, below)
Petition for proposed referenda
Generally, 3.95
Circulation of petition, 3.96
City council's action on petition (see City council's action on referendum petition, above)
Contents of petition, 3.95
Effective date of ordinances, 3.101
Filing of petition, 3.97
Inspection of petition for referenda, restrictions on, 2.227, 2.243

Procedural exemptions
California Environmental Quality Act (CEQA), applicability to initiatives, 3.121
Housing growth control ordinances, applicability to initiatives, 3.122
Notice and hearing requirements, inapplicability to enactment of initiatives, 3.120
Redevelopment agencies, ordinance creating subject to referendum, 5.305, 5.310
Redevelopment plans, ordinance adopting plan subject to referendum, 5.335
Signatures
Declaration of person soliciting signatures for petition, 3.84
Number of signatures required for referendum petition, 3.97
Tax, signature requirements for measure repealing or reducing, 3.91
Timing of election, number of signatures on petition determining, 3.89
Special taxes
Adoption or repeal of, 5.120
Two-thirds vote required for passing, 3.92
Statutory procedures for city initiatives
Generally, 3.81
Adoption of initiative, majority vote required for, 3.92
Charter cities, inapplicability of statutory schemes for initiatives to, 3.102
Conflicting initiatives, effect of, 3.93
Effective date, 1.237-1.238
Legislative acts, initiative powers limited to, 3.81
Petitions (see Petition for proposed initiative, above)
Repeal of initiative adopted by city council or voters, 3.92
Timing of election (see Timing of election for initiative, below)
Statutory procedures for city referenda (ordinances)
Generally, 1.229, 3.94
Adopting ordinances, generally, 1.236
Adoption by reference, 1.240
Amendment or repeal of ordinance, 1.242
Authority of city council to make and enforce ordinances, 1.230
Charter cities, inapplicability of statutory schemes for referenda to, 3.102
Drafting ordinances, 1.235
Effect of ordinances, 1.231
Penalty for violation of ordinance, 1.241
Permissible subjects, 1.233
Petition for proposed reference (see Petition for proposed referenda, above)
Publication of ordinance, 1.239
Resolutions as ordinances, 1.244
Resolutions distinguished, 1.228, 1.243
Severability clauses, effect of, 1.234
Validity of ordinances, 1.232
Zoning ordinances. See **Zoning Ordinances**
Tax measure
Signature requirements for measure repealing or reducing tax, 3.91
Special taxes (see Special taxes, above)
Time, generally
Effective date of ordinances, 3.101
Petition protesting adoption of ordinance, time limit for submitting after adopted referendum attested by city clerk, 3.97
Petition, time limit for filing, 3.85
Report on impact of initiative, time limit for presenting, 3.88
Submitting ordinance to voters, time limit for, 3.100
Timing of election for initiative
Number of signatures on petition determining, 3.89
Regular election, city council placing initiative on ballot for next, 3.91
Special election, 3.90
Unlawful initiative or referendum, city's options about
Generally, 3.116
Ballot, city's options after placing measure on, 3.119
Ballot, refusal to place measure on, 3.118
Title and summary, city's refusal to prepare, 3.117
Writ of mandate (see Mandate, writ of, above)

Injunctions
Air quality abatement order violations, 11.222-11.223
Antitrust actions, injunctions available in, 13.153

Closed sessions. See **Closed Session Meetings**
Code enforcement, injunctive relief as remedy, 12.2, 12.4, 12.16
Drug House Abatement Act, injunctive relief under, 12.13-12.17
Election materials, injunction seeking amendment or deletion of, 3.57
Endangered Species Act (ESA) enforcement, 11.279, 11.283
Fair Labor Standards Act (FLSA), injunctive relief to prevent violations of, 4.84
Firefighters Procedural Bill of Rights Act, injunctive relief under, 4.319
Immunity doctrine, inapplicability to injunctions, 13.91
Nuisance abatement, claims not subject to Government Claims Act, 13.32
Political Reform Act of 1974, standing to sue to enjoin violations or to compel compliance with, 3.207
Public Records Act, injunctive relief for improper withholding of records under, 2.258
Public Safety Officers Procedural Bill of Rights Act, injunctive relief under, 4.310
Redevelopment plans, injunction issuing for failure to timely prepare replacement housing plan, 5.408
Section 1983 actions. See **Section 1983 Actions**
Speech, prior restraint not allowed by First Amendment, 9.127
State mandates, injunctions against enforcement if unfunded, 5.261
Taking, injunction against regulation resulting in, 10.404
Title VII and Age Discrimination in Employment Act, injunctive relief in action for violations of, 4.264
Unfair Competition Act, injunctive relief under, 12.12, 12.21
Water quality, violation of waste discharge requirement permit, 11.157, 11.159

Insolvency. See **Bankruptcy and Insolvency**

Inspection
Administrative abatement, evidence gathering and inspection warrants under, 12.67
Initiative, referendum, and recall petitions, restrictions on inspection of, 2.227, 2.243
Personnel records. See **Personnel Records**
Prevailing wage law, contractor or subcontractor making payroll records available for inspection under, 7.54, 7.93
Public Records Act. See **Public Records Act (California)**
Warrants for, 12.67

Insurance
Additional insured endorsements
Certificates of insurance, effect of, 7.284
Contract, insurance policy as, 7.279
Endorsement language, 7.281
Form endorsements, 7.282
Reasons for additional insured status, 7.280
Aggregate limits, 7.273
Automobile coverage, 7.213, 7.285, 13.87
Boat launching facility on private property, 6.173
Bodily injury coverage, 7.287
Broad form coverage, 7.274
Certificates of insurance, 7.284
Claims made policies (see Occurrence versus claims made policies, below)
Commercial general liability coverage
Generally, 7.212
Amounts, 7.276
Scope of coverage, 7.275
Common contractual provisions, 7.216
Comprehensive coverage
Generally, 7.270
Exclusions, 7.271
Owner-controlled insurance programs, 7.272
Duty to defend, 7.256
Employer's liability, 7.215
Errors and omissions coverage for public officials, 7.293
Exclusions
Generally, 7.255
Comprehensive coverage, 7.271
Indemnification. See **Indemnification**
Interpretation of insurance policies, 7.254-7.255
Licensing insurance companies, 7.278
Mandatory versus optional coverage, 7.253
Occurrence versus claims made policies

Generally, 7.267
Claims made policies, 7.269
Occurrence policies, 7.268
Parade permits, insurance as requirement of, 9.150
Personal injury coverage, 7.288
Products and completed operations coverage, 7.289
Professional liability insurance, 7.214, 7.292
Property insurance, 7.290
Rating insurance carriers
Best's rating, 7.277
Licensing insurance companies, 7.278
Resources for practitioners, 7.266
Right to require insurance, 7.209-7.210
Self-insurance
Generally, 7.258
Pools (see Self-insurance pools, below)
Retentions and reserves, 7.259
Self-insurance pools
Examples of pool types, 7.264
Governing law, 7.262
Other insurance, pools not considered, 7.263
Professional organizations, 7.265
Purpose and scope, 7.260
Services provided, 7.261
Submitting and enforcing insurance claims, 7.294
Surety bonds distinguished, 7.95
Tax exemptions for insurance companies, 5.102
Third party liability policies (see Occurrence versus claims made policies, above)
Types of insurance, generally, 7.211
Umbrella or excess liability policies, 7.291
Workers' compensation. See **Workers' Compensation**

Intent
Federal preemption analysis, ascertaining congressional intent for purposes of, 1.33-1.35

Interest on Money
Back pay in discrimination action, recovery of pre-judgment and post-judgment interest, 4.259
Eminent domain proceedings. See **Eminent Domain**
Public works contracts, provision for interest on progress payment requests, 7.72

Intergovernmental Agreements, Authority for. See **Goods and Services, Contracting for**

Intergovernmental Relations (Federal)
Eleventh Amendment, immunity under
Generally, 1.92
Municipality immunity, 1.94
State immunity, 1.92-1.93, 13.127
Eminent domain, 1.106
Grants. See **Grants (Federal and State)**
Regulation of federal lands
Implied immunity, 1.87
Intergovernmental Cooperation Act, 1.88
Property clause, 1.86
Supremacy clause, 1.85
Tenth Amendment, power reserved for states under
Generally, 1.89
Generally applicable laws, 1.90
Implements of federal regulation, state and local governments used as, 1.91

Intergovernmental Relations (State)
California Public Utilities Commission (CPUC). See **California Public Utilities Commission (CPUC)**
Immunity
Generally, 1.102
Constitutional rights, immunity from assertion of, 1.104
Federal supremacy clause, 1.103

Zoning and building code regulations, state immunity from, 1.105
State agencies, 1.101
State mandates, 1.97

Internal Organization of Cities
Forms of government
Generally, 1.179
Council/administrator, 1.181
Council/manager. See **City Manager**
Strong mayor, 1.182

Internet
Cable operators providing Internet access, rules governing, 6.73
Public works contracts, Internet submissions of bids for, 7.14
Regulation of content or access as speech regulation, 9.130

Interpretation of Cases and Statutes. See **Construction and Interpretation**

Interrogation
Audiorecording of interrogation. See **Video- and Audiorecording**
Firefighters. See **Firefighters Procedural Bill of Rights**
Peace officers. See **Public Safety Officers Procedural Bill of Rights Act**

Intoxication. See **Alcohol and Drugs**

Inverse Condemnation
See also **Condemnation; Taking**
Attorney fees, municipal liability for, 13.161
Electric utility, effect of inverse condemnation challenge, 6.39
Equitable indemnity, municipality cross-complaining against third party, 13.182
Government Claims Act, actions not subject to, 13.32
Redevelopment, action for damages for failure of agency to timely condemn, 5.355

Investigations
Background checks of minors seeking position supervising other children, 4.25
Discrimination complaint, investigation of. See **Discrimination Laws, Enforcement of**
Fair Labor Standards Act (FLSA) violations, Department of Labor investigating, 4.83
Grievance filed by employee, city's investigation of, 4.291
Law enforcement agencies' investigative records, exemption from disclosure, 2.251
Police misconduct, statute of limitations for investigating, 4.271
Sexual harassment claim, employer's investigation of. See **Sexual Harassment**

Investments
Authority to invest
City council, 5.269
City manager, 5.270-5.271
City treasurer, 5.270
Definitions
Active deposit, 5.273
Inactive deposit, 5.273
Deposits, 5.273
Disqualification of public official for direct or indirect investment in business entity, 2.121
Permitted investments
Generally, 5.265
Charter cities permitted investments, 5.266
Local Agency Investment Fund, 5.267
Policy for investments, 5.268
Reporting requirements, 5.272

Investor-Owned Utilities. See **Electric Utilities**

Jails. See **Correctional Facilities**

Joint Powers Agencies

Generally, 1.76
Closed session disclosure report on disposition of claims, 2.106
Council of governments created by joint powers agreement. See **Council of Governments (COG)**
Delegated powers under joint powers agreements, 1.77
Disaster preparation and response agencies, joint powers agreements establishing, 6.199
Financing, use of joint powers agencies in, 1.78
Indemnity issues in joint powers agreements, 13.181
Land use, regional planning issues and joint powers authorities, 10.276
Political Reform Act of 1974, city attorney's fee splitting arrangement with bond counsel for joint powers agency as violation of, 2.209
Preservation of public interest in sensitive lands, joint powers agreements, 11.8

Journalists. See **Newspapers and News Media**

Judgments
Election contests. See **Election Contests**
Eminent domain action, judgment and payment of judgment in, 8.63
Parking fines and forfeitures, obtaining and enforcement, 5.211

Judicial Review
See also **Appeals**
Due process. See **Due Process**
Government Claims Act, judicial review of determination on petition for relief under, 13.83-13.85
Initiatives, judicial review of, 3.123
LAFCO decisions, judicial review of, 1.129
Parliamentary procedures, judicial review of, 2.14

Junk Dealers
Business and occupational regulation of, 9.46

Jurisdiction
Annexation of territory, effect of, 1.158
Bankruptcy court's jurisdiction over municipal bankruptcy, 5.446
Cable service providers, CPUC jurisdiction over, 6.63
California Coastal Commission, jurisdiction over post-certification appeals from local government permit decisions, 10.316-10.317
Detachment of territory, effect of, 1.164
Dissolution and disincorporation, effect of, 1.174
Electric utilities, jurisdiction over. See **Electric Utilities**
Endangered Species Act (ESA), 11.277
Incorporation, city jurisdiction after, 1.144
LAFCOs, jurisdictional overlaps for, 1.130
Mandamus, exhaustion of remedies as jurisdictional requirement, 13.13
Meyers-Milias-Brown Act, jurisdiction of California Public Employment Relations Board to hear complaints alleging violation of, 4.323
Reclaimed water projects, regulatory jurisdiction over, 6.8
Section 1983 actions, states having concurrent jurisdiction over, 13.122, 13.151
Solid waste and recycling services, jurisdiction over. See **Solid Waste and Recycling Franchises**
Supplemental jurisdiction of federal court over related state claim, 13.159
Taking, ripeness as jurisdictional requirement, 10.371, 13.27
Title VII and Age Discrimination in Employment Act lawsuits, state and federal courts sharing jurisdiction over, 4.248
Water quality for wetlands. See **Water Quality**
Workers' Compensation Appeals Board, jurisdiction of, 4.382

Labor Negotiations. See **Closed Session Meetings**

Labor Unions
Campaign regulations. See **Campaign Regulations**
Civil Rights Act of 1871, union's standing to sue under, 4.157
Collective bargaining agreements. See **Collective Bargaining Agreements**
Meyers-Milias-Brown Act. See **Meyers-Milias-Brown Act**
Strikes. See **Strikes**

LAFCOs. See **Local Agency Formation Commissions (LAFCOs)**

Landfills
California Integrated Waste Management Act of 1989, effect of, 6.100
Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERLA), litigation under, 6.100
Environmental Protection Agency (EPA) regulating siting, design, and construction of landfills on wetlands sites, 6.100
Resource Conservation and Recovery Act of 1976 (RCRA), effect of, 6.100

Landscaping and Lighting Act of 1972, 5.134

Land Use
Generally, 10.1
Affordable housing. See **Affordable Housing**
Agencies to carry out land use responsibilities, 10.4
Air quality attainment plans lack power to impact land use regulations, 11.192
Beaches, tidelands, and streams. See **Tidelands, Beaches, and Streams**
Building permits. See **Building Permits**
California Coastal Act. See **California Coastal Act**
Challenges to land use decisions
Generally, 10.362
CEQA. See **California Environmental Quality Act (CEQA)**
Civil rights claims, 10.444
Due process issues. See **Due Process**
Equal protection. See **Equal Protection**
Taking. See **Taking**
Discrimination. See **Discrimination**
Equitable estoppel defense against entity, exceptional circumstances required for, 13.175
Exactions. See **Exactions**
General plans. See **General Plans**
Growth management. See **Growth Management**
Hearings
Procedural due process requiring, 10.5-10.9
Record of hearing, request for, 2.78
Housing. See **Housing**
Mandamus, scope of review in land use decisions, 13.8
Moratoria
Authority for, 10.208-10.209
Takings issues. See **Taking**
Notice
Legislative acts, notice and hearing requirements, 10.9
Quasi-judicial proceedings (see Quasi-judicial proceedings, notice requirements for hearings, below)
Permit Streamlining Act. See **Permit Streamlining Act (PSA)**
Planning and Zoning Law as basis for, 10.2
Planning commissions as optional advisory group, 10.3
Quasi-judicial proceedings, notice requirements for hearings
Generally, 10.5
Adequacy of notice, 10.7
Affected property owners, notice to, 10.6
Type of notice, 10.8
Regional planning issues
Airport planning. See **Airports**
Housing obligations for regional needs, 10.275
Joint powers authorities, 10.276
Office of Planning and Research for, 10.250
Transportation planning. See **Transportation Planning**
Waste management. See **Waste Management Planning**
Streams, tidelands, and beaches. See **Tidelands, Beaches, and Streams**
Subdivisions. See **Subdivisions**
Tidelands, beaches, and streams. See **Tidelands, Beaches, and Streams**
Water considerations in. See **Water Supplies**

Law Enforcement Personnel
See also **Criminal Law**
Arrest record or participation in diversion program, permissibility of asking candidates for peace officer position about, 4.22
Closed session of legislative body to meet with law enforcement about public security, 2.99
Meyers-Milias-Brown Act. See **Meyers-Milias-Brown Act**

Misconduct
Public Safety Officers Procedural Bill of Rights Act, time limit for imposing discipline after discovery of alleged misconduct, 4.303
Statute of limitations for investigating civilian police employee misconduct, 4.271
Overtime pay requirements, partial exemption for law enforcement personnel. See **Fair Labor Standards Act (FLSA)**
Personnel records. See **Personnel Records**
Public Records Act
Exemption from disclosure for peace officer personnel records and records of citizen complaints, 2.247
Investigation records of law enforcement agencies, exemption from disclosure, 2.251
Names and salaries of peace officers, disclosure of, 2.246
Punitive action against police officer. See **Public Safety Officers Procedural Bill of Rights Act**
Scope of employment, interpretation of for indemnification issues, 13.88
Security guards, police officers as, 7.191
Sheriff
Emergency powers of sheriff, 6.199
Separate client from county, sheriff as, 2.201
Special taxes for support of, 5.88-5.91
Statute of limitations tolled while criminal charges pending against claimant, 13.67
Strikes by police officers, illegality of, 4.348

Layoffs
Distinction between layoffs and discharging employees for cause, 4.41

Leases
Acquisition offer to lessees when eminent domain contemplated, 8.29
Certificates of participation. See **Debt Financing**
Debt limit, as exception to, 5.293
Economic development as means of reducing lease amount, 5.298
Eviction regulations as example of valid overlapping state and local regulation, 1.41
General leasing authority, 8.115
Harbor leasing. See **Harbors**
Lease-back agreements. See **Debt Financing**
Prevailing wage law, applicability to work performed on leased facilities, 7.88
Recordation of lease, 8.118
Revenue from leases of real and personal property, 2.263
Specific kinds of leases, authority for, 8.116
Statement concerning taxable interest, 8.117
Surplus real property, offer to sell or lease. See **Surplus Property**

Legal Malpractice
Reliance on legal advice from government attorney, prohibition against legal malpractice action based on, 2.171

Lewd or Dissolute Conduct
Personal conduct regulation of, 9.75-9.76

Liability
Generally, 13.90
Affirmative defenses. See **Defenses**
Animals, liability issues of public officers for death or injuries to, 9.173
Antitrust laws, application to municipalities, 13.153
Apportionment of liability for economic damages, 13.182
Attorney fees, municipal liability for. See **Attorneys' Fees**
Checklists (see Torts, generally, below)
Common law liability, abolishment of, 13.94
Constitutional claims as basis for liability claims
Generally, 13.113
Section 1983 actions, 13.114, 13.116
Contractual liability
Generally, 13.154
Limitation of liability clauses, 7.226
Public entity liability, contractual provision for, 7.209, 7.218
Damages. See **Damages**
Dangerous condition of public property
Generally, 13.99
Absence of prior accidents, admissibility to show site not dangerous, 13.101

Adjacent property, dangerous condition on, 13.102
Affirmative defenses, 13.106
Certificate of review required before filing action, 13.106
Definition of dangerous condition, 13.101
Elements of proof, 13.99
Legal cause of injury, dangerous condition as, 13.104
Notice of, 13.105
"Owned or controlled" property, 13.100
Trivial defects, insufficiency to create dangerous condition, 13.103
Definitions
Actual notice, 13.105
Constructive notice, 13.105
Dangerous condition, 13.101
Employee, 13.94
Enactment, 13.98
Legal cause, 13.104
Public entity, 13.94
Discretionary acts
Generally, 13.95
Discretionary versus ministerial acts, test for, 13.96
Employee immunity for discretionary acts, application of, 13.97
Mandatory duties, liability for failure to discharge, 13.98
Hazardous materials. See **Hazardous Materials and Toxic Waste**
Immunity principles
Generally, 13.91
Antitrust, immunity of municipality from liability for, 13.153
Design immunity, 13.106-13.107
Disaster liability immunity under California Emergency Services Act. See **California Emergency Services Act**
Discretionary acts, employee immunity for, 13.97
Government Claims Act, specific immunities in, 13.93
Section 1983 actions. See **Section 1983 Actions**
Tort immunities, 13.92
Vehicle pursuits by public safety personnel, immunity for liability from, 13.134
Indemnification issues. See **Indemnification**
Mandatory duties, liability for failure to discharge, 13.98
Notice
Actual notice defined, 13.105
Constructive notice defined, 13.105
Dangerous condition of public property, notice of, 13.105
Personal liability of officers and employees, 13.155
Scope of employment
Color of law compared, 13.132
Determination of, 13.109
Section 1983 actions. See **Section 1983 Actions**
Torts, generally
Generally, 13.94
Checklist after lawsuit filed, 13.108
Checklist before lawsuit filed, 13.107
Dangerous condition of public property (see Dangerous condition of public property, above)
Defamation. See **Defamation**
Discretionary acts (see Discretionary acts, above)
Immunities for (see Immunity principles, above)
Intentional torts by employees, liability of entity for, 13.109
Scope of employment, determining, 13.109
Traffic signs and signals, providing versus maintaining, 13.106
Wrongful death liability, 13.121

Libel. See **Defamation**

Liberty Interests in Pursuing Employment. See **Disciplinary Actions Against Employee**

Libraries
Exemptions from property tax by, 5.22, 5.101
Special taxes for support of, 5.92

Licenses and Permits
Adult businesses, permit requirements and operating restrictions, 9.12
Air quality. See **Air Quality**
Alcohol sales, licensing for, 9.21
Appropriations limit on, 5.11
Army Corps of Engineers. See **Army Corps of Engineers**
Building permits. See **Building Permits**
Business license fees and taxes. See **Taxes**
California Coastal Act. See **California Coastal Act**
Closed session of legislative body to consider license application by person with criminal record, 2.99
Conditional use permits. See **Conditional Use Permits**
Contractual provision warranting contractor properly licensed, 7.229
Dogs and cats, licensing regulation of, 9.162
Endangered Species Act (ESA) permits. See **Endangered Species Act (ESA)**
Expressive activity permits, expedited mandamus review for, 13.23
Fish and Game Department. See **Fish and Game, Department of**
Household hazardous waste drop-off events and sites, permit required for, 11.241
Insurance company licensing, 7.278
Motor vehicle license fees, authority for, 5.7
National Pollutant Discharge Elimination System (NPDES) permits. See **Water Quality**
Parades and parade permits. See **Parades and Parade Permits**
Permit Streamlining Act. See **Permit Streamlining Act (PSA)**
Prior restraints against speech and permit requirements, 9.128
Public Records Act, exemption from disclosure of licensee's personal financial data, 2.248
Public works contracts, contractor's license issues for. See **Contractors and Subcontractors for Public Works Contracts**
Reclaimed water project, permits required for operation of, 6.9
Section 1983 actions, causation as defense for employee involved in permit application denied by city council, 13.142
State subventions. See **Revenues**
Storm water permits. See **Storm Drains**
Taxes. See **Taxes**
Taxicab licensing violations, consequences of, 9.42
Water quality and discharge. See **Water Quality**

Lie Detector Tests. See **Polygraph Tests**

Liens and Encumbrances
Benefit assessments and assessment districts, recording assessment roll as placing lien, 5.141
Community facilities district, filing of notice of special tax lien after formation of district, 5.81
Drug House Abatement Act, liens against property under, 12.14
Fees and charges, lien on parcel compared with lien only if default, 5.176
Nuisance abatement lien, 12.13-12.14, 12.23
Red Light Abatement Act, liens against property under, 12.13

Limitation of Actions See **Statutes of Limitations**

Limousine Rentals
Business and occupational regulation of, 9.34

Liquidated Damages. See **Damages**

Lis Pendens
Eminent domain proceedings, recording lis pendens notice for, 8.45

Loans
Public official's acceptance of personal loans prohibited, 2.156
Redevelopment
Commercial rehabilitation loans possible, 5.372
Mark-Roos public financing authority bonds, 5.240
Water Resources Department, evaluation of applications for loans and grants by, 11.93

Lobbying
Public funds, permissibility of lobbying efforts involving use of
Generally, 3.217
Distinguishing between lobbying and campaigning, 3.219
Political Reform Act of 1974, registration and reporting requirements for state lobbyists under, 3.218

Regulation of lobbyists appearing before city boards or agencies, 2.187
Reporting requirements for lobbying by state and local agencies
Generally, 2.186
Political Reform Act of 1974, registration and reporting requirements for state lobbyists under, 3.218
Statutory authority permitting cities to engage in lobbying, 2.185

Local Agency Formation Commissions (LAFCOs)
Generally, 1.107
Annexation. See **Annexation**
CEQA, LAFCO as project for purposes of, 1.122
Changes of organization
Generally, 1.114
Annexation. See **Annexation**
Conditions on changes, 1.116
Confirmation election required if LAFCO initiates change of organization, 1.114
Consolidation of districts, 1.170
Detachment. See **Detachment**
Farmland security zones, changes relating to, 1.115
Limitations on approving or disapproving changes, 1.124
Quo warranto action, challenging completed change of organization or reorganization by, 1.129
Validation action, challenging completed change of organization or reorganization by, 1.129
Composition of LAFCOs, 1.110
Funding, 1.111
Historical background, 1.108
Incorporation proceedings. See **Incorporation**
Independent judgment exercised by LAFCO members, 1.110
Limitations on LAFCO power
Approving or disapproving changes of organization, limitations on, 1.124
Imposing conditions, limitations on, 1.123
Mandatory LAFCO approval, 1.125
Powers of LAFCOs
Generally, 1.112
Changes of organization (see Changes of organization, above)
Limitations on (see Limitations on LAFCO power, above)
New or extended services outside boundaries, provision of, 1.121
Particular powers, 1.113
Spheres of influence (see Spheres of influence, below)
Procedures applicable to LAFCO proceedings
Generally, 1.126
Evidence gathering, 1.127
Incorporation proceedings. See **Incorporation**
Judicial review, 1.129
Jurisdictional overlaps, 1.130
Subsidiary districts, establishing. See **Subsidiary Districts**
Time limits, 1.128
Purpose of LAFCOs, 1.108
Role of LAFCOs, generally, 1.109
Spheres of influence
Generally, 1.117
Determining sphere of influence, 1.118
Mandatory service reviews, 1.119
Updates and amendments to sphere of influence, 1.120
Validation action, challenging sphere of influence determination by, 1.129
Subsidiary districts. See **Subsidiary Districts**
Writings
Policies and procedures required to be adopted by LAFCOs, 1.109
Sphere of influence determinations, 1.118

Local Agency Investment Fund
Investment vehicle for local governments, 5.267

Local Ordinances. See **Ordinances**

Local Preferences. See **Goods and Services, Contracting for**

Loitering
Generally, 9.100
Due process issues with regulation of, 9.102-9.103
Equal protection issues with regulation of, 9.101
Free assembly and association issues with regulation of, 9.104
Homeless persons, ordinances as cruel and unusual punishment, 9.106
Liability issues, 13.121
Preemption of criminalized conduct, 9.105

Low-Income Housing. See **Affordable Housing**

Loyalty Oaths
Religious beliefs of applicant, effect on requirement of taking loyalty oath, 4.218

Mail
Agenda for meeting, mailing of, 2.57
Ballots, mailing of. See **Ballots**
Counting votes cast by, 3.23
Mass mailing restrictions for public officials, 2.157

Malpractice
Medical. See **Medical Malpractice**
Reliance on legal advice from government attorney, prohibition against legal malpractice action based on, 2.171

Management Employees. See **Meyers-Milias-Brown Act**

Manager. See **City Manager**

Mandamus, Writ of
Generally, 13.2-13.3
Administrative mandamus
Generally, 13.16
Burden of proof, 13.22
Evidence admissible in actions for, 13.21
Expressive activity permits, expedited review for, 13.23
Findings required, 13.16
Scope of review, 13.17
Standard of review (see Standard of review for administrative mandamus, below)
Statute of limitations applicable to, 13.23
Airport land use compatibility plans (ALUCP), failure of commission to act on, 10.258
Appeal of order from, 13.15
Attorney fees, municipal liability for, 13.161
Building permit decisions, application of writ to, 13.4
Burden of proof
Generally, 13.10
Administrative mandamus, 13.22
Exhaustion of administrative remedies required, 13.13
Presumption of validity required, 13.12
Reasonable relation test as deferential standard, 13.11
California Coastal Commission actions, mandate for review of, 10.322
California Environmental Quality Act (CEQA), challenges to, 11.73, 11.75
Constitutional limits on review
Generally, 13.24
Equal protection issues when discriminatory classification involved, 13.25
Ripeness requirement, 13.27
Substantive due process issues and, 13.26
Cost reimbursements, mandamus to set aside decision of Commission on State Mandates, 5.260
Definitions
Adjudicatory act, 13.2, 13.5
Legislative act, 13.2, 13.5
Ministerial act, 13.2, 13.4
Election materials, writ of mandate seeking amendment or deletion of, 3.57
Evidence
Admissibility of evidence in actions for mandamus, 13.9, 13.21

Standard of review for administrative mandamus, substantial evidence test as, 13.19
Government Claims Act
Claims for release of funds or return of property not subject to, 13.32
Rejection of claim not subject to mandamus, 13.65
Relief from claims requirement, granting petition for subject to mandamus, 13.84
Immunity doctrine, inapplicability to mandamus, 13.91
Initiatives. See **Initiatives and Referenda**
Pension plan, mandamus proceeding to compel public body to pay, 4.40
Proper method of review, traditional mandamus as
Ministerial acts lacking discretion, 13.4
Quasi-legislative acts but not adjudicatory acts, 13.5
Quasi-judicial proceedings (see Administrative mandamus, above)
Redevelopment, action to force eminent domain proceedings or declare exemption, 5.355
Rent control, timing of mandamus and Section 1983 actions involving denial of fair return, 9.51
Scope of employment, declaratory relief for employer funded defense, 13.88
Scope of review
Generally, 13.6
Abuse of discretion, application to mandamus, 13.6
Land use decisions, special considerations in, 13.8
Motives of legislators not subject to inquiry, 13.7
Standard of review for administrative mandamus
Generally, 13.18
Independent judgment test for fundamental vested rights, 13.20
Substantial evidence test, 13.19
Statute of limitations, 13.14, 13.23
Taking, mandamus seeking invalidation of regulation causing, 10.404
Water supplier, compelling compliance of, 11.108

Mandates
Cost reimbursement by state for mandates. See **Cost Reimbursements From State**
State mandates, 1.97
Suspended or repealed mandates, review of state budget bills for, 1.97

Marijuana
Medical marijuana, no duty to reasonably accommodate use of, 4.224

Marks-Roos Local Bond Pooling Act of 1985
Generally, 5.237
Joint powers agency authorized to pool capital needs of agencies under, 1.78, 5.237
Public financing authority bonds
Generally, 5.237
Lease and installment sale financing, 2.239
Loans for redevelopment activities, 5.240
Pooling of bonds, 2.238

Massage Parlors
Business and occupational regulation of, 9.35

Mass Transit. See **Public Transportation**

Mayors
Generally, 1.202
Appointment power, 1.206
Authority, 1.204
Conflict of interest disclosure statements. See **Political Reform Act of 1974**
Establishing or eliminating office of elected mayor, 1.203
Mayor pro tempore, selection of, 1.207
Presiding officer at city council meetings, mayor as. See **City Council Meetings**
Qualifications for elected mayor, 3.34
Salary, 1.205, 1.211
Strong mayor form of government, 1.182
Vacancy in office, filling, 1.203

McAteer-Petris Act, 6.179

Meal Periods. See **Rest and Meal Periods**

Media. See **Newspapers and News Media**

Mediation
See also **Alternative Dispute Resolution (ADR); Arbitration**
Code enforcement proceedings, use of mediation in, 12.81
Meyers-Milias-Brown Act providing for, 4.349
Public works contracts, mediation provisions in, 7.47, 7.112

Medical Examination
Disabled job applicant, employer requiring medical examination of. See **Disabled Persons**
Drug testing. See **Drug Testing**
Fair Employment and Housing Act (FEHA) allowing employment offer conditioned on results of medical examination, 4.21

Medical Malpractice
Accrual of cause of action for claims presentation, 13.58
California Emergency Services Act, immunity from disaster malpractice under, 6.194

Medical Reports
Confidentiality of
Generally, 4.384
Discrimination based on employee's refusal to sign authorization for release of confidential medical information prohibited, 4.114
Drug testing, confidentiality of medical information obtained from, 4.114
Workers' compensation litigation, medical reports in. See **Workers' Compensation**

Meet and Confer Obligation. See **Meyers-Milias-Brown Act**

Meetings
Generally, 2.1
Agendas. See **Agendas for Meetings**
California Emergency Services Act governing meeting procedures after disaster, 6.188
City council meetings. See **City Council Meetings**
Closed session meetings. See **Closed Session Meetings**
Constitutionality of prayer or silent meditation at beginning of meetings, 2.6
Minutes of meeting
City council meeting, 2.6
Land use hearing, request for record of, 2.78
Open meeting laws. See **Open Meeting Laws**
Quorum requirements. See **Quorum**
Voting during meetings
City council meetings, requirement of majority or super-majority vote for, 2.2
Closed session, disclosure of vote in. See **Closed Session Meetings**
Teleconferenced meetings, voting by roll call during, 2.72

Mello-Roos Community Facilities Act of 1982
Generally, 5.76
Amount of tax, 5.82
Bonds
Challenges to validity of tax or bond issuance, 5.87
Issuance and limitations on, 5.86-5.87, 5.229
Changes to district after approval, 5.85
Collection of tax, 5.83
Exemptions to tax, 5.84
Facilities, types authorized, 5.78
Formation of district, procedural steps, 5.81, 5.85
Joint community facilities agreements, 5.80
Levying of tax, 5.82
Proposition 218 s not rescinding election provisions under Act, 5.117
Redevelopment plan financing using, 5.395
Services, types authorized, 5.79
Voting mechanics to create district, 5.77

Meyers-Milias-Brown Act

Generally, 4.320
Agency shop agreements, employees paying organization service fee for representation services under, 4.332
Arbitration (see Binding arbitration for law enforcement officers and firefighters, below)
Bargaining units, public agency employer's exclusive right to determine appropriate, 4.333
Binding arbitration for law enforcement officers and firefighters
Generally, 4.342
Constitutionality of binding arbitration, 4.324, 4.342
Construction and interpretation of Act
Cases interpreting National Labor Relations Act (NLRA), effect on interpretation of Meyers-Milias-Brown Act, 4.325
Liberal construction of terms and conditions of employment subject to meet and confer obligations, 4.338
Covered employees, 4.320
Discrimination against employee exercising rights under Act prohibited, 4.326
Dispute resolution for violations of Act
Binding arbitration (see Binding arbitration for law enforcement officers and firefighters, above)
Jurisdiction of California Public Employment Relations Board to hear complaints alleging violation of Act, 4.323
Excluded employees, 4.320
Exclusive representative, effect of employer recognizing employee organization as, 4.331
Firefighters
Binding arbitration (see Binding arbitration for law enforcement officers and firefighters, above)
Right of firefighters to organize union, 4.328
Guaranty of employees' union right under, 4.322
Impasse in bargaining
Generally, 4.341
Binding arbitration (see Binding arbitration for law enforcement officers and firefighters, above)
Other employees, impasse procedures for, 4.343
Individual's right to represent self, 4.331
Interpretation of Act (see Construction and interpretation of Act, above)
Law enforcement personnel
Binding arbitration (see Binding arbitration for law enforcement officers and firefighters, above)
Right of law enforcement employees to join or participate in employee organizations, 4.328
Management employees
Employer's restriction on management employees representing other employees, 4.329
Shop agency agreement, inapplicability to management employees, 4.332
Management rights, test for determining if action falls within, 4.340
Mandatory collective bargaining system for California local government, Act creating, 4.322
Mediation, 4.349
Meet and confer obligation
Generally, 4.335
Attorney fees, award against losing party of discovery motion, 13.170
Good faith requirement of parties to meet and confer, 4.339
Impasse (see Impasse in bargaining, above)
Liberal construction of terms and conditions of employment subject to meet and confer obligations, 4.338
Scope of representation (see Scope of representation, matters within, below)
Unilateral changes in violation of Act as per se violation of duty to meet and confer, 4.344
Unilateral implementation following meet and confer, 4.345
Memorandum of understanding, contents of, 4.346
Notice of proposed ordinance, rule, resolution, or regulation relating to matters within scope of representation, requirement governing body give, 4.334
Organizing union, employees' rights concerning
Generally, 4.327
Firefighters' right to unionize, 4.328
Law enforcement employees' right to join or participate in employee organizations, 4.328
Management and confidential employees' representation of other employees, employer's restriction on, 4.329
Professional employees' right to be represented separately from nonprofessional employees, 4.330
Personnel records, union's access to, 4.129
Refusal to join employee organization, employees' rights concerning, 4.327
Rules for administration of employer-employee relations, Act providing, 4.321
Scope of representation, matters within
Generally, 4.336
Definitive test for determining if matter within scope of representation, lack of, 4.337
Strike, public employees' limited right to, 4.348
Unfair labor practices
Actions constituting, 4.347
Statute of limitations for unfair labor practices filed with California Public Employment Relations Board, 4.323
Unilateral changes

Generally, 4.344
Meet and confer, unilateral implementation following, 4.345

Military
General plan, impact on military facilities, 10.23
Protected leave for military service, 4.163, 4.175
Uniformed Services Employment and Reemployment Rights Act of 1994, employee's right to take leave under, 4.163

Mines and Mining
Lease of city property for production of minerals, 8.116
Office of Mine Reclamation (OMR), 1.101

Minimum Wage. See **Overtime and Minimum Wage**

Minors
See also **Children**
Background checks of minors seeking position supervising other children, 4.25
Curfews as personal conduct regulation of, 9.67-9.70
Fair Labor Standards Act (FLSA), child labor provisions of. See **Fair Labor Standards Act (FLSA)**
Government Claims Act
Claims by minors subject to act, 13.29
Late claims by minors, 13.59, 13.71
Parents and minors, claims are separate under Act, 13.51
Tolling of presentation period, 13.59, 13.74

Minutes of Meetings. See **Meetings**

Misconduct
Police misconduct. See **Law Enforcement Personnel**
Workers' compensation benefits, penalty if injury caused by employer's serious and willful misconduct, 4.377

Misdemeanors. See **Criminal Enforcement**

Misrepresentation. See **Fraud and Misrepresentation**

Mistakes. See **Bidding for Public Works Contracts**

Mobile Homes and Mobile Home Parks
Definition of vacancy, 9.60
Rent control. See **Rent Control**

Modifications. See **Amendments and Modifications**

Moratoria. See **Land Use**

Motor Vehicles
See also **Vehicular Regulations**
Ambulances. See **Ambulances**
Automobile insurance, 7.213, 7.285, 13.87
Dealerships, prohibition on redevelopment agency assistance with, 5.371
Emissions, preemption of regulation of, 11.196
License fees as revenue source, authority for, 5.7
Limousines, regulation of, 9.34
Noise regulation of sound amplification systems, 9.111
Registration fees, raising for air quality purposes, 11.191
Taxicabs. See **Taxicabs**
Trucks. See **Trucks, Regulation of**
Vehicle abatement laws, 12.72

Motor Vehicles, Department of (DMV)
Employer requesting copy of job applicant's DMV records, 4.26

Municipal Affairs Doctrine, 5.5

Municipal Improvement Act of 1913, 5.132

Municipal Improvement Bond Act of 1901, 5.295

Municipal Plaintiffs
Generally, 13.173
Definitions
Person, 13.173
Plaintiff, 13.173
Equitable estoppel defense against entity
Generally, 13.174
Elements of estoppel, generally, 13.175
Examples of application of estoppel to municipalities, 13.177
Policy factors to consider in application of defense, 13.176
Government Claims Act, application to municipal plaintiffs, 13.178
Indemnity actions by municipalities
Generally, 13.179
Equitable indemnity, 13.182
Express indemnification, 13.180
Joint powers agreements, 13.181
Subrogation actions by municipalities, 13.183
Validation actions
Generally, 13.184
Legislative actions, 13.186
Procedures for action, 13.185
Remedies available for enforcement of ordinances, 13.187

Names
Ballots, candidates' names on. See **Ballots**
Open meetings, signing register or giving names prohibited as condition for attendance at, 2.74
Public Records Act
Exemption for citizens' names, addresses, and phone numbers, 2.257
Peace officers, disclosure of names and salaries of, 2.246

National Environmental Policy Act (NEPA)
Airports, review of regulatory actions involving, 6.155
CEQA. See **California Environmental Quality Act (CEQA)**
Endangered Species Act (ESA) enforcement actions, inclusion of NEPA claims with, 11.286

National Origin, Discrimination Based on
California Constitution provision prohibiting discrimination based on national origin, 4.164
Civil Rights Act of 1991, no remedy for discrimination based on national origin under, 4.150
FEHA. See **Fair Employment and Housing Act (FEHA)**
Govt C §11135, discrimination prohibited under, 4.169
Immigration Reform and Control Act of 1986 prohibiting discrimination against applicants and employees based on citizenship or national origin, 4.12, 4.149
State personnel laws prohibiting, 4.170
Unruh Civil Rights Act and Ralph Civil Rights Act, scope of, 4.168

National Pollutant Discharge Elimination System (NPDES). See **Water Quality**

Natural Community Conservation Planning Act, 11.296

Natural Resource Agencies. See **Environmental and Natural Resources Agencies**

Negative Declarations. See **California Environmental Quality Act (CEQA)**

Negligence
Active negligence
Generally, 7.302
General indemnification clauses and active negligence, 7.304
General versus specific indemnification clauses, 7.303
Passive negligence distinguished, 7.301
Indemnification
Accrual of right to indemnification, 7.305

Active negligence (see Active negligence, above)
Defense costs, right to, 7.306
General principles, 7.299
Passive negligence, 7.301
Statute of limitations for enforcing indemnity agreement, 7.307
Statutory limitations, 7.300
Section 1983 actions, negligence not sufficient, 13.139

Negotiated Purchase Agreement
Acquisition of property by negotiated purchase agreement, common prerequisites for
Generally, 8.2
Appraisal, 8.8-8.9
CEQA, environmental review under, 8.6
Compliance with statutory and regulatory guidelines, 8.3
Environmental (contamination) assessment (see Environmental (contamination) assessment, below)
General plan, conformity with, 8.4
Notice of intent to appraise, 8.9
Offer in full amount of appraisal, rules governing, 8.30
Preliminary work to ascertain property interests, 8.5
Title search, 8.7
Appraisals, use of, 8.8-8.9, 8.30
Environmental (contamination) assessment
Generally, 8.10
Failure to perform assessment, consequences of, 8.13
Further assessment, 8.12
Purpose of assessment, 8.11

Negotiations
Closed session. See **Closed Session Meetings**
Eminent domain proceedings, precondemnation negotiations, 8.40
Federally funded projects. See **Federally Funded Projects**
Surplus property, good faith negotiations to purchase or lease, 8.94

NEPA. See **National Environmental Policy Act (NEPA)**

Newspapers and News Media
Adult publications. See **Adult Businesses**
City council meetings, rules affecting journalists' attendance at, 2.28
Election, publishing notice of. See **Elections**
Newsrack restrictions, 9.129
Notice of special meetings, media requesting, 2.68
Ordinance, publication of, 1.239
Police officer, employer prohibited from subjecting to visits by news media, 4.307
Recall, publishing notice of, 3.154
Removal of news media for participation in disruption of meeting, 2.81
Resolution of intent to dispose of real property, publication of, 8.83
Standing of news media to seek government records, 2.230
Taxation of First Amendment activity, 9.153

Noise
Generally, 9.107
Airports. See **Airports**
Air quality. See **Air Quality**
Freedom of speech issues with, 9.108
General plans for land use. See **General Plans**
Overbreadth challenges to regulation, 9.110
Vagueness challenges to regulation, 9.109
Vehicles and sound amplification systems, 9.111

Nomination of Candidates. See **Elections**

Nonconforming Uses and Structures. See **Zoning**

Nonprofit Corporations
Lease of city property to nonprofit corporation for housing development, 8.116

Services provided by, 1.84

Nonsummary Vacation of Streets, Highways, and Service Easements
See also **Summary Vacation of Streets, Highways, and Service Easements**
Agreements not to vacate, 8.141
Effect of vacation
Generally, 8.138
City owns easement only, 8.139
City owns underlying property, 8.140
Posthearing procedure
Conditions imposed by city council, 8.132
Recordation of vacation, 8.133
Resolution vacating easement, 8.131
Prehearing procedure
Hearing and notice, 8.129
Initiation of proceedings, 8.128
Planning commission role, 8.127
Receipt of evidence, 8.130
Reservations
Existing utilities, 8.136
Future sewers, storm drains, and other utilities, 8.134
Future streets, 8.135
Trails, 8.137

Notice and Notification
Adjournment of meeting, notice of, 2.70
Annexation. See **Annexation**
Cable television and video system franchises, program notice requirements, 6.82
CEQA. See **California Environmental Quality Act (CEQA)**
Closed sessions. See **Closed Session Meetings**
Code enforcement, notice requirements for
Administrative enforcement. See **Administrative Enforcement**
Criminal enforcement. See **Criminal Enforcement**
Conditional use permit, notice of, 10.103
Continuance of hearing, notice of, 2.71
Contractual provision specifying written notice, 7.227
Detachment. See **Detachment**
Election, notice of. See **Elections**
Emergency notice requirements under Ralph M. Brown Act (Brown Act), 6.197
Eminent domain proceedings. See **Eminent Domain**
Endangered Species Act, notice before filing suit to enforce, 11.285
Enforcement of discrimination laws. See **Discrimination Laws, Enforcement of**
Fees, notice of hearing for imposition of, 10.226
Firefighters, notifying of proposed disciplinary action, 4.317
Government Claims Act. See **Government Claims Act**
Hazardous materials. See **Hazardous Materials and Toxic Waste**
Incompatible activities, local rules providing for notice of, 2.184
Initiatives. See **Initiatives and Referenda**
Land use decisions, notice of. See **Land Use**
Liability. See **Liability**
Meyers-Milias-Brown Act requiring governing body give notice of proposed ordinance, rule, resolution, or regulation relating to matters within scope of representation, 4.334
Motor Voter Act requiring notification to all applicants about acceptance of registration applications, 3.72
Negotiated purchase agreement, notice of intent to appraise for, 8.9
Nonsummary vacation of streets, highways, and service easements, notice requirements, 8.129
Police officer, notifying of proposed discipline, 4.303
Prevailing wage law, notices concerning rates under, 7.51
Proposition 218, notice and hearing requirements, 5.140, 5.147, 5.179
Public Records Act, notification of denial of request for record, 2.236
Public works contract. See **Public Works Contract**
Recall, notice of intention to. See **Recall**
Right to sue notice. See **Discrimination Laws, Enforcement of**
Special meeting, notice requirements for, 2.65
State Housing Law, notice requirements for enforcement agency under, 12.6
Stop notices. See **Stop Notices**

Surplus property, notice requirements for purchase or lease of, 8.93

Nuisance, Abatement of
Alcoholic beverages, sale of, 9.18
Burden of proof requirements, 12.2
Conditional use permits
Denial of issuance, 10.107
Revocation or termination, 10.111
Construction projects, incompletion as subject to nuisance action, 10.246
Cost recovery in nuisance abatement actions, 12.22-12.24
Counterfeiting activities, abatement of building used for, 12.15
Criminal nuisance, 12.38
Dance halls, limitations on, 9.28
Domestic animals, nuisances caused by, 9.160
Drug House Abatement Act. See **Drug House Abatement Act**
Drug manufacturing, sale, or use, buildings used for, 9.78
General public nuisance
Generally, 12.3
Doctrine of public nuisance per se, 12.4
Injunctive relief, 12.4
Judicial abatement, 12.5
Government Claims Act, injunctions to abate nuisance not subject to, 13.32
Graffiti, declaring as nuisance, 9.93
Lien, enforceability of fines as, 12.13-12.14, 12.23
Personal conduct regulation
Generally, 9.113
Definition of nuisance and public nuisance, 9.114-9.115
Local authority to declare nuisance, 9.117
State law on nuisance, 9.114-9.116
Red Light Abatement Act, enforcement and remedies under, 9.15, 12.13-12.16
Taking, regulation to prevent or eliminate nuisance not a taking, 10.389
Water quality issues, city authority to abate, 11.118

Oaths
Elected officials, administering oath of office to, 1.187, 3.27
Loyalty oath in California Constitution, effect of applicant's religious beliefs on requirement of taking, 4.218

Obesity
Disability per se, obesity not characterized as, 4.226

Occupational Regulation. See **Business and Occupational Regulation**

Office of Mine Reclamation (OMR), 1.101

Office of Planning and Research (OPR), 1.101, 1.120

Offsets. See **Setoffs**

Oil and Gas
See also **Gas Service**
Federal Energy Regulatory Commissions' regulation of wholesale sale and transmission of natural gas, 6.34
Fees for oil pipelines, 5.192
Franchise for oil pipeline, 6.57
Harbors, oil spill response and contingency planning for, 6.177
Lease of city property for production of oil and gas, 8.116
State Lands Commission's responsibility for oil and gas drilling production and operations, 1.101

OMR. See **Office of Mine Reclamation (OMR)**

Open Meeting Laws
See also **Closed Session Meetings**
Generally, 2.36
Adjourned meetings
Notice of adjournment, posting of, 2.70

Order of adjournment, adjournment of meeting to time and place specified in, 2.50
Advisory committees
Posting agenda 72 hours in advance of advisory committee's meeting, effect of, 2.47
Statutory less-than-a-quorum exception for, 2.38
Attendance at open meetings, rights of public
Anonymity, right of, 2.74
Audio, video, and photographic recording rights, 2.75
Closed sessions, limits on attendance at, 2.84
Distinction between attending and participating in meeting, 2.74
Documents (see Documents, public's right to access, below)
Opportunity to address legislative body, 2.80
Reasonable time restrictions and other regulations, 2.80
Removal of persons for disruption of meeting, 2.81
Signing register or giving names prohibited, 2.74
Attorney fees for cases alleging violations of Ralph M. Brown Act, 13.162
Benefit assessments and assessment districts, application of Ralph M. Brown Act to, 5.130, 5.146
City attorney recommending city council members reading Brown Act, 2.3
Civil action for Brown Act violations. See **Closed Session Meetings**
Closed sessions. See **Closed Session Meetings**
Committees
Advisory committees (see Advisory committees, above)
Standing committees (see Standing committees, below)
Continued hearings
Generally, 2.51
Announcement of time and place for resumption of continued hearing, 2.71
Criminal prosecution of officials-elect for violations of Brown Act, 2.39
Definitions
Legislative bodies, 2.37
Meeting, 2.40
Documents, public's right to access
Generally, 2.76
Americans with Disabilities Act (ADA), availability of documents in alternative format in compliance with, 2.77
Attorney-client privileged written communications, exception for, 2.79
Tape or film record or meeting, availability to public for 30 days, 2.78
Emergency meetings
Generally, 2.49, 6.196
Agenda for. See **Agendas for Meetings**
Legislative body meeting in closed session regarding emergency situation, 2.69
Notice requirements, 6.197
Posting of minutes required, 6.198
Entities and persons covered by
Elected officials not yet assuming office, applicability of Brown Act to, 2.39
Legislative bodies, 2.37
Statutory less-than-a-quorum exception for advisory committees, 2.38
Entities covered by Brown Act, 2.5
Exemptions (see Statutory exemptions from open meeting requirements, below)
Lawful meetings (see Types of lawful meetings, below)
Legislative body of local agency, requirements before taking action, 10.409
Minimum procedural requirements for conducting meetings, Brown Act establishing, 2.5
Notice of emergency meetings, 6.197
Prohibited meetings, 2.54
Project area committees, application to, 5.388
Redevelopment agencies, open meetings laws apply, 5.315
Regular meetings
Generally, 2.47
Agenda for regular meeting. See **Agendas for Meetings**
Time and place of regular meeting, Brown Act requiring legislative body provide, 2.35
Special meetings
Generally, 2.48
Agenda for special meeting. See **Agendas for Meetings**
Staff briefings, effect of Brown Act on, 2.54
Standing committees
Posting agenda 72 hours in advance of standing committee's meeting, effect of, 2.47
Statutory exemptions from open meeting requirements for, 2.46
Statutes relevant to meeting requirements for legislative bodies, 2.118

Statutory exemptions from open meeting requirements
Conferences and seminars, members of legislative body attending, 2.42
Individual contacts between member of legislative body and other persons, permissibility of, 2.41
Open community meetings to address local concerns, 2.43
Other local agencies, attendance at meetings of, 2.44
Social and ceremonial gatherings, 2.45
Standing committees, meetings of, 2.46
Teleconferenced meetings
Generally, 2.52
Agenda requirements for, 2.72
Quorum requirements, 2.52, 2.72
Types of lawful meetings
Adjourned meetings (see Adjourned meetings, above)
Continued hearings (see Continued hearings, above)
Emergency meetings (see Emergency meetings, above)
Extraterritorial meetings, 2.53
Regular meetings (see Regular meetings, above)
Special meetings (see Special meetings, above)
Teleconferenced meetings (see Teleconferenced meetings, above)

Open Space
Conservancies for the preservation of, 11.7
General plans for land use. See **General Plans**
Redevelopment area may not include restricted open spaces, 5.320
Surplus property, offer to sell or lease for open space purposes, 8.89
Tax reimbursements for property tax reductions, 5.215

OPR. See **Office of Planning and Research (OPR)**

Orders
Eminent domain proceedings, orders in. See **Eminent Domain**
Public Records Act, order for disclosure of records under. See **Public Records Act (California)**

Ordinances
Affordable housing. See **Affordable Housing**
Amendment or repeal of, 1.242
Camping in parks, equal protection issues in ordinances against, 9.62
County ordinances, 1.145
Enforcement of ordinances, remedies available, 13.187
Franchise ordinances for utilities. See **Franchises**
Government Claims Act, local claim requirements in addition to, 13.39
Parcel taxes, drafting tips for, 5.66
Public transportation fares set by ordinance, 6.129
Recyclable materials, ordinances on areas for collecting and loading, 6.119
Redevelopment agencies, changing from separate to legislative body agency, findings required, 5.309
Set-aside of funds for redevelopment plan housing requirement, ordinance amendment to comply, 5.427
Solid waste flow control ordinances, 6.101
Statutory procedures for city referenda. See **Initiatives and Referenda**
Subdivisions. See **Subdivisions and Subdivision Map Act**
Transient occupancy taxes, drafting tips for, 5.52
Vacant residential property acquired through foreclosure, applicability of local ordinances to, 12.76
Wells, local ordinances affecting, 11.120
Zoning ordinances. See **Zoning Ordinances**

Organization and Reorganization of Municipalities
See also **Formation of Municipal Corporations**
Annexation. See **Annexation**
Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, effect of, 1.10
Detachment. See **Detachment**
Incorporation. See **Incorporation**
Internal organization of cities. See **Internal Organization of Cities**
LAFCOs. See **Local Agency Formation Commissions (LAFCOs)**

Outdoor Advertising. See **Signs and Billboards**

Overtime and Minimum Wage
California minimum wage requirements, 4.58, 4.67
Fair Labor Standards Act, overtime pay and minimum wage provisions of. See **Fair Labor Standards Act (FLSA)**
Public safety employees, partial exemption to overtime provisions for, 4.69

Ownership and Possession
Adverse possession, acquiring or losing title to property through, 8.69, 8.114
Eminent domain proceedings. See **Eminent Domain**

PAC. See **Project Area Committees (PAC)**

Parades and Parade Permits
Generally, 9.146
Discretion by permitting official, 9.148
Fees for permits, 9.149
Insurance and indemnity requirements, 9.150
Police protection for parades, 9.151
Processing time for permits, 9.147

Parcel Taxes. See **Taxes**

Parent and Child
See also **Children**
Childbirth. See **Pregnancy and Childbirth**
Government Claims Act, separate claim for parents and minors under Act, 13.51

Parking
Affordable housing
Density bonuses, limitations on parking requirements, 10.186
Second units, limitations on parking requirements for, 10.169
Air quality districts generally prohibited from parking regulations, 11.194
Debt limit, parking agencies excluded from, 5.294
Delegation to local entities, 8.158
Fines and forfeitures. See **Penalties**
Local no-parking regulations, 8.159
Permitted regulations
Commercial vehicles on residential streets, 8.161
Miscellaneous regulations, 8.164
Off-street parking facilities, 8.162
Preferential parking regulations, 8.163
Private driveways, 8.162
State highways, 8.162
Street cleaning, 8.163
Time restrictions, 8.160
Two- or three-wheeled motor vehicles, 8.161
Vending vehicles, 8.161
Preemption by state law, 8.157
Variances, procedures for issuance, 10.116

Parking and Business Improvement Area Law of 1989, 5.136

Parkland
Abandonment of (see Dedicated lands, abandonment of, below)
Camping in parks. See **Camping**
Dedicated lands, abandonment of
Original dedications, 8.96
Parks dedicated by city, 8.97
Private dedications, 8.98
Disposition of
Generally, 8.95
Dedicated lands (see Dedicated lands, abandonment of, above)
Intergovernmental transfers, 8.101
Parks acquired from counties, 8.100
Parks not used for park purposes, 8.99

Surplus property, offer to sell or lease for park and recreation purposes, 8.89

Parliamentary Rules of Procedure. See **City Council Meetings**

Pawnbrokers
Business and occupational regulation of, 9.36

Peace Officers. See **Law Enforcement Personnel**

Penalties
Air quality. See **Air Quality**
Bail forfeitures, 5.196, 5.201
California Coastal Act, penalties for violations of, 10.330-10.332
California Environmental Quality Act (CEQA), sanctions for failure to timely prepare and certify administrative record, 11.68
California Integrated Waste Management Act of 1989 requirements, penalties for noncompliance with, 6.117
Code enforcement, civil penalties associated with. See **Civil Enforcement**
Court fines
Amount available for distribution, 5.198
Calculation of amount, 5.197
Distribution of, 5.198, 5.200
Distribution of fines, 5.196
Installment payments authorized, 5.199
Disciplinary actions. See **Disciplinary Actions Against Employee**
Drug testing law, penalties for violation of. See **Drug Testing**
Fair Labor Standards Act (FLSA), criminal sanctions for violation of, 4.85
False claim presented by contractor to public entity, penalties for, 7.114
Firefighters Procedural Bill of Rights Act, penalties for violation of, 4.319
Foreclosure, fines for failure to maintain vacant property acquired through, 12.74-12.75
Graffiti, state law sanctions, 9.88-9.90
Hazardous materials and toxic waste, penalties for not providing notice of to buyers and renters, 11.252
Ordinance, penalty for violation of, 1.241
Parking fines and forfeitures
Generally, 5.202
Administrative hearings for disputes of, 5.206-5.207
Amount of penalty, 5.203
Apportionment requirements, 5.204
Collection issues, 5.209-5.211
Criminal justice fund penalties, 5.213
Equipment and registration tab violations added to parking citations, 5.212
Hearings examiner qualifications, 5.207
Investigation and review process, 5.205
Liability, who bears, 5.203
Trial de novo appeal, 5.208
Police powers, criminal or civil penalties imposed by city as part of, 1.18
Political Reform Act, sanctions under. See **Political Reform Act of 1974**
Prevailing wage law, penalties under. See **Prevailing Wage Law**
Proposition 62, failure to comply with, 5.109
Public Records Act, appeal of sanctions for nondisclosure of records, 2.262
Public Safety Officers Procedural Bill of Rights Act, civil penalties for violation of, 4.310
Rates, penalties for nonpayment, 5.171
Redevelopment agency failure to meet excess surplus requirements, 5.432
Sanctions motions for frivolous or improper actions, 13.169
Section 1983 actions, civil penalties allowed, 13.150
Solid waste
City solid waste plan, penalties associated with failure to implement, 6.112
Reductions to landfills, penalties for failure to achieve, 6.104
State Housing Law, civil penalties under, 12.7, 12.20
Subletting and Subcontracting Fair Practices Act, penalties for failure to comply with, 7.81
Timing considerations
Judgments, time to mail notice of, 5.211
Parking fines and forfeitures, investigation and review process, 5.205
Parking fines and forfeitures, trial de novo, 5.208
Unfair Competition Act, penalties awarded under, 12.12, 12.21
Water quality enforcement actions, 11.155-11.156, 11.159
Workers' compensation laws, penalties under. See **Workers' Compensation**

Pending Litigation. See **Closed Session Meetings**

Pension Plans. See **Retirement and Pension Plans**

Performance Evaluations. See **Evaluation of Employees**

Permanent Disability Benefits. See **Workers' Compensation**

Permits. See **Licenses and Permits**

Permit Streamlining Act (PSA)
Generally, 10.10
Adjudicatory acts, application to, 10.12
Air quality permits, issues with, 11.230
Appeal rights, 10.15
Applications for land use, elements of completeness, 10.11
Automatic approval if public notice requirements met, 10.14
California Environmental Quality Act (CEQA), time limit interaction with, 10.13, 11.58
Lot line adjustments, approval of, 10.151

Personal Conduct Regulation
Camping in parks. See **Camping**
Constitutional issues
Generally, 9.81
Due process, 9.82-9.83
Equal protection, 9.84
Curfews. See **Curfews**
Disorderly conduct. See **Disorderly Conduct**
Drugs and drug paraphernalia. See **Alcohol and Drugs**
Gambling. See **Gambling**
Gangs and gang activities. See **Gangs**
Graffiti. See **Vandalism or Graffiti**
Loitering. See **Loitering**
Noise. See **Noise**
Nuisances, issues with. See **Nuisance, Abatement of**
Speech regulation. See **Speech Regulation (Government as Property Owner)**
Trespassing. See **Trespass**
Vandalism. See **Vandalism or Graffiti**

Personal Injury
Government Claims Act, claims subject to, 13.29
Insurance coverage, 7.288
Torts. See **Liability**

Personal Property
Acquisitions of, 8.77
Disposition of. See **Disposition of Property**

Personnel Records
Access to records
Employee's right to access own records, 4.125, 4.299
Third party (see Third party's right to access records, below)
Firefighter responding to adverse comments in personnel file, time limit for, 4.313
Inspection of records (see Access to records, above)
Law enforcement records (see Police officers' records, below)
Maintenance of records
Generally, 4.122
Americans with Disabilities Act (ADA), confidentiality of medical information under, 4.124
State law, requirements under, 4.123
Police officers' records
Adverse comments, police officer's right to read and file written response, 4.123, 4.298
Inspection of personnel file, 4.299
Unwarranted disclosure, protection of police officer's personnel records from, 4.131
Third party's right to access records
Generally, 4.126

HIV tests, liability for improper disclosure of, 4.132
Meyers-Milias-Brown Act, union's access to records under, 4.129
Police officer's records (see Police officers' records, above)
Public Records Act, right to inspect and copy records under, 4.127
Subpoena of personnel records, requirements for, 4.130
Title VII of Civil Rights Act, discoverability of personnel files under, 4.128

Petitions
Liability for defamation during petition signature gathering, 13.110

Pets. See **Animals**

Photographs
Public records, photographs as, 2.229

Physicians
Workers' compensation treatment, employee's pre-designation of physician for purposes of, 4.362

Planning and Zoning Law. See **Zoning**

Plants. See **California Endangered Species Act (CESA); Endangered Species Act (ESA)**

Pleadings. See **Complaints**

Police Chief
Emergency powers, 6.199
Powers and duties, 1.259

Police Officers
Generally. See **Law Enforcement Personnel**
Bill of rights. See **Public Safety Officers Procedural Bill of Rights Act**

Police Power
Animals, authority for regulation of, 9.157-9.158, 9.163
Code enforcement. See **Code Enforcement**
Criminal or civil penalties imposed by city, permissibility of, 1.18
Curfews, 9.65
Defined, 1.15
Economic development, as authority for, 5.297
Environmental law, limits of statutes on, 11.2
Exactions, authority for, 10.213
Fees, charges and rates, authority to impose, 5.159
Fluoridation of water supply as exercise of police power, 6.10
Graffiti, regulation of, 9.86
Moratoria on land use, 10.208
Public purpose, police power required to be reasonably related to, 1.32
Revenues, authority for raising, 5.3
Scope of police power, 1.16
Solid waste collection, police power authority over, 6.92
State preemption of local laws, 1.17
Taxing power compared, 1.21, 5.17
Zoning, 10.85
Zoning ordinances as example of valid overlapping state and local regulation, 1.41

Political Activities
Policies attempting to influence or control political activities or affiliations of employees, prohibition against, 4.136

Political Reform Act of 1974
See also **Ethical Considerations**
Generally, 2.119
Advertisement funding sources, disclosure of
Ballot measure campaign advertisements, 3.201
Mass mailing restrictions, 3.200
Spokesperson, reporting payments made to, 3.202
Amendment of Act

Proposition 208 (see Proposition 208, amendment of Political Reform Act of 1974, below)
Propositions 68 and 73, amendment of Political Reform Act by, 3.187
Applicability of Act to local elective office, 3.208
Attorney fees for compelling compliance with Act, 13.162
Business entities (see Disqualification of public officials in event of conflict of interest, below)
Campaign regulations
Generally, 2.151, 3.186
Amendment of Act (see Amendment of Act, above)
Covered officers disqualified from participating in proceeding after receiving $250 during previous 12 months from financially-interested participant, 2.153
Disclosure requirements and disqualifications, campaign contributions greater than $250 triggering, 2.152-2.153
Proposition 34, effect of, 3.189, 3.202
City attorney's fee splitting arrangement with bond counsel for joint powers agency as violation of Act, 2.209
Common law doctrine against conflicts of interest, effect of Act on, 2.174
Conflict of interest disclosure statements
Contents of statement, 2.144
Leaving office statements, 2.148-2.150
Persons required to file, 2.143
Project area committees, application to, 5.387, 5.433
Redevelopment agencies, application to, 5.433
Timing of disclosure statements, 2.145-2.147
Conflict of interest, disqualification of public officials in event of (see Disqualification of public officials in event of conflict of interest, below)
Constitutional rights, disclosure requirements affecting
Heightened scrutiny standard for disclosure laws affecting constitutionally protected interests, 3.192
Privacy of association and religious beliefs, disclosure of contribution amounts, sources of contributions, campaign related expenses as infringement on, 3.191
State interests in disclosure laws, balancing constitutional rights against, 3.193
Contents of disclosure statements
Generally, 3.198
Advertisement funding sources (see Advertisement funding sources, disclosure of, above)
Identification of contributors, lenders, and recipients, 3.199
Disclosure requirements under
Generally, 3.190
Campaign contributions greater than $250 triggering disclosure requirements and disqualifications, 2.152-2.153
Charitable fund raising, disclosure requirements affecting, 2.159
Conflict of interest disclosure statements (see Conflict of interest disclosure statements, above)
Constitutional issues (see Constitutional rights, disclosure requirements affecting, above)
Pre-election statements, requirement of filing, 3.197
Semiannual disclosure statements (see Semiannual disclosure statements documenting contributions and expenditures, below)
Disqualification of public officials in event of conflict of interest
Generally, 2.120
Business entity, direct or indirect investment in, 2.121
Gift source, interest in, 2.125
Income source, interest in, 2.123
Management position held in business entity, 2.124
Real property, direct or indirect interest in, 2.122
Duties of public official after determination of disqualification, 2.141
Eight-part test for analyzing disqualifying conflict of interest under
Generally, 2.126
Exception if governmental decision affects public official's economic interests in manner indistinguishable from effect on public, 2.139
Exception involving legally required participation, 2.140
Foreseeability of effect on public official's economic interest, 2.138
Identifiable economic interests, determining if public official has (see Identifiable economic interests, determining if public official has, below)
Identifiable economic interests, determining involvement in governmental decision, 2.136
Making, participating in, or influencing governmental decision, determining if public official involved in, 2.128
Materiality of economic interest necessity, 2.137
Public official, determining if individual qualifies as, 2.127
Enforcement of Act
Generally, 2.160
Administrative sanctions, 3.206
Civil sanctions for violation of, 3.205

Criminal penalties for violation of Act, 2.160, 3.204
Hearing to determine violation of Act, 3.206
Injunction to enjoin violations or to compel compliance with Act, 3.207
Gifts in excess of $420, prohibition against acceptance of, 2.155
Honorarium, prohibition against acceptance of, 2.154
Identifiable economic interests, determining if public official has
Generally, 2.129
Business entities, 2.130, 2.133
Business position, 2.133
Gifts, source of, 2.134
Income, source of, 2.132
Personal finances, 2.135
Real property, 2.131
Lobbying activities and expenses, registration and reporting requirements for state lobbyists, 3.218
Local conflict of interest code, 2.142
Mandatory ethics training for all local elected officials, 2.161
Mass mailing restrictions, 2.157
Personal loans, prohibition against acceptance of, 2.156
Proposition 34. See **Proposition 34**
Proposition 208, amendment of Political Reform Act of 1974 by
Generally, 3.187
Invalidation and repeal of Proposition 208, 3.188
Repeal of, 3.188-3.189
Quorum, city council member with financial conflict of interest not counted towards, 2.2
Regulations implementing, 2.119
Reports (see Semiannual disclosure statements documenting contributions and expenditures, below)
Revolving door prohibitions, duration of, 2.158
Sanctions (see Enforcement of Act, above)
Semiannual disclosure statements documenting contributions and expenditures
Generally, 3.194
Contents of disclosure statements (see Contents of disclosure statements, above)
Independent expenditures, reporting of, 3.196
Late contributions, reporting of, 3.195
Time
Disclosure statements, timing of, 2.145-2.147
Revolving door prohibition, duration of, 2.158

Pollution
Air pollution control districts (APCD) or air quality management districts (AQMD). See **Air Quality**
Public records, air pollution data as, 2.225
Toxic waste. See **Hazardous Materials and Toxic Waste**

Polygraph Tests
Employment, polygraph tests as condition of, 4.16
Police officer's right to refuses to submit to, 4.305

Porter-Cologne Water Quality Act. See **Water Quality**

Possession. See **Ownership and Possession**

Posters in Workplace
Mandatory workplace posters, 4.268
Sexual harassment, employer's duty to post poster about, 4.211

Prayer
Constitutionality of non-denominational prayer or silent meditation at beginning of meetings, 2.6

Preemption of Local Laws
See also **Federal Preemption**
Generally, 1.36
Aerosol paint containers, 9.89
Alcoholic beverages, sale of, 9.17-9.18
Auctions, 9.26
Business regulation under guise of revenue raising, 9.3
Contradiction of state law, 1.38

Drug paraphernalia, 9.79
Duplication of state law, 1.37
Foreclosure, CC §2929.3 not preempting local ordinances directed at vacant residential property acquired through, 12.76
General taxes, charter provision requiring super majority to levy preempted by California Constitution, 5.116
Initiative regulating matters preempted by state, prohibition against, 3.112
License fees and taxes for businesses, preemption of, 5.36
Loitering, preemption of conduct criminalized by state, 9.105
Massage practitioners, certificated, 9.35
Municipal affair determination, use in preemption analysis for charter cities, 1.31
Occupation of field by state law, expressly or by implication, 1.39
Parking on public streets, state law preempting local regulation of, 8.157
Police power of city, state's preemption of, 1.17
Rent control regulation
  Landlord/tenant state laws, preemption by, 9.58
  Mobile home parks, preemption by state law, 9.59
Sales and use taxation preempted by state, 5.26
Streets and sidewalks, effect of state's preemption of traffic control on local regulation of use of, 8.152-8.153
Telecommunications franchises, 6.90
Video service providers, state law preempting local regulation of, 6.59
Weapons and firearms regulation, preemption by state, 9.96

Preferential Treatment
Public employment or public contracting, preferential treatment prohibited in, 1.57

Pregnancy and Childbirth
FEHA. See **Fair Employment and Housing Act (FEHA)**
Pregnancy disability leave, 4.174
Title VII of Civil Rights Act of 1964, pregnancy discrimination prohibited under, 4.142

Prejudice. See **Bias and Prejudice**

Presumptions and Inferences
City council's legislative actions, presumption affecting validity of, 2.32
Congressional intent to preempt state legislation, no presumption of, 1.33
General plans for land use, rebuttable presumption of validity after compliance finding, 10.50
Lab C §2810 violation, rebuttable presumption affecting burden of proof regarding, 7.58
Mandamus action, presumption affecting validity of decisions of agency or public office, 13.12
Work-related injuries, presumptions affecting. See **Workers' Compensation**

Pretrial Conference
Eminent domain action, final pretrial conference in, 8.59

Prevailing Wage Law
Generally, 7.50
Apprentices, 7.55
Charter cities, applicability to, 7.84, 7.173
Day's work, 7.56
Economic development, application of prevailing wage law, 5.300
Exemptions
  Private residential projects, 7.87
  Volunteers, 7.94
Federally funded projects
  Generally, 7.164
  Contract provisions, 7.167
  Davis-Bacon Act, requirements under, 7.166
  Penalties for failure to comply with prevailing wage statutes, 7.169
General law cities, applicability to, 7.83
Indemnification of city required if subsidy triggers prevailing wages, 5.300
Labor Compliance Program, effect of, 7.52
Leased facilities, applicability to work performed on, 7.88
Miscellaneous public agencies, applicability to, 7.83
Notices concerning rates, 7.51
Partly or wholly private projects, applicability to, 7.83
Payroll records
  Certifying accuracy of, 7.54, 7.93

Inspection, availability of records for, 7.54, 7.93
Maintenance of, 7.54, 7.82, 7.92
Penalties
Failure to pay prevailing wages, 7.53, 7.90
Failure to require payment of prevailing wages, 7.91
Private residential projects exempt under certain conditions, 5.363
Private residential projects, inapplicability to, 7.87
Redevelopment agencies, applicability to, 7.83
Redevelopment plans, prevailing wage issues, 5.362-5.363
Requirement to pay prevailing wages, 7.89
Scope of public works
Exemptions, 7.87
Leased facilities, 7.88
Paid for in whole or part out of public funds, 7.86
Public works defined, 7.85
Statutory authority, generally, 7.82
Volunteer work, inapplicability to, 7.94
Workers' compensation, 7.57

Primary Elections, Contest Over. See **Election Contests**

Prior Meetings. See **Agendas for Meetings**

Prisons. See **Correctional Facilities**

Privacy
Employment tests as invasion of. See **Testing for Hiring, Promotion, or Retention of Employees**
Housing, rights to privacy, 10.199
Invasion of privacy, competing governmental interests justifying, 4.99
Personnel records. See **Personnel Records**
Public Records Act. See **Public Records Act (California)**
Public Safety Officers Procedural Bill of Rights Act, privacy rights under. See **Public Safety Officers Procedural Bill of Rights Act**

Private Attorney General Doctrine
Generally, 13.163
Calculation of amount of fee award, 13.165
Prevailing or successful party, 13.164

Privilege
Attorney-client privilege. See **Attorney-Client Privilege**
Deliberative process privilege, effect on request for information under Freedom of Information Act (FOIA) or California Public Records Act, 2.241
Public Records Act, effect of privilege on request for information under. See **Public Records Act (California)**
Sexual harassment claim, qualified privilege for statements made during investigation of, 4.209

Probationary Police Officers. See **Public Safety Officers Procedural Bill of Rights Act**

Probation. See **Criminal Enforcement**

Project Area Committees (PAC)
Generally, 5.330
Amendments to plans, PAC involvement in, 5.391
Consulting with community without PAC, 5.382
Duration of committee, 5.383-5.384
Formation of PAC
Contents and notice of procedures for process, 5.375
Timing considerations, 5.374
Members of, who included, 5.380
Notice and hearing
Failure to comply with procedures, 5.379
Procedures adopted by legislative body about forming PAC, contents and notice of, 5.375
Required meetings and hearings, 5.376
Timing of meetings and hearings, 5.377
Who must be notified, 5.378

Reports and recommendations from PAC to legislative body, 5.390-5.391
Responsibilities of PAC
Advice and consultation to agency, 5.386
Conflict of interest laws apply, 5.387
Open meetings laws apply, 5.388
Residential housing issues, 5.385
Selection of members, method for, 5.381
Services provided to PAC, 5.389
Timing considerations
Amendments to redevelopment plans, notice to PAC, 5.391
Challenges to procedures for formation, time for, 5.375
Duration of consultation with committee, 5.383
Formation of PAC, time for, 5.374
Meetings and hearings, timing of, 5.377
When required, 5.374, 5.384

Promotion. See **Testing for Hiring, Promotion, or Retention of Employees**

Proof
See also **Burden of Proof**
Dangerous condition of public property, elements of proof, 13.99
Work-related injury, proof of. See **Workers' Compensation**

Property and Business Improvement District Law of 1994, 5.136

Property Taxes
Annexation, negotiating exchange of property tax revenues after, 1.152-1.153
Apportionment of taxes, 5.25
Before, 1978, 5.18
Benefit assessments, collection with property taxes, 5.124
Characteristics of, 5.21
City-owned property outside its boundaries subject to tax, 5.24
Excise taxes, 5.59, 5.68
Exemptions from, types of property, 5.22, 5.101
Mello-Roos special tax, collection with property taxes of, 5.83
Parcel taxes compared, 5.63
Penalty of property tax forfeiture for failure to comply with Proposition 62, 5.109
Private possessory interest in government property tax authorized, 5.23

Proposition 1A
Sales and use taxes, effect on, 5.26
Vehicle license fees, amount of, 5.7

Proposition 4. See **Gann Limit**

Proposition 13
Generally, 1.52
Constitutionality of, 1.52, 5.99
Limits on taxing authority by
Generally, 5.98
Special taxes, limitations on, 5.100
Property taxes, effect on, 5.19-5.20, 5.24
Real property transfer taxes under, 5.68
Tax, limiting city ability to, 5.8

Proposition 34
Campaign finance regulations, effect of Proposition 34 on, 3.189, 3.202
Fair Political Practices Commission's authority to prosecute criminal violations of Political Reform Act, repeal of, 3.204
Violations of Political Reform Act of 1974, penalties for, 3.205

Proposition 62
Generally, 5.105
Charter cities, inapplicability to, 5.105
General taxes, imposition subject to Proposition, 5.16
Local real property transaction sales taxes under, 5.108

Penalty for failure to comply with Proposition 62, 5.109
Procedures for enacting taxes under, 5.106
Real property transfer taxes under, 5.68
Voter approval requirement for taxes under, 5.9
"Window period" taxes, 5.107

Proposition 68
Political Reform Act of 1974, amendment of, 3.187

Proposition 73
Elective office, Proposition 73 prohibiting expending or accepting public monies to seek, 3.210
Political Reform Act of 1974, amendment of, 3.187

Proposition 99, 5.354, 8.31

Proposition 208. See **Political Reform Act of 1974**

Proposition 209
Statutory affirmative action programs, effect of Proposition 209 on, 4.8, 7.29, 7.32

Proposition 218
Generally, 5.110
Benefit assessments and assessment districts
Generally, 5.144
Burden of proof in challenges to assessment, 5.151
Business-based assessments not subject to Proposition, 218, 5.124
Engineer's report, requirement for, 5.138
Exemptions from procedural requirements (see Exemptions from procedural requirements for assessments, below)
Initiatives to reduce or appeal, 5.157
Majority protests, 5.148
Notice, protest, and hearing requirements, 5.140
Procedural requirements (see Procedural requirements for assessments, below)
Public property assessments, 5.150
Ralph M. Brown Act application, 5.130
Special benefits only are assessable, 5.145
Statute of limitations for challenges to assessment, 5.152
Superseding of other provisions for notice, protest, and hearing, 5.128
Commentary for interpretation of, 5.110
Definitions
Charge, 5.175
Fee, 5.175
General tax, 5.111
Increase (taxes), 5.51, 5.114
Property ownership, 5.175
Property-related service, 5.175
Special tax, 5.16, 5.71, 5.111
Development fees exempt, 5.163, 5.185
Elections or ballot measures, Proposition 218 ballot and protest procedures not constituting, 3.211
Exemptions from procedural requirements for assessments
Business-based assessments, 5.155
No other exemptions, 5.156
November 6, 1996, assessments in existence on, 5.153
Refund of assessment bonds, 5.154
Exemptions from property-related fees and charges, 5.163, 5.184-5.186
Fees and charges (see Property-related fees and charges, below)
General taxes, imposition subject to Proposition, 5.16
Increases that require voter approval, 5.114
Parcel tax treatment by, 5.21, 5.62, 5.113
Procedural requirements for assessments
Generally, 5.146
Exemptions from (see Exemptions from procedural requirements for assessments, above)
Mail ballots allowed, 5.149
Protest by ballots, 5.148
Public hearing and notice requirements, 5.147
Procedure for adopting general taxes

Legislative body action required, 5.115
Special tax elections not rescinded by Proposition, 218, 5.117
Timing of election, 5.116
Voter approval requirement, 5.116
Procedure for adopting special taxes
Contents of ordinance or resolutions for, 5.118
Initiatives to changes special taxes, 5.120
Legislative body action required, 5.118
Timing of election, 5.119
Voter approval requirement, 5.119
Procedure for imposing fees or charges
Generally, 5.10, 6.42
Hearing requirements, 5.179
Notice requirements, 5.178
Property-related fees and charges
Generally, 5.174
Burden of proof in challenges to validity of fee or charge, 5.177
Definition of phrase, 5.175
Effective date of Proposition, 218, 5.183
Exemptions, 5.163, 5.184-5.186
Limited to listed items, 5.113
Procedural requirements for fees and charges (see Procedure for imposing fees or charges, above)
Restrictions on imposition of fees and charges, 5.176
Stand-by charges classified as assessments, not fees, 5.176
Voter approval requirements (see Voter approval requirements for fees and charges, below)
Timing considerations
Fees and charges, hearing requirements, 5.179
Notice, protest, and hearing requirements, 5.140, 5.147
Utility users tax, telecommunications issues with, 5.50-5.51
Voter approval requirements for fees and charges
Fees subject to approval, 5.180
Procedural requirements, 5.181
Time for election, 5.181
Who may vote, 5.182
Water, sewer, and garbage service fees must comply, 5.166
"Window period" taxes, 5.112

Prosecutors. See **Government Lawyers, Ethical Obligations for**

PSA. See **Permit Streamlining Act (PSA)**

Psychiatric Counseling
Compensation for attendance at mandatory counseling sessions, 4.65

Psychiatric Injuries. See **Workers' Compensation**

Public Assistance
Gift of public funds prohibition does not apply to public assistance, 5.279

Publication. See **Newspapers and News Media**

Public Employees
Adverse employment actions. See **Adverse Employment Actions**
Affirmative action. See **Affirmative Action in Hiring Public Employees**
Closed session meeting about. See **Closed Session Meetings**
Conflict of interest in joint representation of public employee and entity, effect of punitive damages sought against employee, 2.207
Disaster service workers, public employees as, 6.199
Disciplinary actions. See **Disciplinary Actions Against Employee**
Discrimination laws. See **Discrimination**
Discrimination. See **Discrimination**
Distinction between public officer and employee, 4.1
Drug testing. See **Drug Testing**
Evaluation of. See **Evaluation of Employees**
Fair Labor Standards Act. See **Fair Labor Standards Act (FLSA)**

Government Claims Act, claims subject to, 13.29
Indemnification. See **Indemnification**
Liability of municipality for actions by. See **Liability**
Meyers-Milias-Brown Act. See **Meyers-Milias-Brown Act**
Nature of public employment, 4.1
Personal liability of officers and employees, 13.155
Personnel records. See **Personnel Records**
Public Records Act, disclosure of public employees' salaries under, 2.246
Public safety. See **Public Safety Employees and Personnel**
Recruitment of. See **Recruitment and Qualifications of Public Employees**
Reinstatement. See **Reinstatement of Employee**
Rights of public employees, 4.2
Section 1983 claims for actions by. See **Section 1983 Actions**
Special reorganizations, status of public employees in, 1.167
Termination of employment. See **Termination of Employment**
Transit employees, drug and alcohol testing of. See **Public Transportation**
Workers' compensation. See **Workers' Compensation**

Public Funds
Campaign regulations. See **Campaign Regulations**
Gifts of public funds, prohibition against
Generally, 1.42, 5.13, 5.277
Charter city exception, 1.44, 5.13
City council members, 1.209, 5.13
Economic development, gift considerations before providing, 5.297
Examples regarding prohibited gifts, 5.279
Public purpose exception, 1.43, 5.278
Graffiti removal, use for, 9.91
Lobbying with public funds. See **Lobbying**

Public Hearings. See **Hearings**

Public Meetings. See **Meetings**

Public Nuisance. See **Nuisance, Abatement of**

Public Policy
FEHA discrimination claim as basis for tortious violation of, 4.166
Subletting and Subcontracting Fair Practices Act, public policy behind, 7.76

Public Purpose
Police power required to be reasonably related to public purpose, 1.32
Prohibition against gifts of public funds, public purpose exception to, 1.43
Redevelopment. See **Redevelopment**

Public Purpose Entities
Council of governments (COG). See **Council of Governments (COG)**
Independent of municipal boundaries
Generally, 1.71
Special districts. See **Special Districts**
Joint powers agencies. See **Joint Powers Agencies**
Nonprofit corporations, 1.84
Regional governments, 1.79
Within boundaries of municipalities
Housing authorities, 1.70
Industrial development authorities, 1.70
Redevelopment agencies, 1.70
Subsidiary districts, 1.70

Public Records Act (California)
Generally, 2.219
Agencies covered by Act, 2.223
Appeals
Attorney fees, prevailing party appealing denial of, 2.263
Extraordinary writ, review of disclosure order by, 2.262

Sanctions, appealing award of, 2.262
Attorney fees, recovery of, 2.263, 13.162
California Constitution establishing public's right of access to information, 2.218
Destruction of records
General prohibition against, 2.264
Holding records for requisite time period, destruction of records after, 2.268
Preservation in alternative media and destruction of public records, procedures for, 2.269
Elections. See **Elections**
Electronic format, effect of record in, 2.238
Exemptions in Act
Generally, 2.240
Burden of proof on public agency withholding record, 2.240, 2.250
Exemptions (see Exemptions in Act, above)
Privileges (see Privileges, below)
Segregable portion of record, availability for inspection after deletion of portions exempted by law, 2.237
Specific record exemptions (see Specific record exemptions, below)
Faster or greater access to records, state or local agency adopting requirements allowing for, 2.239
Freedom of Information Act compared, 2.220
Inspection of records (see Records subject to inspection under Act, below)
Law enforcement personnel. See **Law Enforcement Personnel**
Licensee's personal financial data, exemption from disclosure of, 2.248
Miscellaneous statutes granting or restricting right to inspect public records, 2.221
Names. See **Names**
Nondisclosure (see Exemptions in Act, above)
Order for disclosure
Generally, 2.260-2.261
Extraordinary writ, review of disclosure order by, 2.262
Pending litigation
Adjudication or settlement, exemption from disclosure of records pertaining to pending litigation until after, 2.245
Determining if records privileged in pending litigation, exemptions in Act not, 2.230
Privileges
Deliberative process privilege under Act, 2.241
Miscellaneous statutory privileges, 2.254
Pending litigation, exemptions in Act not determining if records privileged in, 2.230
Trade secrets as privileged information, 2.255
Records subject to inspection under Act
Generally, 2.222, 2.224
Air pollution data as public records, 2.225
E-mail, photographs, photocopies, and faxes as public records, 2.229
Housing and building code violations as public records, 2.226
Initiative, referendum, and recall petitions, restrictions on inspection of, 2.227, 2.243
Public meetings, recordings of, 2.228
Remedies for improper withholding of records
Generally, 2.258
Attorney fees and costs, recovery of, 2.263
In camera review of records in chambers, 2.261
Order (see Order for disclosure, above)
Sanctions, 2.262
Timing for pleadings, 2.259
Requests for copies or data under Act
Assistance from agency, public's right to, 2.232
Exact copy of identifiable record, right to, 2.231
Fees covering direct cost of duplication, 2.234
Focused and specific request, requirement of, 2.233
Notification of denial of request, 2.236
Time limit for providing copy of record after receiving request, 2.235
Retention of public records
Generally, 2.264
Alternative media, preservation in, 2.269
Definition of record, 2.265
Destruction of records (see Destruction of records, above)
Federal law requirements on record retention, 2.267
State law requirements on record retention, 2.266
Right of public to inspect public records, 2.230
Specific record exemptions

Generally, 2.242
Architectural and engineering plans, 2.256
Arrest records, 2.249
Concealed weapons permits, partial exemption applicable to, 2.253
Criminal investigation records, 2.251
Election documents, 2.243
Law enforcement personnel. See **Law Enforcement Personnel**
Litigation records, 2.245
Miscellaneous statutory exemptions and privileges, 2.254
Names, addresses, and phone numbers of citizens, 2.257
Peace officer personnel and citizen complaints, 2.247
Personal information obtained from citizens in course of regulatory activities, public agency's burden of proving release of information constitutes invasion of privacy, 2.250
Personnel, medical, or similar records, exemption based on invasion of privacy, 2.246
Preliminary drafts, notes, and inter-agency or intra-agency memoranda, exemption for, 2.244
Trade secrets, 2.255
Utility customer records, 2.252
Time. See **Time**
Withholding of records (see Remedies for improper withholding of records, above)

Public Safety Employees and Personnel
Firefighters. See **Firefighters**
Law enforcement personnel. See **Law Enforcement Personnel**
Section 1983 Actions against. See **Section 1983 Actions**
Vehicle pursuits, immunity for liability from, 13.134

Public Safety Officers Procedural Bill of Rights Act
Generally, 4.294
Appeal of disciplinary action, 4.309
Covered employees, 4.295
Excluded employees, 4.295
Inspection of personnel file, 4.299
Interrogation of peace officers, procedures for
Lybarger warning preceding questioning about potentially criminal conduct, 4.301
Post-interrogation requirements, 4.302
Pre-interrogation procedural safeguards, 4.300
Notice of proposed discipline, 4.303
Privacy rights under
Generally, 4.304
Financial records, officer not required to disclose, 4.306
News media, employer prohibited from subjecting officer to visits by, 4.307
Polygraph examination, police officer's right to refuse to submit to, 4.305
Searches by employer, restrictions on, 4.308
Probationary police officers
Appeal of disciplinary action by, 4.309
Applicability of Act to, 4.295
Punitive action
Adverse comments in personnel file, 4.298
Defined, 4.296-4.297
Reimbursements of state mandates under Act, 5.247
Remedies for violation of, 4.310
Time limit for imposing discipline after discovery of alleged misconduct, 4.303

Public Transportation
Generally, 6.120
Advertising on vehicles, 6.126
Certification of bus drivers, 6.128
Charter service, prohibition on, 6.136
City council members' acceptance of free transportation, 1.194
Claims and actions against public carriers, 6.138
Common carrier law
Generally, 6.121
Collection of evidence following accident, duty regarding, 6.123
Protection of passengers, 6.122
Constitutional issues

Advertising on vehicles, constitutional issues involving, 6.126
Transit employees, constitutional constraints on drug and alcohol testing of, 6.130
Disabled persons
Americans with Disabilities Act (ADA), effect of, 6.124
Drug and alcohol testing of pre-employment applicants to accommodate individuals with disabilities, 6.132
Federal Transit Act, effect of, 6.124
Reduced fares for, 6.129
State accessibility requirements, 6.125
Drug and alcohol testing of transit employees
Chain of custody of urine samples, 6.134
City employees, applicants, and trainees driving commercial vehicles, 6.131
Constitutional constraints, 6.130
Face to face evaluation for return to work, 6.133
Off-duty employees, 6.134
Pre-employment testing of applicants to accommodate individuals with disabilities, 6.132
Taxicab drivers, 6.137
Duties of public carriers
Common carrier law (see Common carrier law, above)
Disabled persons, duties to (see Disabled persons, above)
Fares, setting of, 6.129
Route scheduling, 6.127
Specified rate of return for services, requirements for, 6.135
Surplus property, offer to sell or lease for purpose of developing property within area covered by transit village plan, 8.92
Taxicab operators, 6.137

Public Trust Doctrine
Generally, 10.334
Areas protected by, 10.339-10.340, 11.4
California State Water Resources Control Board as administrator, 11.5
Enforcement, standing for and means of, 10.338
Flexibility of public trust doctrine, 10.336
Future of doctrine, court interpretation of, 11.6
Harbors. See **Harbors**
State and local responsibilities under the doctrine, 11.5
Traditional uses, protection of, 10.335
Water rights, effect of public trust doctrine on, 10.337

Public Utilities. See **Utilities**

Public Works Contracts
Abandonment claims, effect on public works contracts, 7.116
Affirmative action. See **Affirmative Action in Hiring Public Employees**
Alternative dispute resolution
Arbitration (see Arbitration, below)
Mediation, 7.47, 7.112
Stipulation to have dispute settled by temporary judge or referee, 7.113
Amendment or modification of contract, 7.62
Arbitration of disputes involving
Contractual provisions, 7.47, 7.68, 7.112
Statutory requirement, 7.111
Bidding. See **Bidding for Public Works Contracts**
Bonding and insurance companies, specifying, 7.70
Brand or trade names, specifications by, 7.63
Charter cities. See **Charter Cities**
Contractors. See **Contractors and Subcontractors for Public Works Contracts**
Cost records, 7.73
Damages. See **Damages**
Definition of public works, 7.85
Differing site conditions, effect of construction problems arising from, 7.108
Disclaimers, effect of, 7.107-7.108
Engineering specifications and costs
Generally, 7.61
Finality of engineer's decision (see Finality of engineer's decision, below)
Federally funded projects. See **Federally Funded Projects**
Finality of engineer's decision

Historical rule, 7.109
Statutory rule, 7.110
Governing law, 7.2
Government Code claims presentation requirements, 7.48
Implied warranty of correctness, 7.106
Indemnification, limits on, 7.69
Interest on progress payment requests, 7.72
Lab C §2810 liability, 7.58
Non-collusion affidavit, 7.44
Notice
Bidding on public works contracts, notice requirements for. See **Bidding for Public Works Contracts**
Third party claims, provision for timely notification of, 7.65
Plans and specifications, assumption of responsibility for, 7.71
Prevailing wage law, effect of. See **Prevailing Wage Law**
Release of claims, 7.64
Resolution of contract disputes, 7.68
Retention of funds by public entity
Generally, 7.45
Securities in lieu of retention, 7.46
Subcontractors. See **Contractors and Subcontractors for Public Works Contracts**
Surety bonds. See **Surety Bonds**
Termination of contract, 7.62
Time considerations. See **Time**
Trenching requirements, 7.43
Unfair business practice claims, 7.42
Utilities relocation, 7.60
Venue provision, 7.74

Public Works Power
Generally, 1.23, 10.214
Authority for, 5.4
Proprietary activity, publicly owned municipal utilities as, 1.25
Scope of public works power, 1.24

PUC. See **California Public Utilities Commission (CPUC)**

Punitive Damages
Civil Rights Act of 1991, recovery of punitive damages under, 4.154-4.155, 4.261
Code violations, punitive damages for, 12.26
Conflict of interest in joint representation of public employee and entity, effect of punitive damages sought against employee, 2.207
Immunity of entity for punitive damages, 13.155
Indemnification. See **Indemnification**
Municipalities, no award of punitive damages against, 4.267
Personal liability of officers and employees for, 13.155
Public agency, no award of punitive damages against, 4.261
Section 1983 actions. See **Section 1983 Actions**
Title VII action, restrictions in awarding punitive damages in, 4.261

Quid Pro Quo Sexual Harassment. See **Sexual Harassment**

Quorum
City council meetings, quorum requirement for, 2.2
Disqualified public official not counted towards achieving quorum, 2.141
"Legally required participation", quorum for, 2.140
Statutory less-than-a-quorum exception for advisory committees, 2.38
Teleconferenced meetings, quorum of members of legislative body participating from locations within local agency's jurisdictional boundaries, 2.52, 2.72

Quo Warranto
Distinction between election contest and quo warranto, 3.124
Local Agency Formation Commission (LAFCO) change or organization or reorganization, quo warranto for challenging, 1.129

Racial Discrimination
California Constitution provisions prohibiting racial discrimination, 4.164
Civil Rights Act of 1991. See **Civil Rights Act of 1991**
FEHA. See **Fair Employment and Housing Act (FEHA)**
Govt C §11135, discrimination prohibited under, 4.169
State personnel laws prohibiting, 4.170
Unruh Civil Rights Act and Ralph Civil Rights Act, scope of, 4.168

Ralph Civil Rights Act
Scope of, 4.168

Ralph M. Brown Act. See **Open Meeting Laws**

Random Drug Testing. See **Drug Testing**

Rates
See also **Charges**; **Fees**
Generally, 5.158
Authority for, 5.159, 5.168
Collection issues, 5.171
Preferential treatment for city residents allowed, 5.170
Procedures for setting rates, 5.169
Timing issues for notice and hearing, 5.169

Rates for Cable Television. See **Cable Television and Video Systems Franchises**

RCRA. See **Resource Conservation and Recovery Act of 1976 (RCRA)**

Real Property
Acquisition of real property. See **Acquisition of Property**
Adverse possession, 8.69, 8.114
Closed sessions. See **Closed Session Meetings**
Code enforcement. See **Code Enforcement**
Dangerous condition of public property. See **Liability**
Disposition of real property. See **Disposition of Property**
Disqualification of public official for direct or indirect interest in real property, 2.122
Economic development can mean a reduction of property price, 5.298
Foreclosure. See **Administrative Enforcement**
Limits on use of city property
Deed restrictions, 8.121
Obstructions and encroachments, 8.119
Removal of obstructions, 8.120
Open space. See **Open Space**
Parkland. See **Parkland**
Redevelopment Agency's officers and employees, requirement of disclosing property owned and direct or indirect financial interests in property within redevelopment project area, 2.181
Title to real property, retention of records affecting, 2.264
Trespassing. See **Trespass**

Reasonable Accommodation for Disabled Persons
ADA, reasonable accommodation under
Generally, 4.228
Interactive process with qualified individuals with disability to asses reasonable accommodation, requirement employer engage in, 4.232, 4.353
Alcohol and drug rehabilitation, employer reasonably accommodating employee's participation in, 4.120
Best available accommodation, no requirement employer provide, 4.230
Defense to disability discrimination claims against employer, undue hardship posed by reasonable accommodation as, 4.233
EEOC regulations defining, 4.229
Examples of, 4.231
FEHA
Interactive process to determine effective reasonable accommodation, requirement employer engage in, 4.232, 4.353
Suitable job opportunities, requirement employer offer to disabled person, 4.231
Medical marijuana, no duty to reasonably accommodate, 4.224
Rehabilitation Act of 1973, reasonable accommodation requirements under, 4.117
Undue hardship, effect of, 4.233

Recall
Generally, 3.149
Answering recall statement, 3.155
Ballot for recall election
Generally, 3.167
Sample ballot and ballot information, city clerk mailing to registered voters, 3.168
City clerk
Examination of petition (see Examination of petition by city clerk, below)
Filing petition (see Filing petition, below)
Notifying recall proponent if proposed petition meets requirements of California Election Code, 3.158
Sample ballot and ballot information, city clerk mailing to registered voters, 3.168
Withdrawal of signature, voter filing written request with city clerk for, 3.162
City's participation in recall measure. See **Ballot Measures, City's Participation in**
Collection of signatures for recall petition
Number of qualified signatures required, 3.161
Time limit to obtain signatures, 3.160
Election
Ballot (see Ballot for recall election, above)
Declaration of results, 3.170
Notice of election, 3.169
Order setting time for special election, 3.166
Procedures for election, 3.169
Examination of petition by city clerk
Generally, 3.164
Certification of examination results, 3.165
Filing petition
Examination of petition sections by city clerk, 3.164
Obligations of city clerk, 3.158
Obligations of proponent, 3.157
Submission of petition for filing and acceptance, 1.195, 3.163
Limitations on recall of elected official, 3.150
Notice of intention to recall
Generally, 3.151
Contents of notice, 3.152
Filing of notice, 3.153
Publication of notice in newspaper of general circulation, 3.154
Notifying recall opponent if proposed recall petition meets requirements of California Election Code, 3.158
Petition for recall
Collection of signatures (see Collection of signatures for recall petition, above)
Filing petition (see Filing petition, above)
Form and contents of, 3.156
Resignation of officer to be recalled resulting in termination of recall proceedings, 3.174
Signatures (see Signatures, below)
Signatures
Generally, 3.159
Collection of signatures (see Collection of signatures for recall petition, above)
Examination of petition (see Examination of petition by city clerk, above)
Returning petition to proponent if number of signatures insufficient, 3.163
Withdrawal of signature, voter filing written request with city clerk for, 3.162
Successor candidate
Election of successor to unexpired term or recalled officer, 3.172
Failure of candidate receiving highest number of votes to qualify for office, consequences of, 3.173
Nominations for, 3.171
Time
Answer to recall statement, time limit for filing, 3.155
Corrected petition, time limit for filing, 3.158
Filing notice of recall, time limit for, 3.153
Insufficient petition, time limit for proponents to examine, 3.165
Order setting time for special election, 3.166
Sample ballot and ballot information, time limit for city clerk to mail to registered voters, 3.168
Signatures for recall petition, number of days to obtain, 3.160
Vacancies, filling by appointment
After petition filed, vacancy occurring, 3.175
Before recall petition filed, filling vacancy, 3.174

Receivership
Code violations, appointment of receiver as remedy for, 12.9, 12.27

Reclaimed Water. See **Water Service**

Recordation of Documents
Boundary map, 5.139
Code violation notices, recordation of, 12.82
Deeds conveying interest in real property, certificate of acceptance by city council required before recording, 8.76
Eminent domain proceedings, recording lis pendens notice for, 8.45
Lease of city property, recordation of, 8.118
Public works project, recording notice of completion for, 7.123
Resolution vacating easement, recordation of, 8.133, 8.149

Records and Reports
Agenda as public record, 2.76
Audiorecording of interrogation. See **Video- and Audiorecording**
CEQA, administrative records under. See **California Environmental Quality Act (CEQA)**
City treasurer reporting on investments to legislative body, 5.272
Closed session reports. See **Closed Session Meetings**
Consumer report about job applicant, requirements for employer seeking, 4.216
Contractual provision requiring maintenance of records, 7.237
Disclosure statements documenting contributions and expenditures. See **Political Reform Act of 1974**
Engineer's report, preparation of, 5.138
Environmental impact reports (EIRs). See **California Environmental Quality Act (CEQA)**
Environmental impact reports. See **California Environmental Quality Act (CEQA)**
Fair Labor Standards Act (FLSA), recordkeeping requirements under. See **Fair Labor Standards Act (FLSA)**
Federally funded projects, records for. See **Federally Funded Projects**
General plan, annual report on implementation of, 10.67
Government attorney's duty to report illegal activities, 2.193
Initiative petition, city council referring to city agencies for report on fiscal impact, general and specific plan consistency, and other matters, 3.88
Lobbying by state and local agencies, reporting requirement for. See **Lobbying**
Medical reports. See **Medical Reports**
Personnel records. See **Personnel Records**
Police officer not required to disclose financial records, 4.306
Prevailing wage law, requirements for payroll records under. See **Prevailing Wage Law**
Public Records Act. See **Public Records Act (California)**
Public works contracts, cost records kept by public entity's engineer, 7.73
Redevelopment, disclosure of terms of lease or sale of property in form of report for purposes of, 8.109

Recount. See **Elections**

Recruitment and Qualifications of Public Employees
Affirmative action. See **Affirmative Action in Hiring Public Employees**
Benefit plans. See **Benefit Plans**
Compensation plans. See **Compensation Plans**
Discrimination (see Nondiscrimination laws, below)
EEOC (see Nondiscrimination laws, below)
Hiring
Generally, 4.3
Nondiscrimination laws (see Nondiscrimination laws, below)
Residency requirements for public employees, restrictions for, 4.5
Restrictions on hiring (see Restrictions on hiring, below)
Testing. See **Testing for Hiring, Promotion, or Retention of Employees**
Immigration Reform and Control Act prohibiting hiring of persons without legal right to work in U.S., 4.12
Nondiscrimination laws
Generally, 4.213
Disabled persons. See **Disabled Persons**
HIV test results, prohibition against employer making hiring decision based on, 4.24, 4.171
Job requirements as subterfuge for discrimination prohibited, 4.217
Loyalty oath, effect of applicant's religious beliefs on requirement of taking, 4.218
Performance standards, EEOC guidelines for enforcing, 4.215
Pre-employment inquiries, restrictions on, 4.216
Public employees, nondiscrimination requirements in hiring of, 4.4

Testing, EEOC's uniform guidelines on, 4.14, 4.214
Pension plans. See **Retirement and Pension Plans**
Reductions in force for financial reasons (layoffs), 4.41
Restrictions on hiring
Americans with Disabilities Act (ADA), prohibited hiring practices under, 4.20, 4.221
Arrests and criminal records, limitations on employers asking potential employee about, 4.22
Children, special rules for employees working with, 4.25
Criminal record of applicant, inquiries about, 4.22-4.23
Department of Motor Vehicle records, employer requesting copy of, 4.26
Discrimination laws. See **Discrimination**
Fair Employment and Housing Act (FEHA), hiring restrictions under, 4.21
HIV test results, prohibition against employer making hiring decision based on, 4.24, 4.171
Testing. See **Testing for Hiring, Promotion, or Retention of Employees**

Recycling. See **Solid Waste and Recycling**

Redevelopment
See also **Economic Development**
Generally, 1.43
Adoption of plans. See **Redevelopment Plan Adoption**
Agencies
Advisory bodies for, 5.311-5.312
Changing from separate agency to legislative body, 5.309
Community development commission creation, 5.310
Conflicts of interest (see Conflicts of interest, below)
Cooperation between agencies to create plan, 5.339-5.340
Implementation of plans by. See **Redevelopment Plan Implementation**
Legal status of agencies, 5.306
Legislative body as agency, 5.308
Open meetings laws requirements apply, 5.315
Powers and authority of agencies, 5.304, 5.314
Referendum, ordinance creating redevelopment agencies subject to, 5.305, 5.310
Reports required, 5.399
Separate agencies, activating by ordinance, 5.307
Staffing authority, 5.313
State agencies for local purposes, 5.305
Amendments to plans
Mergers of project areas, 5.436
Modifications before adoption, 5.333
Procedure for amendment same as for adoption, 5.343
Project area committees for. See **Project Area Committees (PAC)**
Purpose of, 5.342
Statement of amendment land area recording, 5.345
Time limit extensions, amendments for, 5.344
Timing of, 5.342
Authority for, 5.302
Bond issuance to provide loans for redevelopment, 5.240
CEQA. See **California Environmental Quality Act (CEQA)**
Community development commission creation, 5.310
Community development committee to advise commission, 5.312
Community redevelopment commission
Advising agency, 5.311
Member's disclosure of financial interest in property within project area of community redevelopment commission, 2.182
Community Redevelopment Law, disposition provision applicable to redevelopment agencies under, 8.80
Conflicts of interest
Acquiring land in project area, prohibition against agency, 5.434
Disclosure obligations of agencies, consultants, and project area committee members, 5.433
Incompatible offices, prohibition when city council has declared itself the redevelopment agency, 5.435
Debt limit, redevelopment agencies excluded from, 5.294
Definitions
Community, 5.306
Redevelopment, 5.301
Tax increment, 5.392
Disposition of property for purposes of
Generally, 8.107

Public hearing requirement, 8.108
Report, disclosure of terms of lease or sale in form of, 8.109
Required provisions in disposition documents, 8.110
Financing of activities
Appropriations from legislative body, 5.397
Mello-Roos Community Facilities Act funding, 5.395
Other sources, 5.396
Reports required, 5.399
Tax increment financing (see Tax increment financing, below)
Transient occupancy taxes can be used to secure bonds, 5.398
Gann Limit, 5.285
History of redevelopment law, 5.303
Homeowners and Private Property Protection Act, limits on redevelopment agencies imposed by, 8.31
Housing requirements. See **Redevelopment Housing Requirements**
Implementation of plans. See **Redevelopment Plan Implementation**
Loans. See **Loans**
Mergers of project areas, 5.436
Modifications to plans (see Amendments to plans, above)
Open meetings laws requirements apply to agencies, 5.315
Plan adoption. See **Redevelopment Plan Adoption**
Prevailing wage law, applicability to redevelopment agencies, 7.83
References for additional information about, 5.438-5.439
Tax increment financing
Bonds issued based on, 5.228, 5.394
Nature of tax increment revenues, 5.392
Set-aside of funds for housing requirement. See **Redevelopment Housing Requirements**
Theory of tax increment revenues, 5.393
Use of tax increment funds, 5.394
Timing considerations
Extensions of time limits by amendment, 5.344
Mergers of project areas, notice, 5.436
Statement of amendment land area recording, 5.345
Transfer of powers over county project area to city by court order, 5.437

Redevelopment Housing Requirements
Affordability covenants, 5.413, 5.431
Definitions
Affordable housing cost, 5.404
Developed, 5.412
Excess surplus, 5.432
Existing obligation, 5.425
Extremely low income household, 5.404
Lower-income household, 5.404
Moderate-income household, 5.404
Substantial rehabilitation, 5.412
Very-low-income household, 5.404
Housing element of general plans. See **Housing Element of General Plans**
New and rehabilitated housing
Affordability covenants, 5.413
Affordable housing plan requirements, 5.415
Agency-developed housing, 5.410
Applicability of requirement, 5.409
Definition of developed, 5.412
Definition of substantial rehabilitation, 5.412
Non-agency-developed housing, 5.411
Owner-occupied housing, market-price sales, 5.416
Replacement housing, relationship to, 5.414
Replacement housing
Applicability of requirement, 5.400
Benefit to project legislatively declared for purpose of spending set-aside funds, 5.430
Definition of terms (see Definitions, above)
Insufficient suitable housing, land must be made available, 5.406
New and rehabilitated housing, relationship to, 5.414
Permanent housing availability, time limit for, 5.407
Plan for replacement housing, requirement for, 5.408

Priority of displaced low or moderate income families, 5.405
Type, timing, and amount of housing required, 5.402-5.403
When required, 5.401
Set-aside of funds for housing requirement
Generally, 5.417
Deficit elimination plan if using existing obligation exception, 5.426
Definition of existing obligation, 5.425
Exception for existing obligations, 5.423-5.426
Findings that avoid need for set-aside, 5.418-5.420, 5.422
Ordinance amendment to comply with set-aside requirements, 5.427
Statement of existing obligations or programs required, 5.424
Transfer of set-aside obligation to another project area possible, 5.421, 5.424
Timing considerations
Affordability covenants, duration of, 5.413, 5.431
Affordable housing plan requirements, 5.415
Excess surplus requirement, 5.432
Findings that avoid need for set-aside, 5.422
Permanent housing availability, time limit for, 5.407
Plan for replacement housing, requirement for, 5.408
Replacement housing, when required, 5.402
Use of low-income and moderate-income housing fund monies
Generally, 5.428
Definition of excess surplus, 5.432
Excess surplus requirement, 5.432
Location where funds used, 5.430
Planning and administrative expenses, 5.429
Restrictions and covenants for affordability, 5.413, 5.431

Redevelopment Plan Adoption
Generally, 5.316
Amendments to plans. See **Redevelopment**
Apportionment of taxes
Basic aid school districts, special apportionment for, 5.327
Consultation about tax allocation, 5.325
Exclusivity of apportioned payments, 5.325
Formula for tax-increment sharing, 5.326
Payments to schools subordinate to debt if request timely made, 5.326
School districts, allocation for, 5.327-5.328
Challenges to plans, 5.341
Consideration by other entities, 5.330
Definitions
Basic aid school districts, 5.327
Blight, 5.319
Eminent domain program, 5.336
Hearings and meetings required
Planning commission review and report, 5.330
Procedure and timing for, 5.332-5.333
Project area committee consideration of plan. See **Project Area Committees (PAC)**
Housing requirements. See **Redevelopment Housing Requirements**
Interagency cooperation for plans, 5.339-5.340
Joint projects and delegation, 5.339-5.340
Modifications of plan possible after submission to legislative body, 5.333
Objections to plan, legislative body must consider and respond, 5.334
Post-adoption notifications, 5.338
Preliminary plan formulation, 5.321
Procedures for adoption, 5.335-5.337
Project area committees. See **Project Area Committees (PAC)**
Project area selection
Definition of blight, 5.319
Initial designation of project area, 5.321
Initial feasibility study, 5.318
Non-blighted property, inclusion limited, 5.320
Report to council, contents of, 5.329
Statute of limitations for challenges to plans, 5.341
Survey area designation, 5.317

Taxing entities, relations with
Apportionment of taxes (see Apportionment of taxes, above)
Preliminary report submitted to taxing entities, 5.324
Property tax assessed value information, 5.323
Report back to redevelopment agency, 5.322-5.323
Statement of preparation must be submitted, 5.322
Timing considerations
Hearing notice time requirements, 5.331-5.332
Modifications to plan, commission to issue recommendation, 5.333
Objections to plan, time for response, 5.334
Payments to schools subordinate to debt if request timely made, 5.326
Post-adoption notifications, 5.338
Vote to approve plan, 5.337

Redevelopment Plan Implementation
Amendments to plans. See **Redevelopment**
Big box retailer, prohibition on redevelopment agency assistance with, 5.371
California Environmental Quality Act (CEQA) compliance, 5.361, 5.364
Commercial rehabilitation loans possible, 5.372
Cooperation agreements between public entities, 5.367, 5.396
Definitions
Big box retailer, 5.371
Displaced person, 5.356
Participant, 5.351
Public works, 5.363
Reuse value, 5.362
Vehicle dealer, 5.371
Developer selection (see Disposition and development agreements, below)
Disposition and development agreements
Generally, 5.359
Approval of the agreements, 5.365
CEQA compliance issues, 5.361, 5.364
Contents of agreements, 5.362
Exclusive negotiation agreement with selected developer, 5.360
Owner participation agreements compared, 5.358
Prevailing wages issues, 5.362-5.363
Replacement housing plan required before execution of agreement, 5.408
Scope of development, 5.361
Five-year implementation plans required, 5.368
Gaming or gambling, prohibition on redevelopment assistance with development involving, 5.370
Housing requirements. See **Redevelopment Housing Requirements**
Infrastructure improvements, finding required for, 5.369
Loans for commercial rehabilitation, 5.372
Owner participation agreements
Contents and requirements for, 5.366
Disposition and development agreements compared, 5.358
Replacement housing plan required before execution of agreement, 5.408
Participation of owners and tenants
Generally, 5.346
Forms of participation, 5.350
Good faith and reasonableness requirement, 5.347
Owner participation agreements (see Owner participation agreements, above)
Property-specific participation not required, 5.348
Reasonable conditions can be imposed by agency, 5.349
Rules on participation and preferences, 5.351
Prevailing wages issues, 5.362-5.363
Property acquisition
Generally, 5.352
Developer reimbursement of relocation payments, 5.357
Eminent domain, requirements for and restrictions of, 5.354-5.355
Forced sales, 5.355
Relocation assistance required, 5.356-5.357
Voluntary means for acquisition, 5.352-5.353
References for additional information about, 5.373
Relocation assistance required, 5.356-5.357

Sales or use tax, prohibition on redevelopment assistance with projects that generate, 5.370
Timing considerations
Approval of disposition and development agreements, notice of, 5.365
Five-year implementation plans required, 5.368
Forced sales, timeline to acquire property, 5.355
Vehicle dealerships, prohibition on redevelopment agency assistance with, 5.371

Redevelopment Project Area
Disclosure by redevelopment agency's officers and employees of property owned and direct or indirect financial interests in property within redevelopment project area, 2.181
Powers of redevelopment agencies, 1.70

Red Light Districts
Red Light Abatement Act, enforcement and remedies under, 9.15, 12.13-12.16

Reductions in Force. See **Layoffs**

Referenda. See **Initiatives and Referenda**

Regional Air Quality Management. See **Air Quality**

Regional Governments
Proposals for, 1.79

Regional Planning. See **Land Use**

Rehabilitation Act of 1973
Alcoholics, applicability of Act's provisions to, 4.117, 4.148
Back pay, recovery of, 4.259
Obesity not disability per se, 4.226

Reimbursement
City council expenses. See **City Council**
Cost reimbursement from state. See **Cost Reimbursements From State**
Developer reimbursement of relocation payments, 5.357
Fees charged, reimbursements of state mandates if, 5.251
Public Safety Officers Procedural Bill of Rights Act, reimbursements of state mandates under, 5.247
Salary, per diem, or reimbursement for expenses from government entity as non-interest, 2.169
Tax reimbursements for property tax reductions, 5.215
Utilities relocating equipment or facilities, reimbursement for relocation expenses, 8.125

Reinstatement of Employee
Disciplinary action against employee, reinstatement of employee deprived of liberty interest hearing before termination, 4.287
Discrimination action, reinstatement as form of equitable relief, 4.264
Skelly violations, no entitlement to reinstatement for, 4.284

Relatives. See **Children; Spouses**

Religious Discrimination
Civil Rights Act of 1991, no remedy for religious discrimination under, 4.150
Constitutional limits on municipal authority. See **Constitutional Limits on Municipal Authority**
EEOC compliance manual on, 4.215
FEHA. See **Fair Employment and Housing Act (FEHA)**
Govt C §11135, discrimination prohibited under, 4.169
Loyalty oath, effect of applicant's religious beliefs on requirement of taking, 4.218
Pre-employment inquiries about religion, 4.216
State personnel laws prohibiting, 4.170

Religious Land Use and Institutionalized Persons Act (RLUIPA), 10.134

Religious Organizations
Lease of public building to religious group, constitutionality of, 8.115
Zoning issues involving, 10.133-10.134

Religious Practices

Constitutionality of non-denominational prayer or silent meditation at beginning of meetings, 2.6
Constitutional limits on municipal authority. See **Constitutional Limits on Municipal Authority**

Relocation Assistance
Generally, 8.14
Advisory assistance to displaced persons
Generally, 8.16
Availability of representative, 8.19
Displacee's needs, representative's understanding of, 8.18
Role of relocation representative, 8.17
Claim procedure, 8.24
Comparable replacement, 8.21
Duplication of payments, 8.23
Grievance procedure, 8.25
Last resort housing, 8.21
Plan for relocation, 8.20
State Housing Law, relocation assistance required under, 12.8
Summary of relocation benefits, 8.22
Time considerations for public agency providing relocation assistance, 8.39
Triggers for relocation obligations, 8.15

Rent
See also **Rent Control**
Airport rents, 6.151
Relocation assistance, 8.24
Revenues from rental of property, 5.293
Transient occupancy taxes. See **Taxes**

Rent Control
Administration of ordinances
Generally, 9.53
Annual rent increases, 9.54
Decreases in rent, 9.55
Due process for rent adjustment applications, 9.56
Pass-through increases in rent, 9.55
Preemption by state laws, 9.58-9.59
Standard of review, substantial evidence as, 9.57
Application of to residential units, 9.47
Exemptions from rent control, 9.52
Mobile homes and mobile home parks
Preemption of local laws, 9.59
Vacancy control regulations, 9.60
Permissible regulation
Generally, 9.48
Just and reasonable return for landlords, 9.50-9.51
Legitimate governmental purpose, 9.49
Taking, impermissible regulation as, 9.51
Vacancy decontrol and exemptions from rent control, 9.52

Reports. See **Records and Reports**

Reservations. See **Nonsummary Vacation of Streets, Highways, and Service Easements**

Residence and Domicile
Candidate for election, residency requirements, 3.33
City council member moving residence outside city or district, effect of, 1.191
Public employees, residency requirements for, 4.5
Voting, residence for purpose of, 3.63

Resolution of Necessity. See **Eminent Domain**

Resolutions. See **City Council**

Resource Conservation and Recovery Act (RCRA), 6.100, 11.238, 11.251

Respondeat Superior
Immunity of municipality from liability under theory of, 4.158

Rest and Meal Periods
Fair Labor Standards Act (FLSA), compensation for rest and meal periods under, 4.61

Retaliation Against Employees
See also **Adverse Employment Actions**
Generally, 4.180
Sexual harassment charge, retaliation against employee for filing, 4.205
Title VII of Civil Rights Act of 1964, retaliation for engaging in protected activities prohibited under, 4.139
Whistleblower disclosing violations of state or federal statutes, prohibition against retaliation against, 4.134

Retirement and Pension Plans
Generally, 4.32
Amendment of pension plan, restrictions on, 4.36
Beneficiary remedies, 4.40
Constitutional validity of pension plans, 4.33
Disability retirement benefits. See **Workers' Compensation**
Election of alternative methods of receiving pension payments, 4.35
Forfeiture of previously earned pension prohibited, 4.35
Gann Limit, 5.287
Gift of public funds prohibition does not apply to pensions, 5.279
Hearings
Disability retirement claims, appeal hearings for, 4.39
Retirement board's holding of hearings, statutes governing, 4.40
Legislation authorizing retirement systems, 4.34
Liberal construction in favor of employee pension plans, 4.34
Mandamus proceeding to compel public body to pay pension, 4.40
Persons entitled to benefits
Generally, 4.37
Death benefit, designated beneficiary's entitlement to, 4.38
Disability, accrual of pension on, 4.39
Purpose of, 4.32
Rights of employees, 4.35

Revenue Bond Law of 1941, 5.225-5.226

Revenue Bonds
Generally, 5.223
Debt limit issues, 5.224
Harbor activities, financing of, 6.161
Joint powers agencies' power to issue revenue bonds, 1.78
Marks-Roos Local Bond Pooling Act of 1985, effect of, 1.78
Revenue Bond Law of 1941, 5.225-5.226
Voter approval, when needed, 5.225

Revenues
See also **Income**
Benefit assessments and assessment districts. See **Benefit Assessments and Assessment Districts**
Charges. See **Charges**
Debt financing. See **Debt Financing**
Fees. See **Fees**
Fines and forfeitures. See **Penalties**
Franchise fees. See **Franchises**
Gifts. See **Gifts**
Grants, 5.217
Pledged special revenues, exclusion of from bankruptcy automatic stay, 5.450
Rates. See **Rates**
Reimbursements of state mandates. See **Cost Reimbursements From State**
Rental of property, 5.293
State subventions
Collection services on behalf of cities, 5.216
Shared revenues, 5.214
Tax reimbursements, 5.215

Taxes. See **Taxes**

Right to Sue Notice. See **Discrimination Laws, Enforcement of**

Rivers and Harbors Act of 1899
Army Corps of Engineers, authority under, 10.355

RLUIPA (Religious Land Use and Institutionalized Persons Act), 10.134

Road Closures
Generally, 8.154
Circulation element, implementation of, 8.155
Selective access, 8.156

Roads (Generally). See **Sidewalks, Streets, Roads, and Highways**

Roller Skates. See **Bicycles, Roller Skates, and Skateboards**

Roster of Public Agencies. See **Government Claims Act**

Rules of Professional Conduct. See **Government Lawyers, Ethical Obligations for**

Safe Drinking Water Act. See **Water Quality**

Safe Harbor
Agenda for regular meeting listing closed session, safe harbor created by, 2.73, 2.83

Safety in Workplace
Federally funded projects, compliance with Contract Work Hours and Safety Standards Act, 7.158
Injury and illness protection plan, state law requiring employers' adoption of, 4.137
Miscellaneous safety regulations for employers, 4.138

Safety Regulations. See **Health and Safety Regulations**

Salaries and Compensation
See also **Compensation Plans**
Additional compensation granted after contract performed or services rendered, prohibition against, 1.45
Appointive officers and employees, compensation of, 1.253
Back pay, recovery of. See **Back Pay**
City council members, compensation of. See **City Council**
Contract provision stating basis for contractor's compensation, 7.207
Disputes over wages, resolution of. See **Meyers-Milias-Brown Act**
Eminent domain, setting just compensation for acquisition of property through. See **Eminent Domain**
Fair Labor Standards Act, compensatory time off requirements under. See **Fair Labor Standards Act (FLSA)**
Mayor's salary, 1.205, 1.211
Meet and confer obligation about wages. See **Meyers-Milias-Brown Act**
Overtime pay. See **Overtime and Minimum Wage**
Prevailing wage law. See **Prevailing Wage Law**
Prohibited contracts under Govt C §1090, exception for salaries, 2.169
Public disclosure of public employees' salaries over $100,000 per year, 4.127
Public Records Act, disclosure of public employees' salaries under, 2.246
Reduction in salary as punitive action, 4.296
Retroactive compensation limitation, 5.280

Sales and Use Taxes. See **Taxes**

Sanctions. See **Penalties**

Sanitation Service. See **Solid Waste and Recycling**

Schools
See also **Universities and Colleges**
Air quality, facilities with risk management and prevention plans cannot locate near schools, 11.205
Exemptions from property tax for schools, 5.22, 5.101

Proposition 13, exception for bonds for new schools, 5.20
Redevelopment plans, tax-increment apportionment for schools, 5.327
Surplus property, offer to sell or lease property suitable for school facilities construction purposes, 8.91

Scope of Representation. See **Meyers-Milias-Brown Act**

Searches
Fourth Amendment issues with. See **Constitutional Law**
Police officer, restrictions on employer's searches of, 4.308

Second Units. See **Affordable Housing**

Secretary of State
Charters effective when filed with Secretary of State, 1.13
Nonprofit corporations established and recognized by, 1.84

Section 1983 Actions
Generally, 13.114
Acts of others, liability for causing, 13.142
Attorney fees awards for. See **Attorneys' Fees**
Causation
Acts of others, liability for causing, 13.142
Defense for employee involved in permit application denied by city council, 13.142
Municipal policy or custom requirement, 13.138
Prima facie case, establishing, 13.133, 13.138
Collateral estoppel issues, 13.128
Conflict of interest for government lawyers, 13.143
Constitutional basis for, 13.114, 13.116
Damages
Generally, 13.144
Attorney fees and damages, 13.145
Compensatory damages, 13.146
Nominal damages, 13.145
Punitive damages (see Punitive damages, below)
Defamation claim including denial of right expressly protected in constitution, 13.112
Defenses
Absolute immunity, 13.124-13.125
Collateral estoppel issues in Section 1983 actions, 13.128
Duty of entity to provide, 13.143
Immunities (see Immunities under, below)
Permit applications denied by city council, causation defense for employee, 13.142
Qualified immunity, 13.124, 13.126
Definitions
Clearly established, 13.126
Color of law, 13.132
Policy-maker, 13.137
Discovery considerations for removal to federal court, 13.151
Due process. See **Due Process**
Ethical obligations for government lawyers
Conflict of interest in Section 1983 actions, 13.143
Immunity in Section 1983 actions for prosecutorial functions, 13.125
Exhaustion of administrative remedies not usually required, 13.129
Forum considerations, state or federal court, 13.151
Government lawyers (see Ethical obligations for government lawyers, above)
Immunities under
Collateral estoppel issues, 13.128
Individual (see Individual immunities under, below)
Local governments, no immunity for, 13.123
Naming of defendants, individual or official capacities, issues with, 13.141
States, Eleventh Amendment immunity for, 13.127
Zoning commissions immunity from Section 1983 action, 13.125
Indemnification, application of duty to indemnify to claims under, 13.87, 13.89, 13.147
Individual immunities under
Generally, 13.124
Absolute immunity, 13.124-13.125

Qualified immunity, 13.124, 13.126
Injunctions
Generally, 13.115, 13.148
Defendant sued in official capacity if injunction sought, 13.141
Jurisdiction, concurrent state and federal, 13.122, 13.151
Municipal policy or custom requirement
Generally, 13.134
Causation of constitutional violation from policy or custom, 13.138
Discretionary acts versus policy, 13.138
Inadequate training or supervision, liability from pattern of, 13.136
Injunctions authorized for cases involving, 13.115, 13.148
Lower-level employees, liability for persistent acts or omissions of, 13.135
Policy-maker, policy or custom must be attributable to, 13.137
Naming of defendants, individual or official capacities, 13.141
Negligence not sufficient, 13.139
Prima facie case, establishing
Generally, 13.129-13.130
Causation requirement, 13.133, 13.138
Federally protected right, deprivation of, 13.131
Municipal policy or custom (see Municipal policy or custom requirement, above)
Specific intent not required, 13.139
State action under color of state law, 13.132
State of mind relevant only to underlying violation, 13.139
Punitive damages
Disclosure to employees of exposure to, 13.143, 13.156
Immunity of local government from, 13.123
Indemnification of employee by entity of, 13.87, 13.89, 13.147, 13.156
Standard for award of, 13.147
Remedies
Attorney fees and costs, 13.149
Civil penalties allowed, 13.150
Damages (see Damages, above)
Injunctions, when available, 13.148
Rent control, timing of mandamus and Section 1983 actions involving denial of fair return, 9.51
Scope of law
Generally, 13.115
Constitutional rights as federal rights within scope, 13.116
Federal laws, private right of action for violation of, 13.120
Liberty interests may be subject to constitutional protections, 13.119
Property interests with reasonable claim of entitlement, 13.118
Rights and interests that do not constitute constitutional violation, 13.117
State court actions, concurrent jurisdiction of claims, 13.122
Wrongful death liability, 13.121
State law remedies, interaction with Section 1983 claims, 13.140
Statute of limitations, 13.152
Supervisor liability for acts of subordinates, 13.142
Text of section, 13.114
Timing considerations, deadline for removal to federal court, 13.151

Securities
Debt financing. See **Debt Financing**
Public works contracts, contractor substituting securities in lieu of funds retained by public entity, 7.46

Security Patrols and Security Guards
Generally, 9.37
Airports, security in, 6.155
Authority for regulation of, 9.38
Licensing of, 9.39
Police officers as security guards, 7.191

Self-Dealing. See **Ethical Considerations**

Self-Insurance. See **Insurance**

Seminars. See **Conferences and Seminars**

Seniors
Affordable housing, 10.177

Sentencing. See **Criminal Enforcement**

Separation From Employment. See **Termination of Employment**

Service Easements. See **Easements**

Service of Process and Papers
CEQA decision, requirements for serving petition challenging, 11.67
Election contests. See **Election Contests**
Eminent domain action, service of papers on record owners and occupants of property, 8.53
Recall, serving notice of intent to, 3.151

Services and Goods, Contracting for. See **Goods and Services, Contracting for**

Setoffs
Air quality permits, 11.227
Industrial retirement benefits, offset against workers' compensation benefits, 4.396

Settlement and Compromise
CEQA decision, settlement negotiations if challenging, 11.71
Closed session disclosure report on approval of pending litigation settlement, 2.105
Eminent domain proceedings, 8.60
Indemnification of claim, effect on settlement proceedings, 7.320
Older Workers Benefit Protection Act, compliance with special requirements of, 4.249

Sewage Disposal
Authority to own and operate sewer system, 6.11, 11.162
Fees and charges, 6.12
Treatment plants and pretreatment, 6.12
Collection system regulation by Water Resources Control Board, 11.168
Fees for service, effect of Proposition 218 on, 5.166, 5.180
Intergovernmental agreements to construct and maintain sewers, 7.185-7.186
Lease of city property for sewers and sewage treatment, 8.116
On-site sewage treatment systems, 11.167
Pretreatment programs for industrial users
Local limits on pollutants allowed, 11.165
Purpose of, 11.164
Standards from EPA for, 11.163
Rate-setting procedures, 5.169
Service charge may be billed with other utilities, 5.171
Sludge, use and disposal of, permit required for, 11.166

Sex Discrimination
California Constitution provision prohibiting sex discrimination, 4.164
Civil Rights Act of 1991, no remedy for sex discrimination under, 4.150
Dressing in manner consistent with gender identity, employee's rights regarding, 4.176
Equal Pay Act (California), protections under, 4.167
Equal Pay Act of 1963, sex discrimination in pay prohibited under, 4.143
Fair Labor Standards Act (FLSA), prohibition against sex discrimination in employment under, 4.81
FEHA. See **Fair Employment and Housing Act (FEHA)**
Sexual harassment as sexual discrimination for purposes of equal protection, 4.210
State personnel laws prohibiting, 4.170
Unruh Civil Rights Act and Ralph Civil Rights Act, scope of, 4.168

Sexual Harassment
Generally, 4.186
Defamation claim, false claim of sexual harassment resulting in, 4.209
Defenses
Affirmative defenses by employer to vicarious liability for supervisor's actions, 4.198
Avoidable consequences, effect of employee's failure to take reasonable steps to stop harassment, 4.199
Defined, 4.187
Elected officials, acts constituting sexual harassment not within scope of employment, 13.109

Employer's liability for sexual harassment
Co-employee's conduct, employer's liability for, 4.202
Hostile environment hazard, 4.200-4.201
Non-employee conduct, employer's liability for failure to prevent harassment by, 4.203
Quid pro quo harassment, 4.198-4.199
Retaliation, employer's liability for, 4.205
Fair Employment and Housing Act prohibiting, 4.186, 4.194, 4.199, 4.201
Hostile environment
Elements of hostile environment claim, 4.195
Fair Employment and Housing Act protecting employees from hostile or sex-linked conduct, 4.186, 4.194
Federal law, 4.193
Liability of employer for, 4.200-4.201
Reasonable person standard in determining if actions constitute hostile or abusive work environment, 4.196
Reasonable woman standard in determining if harassment creates hostile work environment, 4.197
Individual's liability for sexual harassment
California law, 4.205
Federal law, 4.204
Investigation of sexual harassment claim
Duty of employer to investigate sexual harassment claims, 4.208
Qualified privilege for statements made during, 4.209
Liability
Employer's liability (see Employer's liability for sexual harassment, above)
Individual's liability (see Individual's liability for sexual harassment, above)
Theories of liability arising out of sexual harassment, 4.210
Offensive conduct, 4.188
Pamphlet about sexual harassment, employer's duty to distribute, 4.211
Policy against sexual harassment, creation of, 4.207
Poster about sexual harassment, employer's duty to post, 4.211
Prevention of, 4.206
Quid pro quo harassment
EEOC's position on sexual favoritism, 4.192
Elements of prima facie case of, 4.190
Liability of employer for, 4.198-4.199
Preferential treatment based on coerced sexual conduct, effect of qualified third parties denied employment opportunities or benefits, 4.191
Retaliation, 4.205
Same-sex sexual harassment actionable under Title VII, 4.187
Supervisors
Affirmative defenses by employer to vicarious liability for supervisor's actions, 4.198
Injunctive orders, individual supervisors subject to, 4.204
Mandatory sexual harassment training for, 4.212
Title VII prohibiting, 4.141, 4.186-4.187, 4.204
Unwelcome conduct, 4.189

Sexual Orientation
Definition of disability, homosexuality and bisexuality outside of, 4.224
Fair Employment and Housing Act (FEHA) prohibiting discrimination based on, 4.165
Govt C §11135, discrimination prohibited under, 4.169
Same-sex sexual harassment actionable under Title VII, 4.187

Sheriff. See **Law Enforcement Personnel**

Sick Leave
"Kin care" use of sick leave, 4.173

Sidewalks, Streets, Roads, and Highways
ADA requirements. See **Americans with Disabilities Act (ADA)**
Annexation, acceptance of county roads and highways, 1.162
Dangerous condition
Streets are not public property until accepted by entity, 13.100
Trivial defects not enough to create dangerous condition, 13.103
Disposition of streets and highways owned in fee, 8.103
Encroachments (see Obstructions and encroachments, below)
General regulatory requirements, 8.152
Harbor access from streets and highways, requirements for, 6.169

Navigable waters, maintenance of public access from streets and highways, 10.344
Obstructions and encroachments
Generally, 8.119
Removal of, 8.120
Regulation of activities on streets and sidewalks
Generally, 8.176
Freedom of speech and assembly, 8.177
Permitted regulation, 8.178
Repair sidewalks, ordinance requiring adjacent property owners, 13.103
Road closures. See **Road Closures**
Traffic signs and signals, liability for providing versus maintaining, 13.106
Vacation of public streets and highways
Generally, 8.126
Nonsummary vacation procedure. See **Nonsummary Vacation of Streets, Highways, and Service Easements**
Summary vacation procedure. See **Summary Vacation of Streets, Highways, and Service Easements**
Vehicular regulations. See **Vehicular Regulations**

Signatures
Contracts, execution of. See **Contracts**
Initiatives. See **Initiatives and Referenda**
Nomination of candidate, required number of signatures needed for, 3.16
Recall petition. See **Recall**

Signs and Billboards
Dangerous condition of public property caused by sign on adjacent property, 13.102
Restrictions on sign enforcement, 12.73
Speech regulation
Generally, 9.137
Amortization of nonconforming signs, 9.142
Billboard restrictions, 9.141
Commercial speech restrictions, 9.139-9.140
Content-based restrictions, 9.138
Non-commercial speech restrictions, 9.140
Permits requirements to erect signs, 9.145
Political sign restrictions, 9.143
Severance of unconstitutional portions of sign ordinances, 9.144
Zoning issues involving, 10.145
Zoning issues involving, 10.145

Skateboards. See **Bicycles, Roller Skates, and Skateboards**

***Skelly* Rights.** See **Disciplinary Actions Against Employee**

Slander. See **Defamation**

Solid Waste and Recycling
Air quality issues, 6.108
Bottle bill (California Beverage Container Recycling and Litter Reduction Act), 6.118
California Integrated Waste Management Act of 1989 requirements
Calculation of diversion rate, 6.116
Diversion requirements, 6.114
Exemption and time extension for diversion requirements, 6.115
Penalties for noncompliance, 6.117
Source Reduction and Recycling Element (SRRE), impact on, 6.113
City solid waste planning
Annual reports, 6.112
County plan, relationship to, 6.112
Household Hazardous Waste Element (HHWE), 6.110, 6.112
Nondisposal Facility Element (NDFE), 6.111-6.112
Penalties, 6.112
Source Reduction and Recycling Element (SRRE), 6.109, 6.111-6.112
Facilities authorized, 6.106
Fees
Franchise fees, 5.194-5.195
Sanitation services, fees for provision of, 5.166, 5.180

Franchises. See **Solid Waste and Recycling Franchises**
Hazardous materials and toxic waste. See **Hazardous Materials and Toxic Waste**
Household Hazardous Waste Element (HHWE), 6.110, 6.112
Landfills. See **Landfills**
Marinas, collection facilities for recyclables required for, 6.174
Nondisposal Facility Element (NDFE), 6.111-6.112
Recyclable design requirements, 6.119
Recyclers, business regulation of, 9.46
Sewage disposal. See **Sewage Disposal**
Source Reduction and Recycling Element (SRRE), 6.109, 6.111-6.113
Waste management planning. See **Waste Management Planning**
Water quality issues
Local pretreatment requirements, 6.107
Regional board regulation, 6.107
Water quality testing, 6.107

Solid Waste and Recycling Franchises
Franchising authority over recyclables, 6.103
Franchising authority over solid waste
Police power authority, 6.92
Statutory authority, 6.93
Jurisdiction
Federal jurisdiction over solid waste, 6.98
State jurisdiction over solid waste, 6.99
Landfill regulatory authority, 6.100
References, 6.102, 6.105
Regulatory authority over recyclables, 6.104
Solid waste franchises
Discontinuation of non-exclusive franchises, 6.96
Existing franchises, effect on, 6.95
No local preemption, 6.94
Procedures used to negotiate services, 6.97
Waste flow control ordinances, effect of, 6.101

Sovereign Immunity
Government Claims Act, impact on doctrine, 13.94
Municipalities, inapplicability of sovereign immunity to, 4.43

Special Assessment Investigation, Limitation and Majority Protest Act of 1931, 5.129

Special Districts
Generally, 1.72
Changes in organization, 1.74
Characteristics of, 1.75
Dependent districts, 1.75
Enterprise districts, 1.75
Formation of, 1.8, 1.72
Independent districts, 1.75
Landowner-voter districts, 1.75
Multifunction districts, 1.75
Non-enterprise districts, 1.75
Power of, 1.73
Registered-voter districts, 1.75
Single function districts, 1.75
Statutory authority, 1.73
Water supplies, role in. See **Water Supplies**
Wright Act of 1887, effect of, 1.8

Special Elections. See **Elections**

Special Fund Doctrine, 5.292

Special Meetings. See **Open Meeting Laws**

Special Taxes

Generally, 5.69
Accountability measures mandated, 5.75
Challenges to lack of voter approval for charge imposed by city, city's burden of showing charge not special tax, 5.74
Community facilities districts. See **Mello-Roos Community Facilities Act of 1982**
Definition of special taxes
Assessment compared, 5.73
Fees compared, 5.72, 5.160
General tax compared, 5.71
Label of special tax not dispositive, 5.70
Proposition 218, definition under, 5.16, 5.71
Two-part test for identification of special tax, 5.71
Initiative for adoption of. See **Initiatives and Referenda**
Libraries, funding for, 5.92
Police and fire protection tax, 5.88-5.91
Procedure to adopt. See **Proposition 218**
Proposition 13. See **Proposition 13**

Speech Regulation (Government as Property Owner)
Generally, 9.118
Forum analysis
Generally, 9.119
Designated or limited public forum, 9.121
Nonpublic forum, 9.122
Traditional public forum, 9.120
Leases of property, public forum considerations, 2.263

Speech Regulation (Government as Regulator)
Generally, 9.123
Charitable street vending or solicitations, 9.152
Content-based restrictions that are permissible, 9.136
Definition of fighting words, 9.136
Mandamus for expressive activity permits, expedited review, 13.23
Parades and parade permits. See **Parades and Parade Permits**
Prior restraints against speech
Injunctions not allowed by First Amendment, 9.127
Internet access or restrictions, 9.130
Newsrack restrictions, 9.129
Permit requirements, 9.128
Sign regulation. See **Signs and Billboards**
Taxation of First Amendment activity, 5.97, 9.153
Time, place, and manner restrictions
Generally, 9.131
Adult entertainment, 9.132
Curfews and public forum access, 9.134
Leafleting, 9.133
Zones for free speech, 9.135
Types of speech
Charitable fund-raising, 9.124
Commercial speech, 9.123
Mixed commercial speech, 9.125
Political speech, 9.126

Speech. See **Constitutional Law**

Spheres of Influence. See **Local Agency Formation Commissions (LAFCOs)**

Spouses
City council. See **City Council**
Defined, 2.135
Government Claims Act, spouse presenting claim under, 13.52

Staff Briefings
Collective concurrence about legislative body, staff prohibited from attempting to develop, 2.54

Standing

Affirmative action programs, third parties' standing to challenge voluntary, 4.10
California Voting Rights Act, standing to file action for violation of, 3.77
CEQA. See **California Environmental Quality Act (CEQA)**
Civil Rights Act of 1871, standing to sue under, 4.157
Closed session, standing to bring action for violation of Brown Act, 2.113
Discrimination claim, standing to file charge with EEOC, 4.243
Election contest, standing to file, 3.125
Endangered Species Act (ESA) enforcement, 11.279
News media's standing to seek government records, 2.230
Political Reform Act of 1974, standing to sue to enjoin violations or to compel compliance with, 3.207
Public trust doctrine, standing to raise claim under, 10.338

Standing Committees. See **Open Meeting Laws**

State Housing Law
Civil penalties and cost recovery under, 12.7, 12.20
Demolition or repair by locality, administrative abatement proceedings resulting in, 12.70
Franchise Tax Board deductions, 12.7
Misdemeanor, State Housing Law violation as, 12.37
Notice requirements, 12.6
Receiver, appointment of, 12.9
Relocation assistance requirement, 12.8
Remedies, 12.6
Timely correction of violations under, 12.6

State Lands Commission, 1.101
Authority, what is included in, 10.360

Statement of Contest for General Election. See **Election Contests**

State Water Resources Control Board. See **Water Quality; Water Supplies**

Statutes of Limitations
See also **Time**
Age Discrimination in Employment Act, time limit for filing lawsuit after filing EEOC charge, 4.249
Benefit assessments, actions challenging validity of assessment, 5.152
California Coastal Act, appeal of local coastal plan decisions, 10.320, 10.322
CEQA. See **California Environmental Quality Act (CEQA)**
Civil lawsuit to enforce discrimination laws, time limit for filing, 4.257
Civil rights actions. See **Civil Rights**
Cost reimbursement test claims filing deadline, 5.257
Department of Fair Employment and Housing (DFEH), statute of limitations for filing complaint with, 4.253
Development agreements, adoption or amendment of, 10.127
Equal Pay Act (Federal), statute of limitations for bringing action under, 4.250
Exactions, period to challenge implementation after notice, 10.229-10.230
Fair Labor Standards Act (FLSA), statute of limitations for bringing action to enforce, 4.91
General plans for land use, challenges to, 10.81
Government Claims Act. See **Government Claims Act**
Indemnity agreement, statute of limitations for enforcing, 7.307
Mandamus, writ of, 13.14, 13.23
Mello-Roos special tax or bonds under, challenges to, 5.87
Meyers-Milias-Brown Act's statute of limitations for unfair labor practices filed with California Public Employment Relations Board, 4.323
Police misconduct, statute of limitations for investigating, 4.271
Prohibited contract under Govt C §1090, statute of limitations for, 2.173
Redevelopment plans
Challenges to, 5.341
PAC formation, challenges to, 5.375
Taking claims, 10.380
Tolling of statute. See **Government Claims Act**
Transient occupancy taxes collection, 5.55
Unfair Competition Act, statute of limitations for actions under, 12.11
Water quality, review of regional board actions, 11.152-11.153, 11.156
Workers' compensation claims, different statutes of limitations for presentation of different types of, 4.392
Zoning ordinances, 10.98

Stay of Proceedings
Automatic stay in bankruptcy, application for, 5.449-5.450

Stop Notices
Payment disputes, 7.120
Preliminary 20-day notice, 7.118
Purpose of, 7.117
Resolution
Contractor bond, 7.124
Duty to withhold amount equal to stop notice, 7.121
Funds subject to withholding, 7.122
Notice to claimant, 7.123
Prompt payment, 7.125
Suit by contractor, 7.126
Suit by stop-notice claimant, 7.127
Timing of, 7.119

Storm Drains
Contents of permits, 6.15
Financing management programs, 6.16
National Pollutant Discharge Elimination System (NPDES) permits, requirements for, 6.13
Types of permits, 6.14

Storm Water. See **Water Quality**

Streams. See **Tidelands, Beaches, and Streams**

Streets. See **Sidewalks, Streets, Roads, and Highways**

Strict Liability
Code violations, strict criminal liability for, 12.45
Sexual harassment, strict liability of employer under FEHA, 4.199, 4.201

Strikes
Exhaustion of administrative remedies with California Public Employment Relations Board by employer before seeking relief in court from strike, 4.323
Meyers-Milias-Brown Act allowing public employees limited right to strike, 4.348

Subcontractors for Public Works Contracts. See **Contractors and Subcontractors for Public Works Contracts**

Subdivisions and Subdivision Map Act
Dedication
Reconveyance of property dedicated under Subdivision Map Act, 8.80
Summary vacation occurring when offer of dedication covered by subdivision map, 8.147
Definition of subdivision, 10.148
Due process for land use decisions, 10.411
Groundwater, authority to preserve and protect under Subdivision Map Act, 11.123
Local ordinances
Antiquated subdivisions, 10.160
Automatic approval procedures, 10.155
Conditions for map approval, 10.156, 10.158
Denial of map, findings for, 10.154
Fees and dedications, imposition on subdivision, 10.157
Flexibility allowed, 10.152
Map approval, by whom, 10.153
Time extensions for tentative maps, 10.159
Procedural due process for land use decisions. See **Due Process**
Requirements to create
Lot line adjustments, application of requirements to, 10.151
Map approval required, 10.148
Parcels, number of and map types, 10.149
Vesting tentative maps, 10.150
Time extensions for tentative maps, 10.159
Water supplies for. See **Water Supplies**
Waterways, public access to, 10.342

Subletting and Subcontracting Fair Practices Act
Generally, 7.75
Clerical errors, relief for, 7.79
Criteria for substitution of subcontractors, 7.77
Emergency/necessity exception, 7.80
Penalties for failure to comply with Act, 7.81
Public policy behind Act, 7.76
Substitution hearing, 7.78

Subpoena and Subpoena Duces Tecum
Department of Fair Employment and Housing's authority to issue subpoenas, 4.254
EEOC's power to issue subpoena during investigation of discrimination complaint, 4.245
Election contest, court clerk issuing subpoenas for witnesses to attend, 3.133
Personnel records, subpoena for, 4.130

Subrogation
Government Claims Act, claims subject to, 13.29
Municipal plaintiffs, application to, 13.183
Work-related injury, employer filing action against third party responsible for, 4.397

Subsidiary Districts
Generally, 1.131
Conducting proceedings to establish subsidiary district, 1.133
Initiating proceedings to establish subsidiary district, 1.132
Powers of, 1.70, 1.131
Revenue consequences of subsidiary district merger into city, 1.134

Subventions. See **Revenues**

Successor Candidate. See **Recall**

Summary Judgment
Election contest, unavailability of summary judgment in, 3.134

Summary Vacation of Streets, Highways, and Service Easements
See also **Nonsummary Vacation of Streets, Highways, and Service Easements**
Generally, 8.142
Challenges to vacation, 8.151
Dead ends, 8.146
Excess right-of-way not required for street or highway purposes, 8.145
Impassability and nonmaintenance, 8.144
Offers of dedication on subdivision maps, 8.147
Public service easements, 8.148
Recordation, 8.150
Relocation, street or highway superseded by, 8.143
Resolution, 8.131, 8.149

Supervisors. See **Sexual Harassment**

Surety Bonds
Bid bonds versus payment bonds, 7.103
Changes to scope of work, effect of, 7.98
Default of principal, effect of, 7.96
Insurance distinguished, 7.95
Invitation for bids requiring submission of labor and materials bond (payment bond), 7.59
Purpose of bond, 7.97
Qualifications of surety
Generally, 7.99
Admitted surety insurer, 7.99-7.100
City liability, 7.101
Scope of surety's liability, 7.97
Sufficiency of sureties, procedures for determining, 7.102
Types of, 7.95

Surplus Property
Good faith negotiations, 8.94
Inventory of property, 8.85
Notice requirements for purchase or lease of, 8.93
Offer to sell or lease surplus property
Generally, 8.86
Enterprise zone property, 8.90
Housing providers, 8.87
Infill opportunity or transit village property, 8.92
Park and recreation or open space property, 8.89
Sale and reverter, 8.88
School property, 8.91

Tables. See **Charts, Checklists, Questionnaires, and Tables**

Taking
See also **Inverse Condemnation**
Airport zoning, taking issues relating to, 6.148
Analysis process
Generally, 10.367-10.368
Ripeness requirement (see Ripeness requirement, below)
As-applied ripeness issues
Generally, 10.373
Exhaustion of remedies requirement, 10.377
Final determination requirement, when met, 10.374, 10.378
Futility exception, 10.378
Multiple applications as possible requirement, 10.375
Repeal or waiver of regulation request requirement, 10.376
State remedies, requirement to meet procedures for, 10.379
Statute of limitations, 10.380
Building permits, extraordinary delays in or denial of application, 10.384, 10.396
Damages
Accrual and measure of damages, 10.405-10.406
Availability of damages, 10.366
Definitions
Facial taking claim, 10.372
Physical taking, 10.365
Regulatory taking, 10.365
Due process requiring just compensation for owner of private property taken by government, 1.66
Endangered species. See **California Endangered Species Act (CESA); Endangered Species Act (ESA)**
Exactions, limits on. See **Exactions**
Facial regulatory taking claims
Difficult to establish and disfavored, 10.382
Ripeness requirement met by, 10.372
Land use
General plans, avoiding issues with, 10.82
Moratoria, issues with, 10.210
Physical occupation, regulations authorizing
Generally, 10.400
Permanent physical occupation, 10.401-10.402
Physical versus regulatory taking, 10.365
Temporary physical occupation, 10.403
Physical versus regulatory taking, 10.365
Property subject to, what constitutes, 10.364
Public access to coast, 10.307
Public use limitation on taking, 10.381
Regulatory taking liability analysis
Generally, 10.383
Development permits, extraordinary delays in or denial of applications, 10.384, 10.396
Diminution of value cases, 10.398
Nexus test, when required, 10.392, 10.399
Nuisance, issues with abatement of, 10.389
Penn Central ad hoc test for taking, 10.386
Physical occupation, regulations authorizing (see Physical occupation, regulations authorizing, above)

Remedies for (see Remedies, below)
Temporary physical taking as result of regulation, 10.385
Two-prong *Agins* standard (see Two-prong *Agins* standard for taking analysis, below)
Remedies
Damages (see Damages, above)
Invalidation of regulations, 10.404
Rent control, impermissible regulation as, 9.51
Ripeness requirement
As-applied claims (see As-applied ripeness issues, above)
Facial attacks as ripe, 10.372
Jurisdictional requirement, ripeness as, 10.371, 13.27
Standards to apply, 10.369-10.370
Substantive due process issues and, 10.423
Section 1983 claims for, 13.118
Source of law for, 10.363
Statute of limitations, 10.380
Substantive due process issues with, 10.422
Two-prong *Agins* standard for taking analysis
Generally, 10.387
Deprivation of all economic use, categorical taking as, 10.389
Some economic use remaining, 10.390
Substantial advancement of legitimate state interest, application, 10.388

Taxes
Generally, 5.15
Apportionment requirements
Business license fees and taxes, 5.38-5.40, 5.44
Property taxes, 5.25
Assessments compared, 5.125
Benefit assessments and assessment districts. See **Benefit Assessments and Assessment Districts**
Business license fees and taxes
Generally, 5.35
Amount of tax, 5.42
Apportionment required between in-city and out-of-city activity, 5.38-5.40, 5.44
Benefit assessments, collection with property taxes, 5.124
Classification and equal protection issues, 5.46
Internal consistency test for Commerce Clause issues, 5.43
Nexus requirement, 5.45
Preemption of local laws by state possible, 5.36
Reasonable connection between tax and taxing jurisdiction required, 5.41
Revenue-raising compared to regulation, 5.37
Charter cities. See **Charter Cities**
Collection services on behalf of cities, 5.216
Comparison of fees and taxes, 5.17, 5.74
Consolidation, effect of, 1.173
Constitutional authority for. See **Finances**
Definitions
Excise tax, 5.57
General tax, 5.16, 5.71
Increase, 5.51
Sales tax, 5.27
Special tax, 5.16
Use tax, 5.27
Due process and equal protection issues
Generally, 5.94
Confiscatory amount, due process prohibitions against, 5.42
Rational basis for distinctions, 5.96
Uniformity in application not required, 5.95
Equal protection issues (see Due process and equal protection issues, above)
Exactions, fees compared with taxes, 10.221
Excise taxes
Admissions taxes, 5.61
Authority for, 5.58
Business license fees and taxes (see Business license fees and taxes, above)
Definition, 5.57

Development taxes, 5.60
Documentary transfer tax, 5.67, 5.98
Parcel taxes (see Parcel taxes, below)
Property taxes, 5.59, 5.68
Sales and use taxes (see Sales and use taxes, below)
Transfer taxes, 5.67-5.68
Transient occupancy taxes (see Transient occupancy taxes, below)
Utility users tax (see Utility users tax, below)
Vehicle license fees, 5.7
Exemptions
Banks, 5.103
Insurance companies, 5.102
Property exempted from tax, 5.22, 5.101
First Amendment issues with, 5.97, 9.153
Gas tax revenues, withholding for failure to comply with congestion management program, 10.253
Harbor activities, financing of, 6.161
Income tax. See **Income Tax, Federal**
Incorporation, tax effects of, 1.138
Initiative for adoption of tax. See **Initiatives and Referenda**
Lease of city property, statement concerning taxable interest included in, 8.117
License fees (see Business license fees and taxes, above)
Local taxation, authority for, 5.6
Mello-Roos Community Facilities Act of 1982. See **Mello-Roos Community Facilities Act of 1982**
Parcel taxes
Generally, 5.62
Basis of tax as use of municipal services and facilities, 5.65
Property taxes compared, 5.63
Proportionality requirement for, 5.66
Proposition 218 effect on, 5.21, 5.62, 5.113
Payroll taxes, 5.34
Proposition 1A. See **Proposition 1A**
Proposition 13. See **Proposition 13**
Proposition 62. See **Proposition 62**
Proposition 218. See **Proposition 218**
Redevelopment plans, effect on. See **Redevelopment**; **Redevelopment Plan Adoption**
Refunds, 5.93
Reimbursements to local entities, 5.215
Sales and use taxes
Definitions, 5.27
Local real property transaction sales taxes, 5.108
Maximum tax rate for, 5.28
Preemption by state, 5.26
Proceeds from, use of, 5.29-5.30
Rebates, when prohibited, 5.299
Redevelopment assistance prohibited for projects that generate sales or use taxes, 5.370
Sharing of proceeds among entities, 5.30
Transactions and Use Tax Law (see Transactions and Use Tax Law, below)
Special assessments. See **Benefit Assessments and Assessment Districts**
Special taxes. See **Special Taxes**
State Housing Law, Franchise Tax Board deductions under, 12.7
Taking issues with exactions, 10.221
Taxing power of municipal corporations. See **Taxing Power**
Transactions and Use Tax Law
Generally, 5.31
General purposes, taxes for, 5.32
Sales tax distinguished, 5.31
Specific purposes, taxes for, 5.33
Transient occupancy taxes
Generally, 5.52
Certificate of tax clearance requests, 5.54
Collection of tax, 5.55
Exemptions under, 5.53
Online travel company litigation issues, 5.56
Redevelopment projects, use for bonds for, 5.398
Statutes of limitations for collection of, 5.55

Utility users tax
Generally, 5.47
Collection of tax, 5.48
Federal excise tax challenges to tax, 5.50
Mobile Telecommunications Sourcing Act challenges to tax, 5.51
Valid overlapping state and local regulation, license taxes as example of, 1.41

Taxicabs
Generally, 9.41
Drug and alcohol testing requirements, 9.43
Licensing requirements, consequences of violating, 9.42

Taxing Power
Generally, 1.19, 5.16
Delegation of taxing power not allowed, 5.14
Limits on taxation and appropriation power of local government
Generally, 1.51
Appropriation limit, 1.53
General property tax limit, 1.52
Miscellaneous tax limitations, 1.56
Police power compared, 5.17
Special assessments and property-related fees and charges, 1.55
Voter requirement for imposition of taxes, 1.54
Police power compared, 1.21
Scope of taxing power, 1.20

Telecommunications
Cable operators providing miscellaneous telecommunications services, 6.73
Federal preemption
Barriers to development of telecommunications services, preemption of, 10.139
Franchises, 6.89
Franchises
Federal law, applicability of, 6.89
Permissible requirements by city, 6.91
State preemption, 6.90
Right-of-way management, 10.139
Telecommunications Act of 1996, 10.139
Utility users tax, telecommunications issues with, 5.50-5.51
Zoning restrictions, 10.139

Teleconferenced Meetings. See **Open Meeting Laws**

Television. See **Cable Television and Video Systems Franchises**

Temporary Disability Benefits. See **Workers' Compensation**

Termination of Employment
Generally, 4.289
Closed session meeting to consider. See **Closed Session Meetings**
Confidential medical information obtained from drug test, effect of employer terminating employee based on, 4.114
Constructive discharge
California law, constructive discharge under, 4.220
Federal law, constructive discharge under, 4.219
Disciplinary penalty, discharge of employee as, 4.276
Distinction between layoffs and discharging employees for cause, 4.41
First Amendment issues with, 13.116
Grievances. See **Grievances, Employee Filing**
Reinstatement. See **Reinstatement of Employee**

Testing for Hiring, Promotion, or Retention of Employees
Generally, 4.13
Americans with Disabilities Act (ADA), restrictions on pre-employment tests under, 4.20
Disparate impact or disparate treatment discrimination, use of employment tests leading to, 4.15
EEOC's adoption of uniform guidelines on employee selection procedures, 4.14, 4.214
Medical examination. See **Medical Examination**

Types of tests
Drug testing. See **Drug Testing**
Medical examination. See **Medical Examination**
Polygraph tests as intrusion on employees' privacy rights, 4.16
Psychological tests, privacy concerns over use of, 4.18
Voice tests, written consent required for using, 4.17

Third Parties
Equitable indemnity, municipality cross-complaining against third party, 13.182
Insurance liability policies. See **Insurance**
Personnel records, third party's right to access. See **Personnel Records**
Public works contract provision for timely notification of third party claims, 7.65
Voluntary affirmative action plan, third parties' standing to challenge, 4.10

Tidelands, Beaches, and Streams
See also **Coastal Areas**
Annexation of tidelands and submerged lands, restrictions on, 1.124
Areas protected
Navigable waters, tidelands, and submerged lands, 10.339
Nontidal lakes and streams, 10.340
Waterways, access to and use of, 10.341-10.346
Liability, no liability for public beaches as natural condition, 13.106
Public access to coast, exactions for, 10.307
Public trust doctrine. See **Public Trust Doctrine**
Regulatory authority
Army Corps of Engineers. See **Army Corps of Engineers**
Boating and Waterways, Department of, 10.361
California Coastal Commission. See **California Coastal Act**
Fish and Game. See **Fish and Game, Department of**
State Lands Commission, 10.360

Time
See also **Statutes of Limitations**
Abandonment of office by city council member, time considerations, 1.192
Adult businesses, licensing timelines, 9.12
Agricultural preserves under Williamson Act, notice of nonrenewal, 10.142
Air quality. See **Air Quality**
Animals, licensing period for, 9.183
Annexation, timely exchange of property tax revenues after, 1.152
Appreciation of affordable housing, 3 year time limit to use for home ownership programs, 10.189
Attorney fee motions by municipality, timing of, 13.168
Budget, filing with auditor, 5.264
Building permits, time to begin and complete work, 10.242-10.243
California Coastal Act. See **California Coastal Act**
CC §2929.3, timely notice to property owner under, 12.75
CEQA. See **California Environmental Quality Act (CEQA)**
City council meetings, time restrictions at. See **City Council Meetings**
Community facilities districts, time to record notice of lien after election for formation of district, 5.81
Constitutional debt limitation, no pledge of revenue beyond 1 year, 1.48
Contracts
Duration of, 7.202
Time of the essence statement, 7.204
Cost reimbursements, order on reconsideration petition, 5.260
Council of government's timely determination of regional housing needs, 1.82
Density bonuses, durational requirements of, 10.188
Department of Fair Employment and Housing holding public hearing on accusation of discrimination, time limit for, 4.255
Detachment, timelines applicable to petitions for, 1.136
Development processing fees, timing of notice and hearing, 5.165
Disclosure statements documenting contributions and expenditures, time for filing, 3.194
Discrimination complaint under Title VII, timeliness of filing charge with EEOC, 4.244
Duration of consultation with PAC, 5.383
Elections
Generally. See **Elections**
Contests. See **Election Contests**
Recall election. See **Recall**

Eminent domain proceedings
Complaint, timely filing of, 8.45
Exchange of appraisals, 8.58-8.59
Final offer and demand, filing at least 20 days before trial, 13.161
Motions affecting compensation, time for, 8.61
Order for possession, timely filing of motion for, 8.54
Precondemnation negotiations, time considerations for, 8.40
Relocation information to occupants timely provided by public agency, 8.39
Service of papers, time for, 8.53
Settlement offers, time for, 8.60
Valuation trial, time for, 8.62
Endangered Species Act (ESA)
Consultations for federal and federal-nexus projects, 11.268
Notice before filing suit to enforce, 11.285
Exactions, waiting period before new fee can go into effect, 10.227
Extension of time. See **Extension of Time**
Fees
Development processing fees, timing of notice and hearing, 5.165
Exactions, waiting period before new fee can go into effect, 10.227
Hearing requirements, 5.179
Firefighters Procedural Bill of Rights Act, time limit for firefighter to respond to adverse comments in personnel file, 4.313
General plans for land use
Adoption of plans, 10.70
Extensions of time to adopt. See **General Plans**
Housing element of general plans. See **Housing Element of General Plans**
Government Claims Act. See **Government Claims Act**
Groundwater regulation, time after regional boards recommend additional standards, 11.121
Harbor related lease, duration of, 6.165
Hazardous materials and toxic waste
Application to build facility, time for notice of intent, 11.245
Processing of applications, time limits, 11.246
Housing element of general plans. See **Housing Element of General Plans**
Incorporation proceedings, time considerations for. See **Incorporation**
Indemnification of public employees and officers
Providing defense, time to notify employee of decision about, 13.86
Punitive damages issues, 13.147
Requests for indemnification, time before trial, 13.87
Initiatives. See **Initiatives and Referenda**
LAFCO proceedings, time limits for, 1.128
Leases, duration of, 8.115
Mandatory greenhouse gas emission limits and emission reduction measures, effective date of, 6.22
Open meeting laws, reasonable time restrictions on speakers under, 2.80
Ordinances, effective date of, 1.237-1.238
Parades and parade permits, processing time for, 9.147
Parking fines and forfeitures
Investigation and review process, 5.205
Judgments, time to mail notice of, 5.211
Trial de novo appeal, 5.208
Permit Streamlining Act (PSA), time limits not mandatory with respect to California Environmental Quality Act (CEQA), 10.13, 11.58
Police officer filing response to adverse comment in personnel file, time limit for, 4.298
Political Reform Act. See **Political Reform Act of 1974**
Post-disciplinary evidentiary hearing, timing of, 4.288
Preliminary 20-day notice, 7.118
Proposition 218 notice and hearing requirements, 5.140, 5.147, 5.179
Public Records Act
Pleading for improper withholding of records, timing of, 2.259
Request for records under Act, time limit for providing copy of records, 2.235
Public works contracts
Bidder, timely legal action by, 7.24
Cost records, timely filing of, 7.73
Notice of completion, time considerations for, 7.125
Provision for timely payment of interest by public entity, 7.72
Rates, timing for notice and hearing, 5.169
Redevelopment plans

Affordability covenants, duration of, 5.413, 5.431
Affordable housing plan requirements, 5.415
Amendments to redevelopment plans, notice to PAC, 5.391
Approval of disposition and development agreements, notice of, 5.365
Challenges to PAC, resolution of, 5.375
Excess surplus requirement, 5.432
Extensions of time limits by amendment, 5.344
Findings that avoid need for set-aside, 5.422
Five-year implementation plans required, 5.368
Forced sales, timeline to acquire property, 5.355
Formation of PAC, time for, 5.374, 5.377
Mergers of project areas, notice, 5.436
Modifications to plan, commission to issue recommendation, 5.333
Notice and hearing requirements, 5.331-5.332
Objections to plan, time for response, 5.334
Permanent housing availability, time limit for, 5.407
Post-adoption notifications, 5.338
Replacement housing, when required, 5.402, 5.408
Statement of amendment land area recording, 5.345
Tax-increment apportionment for schools subordinate to debt if request timely made, 5.326
Resolutions, effective date of, 1.247
Right to sue notice, time limit for bringing private civil lawsuit against defendant after issuance of, 4.248
Safety element of general plans, time for consultation with other agencies, 10.66
Section 1983 actions, deadline for removal to federal court, 13.151
Solid waste diversion requirements, time extension for, 6.115
State Housing Law, timely correction of violations under, 12.6
Statute of limitations. See **Statutes of Limitations**
Stop notices, timing of, 7.119
Stray animals, holding periods for, 9.163, 9.170-9.171
Subdivisions, time extensions for tentative maps, 10.159
Taxicab drivers' drug and alcohol testing, time to mail positive results to DMV, 9.43
Urban water management plans, time for filing after adoption, 11.93
Utility franchise, duration of, 6.53
Water quality issues
Citizen suits for enforcement, time for notice of intent to sue, 11.161
Cleanup and abatement orders, hearing, 11.158
Groundwater regulation, time after regional boards recommend additional standards, 11.121
Hearing notice time for Water Resources Control Board, 11.124
Total maximum daily loads (TMDL), review of, 11.147
Water supplies, time for verification of sufficient water supply for subdivision, 11.105
Workers' compensation liability, time limit for employer to reject, 4.386

Title to Property
Acquisition of property by public agency, title search required before, 8.7
Adverse possession, acquiring or losing title to property through, 8.69, 8.114
Retention of records affecting title to real property, 2.264

Title VII of Civil Rights Act of 1964
Generally, 4.139
Affirmative action programs. See **Affirmative Action in Hiring Public Employees**
Back pay, recovery of, 4.259
Discoverability of personnel files under, 4.128
Distinctions between Title VII of Civil Rights Act of 1964 and Civil Rights Act of 1991, 4.154
Enforcement of Title VII. See **Discrimination Laws, Enforcement of**
Exclusions from coverage under Title VII, 4.140
Front pay, inapplicability of statutory caps on damages to award of, 4.260
Injunctive relief for violation of, 4.264
Jurisdiction of state and federal courts over Title VII lawsuits, 4.248
Pregnancy discrimination prohibited under, 4.142
Retaliation against employee for filing or participating in Title VII action, 4.180
Sexual harassment, prohibition against, 4.141, 4.186-4.187, 4.204
Timeliness of filing discrimination complaint with EEOC, 4.244

Tolling of Statute of Limitations. See **Government Claims Act**

Tort Claims Act. See **Government Claims Act**

Torts. See **Liability**

Toxic Waste. See **Hazardous Materials and Toxic Waste**

Trademarks and Trade Names
Public works contracts, specifications by brand or trade names in, 7.63

Trade Secrets
Public Records Act, exemption from disclosure of trade secrets, 2.255

Traffic Signs. See **Sidewalks, Streets, Roads, and Highways**

Trainees
Fair Labor Standards Act (FLSA), exclusion of trainees from coverage under, 4.47

Transactions and Use Tax Law. See **Taxes**

Transient Occupancy Taxes. See **Taxes**

Transit Village Property
Surplus property, offer to sell or lease for purpose of developing property within area covered by transit village plan, 8.92

Translations
Federal Voting Rights Act requiring translation of ballot into foreign languages, 3.45, 3.67
Recall petition, no requirement of translating into foreign languages, 3.156

Transportation
General plans, consideration of needs for in, 10.25
Hazardous materials, 6.199, 8.168-8.169
Public officials' acceptance of free transportation, restrictions on, 1.194

Transportation Planning
Agency for planning, duties of, 10.251
Air quality issues. See **Air Quality**
Congestion management program, 10.253
Regional plan for, preparation of, 10.252

Trash Service. See **Solid Waste and Recycling**

Travel
Compensability for travel time, limits on, 4.62

Treasurer. See **City Treasurer**

Trespass
Generally, 9.154
Interference with lawful business, 9.156
Real property, trespass to, 9.155
Valid overlapping state and local regulation, trespass laws as example of, 1.41

Trial
Appeals. See **Appeals**
Criminal trial, 12.41
Election contests. See **Election Contests**
Eminent domain action. See **Eminent Domain**
Jury trial, taking by exactions, 10.218

Trucks, Regulation of
Generally, 8.165
Height restriction for parking, 8.166
Indemnification provision in trucking contract, restrictions on, 7.224
Routes
Cargo, restrictions based on, 8.168

Explosives, local regulation of transportation of, 8.169
Highway and residential street restrictions, 8.167
Local height, weight, and routing regulations, standard for, 8.170
Tow trucks, 9.44

Unemployment Insurance
Gann Limit and costs not covered by mandate, 5.284

Unfair Business Practices
Public works contracts, provisions for assignment of unfair business practice claims in, 7.42

Unfair Competition
Civil abatement actions. See **Civil Enforcement**
Defined, 12.10
Electric utility, effect of unfair competition challenge, 6.39

Unfair Labor Practices. See **Meyers-Milias-Brown Act**

Unfunded Mandates. See **Cost Reimbursements From State**

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
Rights of employees to take leave under, 4.163

Unions. See **Labor Unions**

Universities and Colleges
See also **Schools**
Redevelopment plans, tax-increment apportionment for community colleges, 5.327
Student athletes, drug testing of, 4.100
Zoning issues involving community colleges, 10.136

Unruh Civil Rights Act
Business establishments, applicability of Act to, 4.168

Use Permits. See **Conditional Use Permits**

USERRA. See **Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)**

Utilities
See also **Electric Utilities**
Generally, 6.1
CPUC. See **California Public Utilities Commission (CPUC)**
Electric utilities. See **Electric Utilities**
Emergency work, utilities suspending notice and bid requirements for, 6.199
Equipment (see Relocating equipment or facilities, below)
Franchises. See **Franchises**
Fund transfers from utility fund to general fund, 5.162
Public Records Act, exemption from disclosure for utility records, 2.252
Public works power. See **Public Works Power**
Relocating equipment or facilities
Case law, 8.122
Exceptions, 8.124-8.125
Public works contract compensating contractor for utilities relocation work, 7.60
Reimbursement for relocation expenses, 8.125
Statutory obligation, 8.123
Sewage disposal. See **Sewage Disposal**
Sewer services may be billed with other utilities, 5.171
Storm drains. See **Storm Drains**
Taxes on users of. See **Taxes**
Vacation of easements, reservations from, 8.134, 8.136
Water service. See **Water Service**

Vacancies on City Council. See **City Council**

Vacant Residential Property. See **Administrative Enforcement**

Vacation of Public Streets and Highways. See **Sidewalks, Streets, Roads, and Highways**

Validation Actions
Legislative actions, 13.186
Procedures for action, 13.185
Remedies available for enforcement of ordinances, 13.187
When used, 13.184

Valuation
See also **Appraisals**
Eminent domain proceedings. See **Eminent Domain**

Vandalism or Graffiti
Personal Conduct Regulation
Generally, 9.86
Definition, 9.87
Removal of graffiti, 9.91-9.93
State law sanctions for, 9.88-9.90
Preemption of local law affecting aerosol paint cans, 9.89
Treble costs of abatement paid by owner or person or minor guilty of vandalism or graffiti, 12.5

Variances
Generally, 10.113
Air quality. See **Air Quality**
Definition of variance, 10.113
Notice and hearing, 10.118
Procedures for issuance
Findings requirement, 10.117
Local ordinances, conflicts with, 10.115
Parking requirements, 10.116
Standards for issuance, 10.114
Rights granted
Running with the land by variances, 10.119
Special privileges not allowed, 10.120

Vehicular Regulations
See also **Motor Vehicles**
Ambulances. See **Ambulances**
Bicycles, roller skates, and skateboards. See **Bicycles, Roller Skates, and Skateboards**
Parking. See **Parking**
Preemption, 8.152-8.153
Road closures. See **Road Closures**
Taxicabs. See **Taxicabs**
Tow trucks, 9.44
Trucks. See **Trucks, Regulation of**

Venue
Endangered Species Act, enforcement of, 11.277
Public works contract venue provision, 7.74

Vested Rights. See **Due Process**

Vicarious Liability
Sexual harassment, employer's vicarious liability for supervisor's actions, 4.198

Video- and Audiorecording
Firefighter's right to record interrogation, 4.315
Police officer's right to record interrogation, 4.300

Video Systems Franchises. See **Cable Television and Video Systems Franchises**

Volunteers

Fair Labor Standards Act (FLSA), exclusion of volunteers from coverage under, 4.45
Prevailing wage law, volunteer work exemption under, 7.94

Voters and Voting Rights
See also **Elections**
California Voting Rights Act. See **Voting Rights Act (California)**
Expenditure of city funds for voter registration and get-out-the-vote efforts, permissibility of, 3.216
Federal Voting Rights Act. See **Voting Rights Act (Federal)**
Help American Vote Act, purpose of, 3.73
Mello-Roos Community Facilities Act, voting mechanics of, 5.77
National Voter Registration Act (Motor Voter Act), enactment of, 3.72
Project area committee members, voting process, 5.381
Qualifications of
California Constitution, qualifications under, 3.62
Ex-felons' right to vote, 3.64
Residence for purpose of voting, 3.63
Restrictions on right to vote
Rational basis test, voting restrictions subject to, 3.79
Strict scrutiny, voting restrictions subject to, 3.78
Translations. See **Translations**

Voters' Pamphlets
Arguments on city measures
City attorney's impartial analysis, 3.53
Multiple arguments, effect of submission of, 3.55
Persons eligible to file written arguments for or against city measure, 3.54
Public examination and challenge to submitted election materials, 3.57
Rebuttal arguments, 3.56
Candidate's statements, 3.52

Voting During Meetings. See **Meetings**

Voting Rights Act (California)
Generally, 3.74
Attorney fees and costs, recovery of, 3.77
Challenging elections under
Burden of proof in action for violations of Act, 3.76
Standing to file action for violation of Act, 3.77
Violation of Act, racially polarized voting as, 3.75
Comparison to Federal Voting Rights Act, 3.74
Remedies for violation of Act, 3.77

Voting Rights Act (Federal)
Amendments to Act
Language minority requirements, amendment adding, 3.67
1982 amendments to Act, effect of, 3.66
Challenges to elections under Act
At-large elections, challenges to, 3.68
District elections (see District elections, challenges to, below)
Comparison to California Voting Rights Act, 3.74
District elections, challenges to
Generally, 3.69
Dilution of minority vote, challenge to district elections based on, 3.71
Equal protection under 14th Amendment, challenge based on denial of, 3.70
Original requirements of, 3.65
Translation of ballot into foreign language, requirements under Act, 3.45, 3.67

Wages. See **Salaries and Compensation**

Waiver
Age Discrimination in Employment Act (ADEA), restriction on waiver of rights under, 4.146
Annexation agreement requiring waiver of landowner's protest rights, effect of, 1.153
Attorney-client privilege, waiver by majority of legislative body, 2.109
Contractual provision governing waiver, 7.241

Density bonuses for affordable housing, waiver of development standards, 10.185
Eminent domain proceedings, withdrawal of deposit of probable compensation waiving all defenses except additional compensation, 8.50
Government Claims Act, avoiding waiver of statute of limitations, 13.62, 13.69
Public works contracts, waiver of competitive bidding requirement for. See **Bidding for Public Works Contracts**

Waste Management
California Integrated Waste Management Act of 1989, effect of, 6.100
Hazardous materials and toxic waste. See **Hazardous Materials and Toxic Waste**

Waste Management Planning
Elements of integrated waste management plans
Household hazardous waste, 10.263, 11.241
Problems facing local governments, 10.268
Siting issues, 10.264-10.267
Source reduction and recycling, 10.262
Integrated waste management plans
Approval of plans, 10.269-10.271
Creation required, 10.261
Elements of plans (see Elements of integrated waste management plans, above)
Periodic review of plans, 10.272-10.274

Water
Army Corps of Engineers' authority to regulate activities in waters. See **Army Corps of Engineers**
Coastal areas. See **Coastal Areas**
Groundwater extraction, annual notices for, 11.87
Harbors. See **Harbors**
Land use general plans, consideration in, 10.56
Public trust doctrine. See **Public Trust Doctrine**
Quality issues. See **Water Quality**
Reservoirs, access to required, 10.346
Supply issues. See **Water Supplies**

Waterfront. See **Harbors**

Water Quality
Agencies to implement regulations, 11.112
Appeals of state or regional board decisions, 11.152-11.153
Basin plans (see Water quality plans, below)
Cities as regulators
Authority to impose more restrictive controls not preempted, 11.117
EPA enforcement of local regulations possible, 11.119, 11.129
Groundwater quality, local regulation of (see Groundwater quality regulation, below)
Nuisance abatement allowed, 11.118
Cities' role in
Generally, 11.114
Regulated discharger, cities as, 11.115-11.116
Regulator, cities as (see Cities as regulators, above)
Citizen suits, 11.149, 11.161
Definitions
Municipal separate storm sewer systems (MS4), 11.141
Point source, 11.137
Recycled water, 11.181
Waste, 11.180
Waste discharge requirement, 11.115
Wetland, 11.175
Enforcement
Generally, 11.154
Cease and desist orders and injunctions, 11.157, 11.159
Citizen suits, 11.161
Civil prosecution by attorney general, 11.155
Cleanup and abatement orders, 11.158
Criminal penalties, 11.159
EPA, concurrent authority of, 11.154
Regional board authority, 11.154, 11.156

Technical and monitoring reports can be required, 11.160
EPA involvement
Enforcement, concurrent authority of EPA, 11.154
Local regulations, enforcement by EPA possible, 11.119, 11.129
Total maximum daily loads (TMDL), EPA review and approval of, 11.147
Groundwater quality regulation
Injection wells, 11.172-11.174
Management plans, local agencies may adopt, 11.122
Regional water boards can recommend additional standards, 11.121
State law on, 11.169-11.170
Subdivision Map Act, authority to fund efforts to preserve and protect groundwater under, 11.123
Underground storage tanks and, 11.170
Waste discharge requirement permits required, 11.171
Wells, local ordinances required, 11.120
Hazardous waste facilities, compliance with regulations required, 11.248
Implementation by regional boards
Generally, 11.130
National Pollutant Discharge Elimination System permits (see National Pollutant Discharge Elimination System (NPDES) permits, below)
Review by Water Resources Control Board or court, 11.152-11.153
Waste discharge requirements (see Waste discharge requirement permits, below)
Jurisdictional issues with wetlands
Generally, 11.176
Determination must be final for court to hear challenges, 11.179
Fill or dredged materials, discharges to subject to permits, 11.178
Waste discharges, permit requirements, 11.177
National Pollutant Discharge Elimination System (NPDES) permits
Generally, 6.13
Definition of point source, 11.137
Report of waste discharge, as application for federal permit, 11.139
State, issuance by allowed, 11.138
Storm water permits (see Storm water permits, below)
When required, 11.137
Permits for discharge (see Implementation by regional boards, above)
Porter-Cologne Water Quality Act as governing, 11.111
Priority pollutants, 11.129
Recycled water regulation
Definition of recycled water, 11.181
Definition of waste, 11.180
Permit options, 11.182-11.183
Waste discharge requirement permits, combining water recycling requirement with, 11.183
Regional boards
Groundwater quality regulation by (see Groundwater quality regulation, above)
Implementation of regulations by (see Implementation by regional boards, above)
Water quality plans, formulation and adoption by, 11.128
Sewage disposal regulations. See **Sewage Disposal**
Statute of limitations, review of regional board actions, 11.152-11.153, 11.156
Statutes relating to water quality, 11.113
Storm water permits
Generally, 11.140
Construction activity, permit requirements, 11.142
EPA delegating storm water permitting authority to State of California, 6.13
Industrial activity, permit requirements, 11.143
Municipal separate storm sewer systems (MS4), permit required for, 11.141
Total maximum daily loads (see Total maximum daily loads (TMDL), below)
§303(d), Clean Water Act lists (see Total maximum daily loads (TMDL), below)
Timing considerations
Citizen suits for enforcement, time for notice of intent to sue, 11.161
Cleanup and abatement orders, hearing, 11.158
Groundwater regulation, time after regional boards recommend additional standards, 11.121
Hearing notice for Water Resources Control Board, 11.124
Total maximum daily loads (TMDL), review of, 11.147
Total maximum daily loads (TMDL)
Generally, 11.144
Adoption, procedure for, 11.146

Agency responsible for, 11.145
Allocation among sources, 11.144
Citizen suits, 11.149
Development, conflicts with, 11.150
Enforcement of, 11.148-11.149
EPA review and approval of, 11.147
Removal of impaired water body from list for TMDL, 11.151
Underground storage tanks, groundwater regulation and, 11.170
Waste discharge requirement permits
Discharges allowed by, specifications for, 11.133
Periodic review required, 11.136
Quasi-judicial act, permit issuance as, 11.134
Report of waste discharge, as application for permit, 11.132
Standards for issuance, 11.135
Water recycling requirement, combining with, 11.183
When required, 11.131
Water quality plans, 11.128-11.129
Water Resources Control Board, role of
Generally, 11.87, 11.112
Anti-degradation policy of, 11.126
Appeal of decision from, 11.153
Applicability of plan to other agencies, 11.125
Approval of regional water quality plans, 11.129
Hearing notice for Water Resources Control Board, 11.124
Nonpoint source management plan adopted by, 11.127
Total maximum daily loads (see Total maximum daily loads (TMDL), above)
Wetlands
Definition of wetland, 10.306, 10.356, 11.175
Environmental Protection Agency (EPA) regulating siting, design, and construction of landfills on wetlands sites, 6.100
Jurisdictional issues (see Jurisdictional issues with wetlands, above)

Water Resources Control Board. See **Water Quality**

Water Resources, Department of. See **Water Supplies**

Water Service
Generally, 6.2
Conservation of water
Generally, 6.6
Reclaimed water (see Reclaimed water, below)
Duties to customers, 6.5
Fees (see Rates and charges, below)
Fluoridation of water supply, 6.10
Franchises. See **Franchises**
Intergovernmental agreements to construct and maintain water mains, 7.185
Rates and charges
Basis of water rates, 6.4
Conservation, rate structure design encouraging, 6.6
Flat or metered rates, 6.4
Proposition 218, effect on fees for service, 5.166, 5.175, 5.180
Setting water rates, 6.3
Rate-setting procedures, 5.169
Reclaimed water
Augmentation of municipal water supplies, 6.7
Permits required for operation of reclaimed water project, 6.9
Regulatory jurisdiction over reclaimed water, 6.8
Sewage disposal. See **Sewage Disposal**
Storm drains. See **Storm Drains**

Water Supplies
Generally, 11.80
Cities' role in
Evaluation of water supply for development projects (see Evaluation of water supply for development projects, below)
General plans, water supply issues included in, 10.56, 11.92
Groundwater management plans, 11.97

Groundwater regulation, 11.96
Regional water management groups, participation in, 11.110
Urban water management plans (see Urban water management plans, below)
Definitions
Sufficient water supply, 11.106
Urban water suppliers, 11.93
Evaluation of water supply for development projects
Agreements with developers, 11.109
Environmental impact reports requirement, 11.98
Subdivisions, written verification for (see Subdivisions, written verification of water supplies for, below)
Water supply assessments (see Water supply assessments, below)
Groundwater, 11.96-11.97, 11.106
Land use, additional requirements for increases to water demand, 10.71, 11.92
Mandamus to compel compliance of water supplier, 11.108
Regional water management groups, participation in, 11.110
Special districts' role in
Generally, 11.88
Planning duties, 11.90
Private water companies, role of, 11.91
Watermasters, management by, 11.89
State role in
Water Resources Control Board responsibilities, 11.87
Water Resources Department (see Water Resources Department, role of, below)
Subdivisions, written verification of water supplies for
Generally, 11.105
Compelling compliance by water purveyors, 11.109
Definition of sufficient water supply, 11.106
Reliance on supplies not currently available, evidence of, 11.107
Urban water management plans
Generally, 11.93
Alternative sources or demand management measures required, 11.95
Requirements of, 11.94
Water Resources Department, as depository for plans, 11.84
Water supply assessments, incorporation of plans in, 11.100
Watermasters, management by, 11.85, 11.89
Water Resources Department, role of
Applications for loans and grants, evaluation of, 11.93
California Water Plan, updating of, 11.81
Depository for urban water management plans, 11.84
Investigation and survey of water resource issues, 11.83
Mandates from governor, acting on, 11.86
State Water Project, operation of, 11.82
Watermasters, establishment of, 11.85
Water supply assessments (WSA)
Generally, 11.99
Contents of, 11.100
Guides for assessments, 11.104
Insufficient water supplies, requirements, 11.101
Justiciability of assessments, 11.102
Substantial discretion of water suppliers, 11.103

Weapons and Firearms
Confiscation and forfeitures, 9.97-9.99
Personal conduct regulation
Generally, 9.94
Second Amendment issues with, 9.95
Preemption of local laws, 9.96
Public Records Act, partial exemption from disclosure for concealed weapons permits, 2.253
Valid overlapping state and local regulation, gun laws as example of, 1.41

Wetlands
Definition of wetland, 10.306, 10.356, 11.175
Water quality issues. See **Water Quality**

Whistleblowers

Confidential information, whistle-blowing statute permitting attorney to disclose, 2.203
Retaliation against whistleblowers prohibited, 4.134

White-Collar Employees. See **Fair Labor Standards Act (FLSA)**

Wild Animals. See **Animals**

Williamson Act (Agricultural Preserves)
Generally, 10.140
Cancellation of contracts limiting use in, 10.143
Contracts limiting use in, 10.141-10.143
Nonrenewal of contracts limiting use in, 10.142
Public improvements on land subject to contract, 10.144
Redevelopment area may not include restricted open spaces, 5.320
Subvention payments to local governments under Act, 1.115
Types of land that may be qualified for protection under, 11.9

Witnesses
Closed session, appearance of witness at, 2.84
Election contest, court clerk issuing subpoenas for witnesses to attend, 3.133
Experts. See **Experts and Expert Witnesses**
Police officer, no requirement of providing witness statements before interrogation of, 4.302
Probation revocation hearing, right to confront witnesses at, 12.63

Words and Phrases. See **Construction and Interpretation; Definitions**

Workers' Compensation
Generally, 4.350, 7.215, 7.286
Amount of benefits
Generally, 4.367
Increase in amount of benefits if payment delayed for refused, 4.374
Benefits
Generally, 4.360
Amount of benefits (see Amount of benefits, above)
Death benefits, 4.373
Disability benefits (see Disability benefits, below)
Medical treatment (see Medical treatment, below)
Permanent disability benefits (see Permanent disability benefits, below)
Prerequisites for recovering benefits (see Prerequisites for recovering benefits, below)
Sole and exclusive remedy for work-related injury, workers' compensation benefits as, 4.352
Construction and interpretation
Liberal construction of statute of limitations, 4.392
Liberal construction of workers' compensation law, 4.355
Defenses
Affirmative defenses to claimed industrial injury, 4.359
Discrimination claim, defenses to, 4.381
Psychiatric injuries, defenses to, 4.357
Statute of limitations, 4.392
Disability benefits
Light duty, effect of employer providing employee with, 4.365
Permanent disability benefits (see Permanent disability benefits, below)
Retirement benefits (see Disability retirement benefits, below)
Temporary disability benefits (see Temporary disability benefits, below)
Disability retirement benefits
Generally, 4.394
Offset of industrial retirement benefits against workers' compensation benefits, 4.396
Workers' Compensation Appeals Board decision, determining binding effect on retirement proceeding, 4.395
Disaster service workers, 6.199
Discrimination against injured worker, penalties for
Generally, 4.379
Defenses to discrimination claim, 4.381
Fair Employment and Housing Act, employee's disability discrimination claim under, 4.380
Government Claims Act, carrier entitled to intervene in personal injury case without presentation of claim, 13.53
Incapacity for retirement purposes, workers' compensation proceedings not conclusive evidence for adjudication of, 4.39
Injury arising out of employment, requirement of

Generally, 4.354
Burden on employee to prove injury work-related, 4.355
Presumptions affecting work-related injuries, 4.356
Special problems of proof applicable to psychiatric injuries, 4.357
Interactive process with employee about claimed disabilities and workplace needs, ADA and FEHA requiring, 4.353
Liberal construction of workers' compensation law, 4.355
Litigation
Generally, 4.382
Compromise and release, settlement by, 4.388
Costs, employer's liability of, 4.384
Discovery, 4.387
Examples of contested issues, 4.383
Expert medical opinion, 4.384
Findings and award, workers' compensation judge issuing, 4.390
Jurisdiction of Workers' Compensation Appeals Board, 4.382
Medical records (see Medical records, below)
Penalties, resolution of, 4.391
Presentation of claim requirements and employer's required response, 4.385
Rejection of liability by employer, time limit for, 4.386
Related litigation (see Related litigation, below)
Stipulations with request for award, 4.389
Medical records
Confidentiality protection for, 4.384
Continuing obligation on employer to serve employee with all medical records, 4.387
Medical treatment
Employer-paid medical treatment, 4.361
Future medical treatment, stipulations with request for award protecting right to, 4.389
Refusal of medical treatment by employee prohibited, 4.364
Treatment provider (see Treatment provider, below)
Penalties
Discrimination against injured worker (see Discrimination against injured worker, penalties for, above)
Resolution of, 4.391
Violation of workers' compensation laws (see Violation of workers' compensation laws, penalties for, below)
Permanent disability benefits
Generally, 4.368
Apportionment of permanent disability between employers, 4.368
Individual jurisdiction's pension plans, employee's industrial disability retirement allowance reduced by amount of permanent disability benefits paid for same condition, 4.371
Permanent partial disability, 4.370
Rating of, 4.369
Supplemental job displacement benefits, 4.372
Prerequisites for recovering benefits
Employees, benefits limited to, 4.358
Injury (see Injury arising out of employment, requirement of, above)
Presumptions
Acceptance of claim by employer, presumption of, 4.386
Treating physician's presumption of correctness, repeal of, 4.384
Work-related injuries, presumptions affecting, 4.356
Prevailing wage law, workers' compensation provision under, 7.57
Proof (see Injury arising out of employment, requirement of, above)
Psychiatric injuries
Disability retirement benefits for, 4.395
Special problems of proof applicable to psychiatric injuries, 4.357
Related litigation
Generally, 4.393
Disability retirement benefits (see Disability retirement benefits, above)
Federal causes of action, 4.398
State causes of action, 4.399
Subrogation action against third party, employer filing, 4.397
Serious and willful misconduct (see Violation of workers' compensation laws, penalties for, below)
Specialized area of practice, workers' compensation law as, 4.351
Statutes of limitations for different types of claims, 4.392
Temporary disability benefits
Generally, 4.365
Amount of, 4.367

Cessation of temporary disability benefits, 4.366
Treatment provider
Employer's choice of physician for 30 days, 4.363
Pre-designation of physician by employee, 4.362
Violation of workers' compensation laws, penalties for
Increase in amount of benefits if payment delayed for refused, 4.374
Late payments, penalty for, 4.376
Multiple penalties, 4.375
Serious and willful misconduct of employee, reduction of recoverable compensation for, 4.378
Serious and willful misconduct of employer, penalty if injury caused by, 4.377

Workplace Safety. See **Safety in Workplace**

Writings
Environmental impact reports (EIRs), writing required for response to comments, 11.41
LAFCO. See **Local Agency Formation Commissions (LAFCOs)**
Pending litigation closed session, city attorney writing memorandum justifying, 2.92

Writs. See **Mandamus, Writ of**

Wrongful Death
Section 1983 actions, scope of wrongful death liability, 13.121

Zoning
Adult entertainment, 10.131-10.132
Affordable housing. See **Affordable Housing**
Agricultural preservation. See **Williamson Act (Agricultural Preserves)**
Airports. See **Airports**
Alcoholic beverages, sale of, 10.138
Annexation, prezoning land for, 1.123
"Big Box" stores, 10.146
California Coastal Act. See **California Coastal Act**
Conditional use permits. See **Conditional Use Permits**
Conditional zoning, 10.128
Definitions
Legal nonconforming use, 10.121
Zoning, 10.84
Density bonuses for affordable housing, consistency with, 10.187
Due process. See **Due Process**
Flood plains, 10.137
General plans. See **General Plans**
Hazardous materials and toxic waste, 10.135
Historical preservation, 10.129
Immunity of zoning commissions from Section 1983 action, 13.125
Land use, Planning and Zoning Law as basis for, 10.2
Local coastal programs, changes to comply with not subject to initiative or referendum, 10.285
Nonconforming uses and structures
Generally, 10.121
Definition of legal nonconforming use, 10.121
Elimination period for nonconforming use, 10.122
Expansion of nonconforming use, 10.123
Open space, action program for, 10.59
Ordinances. See **Zoning Ordinances**
Police power authority for, 10.85
Procedural due process for land use decisions. See **Due Process**
Religion, exercise of
Churches, temples, and houses of worship, 10.133
Religious Land Use and Institutionalized Persons Act (RLUIPA), 10.134
Schools and community colleges, 10.136
Signs, 10.145
Site or design review process, 10.147
Statutory restrictions on, 10.86
Telecommunications services, right-of-way management, 10.139
Variances. See **Variances**

Vested rights
Generally, 10.124
Common law on vested rights, 10.125
Development agreements, 10.127, 10.228, 10.430
Due process issues and. See **Due Process**
Vesting tentative maps, 10.126, 10.430
View protection, 10.130

Zoning Ordinances
Adoption and amendment procedures
Legislative acts, adoptions and amendment as, 10.91
Urgency measures, 10.92-10.93
Airports, zoning and land use regulations relating to. See **Airports**
Domestic animals, use of ordinances to regulate, 9.159
General plan consistency
Charter cities and consistency with general plan, 10.88-10.89
General law cities and consistency with general plan, 10.87
Judicial review, standard for, 10.90
Legislative acts
Findings, when required, 10.95-10.96
Provisions typical of zoning ordinances, 10.97
Notice and hearing requirements, 10.94
Specific purposes. See **Zoning**
State immunity from local zoning and building code regulations, 1.105
Statute of limitations, 10.98
Subdivisions. See **Subdivisions**
Valid overlapping state and local regulation, zoning ordinances as example of, 1.41

© The Regents of the University of California