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## California Supreme Court to Review Appellate Decision that Imposed CEQA Roadblocks to City's "Go Green" Ordinance

BY CHRISTOPHER J. DIAZ

The efforts of the City of Manhattan Beach (City) to protect marine life by stopping the accumulation of plastic bags in the Pacific Ocean serves as a cautionary tale for all public agencies. Ignoring the City's efforts to "go green," the Second District Court of Appeal in *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 181 Cal.App.4th 521 (2010), affirmed the trial court's ruling requiring the City to expend the funds and effort to prepare a full environmental impact report (EIR) before it adopts an ordinance banning retail establishments, restaurants, and vendors from distributing plastic bags at locations in the City.

On April 22, 2010, the California Supreme Court granted review (No. S180720). Nevertheless, public agencies that are considering adopting an ordinance to protect the environment should proceed carefully if relying on a categorical exemption or adopting a negative declaration pursuant to the California Environmental Quality Act (CEQA). The opinion in *Save the Plastic Bag Coalition* and the pointed dissent provide insight on differing judicial views of what CEQA review may be required for "green" ordinances.

### BACKGROUND

Before adopting the ordinance, the City adopted a negative declaration, which acknowledged that its prohibition on the distribution of plastic bags could lead to an increase in the use of paper bags. The City concluded that the increased use of paper bags would not be a significant effect of the ordinance as the use would be relatively small because of its small population, at just over 30,000. As further evidence that paper bag use would not substantially increase, the City noted that only 11.2 percent of the City is

zoned for commercial use, with only 217 licensed retail establishments in the City using plastic bags on a daily basis. Shortly after the City adopted the ordinance, however, “Save the Plastic Bag Coalition,” an unincorporated association consisting primarily of plastic bag manufacturers, filed suit alleging the City should have conducted a full EIR to study the environmental effects of the increased distribution of paper bags before adopting the ordinance.

**THE COURT’S ANALYSIS OF “GO GREEN” LAWS UNDER CEQA**

In a 2 to 1 decision, the Court of Appeal agreed with the plastic bag manufacturers. The majority’s analysis is noteworthy for the following reasons:

First, the Court of Appeal ignored the CEQA categorical exemption established by Guideline 15308 for projects undertaken to protect the environment. This Guideline exempts a project from CEQA review where it is undertaken “to assure the maintenance, restoration, enhancement, or protection of the environment.” Many agencies may have used this exemption for similar ordinances designed to “go green” or protect the environment.

However, based on the Court’s current holding, which is not binding law in view of the Supreme Court’s review, public agencies should be prepared to scrutinize the use of this exemption for any “go green” ordinances. This is so, because even though the City concluded no potential significant effects would result from its adoption of the ordinance, which arguably should have allowed it to make use of the exemption, the Court sided with the coalition and identified deforestation and other environmental effects, that would have made use of the exemption in this instance inapplicable. As a reminder, public agencies should not use

categorical exemptions where there is a reasonable possibility that an activity will have a significant effect on the environment due to unusual circumstances. See, CEQA Guideline 15300.2.

Second, the Court of Appeal appeared to stretch the definition of “environment” well beyond the boundaries of the City. CEQA requires an EIR whenever there is a fair argument that a project may have a significant effect on the “environment.” “Environment” is defined in CEQA to mean “the physical conditions [that] exist within the area [that] will be affected by a proposed project.” See, Cal. Public Resources Code Section 21060.5. In reaching its decision,

**CEQA requires an EIR whenever there is a fair argument that a project may have a significant effect on the “environment.”**

the Court cited the adverse environmental effects of paper bags including deforestation, increased energy use, increased greenhouse gas emissions, increased solid waste production, and increased acid rain.

In a typical CEQA analysis, the “area that will be affected by a project” would mean the affected city or other local region. In this case, however, the Court based its decision on the negative environmental effects of paper bags that could arguably occur anywhere in the world where paper bags are manufactured. Thus, although an agency may conclude that its ordinance would not have environmental effects in its city or other

local region, it should be cautious in this approach because the Court in this instance was willing to examine the environmental effects well outside the local region.

Finally, this case would make it much easier for a party with a commercial interest to use CEQA as a sword to protect its economic interests. Ordinarily, under existing law, a petitioner must have a “beneficial interest” in the litigation, or the court will likely find it lacks standing to bring a CEQA lawsuit. For CEQA purposes, courts find a “beneficial interest” when the petitioner establishes it may be affected by the project’s environmental impacts, as opposed to some other pecuniary interest.

A very narrow exception to this rule exists where a petitioner without a beneficial environmental interest in the litigation, such as a corporation or other commercial interest, sues to enforce a public duty of the lead agency or to enforce the public’s interest. To do so, it must show: (1) a continuing interest or commitment to the subject matter; (2) by a corporation or other commercial interest consisting of or representing individuals beneficially interested in the action; (3) who would find it difficult or impossible to act on their own; and, (4) where standing would not conflict with other public policies. See, *Regency Outdoor Advertising Co. Inc. v. City of West Hollywood*, 153 Cal.App.4th 825, 833 (2007). The circumstances where this public duty/public interest exception is applied to allow a petitioner standing are relatively few.

In *Save the Plastic Bag Coalition*, however, the Court looked past the coalition members’ lack of beneficial interest, and held that their quest to enforce the City’s public duty to comply with CEQA entitled them to sue even though some of the manufacturers would “benefit commercially

if the City ... chose not to impose a plastic bag distribution ban.” If the Supreme Court upholds the appellate decision, it could clear the way for one business to challenge a competitor’s project on the theory of enforcing a public duty even when the competitor has no environmental interest whatsoever in the matter.

#### THE DISSENT

Justice Richard Mosk’s scathing dissent takes issue with his fellow justices’ decision to require the small city of Manhattan Beach to expend public monies to prepare an environmental document for an ordinance designed to protect the environment. This is made even more ironic by the fact that the legislatively enacted CEQA is being used in this manner even after the legislature’s repeated declarations that plastic bags cause environmental harm and its enactment of legislation promoting the use of reusable bags and the recycling of clean carryout plastic bags. See, Cal. Public Resources Code Section 42250, et seq.

While the majority failed to discuss CEQA exemptions, Justice Mosk believed two potential exemptions could apply. First, the “common sense” exemption of Guideline 15061(b)(3) could apply as the City cited facts in the initial study that supported its belief that no significant environmental effects would originate from the project. Second, Guideline 15308 could apply as this ordinance was designed to protect the environment by limiting the distribution of plastic bags.

Justice Mosk also did not believe that the ordinance could cause larger scale environmental effects such as deforestation and an increase in global warming, requiring an EIR. Justice Mosk also doubted the petitioner’s claim that a “cumulative impact” would result as Manhattan Beach was only the third city in the state to adopt an ordinance banning plastic bags.

**MOVING FORWARD**

Pending the final decision of the California Supreme Court, public agencies should be sure to scrutinize the use of any CEQA exemptions as

**When conducting CEQA environmental analysis, an agency should not necessarily limit its environmental analysis to just the local region, but may need to consider wider potential impacts...**

an ordinance designed to protect the environment does not necessarily mean it is without environmental effects, and the use of an exemption such as Guideline 15308 may not always apply. When conducting CEQA environmental analysis, an agency should not necessarily limit its environmental analysis to just the local region, but may need to consider wider potential impacts—how wide remains to be seen. Finally, the Supreme Court will hopefully provide guidance on whether a party can file a CEQA lawsuit even if its only interest in the outcome of the litigation is for a business advantage.

**FOR ADVICE FROM RW&G ON CEQA ISSUES, PLEASE CONTACT CHRISTOPHER J. DIAZ, DAVID SNOW, OR ANY OF THE ATTORNEYS IN THE FIRM'S PUBLIC LAW OR LITIGATION DEPARTMENTS.**

**PUBLIC LAW**

**Proposition 16: An attack on Local Power**

**BY GREG STEPANICICH**

At the June 8, 2010 Statewide Primary Election, the voters are being asked whether to approve Proposition 16, a ballot measure proposed and so far financed entirely by the Pacific Gas and Electric Company (PG&E). The Proposition requires two-thirds voter approval before local governments may spend funds or incur debt to establish or expand electric delivery service or establish a Community Choice Aggregation (CCA) program. CCA is a program authorized by Public Utilities Code Section 366.2 that permits cities and counties, or a joint powers authority formed by these entities, to purchase electricity on behalf of its residents and businesses for distribution by the incumbent private electric utility.

After five years of study, the Marin Energy Authority, a joint powers authority made up of the County of Marin and seven Marin cities and towns, was established in 2008 to meet the greenhouse gas reduction goals of Assembly Bill 32 by increasing significantly the amount of renewable energy consumed in Marin. The Authority commenced service to its first phase customers on May 7, 2010.

**THE IMPACT OF PROPOSITION 16**

There is no doubt that Proposition 16 was designed not only to derail the Marin Energy Authority but also any other CCA from being established in California such as the proposed CCA program in San Francisco. This Proposition, however, has a much broader reach than CCA's. It prohibits any city from establishing its own electric utility without two-thirds voter approval and may severely impact the operations of all existing public electricity providers in the

state. The purposeful ambiguity of the Proposition makes it impossible to conclude with any certainty how broadly the courts will interpret this initiative measure.

The title that PG&E proposed for Proposition 16 was “The Taxpayers Right to Vote Act.” Although PG&E continues to use this title in its advertising, the California Attorney General changed the official title to “New Two-Thirds Vote Requirement For Local Public Electricity Providers,” as the measure has nothing to do with the approval of taxes. The Proposition amends the state Constitution and, if adopted, can be amended only by the voters.

**THE FINE PRINT**

Proposition 16 states that its purpose is “to guarantee to ratepayers and taxpayers the right to vote any time a local government seeks to use public funds, public debt, bonds or liability, or taxes or other financing to start or expand electric delivery service to a new territory or new customers, or to implement a plan to become an aggregate electricity provider.” The two-thirds voter approval requirement is imposed by Section 9.5(a) of the Proposition and states:

“Except as provided in subdivision (h), no local government shall, at any time, incur any bonded or other indebtedness or liability in any manner or use any public funds for the construction or acquisition of facilities, works, goods, commodities, products or services to establish or expand electric delivery service, or to implement a plan to become an aggregate electricity provider, without the assent of two-thirds of the voters within the jurisdiction of the local government and two-thirds of the voters within the territory to be served, if any, voting at an election to be held for the purpose of approving the use of any public funds, or incurring any liability, or incurring any bonded or other borrowing or indebtedness.”

Public funds are defined broadly to include all types of revenues received by local government except for federal funds. On the other hand, subsection (h) provides two very limited exceptions to the voter approval requirements. The first exception is any indebtedness or use of public funds approved by a majority vote of the voters within the jurisdiction of the affected local government agency prior to the enactment of the Proposition. The second exception applies to any indebtedness or use of public funds incurred solely for the purpose of purchasing or providing renewable energy or for the local government’s own end use and not for electric delivery service to others.

**THE QUESTIONS**

For the Marin Energy Authority, commencing electricity service before the adoption of the Proposition will avoid the voter approval requirement for becoming a CCA, but for others planning to implement a CCA program, the event that triggers becoming an aggregate electricity provider under the Proposition is unclear and subject to dispute.

The particularly troubling part of the Proposition is its voter approval requirement for any expansion of service by existing public utilities and CCA’s that could jeopardize the ability of these public electricity providers to continue to function. The definition of “expand electric delivery service” in subsection 9(d) states: “‘Expand electric delivery service’ does not include (1) electric delivery service within the existing jurisdictional boundaries of a local government that is the sole electric delivery service provider within those boundaries, or (2) continuing to provide electric delivery service to customers already receiving electric delivery service from the local government prior to the enactment of this section.”

This definition is inherently ambiguous as it does

not state what an expansion is, but rather defines the term by what it is not. There is no doubt that an expansion of territory will require voter approval. The question is whether voter approval will be required when the service boundaries remain the same, but the customers change. The answer to this question depends upon how the courts interpret the two exceptions.

**THE EXCEPTIONS**

The first exception applies to electricity delivery service within the existing jurisdictional boundaries of a local government that is the sole provider within those boundaries. This exception seems to exclude existing publicly owned utilities from the voter approval requirements for an expansion of service within their jurisdictional boundaries if they are the exclusive local electric service provider. However, there may be circumstances that undermine this conclusion. For example, the presence of direct access providers within the jurisdiction of a public utility would appear to not make the utility the sole electric delivery service provider.

The interpretation issue for a court under the second exception is whether the definition of “expand” includes all new customers not included within the customer base existing on the date of adoption. If the Proposition is interpreted literally and broadly to apply to any expansion of service beyond the customer base existing on the enactment date, the addition of one new customer will require voter approval. Not only will any new development within the service area of a public utility or CCA require voter approval, but so will the arrival of every new customer into the service area. This is a very harsh and punitive result. An established rule of statutory construction is that a law, including an initiative measure, will not be construed to create arbitrary, capricious or absurd results. *California School Employees Association v. Governing Board of the Marin Community College District*,

8 Cal.4th 333 (1994); *Halberts Lumber*, 6 Cal.App.4th 1233, 1236 (1992). In *Halberts Lumber*, the court stated: “[I]f possible, the words should be interpreted to make them workable and reasonable in accord with common sense and justice, and to avoid an absurd result.”

There is no doubt that the intent of the Proposition is to limit competition and any challenge to PG&E’s monopolistic control over local electric power. The ambiguity of the Proposition will require the courts to divine the

**There is no doubt that the intent of the Proposition is to limit competition and any challenge to PG&E’s monopolistic control over local electric power.**

intent of the initiative. The California Supreme Court in *Robert L. v. Superior Court*, 30 Cal.4th 894, 900 (2003) stated: “... our task is simply to interpret and apply the initiative’s language so as to effectuate the electorate’s intent.” The Court noted that the motive or purpose of the drafters of an initiative is not relevant to its construction as the court must discern the intent of the voters in adopting the initiative. If the voters’ intent in adopting Proposition 16 is to gain greater control over the spending of public monies on establishing or expanding local power sources, it does not mean that the voters intended to cripple the on-going operations of local public utilities or CCA’s by interpreting the word “expand” literally to apply to every new customer.

Under these principles of statutory construction, if Proposition 16 is adopted, the courts should limit the voter approval requirement for expansions to the addition of new territory beyond the existing jurisdictional boundaries of a public electricity provider. To reach this result, however, the courts will be forced to override the literal language of the measure.

**THE CHALLENGE FOR THE COURTS**

The initiative power was added to the California Constitution in 1911 as part of the progressive movement to reform government and break the stranglehold that the state regulated Southern Pacific Railroad had over the state Legislature. *Strauss v. Horton*, 46 Cal.4th 364, 420-421 (2009); *Associated Home Builders v. City of Livermore*, 18 Cal.3d 582, 591 (1976). With the financial ability to dominate the media, unfortunately, the initiative power has evolved into a tool for special interests to protect their economic power. Although the Supreme Court has been reluctant to place limits on the initiative power (e.g., *Rossi v. Brown*, 9 Cal.4th 688 (1995)), the courts should not allow this power of the electorate to be used to impair the functioning of government in order to serve private economic interests. Although the court’s role is not to question the wisdom of validly adopted legislation, the separation of powers doctrine does not mandate that the courts abdicate their responsibility to interpret the law in a manner that prevents unjust or absurd results.

**GREG STEPANICICH SERVES AS GENERAL COUNSEL TO THE MARIN ENERGY AUTHORITY. FOR ADVICE FROM RW&G ON PROPOSITION 16 OR LOCAL ENERGY PROGRAMS, PLEASE CONTACT GREG STEPANICICH OR ANY OF THE ATTORNEYS IN THE FIRM’S PUBLIC LAW DEPARTMENT.**

LITIGATION

**Gang Injunctions: A Civil Tool to Fight a Criminal Problem**

BY JENNIFER PETRUSIS

It is a rare community in California that has not been affected by gang violence. More and more, residents of impacted communities are demanding that their local government agencies use whatever tools necessary to reduce the stranglehold a gang’s dangerous activities can have on the community. In addition to traditional law enforcement efforts, there is a civil tool that has proven to be effective in preventing and combating gang violence—the gang injunction.

**WHAT IS A GANG INJUNCTION?**

A gang injunction is a civil court order enjoining a criminal street gang and its members from engaging, within a defined geographic location, in certain behavior such as associating in public, trespassing, possessing weapons and violating curfew. Gang injunctions have been used in California since the early 1980’s, but have become increasingly popular in the wake of rising gang violence. In the Los Angeles area alone, there are approximately forty gang injunctions covering seventy gangs.

**HOW TO OBTAIN A GANG INJUNCTION**

A gang injunction is obtained through a civil lawsuit brought in the name of the People of the State of California by the City Attorney or the District Attorney of the area impacted by the gang’s activities. The defendant in the lawsuit is the gang itself, which is sued as an unincorporated association. Even though individual gang members are usually not named as defendants in the lawsuit, the injunction will bind all members of the defendant gang.

To obtain a gang injunction, the City Attorney or

District Attorney must establish that the gang’s activities conducted within the defined geographic location constitute a public nuisance because they unreasonably interfere with the community’s comfortable enjoyment of life or property. The City Attorney or District Attorney, working with the city’s law enforcement agency, will collect, review and organize evidence of recent nuisance activities by the gang’s active and admitted members. Helpful evidence includes arrest reports, conviction records, field interview notes, witness declarations, and photographs.

Shortly after filing the complaint for injunction, the City Attorney or District Attorney will apply for a preliminary injunction. If granted, the preliminary injunction will enjoin the nuisance activities of the gang members until the court issues a permanent injunction at the conclusion of the civil case.

**SCOPE OF THE GANG INJUNCTION**

The gang injunction is only effective inside the geographic area defined in the injunction, which is usually referred to as the Safety Zone. The location and size of the Safety Zone will depend largely on the turf claimed by the gang and the gang’s area of influence. The exact prohibitions contained in the gang injunction will vary given the type of activities and crimes committed by the defendant gang. Typical prohibitions include:

1. Do Not Associate: Standing, sitting, running, walking, driving, gathering, or appearing anywhere in public view or any place accessible to the public, with any other known member of the defendant gang. However, this prohibition has the following exceptions: (1) when gang members are inside a school attending class or on school business; (2) when gang members are inside a church; or (3) when gang members are in a classroom attending a licensed gang or drug intervention program.

2. Do Not Intimidate: Confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting, or battering any person within the Safety Zone.
3. Do Not Trespass: Being present on or in any property, or running through any property not open to the general public, except (1) with the prior written consent of the owner, or (2) in the presence of and with the voluntary consent of the owner.
4. Do Not Block Access: Obstructing, impeding, or blocking the free passage of any vehicle or any person on any street, walkway, sidewalk, driveway, alleyway, building entrance, or other area of public access.
5. Obey Curfew: If under 18 years of age, being in or upon public property, or in a public place, between 8:00 p.m. on any day and 5:00 a.m. of the following day. If 18 years of age or older, being in or upon public property, or in a public place, between 10:00 p.m. on any day and 5:00 a.m. of the following day. This prohibition typically contains exceptions for school classes, school activities, employment, and emergency situations.

**IMPLEMENTING THE GANG INJUNCTION**

Before the injunction can be enforced against a particular gang member, due process requires that the gang member be served with the injunction. The city’s law enforcement agency will need to implement a system to keep track of which gang members have received the injunction. Once a gang member has been served, any violation of the injunction’s terms is a violation of a court order, which is a misdemeanor pursuant to Penal Code Section 166(a)(4).

In addition to these criminal sanctions, a gang injunction has several practical applications and benefits:

- It provides law enforcement officers increased opportunities to target suspicious gang activity;
- It provides the community a break from the gang’s constant presence and improves the quality of life for those who live and work in the Safety Zone; and
- It gives gang members an excuse to leave the gang while saving face.

**FOR ADVICE FROM RW&G ON GANG INJUNCTIONS, PLEASE CONTACT JENNIFER PETRUSIS OR ANY OF THE ATTORNEYS IN THE FIRM’S LITIGATION DEPARTMENT.**

**PUBLIC LAW**

**The California Supreme Court Upholds Ban on Immediate Solicitation of Funds at LAX**

**BY AMY GREYSON**

On March 25, 2010, the California Supreme Court upheld the constitutionality of a Los Angeles City ordinance that prohibits solicitation for the immediate receipt of funds at the Los Angeles International Airport (LAX), including inside the terminals, in the airport parking areas, and on the adjacent sidewalks. *International Society For Krishna Consciousness of California, Inc. v. City of Los Angeles*, 48 Cal.4th 446 (2010) (*ISKCON*). The Court held that the City’s ordinance was a valid “time, place and manner” regulation of solicitation that did not violate the Liberty of Speech Clause of the California Constitution.

The Court found the ordinance was narrowly tailored to accomplish the City’s goals of eliminating problems caused by requests for the immediate receipt of funds at a busy municipal airport. These include interference with travelers hurrying to make flights, the crowded and hectic environment of the airport, the risk of fraud and duress, and the likelihood that travelers in a hurry will not stop to complain about solicitors. The Court also ruled that the ordinance left open ample channels of communication, because it did not prohibit distribution of literature and requests for financial support, such as by distributing self-addressed stamped envelopes in areas open to the general public.

**WHAT IS THE IMPACT OF ISKCON?**

The direct impact of the *ISKCON* decision is narrow, in that it only addressed the validity of a solicitation ordinance directed at a municipal airport. However, the decision may be helpful to anticipate how the California Supreme Court

may evaluate other types of solicitation ordinances directed towards public property or facilities that do not fall within traditional public fora such as streets, sidewalks and parks.

Cities often seek to prohibit or restrict the solicitation of funds in public places to achieve a variety of goals. These goals include eliminating unsightly litter, preventing interference with vehicular or pedestrian traffic along public rights-of-way or with the conduct of the government's business, preserving the safety or security of governmental officials, facilities or the general public, and preventing fraud. Groups and individuals solicit funds for a variety of purposes, including religious, charitable, and political causes, as well as for commercial purposes. Consequently, solicitation ordinances directly impact the communication of information, dissemination of differing viewpoints, and advocacy of causes.

Accordingly, the federal and state courts require careful scrutiny of such ordinances because they impact the exercise of constitutional rights of freedom of speech and expression protected by the First Amendment of the United States Constitution and the Liberty of Speech Clause contained in Article I, Section 1 of the California Constitution. These provisions are integral to our system of government. Due to the importance of charitable, religious and political expression in American constitutional law, legal challenges to solicitation ordinances are frequent, and the federal and state courts have wrestled with how to balance the governmental interests against the right of Americans to engage in the free exchange of ideas.

#### **EVOLVING JUDICIAL VIEWS OF SPEECH IN PUBLIC PLACES**

Court decisions have held that a "public forum"—such as streets, sidewalks and public parks—is a traditional area for expression of religious,

political and charitable ideas and viewpoints, and receive the most protection. The courts apply "strict scrutiny" to regulations restricting speech and expression in these traditional public fora. The regulations must be "content-neutral"—they cannot discriminate against a particular viewpoint. However, courts will uphold regulation of solicitation in a public forum if it is a "reasonable time, place and manner" regulation. Under this test, the ordinance must be narrowly tailored, serve a significant governmental interest, and leave open ample alternative means of communication.

Over time, the courts have struggled with how to apply free speech principles to public property that is not a traditional public forum, such as shopping centers, railroad stations, and airports. The United States Supreme Court ruled that an airport is not a public forum under the First Amendment. [*International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).] However, the California Supreme Court has not yet ruled whether a municipal airport is a public forum under the Liberty of Speech Clause of the California Constitution.

The *ISKCON* decision arose after the Ninth Circuit Court of Appeals, in a separate federal lawsuit, asked the California Supreme Court to decide whether LAX is a public forum under California's Liberty of Speech Clause. In the federal case, *International Soc. for Krishna Consciousness of California Inc. v. City of Los Angeles*, 530 F.3d 768 (9th Cir. 2008), the Ninth Circuit was asked to reverse a federal district court decision that ruled the airport solicitation ordinance violated the California Constitution because LAX is a public forum under California's Liberty of Speech Clause, and the ordinance was not a reasonable time, place, and manner restriction on the solicitation of funds at LAX. The Ninth Circuit, before issuing its own decision, referred the case to the California

Supreme Court to decide whether the airport constitutes a public forum under the California Constitution.

The California Supreme Court refused to issue a ruling on whether LAX is a public forum. Instead, the Court held that regardless whether LAX is a public forum, the ordinance was a valid time, place and manner restriction. The *ISKCON* decision included two concurring opinions. One concurring justice concluded that LAX is a public forum, but agreed the ordinance was a valid time, place and manner regulation even under a strict

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scrutiny analysis. Three justices joined in a second concurring opinion that concluded an airport is not a public forum. Those justices found that airports are not like shopping malls, which have replaced the streets and sidewalks of the central business district as a forum for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

**CONCLUSION**

Because the California Supreme Court declined to decide the issue whether LAX is a public forum in *ISKCON*, it is not clear at this time

whether there is a majority view among the present justices of the California Supreme Court whether an airport is a public forum, or how the California Supreme Court may treat public property that does not fall within the scope of a traditional public forum. However, the majority opinion suggests that the Court will attempt to find ways to uphold an ordinance if its regulations are narrowly drawn to address a problematic form of solicitation when local government is able to demonstrate that the method it selected is a reasonable means to accomplish its goals. The decision emphasized that the courts should not second-guess local legislators’ decisions regarding the method to accomplish the city’s goals, even if there may be a less-speech restrictive alternative available. This decision is thus encouraging for cities seeking to balance the right of persons to advocate ideas while at the same time protecting recipients from intrusive conduct or interference with their personal or business activities.

**FOR ADVICE FROM RW&G ON FREE SPEECH ISSUES, PLEASE CONTACT AMY GREYSON OR ANY OF THE ATTORNEYS IN THE FIRM’S PUBLIC LAW DEPARTMENT.**

PUBLIC LAW

**Supreme Court Reviews City’s Right to Examine Police Sergeant’s Private Text Messages**

BY NORMAN A. DUPONT

Modern technology has created a number of dilemmas in the working world. On one hand, pagers, Blackberry-type devices, text messaging services and remote computing have made it possible to work from virtually anywhere and still be “on the job.” On the other hand, many employees, including municipal employees, assume that private messages on e-mail servers and elsewhere will remain private. The United States Supreme Court heard argument on April 19, 2010 on a case raising one specific claim of privacy by a police sergeant, *City of Ontario v. Quon*, No. 08-1332. The Supreme Court’s decision, which is expected before the Court recesses at the end of June, will provide municipalities with significant guidance on the interplay of modern technology and privacy rights.

**BACKGROUND**

The facts in *Quon* are relatively simple. The City of Ontario (City) employed Jeff Quon, who served on the police department’s SWAT team. The City provided various means of electronic communication to its employees, including e-mail, city computers, and text messaging. The City’s written policy advised all employees that there would be no privacy as to “City-owned computer equipment, computer peripheral, city networks, the Internet, e-mail, or other city-related computer services.” But, in a briefing to members of the SWAT team, a police lieutenant orally stated that the City did not intend to “audit” text messages over a certain number of characters. Police Sergeant Quon claimed that this oral instruction from

the lieutenant constituted a separate City policy with respect to text message pagers, and that he had a reasonable expectation in the privacy of his text messages (including sexually explicit messages sent to his wife, mistress, and a fellow SWAT team member).

The City later decided to audit Quon’s text messages, and obtained copies of them from the service provider. Sergeant Quon sued the City pursuant to the federal civil rights provisions (42 U.S.C. Section 1983), alleging that the City, acting under color of state law, violated his federal constitutional rights against unreasonable searches under the Fourth Amendment. Sergeant Quon lost before the federal District Court, which ruled on cross-motions for summary judgment that the Sergeant (and other co-plaintiffs) had a “reasonable expectation” of privacy given the “operational realities” of the policy of the department at that time. But, the District Court ruled that a jury must determine whether the “primary purpose” of the City’s review of the text message records was reasonable under the circumstances.

**THE COURTS’ RULINGS**

Based upon a jury factual determination that the City’s police chief intended only to audit Sergeant Quon’s high-level of use of the text messaging, the District Court then entered judgment for the defendants. On appeal, the Ninth Circuit reversed finding that the City’s action constituted an unreasonable search under the Fourth Amendment. After a denial of a rehearing en banc over the dissent of seven members of the Court of Appeals, the City successfully petitioned the United States Supreme Court for review of the Ninth Circuit’s determination.

At oral argument on April 19th, the Supreme Court’s most liberal justices expressed little

sympathy for Sergeant’s Quon’s position. Justice Breyer repeatedly told Quon’s counsel that he did not see anything unreasonable in the City’s audit of the volume of text messages sent in order to get the billing for the account correct. Justice Ginsburg told Quon’s counsel that she thought that the “oral policy” announced by the police lieutenant was solely limited to the billing of the text message pager, not a retraction of the overall City policy that there was no basis for employee privacy in such messages. Justice Sotomayor told Quon’s counsel that his suggestion that the police sergeant himself could do his own audit of the text messages did not seem either reasonable or businesslike. Justice Stevens asked whether one might not assume that in the context of a SWAT team member whose job was essentially a “24/7” duty that the “whole universe” of such conversations would inevitably be the subject of public inquiry. Justice Kennedy appeared to agree with Justice Stevens that a “reasonable expectation” would be that such text messages would be “discoverable.”

**QUON IS SIGNIFICANT REGARDLESS OF THE OUTCOME**

It is problematic to place great weight on questions posed by Justices at the time of oral argument, which is traditionally a method of probing counsel’s position and not a time for enunciating a Justice’s own conclusion. Nonetheless, a reading of the transcript of the argument suggests that Police Sergeant Quon may have a very difficult time sustaining his hard-won victory in the Ninth Circuit before the High Court.

There is one more important message for any California municipality in *City of Ontario v. Quon*: Litigation over privacy expectations with City employees can be horribly expensive and sometimes can end badly. Cities should carefully review their existing policy statements concerning the expectation of privacy (if any) of all forms of electronic communication and

ensure that the written policy expressly disavows any oral modification of the written policy.

**FOR ADVICE FROM RW&G ON ELECTRONIC COMMUNICATIONS BY PUBLIC EMPLOYEES AND PRIVACY ISSUES, PLEASE CONTACT NORMAN A. DUPONT, GENA M. STINETT, ROY A. CLARKE, OR ANY OF THE ATTORNEYS IN THE FIRM’S PUBLIC LAW AND LABOR & EMPLOYMENT DEPARTMENTS.**

## LITIGATION VICTORIES

**David G. Alderson** and **and Mitchell E. Abbott** successfully defended against a petition for writ of mandate challenging language in a ballot argument relating to a Mission Viejo initiative measure on the June ballot. A sitting City Councilmember in the City of Mission Viejo sued the City Clerk and the County Registrar under the Elections Code, asserting that 29 passages in the ballot argument written by another City Councilmember were false and misleading. After a full-day hearing on March 29, 2010, Orange County Superior Court Judge Luis Rodriguez struck three words or phrases from the ballot argument, but overruled the other 26 objections. After the minor revisions ordered by the Court, the ballot argument remained almost entirely as originally written. (*Schlicht v. Hamman*, Orange County Superior Court No. 30-2010-00352765).

**Saskia T. Asamura, Robert C. Ceccon** and **Ginetta L. Giovinco** successfully moved to dismiss a federal civil rights lawsuit, *Villa Amodei, LLC v. County of Ventura, et al.*, United States District Court Case Number CV10-00413 R (MANx). Plaintiffs sued the County and its Planning Director in federal court over conditions imposed on a conditional use permit to operate a wedding facility. The complaint alleged claims for violation of First Amendment, due process and equal protection rights and a state law claim to rescind a land use settlement and compliance agreement regarding notices of violation. Judge Manuel Real ruled that plaintiffs' failure to appeal the Planning Commission's decision to the Board of Supervisors, and their failure to petition the state court for a writ of administrative mandamus, barred their claims. He also found that plaintiffs failed to allege any concrete injury to support their federal claims, and that the Planning Director was entitled to qualified immunity. The court declined to exercise

supplemental jurisdiction over the state law claim, thus entitling the County defendants to full dismissal of the complaint without leave to amend.

**Saskia T. Asamura** obtained judgment in an employment lawsuit, *Hoetker v. City of Brea et al.*, Orange County Superior Court Case, Number 30-2009-00292573, after the Court granted the City defendants' special motion to strike the case as a SLAPP suit under Code of Civil Procedure Section 425.16. Plaintiff Hoetker and the Brea Police Association sued the City, its Police Department, and several City officials challenging Hoetker's non-promotion to police sergeant. Plaintiffs alleged claims under the Peace Officers' Bill of Rights Act, among others. The court found that the lawsuit targeted activity and speech protected by the SLAPP statute. The court further ruled, based on the allegations and the evidence presented, that plaintiffs had no probability of prevailing on the merits. The court later granted in full the City's motion to recover attorney fees incurred in preparing the SLAPP motion. The case is currently on appeal.

**Saskia T. Asamura** won an order of dismissal of another employment lawsuit, *Harrison v. City of Brea et al.*, Orange County Superior Court, Case Number 30-2008-00110478, after the trial court sustained the City defendants' demurrer to the third amended complaint without leave to amend. Plaintiff had sued the City and 17 individual City employees, claiming he suffered a constructive wrongful discharge based on harassment due to religious creed and other claims. Despite several opportunities to amend, the court found plaintiff failed to allege facts to support his claims. The case is currently on appeal.

**Saskia T. Asamura** and **Toussaint S. Bailey** obtained dismissal of a third employment lawsuit, *Ware v. City of Compton*, Los Angeles

County Superior Court, Case Number BC410941, where plaintiff failed to amend the complaint within the time permitted. Plaintiff challenged his release from a probationary position with the City. The trial court had granted the City defendants' special motion to strike all but one cause of action as a SLAPP suit, and plaintiff appealed. The parties settled on appeal, but plaintiff revoked the settlement. The dismissal followed after the case was remanded to the trial court. The case is currently on appeal.

**Kirsten Bowman, Maricela Marroquín and Katrina Gonzales** successfully defeated a property owner's challenge to a court order granting the City of Brea a right to prejudgment possession of property interests needed for the construction of a road improvement project. In *City of Brea v. Hemin Properties, LLC, et al.*, Orange County Superior Court Case Number 30-2009 00287296, the property owner opposed the City's motion for early possession of the property, alleging, in part, that the City did not have the jurisdictional authority to acquire property located in another city. The trial court granted the City's motion. On the eve of the City commencing construction of the project, the property owner sought an emergency stay and a writ of mandate to compel the trial court to deny the City's motion for early possession. The Court of Appeal denied the writ petition and request for stay.

**Rochelle Browne** successfully defended a challenge to a City's adoption of a senior mobilehome park zoning ordinance in *Mission Valley Oaks v. City of Yucaipa*, Federal District Court Case No. EDCV 09-02203 VAP. Plaintiff mobilehome parks challenged the ordinance as a violation of the Federal Fair Housing Act and several state laws. Because all the parks subject to the ordinance were already qualified as senior parks under the Federal Fair Housing Act (FFHA), the effect of the ordinance was to prevent them from converting their senior parks

to family parks. The City relied on the amendments made to the Act by the Housing for Older Persons Act enacted in 1995 and the 1999 HUD regulations implementing it, which made it easier to qualify for the senior housing exemption in the FFHA. Those regulations indicate that municipally zoned areas can qualify for the exemption. The District Court held that the City properly relied on those regulations and that there was no violation of the FFHA. The District Court declined to address the plaintiffs' claims under California law. There is not yet any reported decision addressing the HUD regulations relied on by the City and plaintiffs have filed an appeal to the Ninth Circuit. Although the plaintiffs have not changed, the case has been re-titled on appeal to *Putnam Family Partnership v. City of Yucaipa*, Ninth Circuit No. 10-55563.

**Ginetta L. Giovinco** prevailed in a CEQA case in *South Orange County Wastewater Authority (SOCWA) v. City of Dana Point and Makar Properties, LLC*, Orange County Superior Court Case No. 30-2009-00283523. This action challenged the City's approval of amendments to its General Plan and Local Coastal Program that would enable our client, Makar, to develop its coastal property with residential and commercial uses. SOCWA, the adjoining property owner, claimed that the potential odors from the aeration tanks at its sewage treatment facility would adversely impact the future residents of Makar's property. SOCWA sought to invalidate the entitlements and require the City to prepare an environmental impact report for the project (with a possible mitigation measure requiring Makar to pay \$4.5 million to cover the tanks). The court denied the writ petition in its entirety, ruling that the California Environmental Quality Act does not require a city to analyze the effects of existing conditions (such as odors from a sewage treatment plant) on a project, and that Makar's project would not itself create any adverse changes or impacts.

**Ginetta L. Giovinco** successfully obtained a reversal from the Court of Appeal in *Gaviota Coast Conservancy, et al. v. Santa Barbara Local Agency Formation Commission, et al.* (California Court of Appeal Civil, Second District, Division Six, Case Number B215836). Petitioners contended that Santa Barbara LAFCO erred when it recorded a ministerial certificate of completion in 2008 to finalize an annexation that it had approved in 1998. The annexation would allow our client, Makar Properties, L.L.C., to obtain water service for the ultimate development of its 200-acre property on the Gaviota Coast. The trial court ruled in favor of petitioners/respondents and awarded over \$185,000 in attorneys' fees. The Court of Appeal reversed the judgment in its entirety. The Court held that all conditions necessary to complete the annexation had been satisfied and that merger of nearby lots owned by Makar was not a condition of annexation. The Court therefore ruled that the certificate of completion was properly recorded and the annexation is valid.

**Gregory M. Kunert** and **Maricela Marroquín** successfully defended the City of Agoura Hills in a mandamus action brought by a property owner who sought to overturn the City Council's decision to deny him a site plan/architectural review permit to construct a car wash. In *Hillel v. City of Agoura Hills*, Los Angeles County Superior Court Case Number BS114736, the property owner argued that the City abused its discretion in denying the permit because his property is zoned to permit car washes. After a trial on the matter, the court denied the writ, thus affirming the City's denial of the permit.

## PRESENTATIONS

**Robert C. Ceccon** participated in a panel discussion titled: "Disasters—Beginning to End," at the City Attorneys Association of Los Angeles Annual Spring Conference in Santa Barbara on March 13, 2010. Bob described his handling of the trial and appeal arising out of the 2005 La Conchita landslide disaster that resulted in 10 deaths and dozens of claims. Bob's presentation focused on how a governmental entity can create a record that will allow it to prevail on a design immunity defense.

**Roy A. Clarke** presented "The Nine Deadly Sins of Hiring and Recruiting in California: How to Avoid These Common—and Costly—Mistakes" for the Employer Resource Institute at their program on April 1, 2010.

**Kevin G. Ennis** presented "Significant California Land Use Legislation in Calendar Year 2009" to the Planning Directors Association of Orange County on February 10, 2010.

**Gena M. Stinnett** participated in a panel discussion titled: "Disasters—Beginning to End," at the City Attorneys Association of Los Angeles Annual Spring Conference in Santa Barbara on March 13, 2010. The presentation focused on the city attorney's role in preparing for and responding to disasters. Gena's topics included the basics of emergency services law; how to comply with state law when drafting local emergency services ordinances; steps a city attorney can take to protect a city from liability; how to ensure government continuity during a disaster; and advance actions cities should take to be eligible for state and federal funds.

**Gena M. Stinnett** presented "All Things Electronic—Advising Public Officials on Email Best Practices and Electronic Records" at the

Orange County City Attorneys Association meeting in Fountain Valley, California on January 21, 2010. The presentation focused on the reasons behind increased concern that public officials may be compelled to disclose emails sent or received by them in conducting the public’s business. Issues relating to the Public Records Act, as well as litigation discovery and electronic records retention, were covered in the presentation. Gena also discussed “best email practices” designed to address some of the disclosure concerns, as well as issues raised by the Brown Act and due process considerations.

**Laurence S. Wiener** presented the course entitled: “The Subdivision Map Act: An Introduction and 2010 Update” for the UCLA Extension public policy program, on March 12, 2010. On March 25, 2010, Larry spoke at the League of California Cities Planner’s Institute. The presentation is entitled: “How to read an EIR.”

**PUBLICATIONS**

**Trisha Ortiz** published an article in the Winter 2010 edition of the California Bar Association, *Public Law Journal*, titled “AB 811: The Promise and Challenge of Public Agency Financing for Private Renewable Energy and Energy Efficiency Improvements.” Trisha was also quoted in the March 29, 2010 edition of the *Los Angeles Daily Journal* regarding AB 811, which she helped draft.

**APPOINTMENTS**

**Jim R. Karpiak** was appointed the General Counsel of the East Contra Costa Fire Protection on February 1, 2010.

**Greg Stepanicich** was appointed to the Board of Directors of the California City Management Foundation. In January 2010, Greg also became General Counsel for the California Statewide Communities Development Authority.

**NEW LAWYERS**

**Christopher L. Hendricks** received his J.D. from the University of San Diego School of Law in 2008. Christopher joins the Firm’s Litigation Department in our Los Angeles office.

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**Changes and Additions to Our Mailing List**

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