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Acquiring Property In A Down Market

BY KIRSTEN R. BOWMAN AND MARICELA E. MARROQUIN

The State of California is in an economic crisis. Cities and public agencies are scrambling to cut costs because of the economic uncertainty and the significant loss of revenue from property and sales taxes. Although many agencies are cutting back on public projects, the current real estate market actually presents an excellent opportunity for public agencies to acquire property needed for public projects at a bargain price through a foreclosure action. There is a certain element of risk because the agency must acquire the property "as is," which can include senior liens, environmental issues, and tenant occupancy. Nevertheless, the payoff often outweighs the risk because a public agency can acquire the property in a short time period at substantial savings. This article outlines the procedures an agency should follow if it seeks to acquire property through a foreclosure sale.

The ADVISOR is Going Green!

RW&G launches the first electronic publication of the **ADVISOR** newsletter. We welcome your feedback. If you did not receive this edition directly and would like to be placed on our electronic mailing list, please sign up by contacting ssantana@rwglaw.com.

RW&G Reception at the 2009 League Conference in San Jose

Please be our guest at RW&G's Reception on Thursday, September 17, 2009, from 7:30 to 10:30 p.m., at the annual League of California Cities Conference. The reception will be held at *The Fairmont San Jose*, 170 South Market Street.

LOCATING THE PROPERTY

The first step in locating a foreclosure property is to review the planned future projects. These would include projects in designated redevelopment areas or public works projects such as improvements to existing infrastructure, widening of streets and highways, or construction of sewer and water facilities. Once the agency has identified a project, it can then investigate specific properties it needs to construct the project. A variety of services track foreclosure sales in specific cities. In addition, the agency can review the local newspaper for published trustee's sales, and check with local law enforcement agencies that require banks to register properties in foreclosure to ensure that they are secured and safe during the change of ownership.

INVESTIGATION PERIOD

Once an agency has identified suitable properties in foreclosure or pre-foreclosure, it should obtain a preliminary title report by a title company. It should also obtain the Schedule B documents, which include a copy of the Deed of Trust to Secure an Indebtedness, the amount of the indebtedness, any junior or subordinate agreements or liens, and copies of the Notice of Default, Substitution of Trustee and Notice of Trustee's Sale. The Schedule B documents will also identify the security interest holder (bank or financial institution) and Trustee, the amount of fees and costs associated with the foreclosure proceedings, the sum of money owed on the original Note, and the date and location of the Trustee's Sale. Code of Civil Procedure Section 2924(g) requires the sale to take place in the County where the property is located, between the hours of 9 a.m. and 5 p.m. on any business day, Monday through Friday.

CONTACTING THE TRUSTEE

Once the agency has reviewed the Schedule B documents, it should contact the Trustee to determine: 1) whether the security interest is a

first deed of trust and is not subordinate to any other deeds of trusts or liens; 2) the date and time of the Trustee's Sale; and 3) how payment can be made. In addition and most importantly, the Trustee will confirm the lowest bid amount. The agency, as a bidder, must show that it can legally participate in the auction by demonstrating that it has the minimum bid for the auction.

ENVIRONMENTAL REVIEW

As part of the investigation process, an agency should conduct a Phase I Environmental Site Assessment to identify potential or existing environmental contamination liabilities. If the Phase I study identifies potential contaminants, the agency should conduct a Phase II Environmental

The savings associated with a lower purchase price may offset the expense of any environmental cleanup of the property.

Site Assessment to collect and analyze samples from the property. This will require contacting the property owner and requesting a right of entry onto the property to conduct more invasive testing.

In a foreclosure action, property is acquired "as is," meaning that if the property is contaminated, the agency will be responsible for any environmental cleanup. However, because the foreclosure sale will move forward as scheduled, there may not be enough time for Phase II testing if contamination is identified during the Phase I study. At this juncture, the agency will need to weigh the risks of acquiring the property without having conducted Phase II testing. The savings

associated with a lower purchase price may offset the expense of any environmental cleanup of the property.

APPRAISAL AND BOARD APPROVAL

Prior to bidding, the agency must appraise the property. Typically, an appraisal takes approximately six to eight weeks so it is advisable to retain an appraiser as soon as possible. Once the appraisal is complete, the agency can determine whether it is economically advantageous to acquire the property through a foreclosure sale. The agency must then seek board approval to acquire the property for a price at or near the appraised value.

Once the agency has authority to purchase or bid on the property, the agency must obtain the funds for the auction. California Code of Civil Procedure Section 2924(h)(b) provides that a Trustee may require a party bidding at a foreclosure sale to demonstrate that it can pay the full amount of the bid by cash or a cashier’s check(s). If the agency intends to pay by cashier’s check, it should ensure that the bank will refund the cashier’s check should the agency not acquire the property. The agency should obtain a cashier’s check for the minimum bid amount and the remaining checks in increments of \$50,000. The checks should total the amount the Board authorized to purchase the property.

PURCHASING THE PROPERTY

Trustee’s Sales are frequently postponed so the agency should contact the Trustee the day before the sale to confirm the date and time of the auction. The day of the sale, the agency should advise the Trustee that it intends to bid on a particular property and show the Trustee the cashier’s check for the minimum bid qualification. Once the bidding begins, it is permissible to simply bid one cent over the minimum bid price. The agency should be careful not to bid on the property for more than the appraised value.

It is likely that an agency will not have a cashier’s check for the exact amount of the purchase price, in which case, the bidder should obtain the Trustee’s agreement to reimburse the agency for any money paid over the purchase price. Code of Civil Procedure Section 2924 provides that a Trustee’s Sale is deemed perfected as of 8 a.m. on the actual date of sale if the Trustee records the deed within 15 calendar days, or the next business day following the 15th day if the county recorder is closed on the 15th day. The agency must ensure that the Trustee’s deed is recorded as soon as possible to confirm transfer of ownership right to the property.

CONCLUSION

Purchasing property through a foreclosure action is a complicated process that occurs within a relatively short period of time. An agency that is interested in acquiring foreclosure property should conduct its due diligence early in the process to determine whether it is economically advantageous to purchase property at a foreclosure sale and assess the risks. The mere fact that a property is in foreclosure does not necessarily mean acquiring it will be a “good deal,” particularly if more money is owed on the property than it is worth.

The procedures outlined above are not all-inclusive. Therefore, an agency should consult with an attorney or foreclosure specialist before embarking on a foreclosure acquisition. On the other hand, acquiring foreclosure property may enable an agency to buy property for needed public facilities at bargain prices.

FOR ADVICE FROM RW&G ON ACQUIRING FORECLOSURE PROPERTIES, PLEASE CONTACT KIRSTEN R. BOWMAN OR MARICELA E. MARROQUIN OR ANY OF THE LAWYERS IN THE FIRM’S EMINENT DOMAIN PRACTICE GROUP .

ENVIRONMENTAL

Sustainability: There’s a New Buzz in Town

BY NORMAN A. DUPONT

Malcolm Gladwell in his book, *The Tipping Point*, vividly described how a concept moves from a mere small idea to the next big thing. Recent literature suggests that the term “sustainability” has reached its tipping point, and is now the next and most fashionable concept for cities and counties to consider. What does it mean, and how can cities address this new concept of “sustainability?”

THE CONCEPT OF “SUSTAINABLE” DEVELOPMENT

Sustainability, like an amoeba, is an amorphous term that quickly adjusts to the particular factual circumstances in which it is applied. Thomas Friedman suggests the global need for a “whole new system” for avoiding “dirty fuels;” his system involves both encouraging new clean energy systems, energy efficiency, and what he terms “an ethic of conservation.” T. FRIEDMAN, *Hot, Flat and Crowded*, 181-197 (2008 Ed.). Professor John Dernbach quotes the U.N. Commission on Environment and Development’s definition of: “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” J. DERNBACH, *Agenda for a Sustainable America*, 7 (ELI Press 2009). In the West, Marc Reisner described the overuse of the Colorado River as a metaphor of sustainability: “[T]he history of the Colorado River contains a metaphor for our time. ... amid the salt-encrusted sands of the river’s dried-up delta, we began to founder on the Era of Limits.” M. REISNER, *Cadillac Desert: The American West and its Disappearing Water*, 121 (Res. Ed. 1993).

Whether one starts with a global perspective, a purely American perspective, or even a

perspective limited to the American West (or California in particular), it is clearly fashionable to suggest an “Era of Limits” that requires that we treat natural resources (water, power sources, and the like) with an entirely new ethic of care and conservation. In short, the new buzzword, “sustainability,” suggests that cities and their residents implement a development model based not just upon current resources at hand, but with a goal of preserving those resources for future generations.

IMPLEMENTING SUSTAINABLE DEVELOPMENT

Many cities and counties have already developed a plethora of programs to implement sustainable development. The City of Los Angeles (and many others) implemented a “green building” ordinance that rewards those developers who adopt strict standards (the “Leadership in Energy & Environmental Design” or “LEED” program) for new projects greater than 50,000 gross square feet or major renovations of older projects of similar size. In Los Angeles, projects that achieve a “LEED-silver” or higher level of sustainability merit expedited processing in its building review department. (City of Los Angeles, Ordinance Number 179820). Not to be outdone, the City of San Francisco has a similar “green building” ordinance that applies to structures that are 25,000 gross square feet or larger.

The California municipal push for “sustainable” growth goes far beyond just a few major urban coastal cities. In the City of Palm Desert, whose closest water body, the Salton Sea, is the accidental excess of the unruly Colorado River, a new drive toward energy efficient air conditioners, solar panels, and other devices has proved to be an extremely popular program among its largely conservative constituency. The City is one of the first to implement provisions of Assembly Bill 811 (Levine), passed just last year as urgency legislation. This statute allows cities

to implement special “assessment zones” to assist in financing new energy-efficient projects for residents. Similarly, the City of Riverside, located in the heart of the “Inland Empire,” adopted its “Green Action Plan,” which states that the City plans to become a “clean, green and sustainable community.”

California cities and community organizations have also sought new ways to continue development by innovative new uses of a scarce resource — water.

In addition, some cities and counties are working to achieve a regional sustainable energy system. Marin County, together with its constituent cities, established a Joint Powers Authority designed to allow County residents to purchase more efficient, lower-carbon sources of energy. (Marin County Ordinance Number 3505, November 2008). This project builds upon a state statute, Assembly Bill 117 (Migden), which allows communities to select their own electrical preferences in “community choice aggregation” programs.

California cities and community organizations have also sought new ways to continue development by innovative new uses of a scarce resource — water. The City of Clovis commenced construction on a water reuse facility that will treat “used” water and make it fit for a variety of non-potable applications. In the San Gabriel Valley, an adjudicatory “watermaster” body, the

Main San Gabriel Basin Watermaster, worked with a coalition of public and private water districts and private industry to fashion a \$300 million-plus cleanup of local groundwater contaminated by decades of industrial processes. The groundwater is treated to a degree that it can be used as a potable water source, avoiding reliance upon the already over-stressed Colorado River or the increasingly limited Northern California water sources.

CONCLUSION

California and its cities and counties have been among the most innovative entities in the world, creating a vast economy of agriculture in parched lands and an entire industry devoted to imagination and animation. “Sustainability” may be a new buzzword, but there is little doubt that cities and counties in this State are more than capable to catching on and leading the trend.

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PUBLIC FINANCE

Build America Bonds: A New and Innovative Financing Tool for State and Local Governments

BY KATRINA C. GONZALES

The American Recovery and Reinvestment Act of 2009 contains a number of important financing tools that provide state and local governments with access to much-needed funding for capital projects. One such provision authorizes the creation of a new category of taxable governmental bonds known as Build America Bonds (“BABs”). BABs offer an innovative feature that allows issuers of state and local governmental bonds to receive direct subsidy payments from the United States Treasury Department in lieu of providing traditional tax-exempt interest or tax credits to bondholders. The Internal Revenue Service recently issued Notice 2009-26 and provides guidance on the types of eligible projects and financing, direct federal subsidy payment procedures, and election requirements for BABs.

WHAT ARE BABs?

BABs are any taxable state or local governmental bonds (but not private activity bonds) issued before January 1, 2011 that meets the requirements for traditional tax-exempt bonds and does not have an issue price with more than a de minimis amount of premium over the bond’s stated principal amount. State and local governments must make an irrevocable election to issue bonds as BABs (including the type of BABs) on or before the issue date of the bonds. They may issue two general types of BABs: Direct Payment BABs, which allow issuers to receive a federal subsidy payment equal to 35% of the interest payment on the bonds; or Tax Credit BABs, which allow bondholders to receive a tax credit equal to 35% of the interest payment on the bonds.

DIRECT PAYMENT BABs

The direct payment option provides a federal subsidy of approximately 35% of the issuer’s taxable borrowing cost. As a result, state and local governments would have lower net borrowing costs and would be able to reach more sources of borrowing than with traditional tax-exempt or tax credit bonds. To illustrate, a city that elects to issue Direct Payment BABs at a 10% taxable interest rate would receive a payment from the Treasury Department that would result in a net borrowing cost of only 6.5% on a bond that actually pays 10% interest.

Section 54AA(g) of the Internal Revenue Code (Code) limits the use of proceeds and types of financing available for Direct Payment BABs. While state and local governments may issue Tax Credit BABs (described below) for any governmental purpose for which tax-exempt governmental bonds could be issued, they may only issue Direct Payment BABs for:

1. Capital expenditures (which normally include costs to acquire, construct, or improve land, buildings, and equipment, but not working capital expenditures);
2. Issuance costs not exceeding 2% of the proceeds; and
3. A reasonably required reserve fund as provided by Section 150(a)(3) of the Code.

In addition, Direct Payment BABs may not be used for refundings except to reimburse capital expenditures and costs paid or incurred after February 17, 2009 that were originally financed with temporary short-term financing issued after that date.

Issuers of Direct Payment BABs must report the issuance on IRS Form 8038-G and request each direct payment on the new IRS Form 8038-CP.

Notice 2009-26 outlines additional reporting requirements and payment procedures for both fixed rate and variable rate Direct Payment BABs. See IRS Notice 2009-26 (Apr. 3, 2009). The IRS indicated it plans to begin making direct payments to bond issuers as early as July 1, 2009. Further, the IRS and Treasury Department are soliciting public comment on all aspects of direct payment procedures, including comments regarding efficient methods of making direct payments, the workability of proposed procedures for state and local governments, ongoing compliance standards, and the procedural tax framework for Direct Payment BABs.

TAX CREDIT BABs

If the state or local entity elects to issue Tax Credit BABs, bondholders would be entitled to a tax credit equal to 35% of each interest payment payable on each interest payment date. Although the credit is nonrefundable, the bondholder may carry forward the unused portion to succeeding taxable years if it exceeds the limitation imposed by Section 54AA(c) of the Code.

Unlike Direct Payment BABs, Tax Credit BABs are not subject to the 2% cost of issuance limitation and may be used to finance capital and working capital expenditures. Further, they may involve the same types of financings as traditional tax-exempt governmental bonds (for example, original new money financings, current refundings, and one advance refunding).

Issuers of Tax Credit BABs must report the issuance on IRS Form 8038-G. Additional reporting requirements are listed in Notice 2009-26.

TRADITIONAL TAX-EXEMPT BOND RULES APPLY TO BABs

BABs are not federally guaranteed on the basis of the tax credit or direct payment provided by

the Treasury Department. In addition, BABs are subject to arbitrage rules contained in Section 148 of the Code. For purposes of those rules, the yield on Tax Credit BABs is calculated without an adjustment for the tax credit provided to bondholders. In contrast, the yield on Direct Payment BABs is calculated by reducing the interest paid to bondholders by the amount of direct payments received from the Treasury Department.

Failure of a BAB to comply with underlying tax-exempt bond rules would result in a retroactive loss of BAB status. This presumably would expose holders of Tax Credit BABs to a retroactive loss of tax credits and expose issuers of Direct Payment BABs to an obligation to return the full amount of the subsidy payment previously received from the Treasury Department.

CONCLUSION

BABs offer an innovative way for state and local governments to finance necessary capital projects such as public buildings, schools, transportation infrastructure, public safety facilities and equipment, water and sewer project facilities, environmental and energy projects, and public utilities. They signal a shift in approach to subsidizing municipal obligations as the federal government seeks more creative ways to help revitalize local communities and address the current economic climate.

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PUBLIC LAW

California Supreme Court Rejects “Bright Line” Due Process Hearing Rule

BY ROY A. CLARKE

A public agency’s administrative hearing process does not violate the rights of an appellant based on the mere appearance of impropriety, a unanimous California Supreme Court confirmed. In *Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal.4th 731 (2009) (*Morongo*), the Court rejected a bright line “relationship-bias” rule that would prohibit an agency from relying on its attorney for advice in one matter, when the same attorney advocates or prosecutes an unrelated matter before the same decision maker.

BACKGROUND

Local agencies often use administrative hearings to resolve disputes, such as code enforcement, and appeals in personnel, zoning, planning, and similar matters. An agency conducting adjudicative proceedings must provide for a fair tribunal in which the decision maker is impartial, free of bias for or against a party. Except where an adjudicator has a financial interest in the outcome, this has traditionally required a showing of actual bias and not just an appearance or possibility of bias.

But following the Supreme Court’s 2002 decision in *Haas v. County of San Bernardino*, 37 Cal.4th 310 (2002), outside parties involved in administrative hearings found fertile ground for delaying proceedings and challenging unfavorable decisions based on the relationships between decision makers (such as hearing officers or members of city councils, boards or commissions) and the agency or its attorneys. This caused significant added burden

and expense on local agencies. *Morongo* provides clarification and relief to public agencies.

THE FACTS

In *Morongo*, the State Water Resources Control Board (Board) initiated administrative proceedings to consider the proposed revocation of a water rights license held by the Morongo tribe. For such proceedings, some agency staff members are assigned to an enforcement team to prosecute the action, while others are assigned to a hearing team, providing advice to the Board. From the limited number of staff attorneys that specialized in water rights, two were assigned, respectively, to the prosecuting and advisory teams in the Morongo case. Agency staff followed formal procedures to assure separation of the prosecution and advice functions, to screen personnel, and to prevent improper *ex parte* communications with the hearing officer by one party outside the presence of the other.

THE CHALLENGE

Staff Counsel Samantha Olsen was assigned to the Morongo enforcement team and was simultaneously assigned to the advisory team in an unrelated matter involving a different region of the state. The Morongo tribe sought to disqualify Ms. Olsen and the entire enforcement team because of “an inappropriate and impermissible appearance of unfairness and bias sufficient to compel ... removal.” 45 Cal.4th at 734. They relied on *Quintero v. City of Santa Ana*, 114 Cal.App.4th 810 (2003), which suggested that once a person serves in the role of neutral adviser to a decision maker, that person could not at the same time, or perhaps even at a later time, serve as a prosecutor or advocate in a different matter.

The Court of Appeal in *Morongo* accepted this argument, reasoning that “[h]uman nature

being what it is, the temptation is simply too great for the . . . Board members, consciously or unconsciously, to give greater weight to Attorney Olson’s arguments by virtue of the fact she also acted as their legal adviser, albeit in an unrelated matter.” 45 Cal.4th at 741. To some, *Quintero* and other cases decided following *Haas* represented “an evolution of the law in due process jurisprudence.” Court of Appeal Slip Opinion, *Morongo Band of Mission Indians v. State Water Resources Control Board*, C052177 July 12, 2007, at page 9. The Court of Appeal in *Morongo* attempted to synthesize these recent due process cases into a new “appearance-of-bias” standard to analyze challenges to the impartiality of administrative proceedings. *Id.* Such a rule would prevent one person from serving as advocate or prosecutor before a decision maker if that person had provided neutral advice or representation in the past. It would also provide a basis to challenge a proceeding in which such a person improperly participated, even if inadvertently. Potentially, it would serve as a bright-line rule prohibiting a person who had served as a neutral advisor from subsequently serving a different role before the same decision maker.

The *Quintero* and *Haas* cases, and others that followed, resulted in significant added expense and logistical challenges for public agencies, as they were required to assign or retain, and pay for, multiple attorneys to serve in prosecutorial and advisory roles in pending cases to avoid even the most remote possibility of a perception of bias.

THE SUPREME COURT’S DECISION

The Supreme Court rejected the Court of Appeal’s shift to an appearance-of-bias standard and reaffirmed the requirement to show actual bias. The Court distinguished *Quintero*, noting that in that case, the city’s “internal separation of functions had not been

maintained” and the attorney had become the “sole or primary legal advisor” for the city’s board. *Id.* at 740. This contrasted with the Water Board in *Morongo*, where, although limited, there were several water rights attorneys involved. In a footnote, the Supreme Court specifically disapproved any language in *Quintero* that is inconsistent with the *Morongo* decision. 45 Cal.4th at 740, fn. 2. The Court concluded:

“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.” *Id.* at 741-742.

CONCLUSION

The *Morongo* decision is welcome relief for local agencies performing administrative functions with limited resources. It allows more flexibility in the assignment of staff and use of legal counsel. It also reaffirms the presumption that a decision maker will be impartial in reaching a decision, absent proof to the contrary.

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EMPLOYMENT LAW

Supreme Court Upholds Termination of Public Employee Who Refused to Answer Questions Without Formal Grant of Immunity

BY D. CRAIG FOX

On February 9, 2009, the California Supreme Court decided *Spielbauer v. County of Santa Clara*, 45 Cal.4th 704 (2009). The Court held, in a unanimous decision, that a public employee can be terminated for refusing to answer potentially incriminating work-related questions, even in the absence of a formal grant of immunity. This decision restores certainty to administrative investigations of public employees and reaffirms the long-standing principle that public employers can compel employees to answer questions during administrative investigations.

BACKGROUND

While defending a client, Deputy Public Defender Thomas Spielbauer (Spielbauer) made false representations to the judge concerning the availability of a witness in order to introduce helpful hearsay statements. In an ensuing internal investigation, Spielbauer's supervisor advised him that his answers could not be used against him in a criminal proceeding and that he could be disciplined for not answering. Spielbauer then refused to answer his supervisor's questions about the incident, based on advice of counsel who contended that Spielbauer must first be given a "formal grant of immunity." Spielbauer was terminated for insubordination, gross misconduct and seeking to mislead a court.

Spielbauer challenged his termination in a petition for a writ of mandate, which the trial court denied. The court of appeal reversed, finding that the supervisor's criminal advisement

was insufficient to compel Spielbauer's responses under threat of discipline. The Supreme Court granted review to consider the specific question, whether a public employer must first offer immunity from criminal charges stemming from an employee's statements, after the employee invokes the Fifth Amendment right against self-incrimination, before terminating the employee for refusing to answer questions related to work misconduct. The Court's answer was "no." 45 Cal.4th at 714.

THE COURT'S ANALYSIS

The Supreme Court first acknowledged the well established rule that incriminating answers may be compelled, without violating the Fifth Amendment, when the person being questioned receives immunity against all direct and indirect prosecutorial use of the answers. Relying on United States Supreme Court and other federal cases, the Court then considered how the privilege against self-incrimination operates in employment situations. In particular, the privilege protects a public employee from being forced to provide incriminating answers to questions under threat of dismissal, when those answers could be used in a criminal proceeding, *even though the employer provides no advance formal grant of immunity.*

Significantly, the Court noted that the privilege against self-incrimination provides no protection against *non-criminal* use of compelled responses. Therefore, the employer may use such responses for adverse employment purposes, including termination, provided the employer does not require the employee to waive the right against self-incrimination. The United States Supreme Court has never held that during a non-criminal investigation, "an employee must be offered *formal immunity* from criminal use before being compelled, by threat of job discipline, to answer questions on that subject." *Id.* at 718. In fact, the Court observed that the

United States Supreme Court has consistently chosen not to change this rule even though it has had the opportunity to do so for over forty years.

The Court then reviewed California cases addressing application of the Fifth Amendment in employment matters. Among them is *Lybarger v. City of Los Angeles*, 40 Cal.3d 822 (1985), where a police officer, who had not been advised of his right to remain silent, refused to answer questions related to official misconduct and was terminated. A trial court upheld the termination. The court of appeal found that the officer had no legal right to be free from an employment-related sanction for his refusal to answer the questions, since under existing law any incriminating statements could not be used against him whether or not he was advised of his constitutional right to remain silent. However, the Supreme Court reversed, ruling that the Public Safety Officers Bill of Rights Act provided the officer with the right to be advised of his right to remain silent, subject to employment sanctions in so doing, and that any answers could not be used against him in a criminal proceeding. The Court did not address the Firefighters Bill of Rights Act, enacted after the appellate decision in *Spielbauer*, which contains a statutory requirement for a formal grant of immunity. [Government Code Section 3253(e)(1).]

PUBLIC POLICY CONSIDERATIONS

Finally, the Court reviewed the purpose behind a public employer’s right to question an employee under threat of discipline, without providing formal immunity. Public employees are held to a higher standard and “owe unique duties of loyalty, trust, and candor to their employers, and to the public at large.” 45 Cal.4th at 725. The Court reasoned:

“Public agencies must be able promptly to investigate and discipline their employees’

betrayals of this trust. In the vast majority of cases, the urgent administrative need to root out and eliminate misfeasance or malfeasance by public employees takes priority over any penal implications...The Constitution cannot mean that a public employee may refuse with impunity to account for his or her performance on the public payroll, and may delay the progress of an employer’s inquiry, unless and until he or she obtains a formal and legally binding guarantee that any statements obtained by the employer will never be used to prosecute the employee on criminal charges.” *Id.* at 725-726.

CONCLUSION

Ultimately, the California Supreme Court found that *Spielbauer* had been accurately, though unnecessarily, advised that any answers he gave to his supervisor’s questions could not be used against him in a criminal prosecution, and that he was properly terminated for refusing to answer those questions since he had no state or federal right to receive a formal grant of immunity from criminal prosecution. The Court recognized the importance of ensuring that public agencies are able to conduct prompt and thorough investigations of their employees when misconduct is suspected, regardless of any incidental burden this places on prosecution of the employee. While the Court declined to decide whether *Lybarger* warnings are required for non-police employees, a methodical approach, including *Lybarger* warnings, is advisable for all public employees.

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PUBLIC LAW

Lack of Transparency Can Be Expensive for Local Agencies

BY GENA M. STINNETT

A recent case, *Galbiso v. Orosi Public Utility District*, 167 Cal.App.4th 1063 (2008) (*Galbiso*), highlighted the importance of openness and access in local government functions. A public agency was required to pay a resident’s attorneys’ fees where the agency placed a series of roadblocks in the way of the resident’s efforts to gain access to *all* public records, and to voice her grievances at the agency’s board meeting. The court ruled the agency violated both the Ralph M. Brown Act [Government Code Sections 54950 *et seq.* (Brown Act)] and the Public Records Act [Government Code Sections 6250 *et seq.*]

BACKGROUND

Galbiso involved a long running dispute between a public utility district (agency) and a property owner. The agency had assessed the owner’s real property for sewer hookups, which went unpaid, ultimately resulting in the agency foreclosing on the property. The owner attempted to exercise certain rights under the Brown Act and the Public Records Act to help defend against the foreclosure action. When the agency blocked her attempt to assert her rights, the property owner sued.

Prior to trial, the parties entered into a settlement agreement by which the agency agreed to abide by the Brown Act and the Public Records Act, but admitted no wrongdoing. The parties asked the trial court to decide whether the plaintiff had prevailed for the purpose of awarding attorneys’ fees. The agency argued the property owner had not prevailed because she had merely succeeded in obtaining the agency’s agreement to follow

the law, which it claimed to have been doing. The trial court denied an award of attorneys’ fees, but the appellate court reversed, concluding the property owner was the prevailing party because the local agency had violated both the Brown Act and the Public Records Act.

BROWN ACT VIOLATIONS

The agency violated the Brown Act in two respects. First, it interfered with or denied the property owner’s right to speak at its board meetings. Second, the agency failed to make the required disclosures before going into closed session.

The agency interfered with the property owner’s right to speak in various ways. When the property owner attempted to speak about the foreclosure lawsuit during the time for public comments on non-agendized items, the agency instructed her to refrain from doing so. When she refused, the agency stopped the meeting and called the sheriff. When the meeting resumed, the Board’s chair moved onto the next agenda item and did not take the property owner’s public comments. The Board then went into closed session to discuss the tax sale of the owner’s real property, and when it resumed the public session, the Board voted on the resolution to sell the property without inviting public comment on it.

These actions violated the Brown Act, which provides that a local agency must allow the public to comment on the topics that will be discussed in closed session prior to going into closed session. Further, during the public comments period at regular meetings of a local agency, the public is permitted to comment on any matter within the subject matter jurisdiction of the local agency, including pending litigation between the agency and the commenter. Also, before voting on an item, the local agency must allow public comment on it. Finally, instead of reading “the title of or otherwise specifically

identify[ing] the litigation to be discussed” as required by the Brown Act, the agency merely read off the item numbers on the agenda. While this is permissible for some types of closed

The agency violated the Public Records Act by denying the property owner access to the agency’s offices to inspect public records...

sessions, it is not adequate when the local agency is a party to litigation that has been initiated formally. [Government Code Sections 54954.9, 54957.7(a).]

PUBLIC RECORDS ACT VIOLATIONS

The agency violated the Public Records Act by denying the property owner access to the agency’s offices to inspect public records and by requiring her to make her requests in writing. The Public Records Act permits oral requests and local agencies must honor such requests. *Los Angeles Times v. Alameda Corridor Transportation Authority*, 88 Cal.App.4th 1381, 1392 (2001). The property owner had repeatedly gone to the agency’s offices to inspect public records. The agency’s superintendent asked her to leave after she “repeatedly and loudly” demanded that staff produce certain documents. 167 Cal.App.4th at 1086. The agency then sent the property owner’s attorney a letter indicating the agency would comply with any Public Records Act request submitted in writing, provided the records were not exempt from disclosure under the Act.

Even though the agency produced no documents as a result of the lawsuit, the court ruled that the

agency’s actions, including effectively denying access to “all” public records, merited ordering the agency to pay the property owner’s attorneys’ fees. 167 Cal.App.4th at 1087.

CONCLUSION

This decision serves as a reminder that public agencies should be vigilant in ensuring that they comply with the provisions of the Brown Act and the Public Records Act, even when faced with a difficult resident. Rebuffing such demands can lead to expensive consequences, including a judicial order to pay attorneys’ fees incurred by the resident to contest denial of access to public records or to speak at a public meeting of the agency’s board.

FOR ADVICE ABOUT THE BROWN ACT OR THE PUBLIC RECORDS ACT, PLEASE CONTACT GENA M. STINNETT OR ANY OF THE LAWYERS IN THE FIRM’S PUBLIC LAW DEPARTMENT.

LITIGATION VICTORIES

Mitchell E. Abbott and **Ginetta L. Giovinco** prevailed in the Court of Appeal earlier this month in a contested validating action challenging the issuance of refunding certificates of participation by the City of Poway, in *Poway Royal Mobilehome Park Owners Assn. v. City of Poway*, Court of Appeal Number D053646. The Court of Appeal, hearing the matter on an expedited schedule, affirmed the San Diego Superior Court judgment upholding the validity of the City’s actions.

Saskia T. Asamura and **Susan E. Rusnak** obtained dismissal of a lawsuit alleging violations of the Fair Employment and Housing Act in *Harrison v. City of Brea*, Orange County Superior Court, Case Number 30-2008-00110478. Plaintiff sued the City and 17 individual City officials and employees alleging harassment due to religion and reporting violations of law, retaliation, discrimination, and related claims. After sustaining two demurrers but allowing plaintiff leave to amend the complaint, the court ultimately ruled plaintiff failed to present any allegations to substantiate his claims.

Saskia T. Asamura and **Robert C. Ceccon** obtained dismissal of two County employees in *Fishback v. County of Ventura*, Ventura County Superior Court, Case Number CIV 244304. Plaintiffs belatedly sought to bring the employees into an existing lawsuit against the County as Doe defendants long after it was filed. The County employees argued they were not proper Doe defendants because their identities were known to plaintiffs when they filed their initial complaint. When the trial court initially denied the motion to quash brought on behalf of the two employees, the employees filed a petition for peremptory writ with the Second District Court of Appeal, Sixth Division. The appellate court issued an Order and Alternative

Writ that commanded the trial court either to grant the motion to quash or to show cause. The trial court entered a new order granting the motion to quash and to dismiss the action as to the two individual County defendants, and denied plaintiffs’ motion for reconsideration of that order.

Toussaint S. Bailey and **T. Peter Pierce** prevailed on behalf of the City of Upland in *Chang v. City of Upland*, Case Number E046204, before the California Court of Appeal, Fourth Appellate District, Division Two. A group of property owners filed a petition for writ of mandate challenging a City Planning Commission decision and City Council affirmance that permitted construction and operation of a new animal shelter at a park owned and operated by the City. The San Bernardino County Superior Court ruled the claim against the Planning Commission was precluded as a matter of law because the Commission’s initial decision to permit the shelter was not the final administrative decision on the matter—a prerequisite to administrative mandamus. The trial court also rejected claims against the City and City Council because petitioners could not establish their compliance with a state statute that governs the manner in which zoning challenges may be brought against local governments. On appeal, petitioners argued that the trial court should have treated the claim against the Planning Commission as a claim against the City and City Council as well. The Court of Appeal summarily rejected petitioners’ position and affirmed the trial court’s judgment in its entirety.

Patrick “Kit” Bobko prevailed in the Second District Court of Appeal, Division One, in *City of Monrovia v. Buckner et al*, Case Number B209987. The City, its residents and the public have been using the Sawpit Wash trail in the City of Monrovia since the 1950s, and this lawsuit obtained a permanent recreational easement for the continued use of the trail. The trail ran over a

portion of private property owned by an individual who attempted to close access to the trail in 2007. The trial court found the City had obtained a permanent recreational easement under Civil Code Section 1009(d) on summary judgment, and the Court of Appeal affirmed.

Robert C. Cecon prevailed in the Second District Court of Appeal, Division Six, in *Cule v. County of Ventura*, Case Number B209795. The Case was brought by a homeowner who alleged she was damaged by a landslide. RW&G represented the County of Ventura. The trial court dismissed the lawsuit against the County after RW&G argued that plaintiff failed diligently to prosecute the action, and failed to bring it to trial within two years. The Court of Appeal affirmed.

Roy A. Clarke helped a City prevail in labor arbitration on a claim of unlawful retaliation under the Meyers-Milias-Brown Act. The union president alleged that his transfer of work location and assignment within his classification was made in retaliation for protected union activity. While acknowledging a variety of protected activity, disputes and conflicts between the City and union, the arbitrator found that the transfer had not actually harmed the union president since the pay, benefits, work and other conditions were substantially the same before and after the transfer. In addition, the arbitrator noted that the transfer was within the retained discretion of management under the MOU and the union had failed to show that the City did not have a legitimate operational basis for the change.

B. Tilden Kim and **Maricela E. Marroquin** obtained a temporary restraining order and preliminary injunction on behalf of the People of the State of California and the City of Highland in *People v. King*, San Bernardino County Superior Court, Case Number CIVDS 906692. The City sought to prevent a motorcycle gang

from hosting an illegal party at the headquarters of an alleged philanthropic organization. The Court granted the temporary restraining order and further enjoined defendants from sponsoring or hosting any events at the philanthropic headquarters without first obtaining a special event permit and from using the property for any use other than as a philanthropic headquarters.

Maricela E. Marroquin prevailed in a small claims appeal on behalf of the Mountains Recreation and Conservation Authority (MRCA) in *Johnson v. MRCA*, Los Angeles Superior Court, Case Number SM 08A02841. Johnson, as President of United Lesbians of African Heritage (ULOAH) and ULOAH filed an action for breach of contract and discrimination under the Unruh Act against MRCA challenging MRCA's denial of ULOAH's application to use Temescal Canyon Gateway Park for a four-day retreat. The MRCA lost in small claims court and the court awarded plaintiff \$5000 plus costs. The small claims appeal court reversed, ruled in favor of the MRCA, and ordered Johnson and ULOAH to pay the MRCA its costs.

Sayre Weaver, T. Peter Pierce and **Veronica Gunderson** achieved victory in the United States Court of Appeals for the Ninth Circuit, successfully defending a regulation adopted by Alameda County that bans the possession of firearms on County-owned property. The regulation was adopted in the wake of a shooting that resulted in several injuries at the County Fairgrounds. In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), the Court rejected challenges to the County's ordinance brought by a gun show operator, and held that the ordinance is valid under the First Amendment, Second Amendment, and the Equal Protection Clause of the Fourteenth Amendment.

PUBLICATIONS

Debbie Cho and **Michael Estrada** authored an article entitled “Using Design-Build Can Save Money on Public Construction” in the May 2009 edition of Western City. Copies of the article are available upon request to dcho@rwglaw.com.

Norman A. Dupont authored an article titled “Supreme Court Rules on Federal Preemption of State Unfair Trade Practices Act: A Renewed Constitutional Presumption Against Preemption” in the January 2009 edition of the American Bar Association (ABA), Environment & Energy Resources Constitutional Law Committee Newsletter. Norm also authored an article titled “NEPA and Climate Change: Are We at the ‘Tipping Point’?” in the Spring 2009 edition of the ABA, Natural Resources & Environment Section. Copies of both articles are available upon request to ndupont@rwglaw.com.

Gena M. Stinnett authored an article titled “Bolting The Doors Can Be Costly: ‘Effective Denial of Access’ Theory Affords CPRA Plaintiffs Attorney Fees” in the Spring 2009 edition of the Public Law Journal. A copy of the article is available upon request to gstinnett@rwglaw.com.

PRESENTATIONS

Roy A. Clarke presented “Performance Appraisals: Using Them Effectively and Legally in Your Agency” at the annual training seminar of the Southern California Public Management Association - Human Resources on April 16, 2009. Roy also presented management training to Fire Department Command Officers on the “Supervisor’s Guide to the Firefighters Procedural Bill of Rights Act.” He conducted training on Fair Labor Standards Act compliance for local agency supervisors. He also continues to make presentations on “Sexual Harassment Prevention Training for Supervisors” to meet the biennial training requirements of AB 1825.

Kevin G. Ennis presented a paper entitled “Significant California Land Use Legislation in Calendar Year 2008” to the Planning Directors Association of Orange County at their meeting in Costa Mesa on February 9, 2009. Kevin also conducted a seminar for UCLA Extension’s Public Policy Program for Planning Commissioner training on conflicts of interest and ethics laws in Los Angeles on February 9, 2009. He also served as a co-instructor of an Advanced Seminar on the Subdivision Map Act in Los Angeles on June 12, 2009.

Steven L. Flower served on a panel of speakers at the League of California Cities, Mayors and Council Members Executive Forum, for a presentation entitled “Making Design-Build Work for Your City,” on May 27, 2009.

James L. Markman presented “Reasonable Accommodations From Zoning Regulations Related To Handicapped Housing” at the League of California Cities, City Attorneys Division Conference, on May 6, 2009.

Trisha Ortiz participated in a panel discussion at the Palm Desert Assembly Bill (AB) 811

Conference. This one day, intensive conference compared and contrasted emerging program models for providing municipal financing for renewable energy and energy efficiency improvements to private property. Local governments, financial institutions, and public/private sector representatives from throughout California joined together on June 12, 2009 to hear about the opportunities and key considerations associated with AB 811 Financing. Trisha worked with the City of Palm Desert to draft AB 811, which became law as an urgency measure in July 2008.

Gena M. Stinnett presented “All Things Electronic: Advising Public Officials on Email Best Practices and Electronic Records” at the City Attorneys Association of Los Angeles County meeting on June 18, 2009. Gena also served on a panel of speakers at the League of California Cities, Mayors and Council Members Executive Forum, for a presentation entitled “Best Practices for Use of Email” on May 28, 2009, and presented “Electronic Records” at the meeting of the Orange County City Clerks on April 13, 2009.

Sayre Weaver served on a panel of faculty speakers at the American Bar Association (ABA) presentation entitled “Gun Regulation and Litigation after Heller,” sponsored by the ABA Government and Public Sector Lawyer’s Division and the ABA Committee on Gun Violence, on May 19, 2009.

APPOINTMENTS

Patrick “Kit” Bobko was sworn-in for a term as Mayor of the City of Hermosa Beach on January 27, 2009. Kit has served on the Hermosa Beach City Council since June 2006.

Jim Karpiak became General Counsel of the Marin Emergency Radio Authority, replacing Greg Stepanicich.

Greg Stepanicich was appointed General Counsel for the Marin Energy Authority in February 2009.

Peter M. Thorson was appointed to the California League of Cities’ Municipal Law Handbook Committee for the 2009 to 2011 term. He will serve as the editor for the Land Use section of the Municipal Law Handbook.

2009 SUMMER ASSOCIATES

Andrew Brady received his B.A. in English from the University of California at Irvine in 2005 and will obtain his law degree from the University of California, Los Angeles School of Law in 2010.

Julie Hamill received her B.A. in International Relations from the University of San Diego in 2003 and will obtain her law degree from the American University, Washington College of Law in 2010.

2009 COMMUNITY IMPACT PROJECT

A team of RW&G lawyers and support staff volunteered their time to the Los Angeles Regional Food Bank this summer. The hands-on volunteer crew made food packages for needy families, individuals, children and seniors who live in our community on Saturday, July 11, 2009.



About the Advisor**EDITOR**

Saskia T. Asamura

ASSISTANT EDITOR

Susan W. Guebely

DIRECTOR OF MARKETING

Susan W. Guebely

PRODUCTION MANAGER

Sheri Santana

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Office Locations**LOS ANGELES**

355 South Grand Avenue, 40th Floor
Los Angeles, California 90071-3101
Telephone: 213.626.8484
Facsimile: 213.626.0078
E-mail: la@rwglaw.com

ORANGE COUNTY

1 Civic Center Circle
PO Box 1059
Brea, California 92822-1059
Telephone: 714.990.0901
Facsimile: 714.990.6230
E-mail: oc@rwglaw.com

SAN FRANCISCO

44 Montgomery Street, Suite 3800
San Francisco, California 94104-4811
Telephone: 415.421.8484
Facsimile: 415.421.8486
E-mail: sf@rwglaw.com

VISIT OUR WEBSITE AT:

www.rwglaw.com