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## RW&G Files Amicus Brief in Morgan Hill RLUIPA Case

**Amy Greyson**, with assistance from **G. Inder Khalsa**, has filed an amicus brief in support of the City of Morgan Hill in the pending Ninth Circuit case *San Jose Christian College v. City of Morgan Hill, et al.* (Ninth Circuit Case No. 02-15693, U.S. District Court Case No. 01-20857). Sixty-two cities have joined in the brief.

San Jose Christian College purchased a site in Morgan Hill that was zoned PUD for health care uses and contained the only full-service hospital site in the community. The College then applied to amend the zoning to allow reuse and expansion of the existing health services buildings for a private institution of higher learning. All uses are allowed in any area zoned PUD under Morgan Hill’s zoning ordinance. The applicant must, however, submit complete development plans, and Morgan Hill asked the College to submit information and plans for phased development. The College then amended its application to reduce the scope of its proposed reuse and development of the existing buildings and property.

After extensive hearings, the City Council denied the zoning amendment application. The grounds for denial were that the College had submitted inconsistent and incomplete information; that the project description was inadequate, thereby precluding environmental review under CEQA; and that maintenance of the only fully-developed full-service hospital facility in the community was a compelling governmental interest.

The College initially filed a petition for writ of mandate in state court, challenging the denial on the basis that Morgan Hill misapplied its ordinance, and under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc *et seq.* The College then voluntarily dismissed its state court action and filed a federal action

challenging the decision under RLUIPA and upon constitutional grounds.

The federal district court granted Morgan Hill’s motion for summary judgment on all issues. The court ruled that the PUD zoning ordinance and CEQA were neutral laws of general application, and that, under a rational basis test, the denial did not violate the First Amendment, RLUIPA, or the Equal Protection Clause. The court held that the College had failed to show that Morgan Hill’s actions constituted a substantial burden on religion because there was no evidence that the zoning ordinance, on its face or as applied, treats religious institutions unequally, discriminates against religious institutions, excludes religious assemblies, or places undue limitations on religious structures within its jurisdiction. The court also ruled that religious institutions are not immune from land use regulations under RLUIPA, and that the College’s failure to comply with the zoning and CEQA requirements were fatal to its claims.

RW&G’s amicus brief argues that the 90-day statute of limitations in Government Code Section 65009, and the College’s voluntary dismissal of its state court action, bar the College from challenging Morgan Hill’s zoning decision under the principle of *res judicata*. The brief also argues that the zoning ordinance and CEQA are neutral laws of general application, and that the requirements for submittal of a complete zoning amendment application and a complete project description under CEQA are not a substantial burden on the College’s free exercise of religion under either the First Amendment or RLUIPA. Finally, the brief contends that the denial did not implicate any hybrid constitutional rights of the College, such as freedom of speech or assembly.

TELECOMMUNICATIONS

**Transfers of Control of Cable Television Franchises: A Victory for Local Franchising Authorities**

BY WILLIAM B. RUDELL

On September 20, 2002, the Ninth Circuit issued its decision in a case that has been closely followed by local franchising authorities. In *Charter Communications, Inc., et al. v. County of Santa Cruz*, 304 F.3d 927 (9th Cir. 2002), the court determined that Santa Cruz County had reasonably withheld its consent to a change in ownership of a cable television franchise.

**BACKGROUND INFORMATION**

In 1998, Microsoft co-founder Paul Allen proposed to acquire Charter Communications, Inc. (“Charter”), which owned a subsidiary known as Charter Communications LLC. The subsidiary had a cable television franchise with Santa Cruz County (“County”), which franchise was administered by the County Board of Supervisors. The County’s consent to the proposed change in ownership was required for Charter to operate its subsidiary’s franchise. Under the franchise agreement, such consent could not be “unreasonably” denied.

Charter submitted its FCC Form 394 to the County and requested approval of the proposed transfer of control. Concerned that the price Paul Allen was paying might adversely impact the level and cost of service to subscribers in the franchise service area, the County requested further detailed information. Charter complied, but later objected to subsequent requests for additional information. The Board of Supervisors then adopted a resolution to deny without

prejudice its consent to the change of control of the franchise that would result from the change in Charter’s ownership structure. Detailed findings were contained in the denial resolution.

When subsequent efforts to resolve the dispute failed, Charter and Paul Allen filed a federal suit against the County. The plaintiffs asserted that the County’s actions violated Charter’s First Amendment rights and unreasonably interfered with its contractual transfer rights. A decision in Charter’s favor was rendered in March 2001 by the federal district court for the Northern District of California. *Charter Communications, Inc. v. County of Santa Cruz*, 133 F.Supp. 1184 (N.D. Cal. 2001). The federal district court found that the County’s denial of consent to the transfer was unreasonable and unlawful under the franchise agreement, the First Amendment, and the Cable Act and its implementing FCC regulations. The County then appealed the federal district court’s two principal conclusions: (1) that the County unreasonably withheld its consent; and (2) that Charter should be awarded its attorneys’ fees.

**THE NINTH CIRCUIT’S DECISION**

The Ninth Circuit focused on what it considered to be the central issue in the case—whether the Board of Supervisors was entitled to any judicial deference regarding its legislative determinations of what was reasonable under the circumstances. The Ninth Circuit noted that this assessment involved the review of a discretionary decision of a legislative body. It concluded that the federal district court had substituted its judgment for the County’s and had accorded no deference to the County’s legislative determination. It opined that, under this deferential standard of review, “the County’s denial of consent should be upheld as long as there is substantial evidence

for any one reason for denial.” The federal district court was also found to have erred by failing to examine whether all of the reasons detailed in the County’s denial resolution were spurious or unlawful. The Ninth Court then proceeded to examine the reasons to determine whether any one of them survived scrutiny under a deferential standard of review.

One of the factors discussed in the County’s denial resolution was the failure of Charter and of Paul Allen to affirmatively demonstrate financial qualifications to operate a cable

**“[I]t was not unreasonable for the County to be concerned about Allen’s true net worth and about the relationship of that wealth to the viability of the enterprise.”**

system. The court noted that, although Paul Allen’s personal “balance sheet” had been provided as evidence of his financial qualifications to perform the franchise obligations, Allen’s personal assets were not contractually pledged in support of performance. The federal district court had improperly conducted its own analysis and had determined that, in light of Allen’s substantial wealth and the equity-only nature of the transaction, his financial qualifications were “incontrovertibly established.” The Ninth Circuit concluded that “it was not unreasonable for the County to be concerned about Allen’s true net worth and about the relationship of that wealth to the viability of the enterprise.”

The Ninth Circuit also faulted the federal district court for failing to give deference to the County’s concern for stabilizing future cable rates charged to subscribers. The Ninth Circuit noted that Allen’s offer, based on a per subscriber amount, was substantially higher than the market price, and that this high price might imperil the possibility of achieving a reasonable return on equity and thereby jeopardize Charter’s financial health, the stability of rates, and the quality of service. The federal district court had improperly rejected these legitimate concerns of the County and had erroneously concluded that there was no basis for the County’s information requests that would generate reliable inferences about prospective rates of return on equity. Nor was the Ninth Circuit persuaded by the federal district court’s decision that due diligence was improper because few other local franchising authorities conduct this review. Referring to the amicus brief submitted by local franchising authorities and the National League of Cities, the Ninth Circuit observed that “this kind of due diligence does not typically occur, not because it is unnecessary but because the limited resources of local governments often prevent such scrutiny.” The Ninth Circuit concluded that it could not be said that “the County acted without a rational basis or without substantial evidence for its decision to deny consent without prejudice.”

With regard to Charter’s assertion that its First Amendment rights had been violated by the County, the Ninth Circuit responded as follows:

“Charter voluntarily entered into an agreement under which the County had to approve any transfer of the franchise, and thus, to that extent, waived its right to

claim that a denial of a transfer violated its First Amendment rights.”

The Ninth Circuit reversed the federal district court’s judgment and vacated its decision, including the award of attorneys’ fees to Charter. (The attorneys’ fees and costs in the litigation are estimated to be nearly one million dollars!)

Charter petitioned the Ninth Circuit for an “en banc” hearing on its decision, which would involve review by a larger panel of the circuit court’s judges. That petition has been denied. The Board of Supervisors has not yet determined whether Charter is in material breach of the franchise for taking over the operations of its subsidiary without the County’s prior consent. Subsequent developments in this lengthy dispute that may be of interest to local franchising authorities will be reported in a future article.

**FOR ADVICE CONCERNING CABLE TELEVISION FRANCHISING ISSUES, CONTACT YOUR OWN LEGAL COUNSEL, WILLIAM B. RUDELL, OR ANY OF THE ATTORNEYS IN THE FIRM’S TELECOMMUNICATIONS PRACTICE GROUP.**

**REAL ESTATE**
**Avoiding Liability for Buildings with Accessibility Law Violations**
**BY JIM R. KARPIAK**

Determining how to comply with accessibility laws in the construction or leasing of facilities or in contracting for services provided offsite can be a vexing undertaking for public entities. Due to the often complex interplay of the Americans with Disabilities Act (“ADA”) and other federal laws on accessibility, legal challenges can arise notwithstanding diligent, good faith efforts to follow the law. Accessibility compliance poses special pitfalls for public entities because their programs generally are required to comply with a higher standard than applies in the private sector. Moreover, a public entity that provides public funding to contractors, developers or lessees that are not in compliance with the standards applicable to the public sector may find itself liable for operating a program that discriminates against the disabled. As a result, public agencies should evaluate their practices in conducting real estate negotiations to make sure that the correct accessibility standards are being applied and that any liability for violations is shifted to the contractor, developer or lessee.

The complex array of federal law that governs accessibility for buildings and facilities is technical and too difficult to summarize here, but their basic guiding principles can be succinctly characterized. In the private sector, Title III of the ADA requires all private entities that operate businesses open to the public to provide accommodations that are accessible to disabled persons pursuant to the ADA Accessibility Guidelines at Appendix A to 28 CFR Pt. 36 (the “Accessibility

Guidelines”). By its terms, the ADA does not apply to housing, but the Fair Housing Amendments Act imposes requirements on privately-developed multi-family housing. The Architectural Barriers Act applies to buildings built with federal assistance, except for private residences.

For the public sector, Title II of the ADA and Section 504 of the Rehabilitation Act of 1973 (“Section 504”) generally require all of a public entity’s programs (including housing) to be accessible. Most federal funding agencies, including the Department of Housing and Urban Development (“HUD”), have their own regulations addressing which standards apply to various programs. Where housing is involved, HUD applies the Uniform Federal Accessibility Standards, 24 CFR Pt. 40, which require among other things that common areas and a certain percentage of the units be accessible to wheelchair users.

It is often obvious when an activity is part of a public entity’s program (e.g., the entity is renting space for its own offices, constructing a public building, holding a public meeting, etc.). Yet the courts use a broad definition of “program” that can include activities of private parties if they directly or indirectly support a public entity’s activities. For example, in *Paxton v. State of W. Va. Dept. of Tax and Revenue*, 192 W. Va. 213 (1994), the state lottery commission in West Virginia was found to have violated Title II of the ADA because some private vendors sold its lottery tickets from sites that were not accessible. In essence, the lottery commission’s program included the sites from which tickets were sold, and it should have monitored whether those sites complied with the Accessibility Guidelines before it entered into contracts with ticket vendors. Thus, even where a transaction does not contemplate a direct

lease of space by the public entity—such as a contract to procure social services, training or the like from a private entity—the facility where the contract is performed should meet the accessibility standards that would apply if the public entity were leasing it for its own occupancy.

More disconcerting is the fact that public funding can trigger a change in the applicable accessibility standards. In *Independent Housing Services of San Francisco et al. v. Fillmore Center Associates et al.*, 840 F. Supp. 1328 (1993), the court held that the San Francisco Redevelopment Agency violated Section 504 by issuing housing bonds and

**...the public entity should be explicit in asserting that the obligation to comply with the accessibility laws rests entirely with the developer, contractor, or lessee...**

using the proceeds to subsidize a residential developer that complied with the law as it applied to private sector housing. In other words, the provision of public funds to a private entity had two unanticipated consequences. First, by bringing what otherwise would be private sector activities into a public program, it changed the substantive obligations applicable to those activities. Second, lack of compliance by the private entity resulted in liability of the public entity for discrimination in its urban redevelopment program.

To avoid the potentially significant costs and delays that can result from accessibility violations, public entities should make changes in their procurement and negotiation processes as well as in the way they draft documents. As an initial matter, it makes sense to include in requests for proposals or qualifications a notice that responders may need to comply with accessibility laws applicable to public sector programs. The negotiation process for real estate agreements and leases should include an early analysis of the contemplated kinds of activities and, if public funding is present, a determination of which laws will apply. Next, the parties (with input from their architects, engineers and consultants) should determine precisely what needs to be done in order to comply with those laws. Although the costs of compliance can be high, not complying can be more expensive if remedial construction is required, not to mention the cost of litigation. Moreover, it is usually better to identify increased costs early so the business deal can be appropriately adjusted, rather than to ignore them and have the transaction fail later because the costs rise exorbitantly and the developer or tenant must abandon the project.

In drafting the documentation for most contracts or real estate agreements, the public entity should be explicit in asserting that the obligation to comply with the accessibility laws rests entirely with the developer, contractor, or lessee who is benefiting from the public subsidy and who controls the project or activity. Some specific provisions that should be considered are: (i) an express condition that compliance with applicable disability access requirements must occur at all times; (ii) covenants by the developer, lessee or contractor to construct and operate the facility in accordance with such laws at all times and to provide certification and

documentation of such compliance to the public entity upon request; and (iii) an indemnification clause surviving termination that covers violations of accessibility laws. Finally, to reduce the risk of contractors or developers denying responsibility for decisions about accessibility compliance, the public entity should not give advice about accessibility laws or make certifications of compliance except to the extent that it is done by licensed professionals in the ordinary course of issuing building permits or conducting inspections.

Accessibility law compliance requires careful planning, and following the steps above is no guarantee that a public entity will avoid questions of liability. A public entity's contracting process should be arranged, however, to draw attention to accessibility issues early enough to plan for compliance and to incorporate measures that shift the risk of liability for non-compliance to the party with which the entity is contracting.

**FOR ADVICE CONCERNING REAL ESTATE ISSUES, PLEASE CONTACT YOUR OWN LEGAL COUNSEL, JIM R. KARPIAK, OR ANY OF THE ATTORNEYS IN THE FIRM'S REAL ESTATE DEPARTMENT.**

**PUBLIC LAW**

**AB 2292: New Restrictions on "Down-Zoning" of Residential Property**

**BY ALEXANDER ABBE**

On September 19, 2002, Governor Davis signed Assembly Bill 2292 (Dutra), related to "down-zoning" of residential property. Effective January 1, 2003, this legislation restricts a city's ability to reduce the maximum allowable density on property in areas designated or zoned for residential uses.

Proponents of the law describe it as an anti-"NIMBY" ("Not In My Back Yard") measure to discourage the practice of some jurisdictions of reducing residential densities in order to block affordable housing developments. It accomplishes this goal, however, by restricting and complicating local zoning control.

The bill adds Section 65863 to the Government Code. The statute contains several provisions, each of which is discussed individually below.

**RESTRICTION ON DOWN-ZONING**

The heart of AB 2292 prohibits a city from reducing the allowable general plan or zoning density of any residentially-designated parcel to a level below the density that was used by the Department of Housing and Community Development ("HCD") when determining whether the city's housing element complied with state law. Section 65863(b). It is immaterial under the statute whether the reduction is initiated by a city or by a member of the public; a city may neither *require* nor *permit* the reduction of density of any residentially-designated parcel. This effectively locks in the current minimum

residential densities specified in a city’s general plan unless the city revises its housing element or makes certain findings described below.

Unfortunately, the statute does not provide any guidance for a city that “self-certifies” its housing element pursuant to Government Code Section 65585(f), or that has its element approved by a court rather than HCD. Absent clarification from the Legislature, the most logical interpretation for such a city is that it should refrain from reducing the residential density for a parcel below the level that existed at the time the city adopted its housing element unless it can make the designated findings.

**FINDINGS REQUIRED TO REDUCE DENSITY**

The limitation on down-zoning is not absolute; a city may still reduce the maximum allowable density of a residential parcel if it makes both of the following findings supported by substantial evidence:

- The proposed reduction in density is consistent with the general plan, including the housing element.
- The remaining sites identified in the housing element are adequate to accommodate the jurisdiction’s share of the regional housing need.

Section 65863(b). The first of these two requirements adds little to existing law. City zoning decisions already must be consistent with the general plan, including the housing element, under several other Government Code provisions. Nevertheless, a city should only approve the down-zoning of a residentially-designated property if it can make a finding that the Land Use Element’s designation allows for the proposed lower density.

Under the second requirement, a city must determine that it will still have adequate sites to meet its regional housing needs assessment (“RHNA”). Given that many cities already find it a challenge to meet their RHNA, this may be a difficult determination to make.

**ADDITIONAL, ADEQUATE, AND AVAILABLE SITES**

If a city cannot make the second finding, the city may still make the reduction in density if it identifies sufficient “additional, adequate, and available sites” with an equal or greater residential density in the jurisdiction so that there is no net loss of residential unit capacity. Section 65863(c). Accordingly, it may be necessary for the city to “up-zone” some other area in order to legally accomplish a down-zoning.

Note that the requirement for a city to identify additional, adequate, and alternate sites under AB 2292 imposes a more difficult burden than the requirement to identify sites for housing under current housing element law. A housing element must “identify *adequate* sites for housing...for the existing and projected needs of all economic segments of the community.” Section 65583 (emphasis added). By contrast, under this new statute, a city must identify “sufficient *additional, adequate, and available* sites.” Section 65863(c) (emphasis added). AB 2292 does not define what constitutes an “available” site, which leaves this open to interpretation. For instance, does the site have to be vacant, or have public utilities connected to it, or have a commitment by a property owner to develop it for affordable housing?

A dictionary definition of “available” is “present or ready for immediate use.” *Merriam-Webster Collegiate Dictionary* (2002). Applying the plain meaning rule, the alternate sites under this statute would have to

be ready for immediate use, which could be a difficult burden for a city to meet.

**NEW “CONTINUOUS OBLIGATION” TO ENSURE SUPPLY OF ADEQUATE SITES**

AB 2292 also mandates that a city “shall ensure that its inventory or programs of adequate sites pursuant to [housing element law] can accommodate its share of the regional housing need pursuant to Section 65584, *throughout the planning period.*” Section 65863(a) (emphasis added). Existing

**AB 2292 also provides that a court should award attorney’s fees to a successful plaintiff challenging the city’s actions under the statute.**

law requires a city to update its housing element every five years; the housing element must “*make adequate provision*” for sites for affordable housing. Section 65583. AB 2292 imposes an *ongoing* obligation to *ensure* that there are adequate sites.

As a result, if during the five-year planning period, a site that a city previously relied upon to meet its RHNA is used for commercial, agricultural, open-space, wildlife preservation, or other non-residential uses, or if the state or federal government takes possession of the land, the city would have to identify additional sites for housing at that time.

**ATTORNEY’S FEES**

AB 2292 also provides that a court should award attorney’s fees to a successful plaintiff

challenging the city’s actions under the statute. A court must award these fees unless, under “extraordinary circumstances,” it finds that awarding the fees would not further the purposes of the statute, or that the action was frivolous. Section 65863(e). The attorney’s fees provision will expire on January 1, 2007, unless the Legislature renews it.

**CONCLUSION**

Given this new basis for challenging zoning decisions, the threat of paying attorney’s fees, and the ambiguities in the new law, AB 2292 creates a significant liability exposure. Cities therefore should carefully review this legislation prior to adopting any measure that would have the effect of reducing the density of residentially-designated land.

**FOR ADVICE CONCERNING HOUSING ISSUES, PLEASE CONTACT YOUR OWN LEGAL COUNSEL, ALEXANDER ABBE, OR ANY OF THE ATTORNEYS IN THE FIRM’S PUBLIC LAW DEPARTMENT.**

**REDEVELOPMENT**

**Use of Alternative Dispute Resolution Procedures in Redevelopment Agreements**

**BY MICHAEL ESTRADA**

Many redevelopment agency attorneys do not recommend the use of alternative dispute resolution (ADR) procedures, such as arbitration, in complex redevelopment agreements. For example, in a typical redevelopment owner participation agreement or disposition and development agreement (OPA/DDA), we would insist on a judicial remedy and not concede to a developer’s request for arbitration or other ADR procedure.

The reason for this is simple. Redevelopment agencies, like most other public entities, are subject to a complex body of law. There are many presumptions in favor of the redevelopment agency that would not apply in a typical arm’s length business-to-business transaction. Further, the public policy rationale for redevelopment may warrant some consideration that would not ordinarily be provided to a business involved in a dispute with another business. And, concepts such as a transaction being an implementing activity of a larger project (the redevelopment plan) is not an issue often faced by arbitrators. It has been our experience in defending our public entity clients that we are most successful in the courts. The time involved in briefing the matter, and in explaining the public policy rationale behind a particular course of action, is often time well spent and can make the difference in achieving a victory for the entity. Thus, we seldom recommend inclusion of ADR provisions in an OPA or DDA.

There are certain limited circumstances,

however, where it may be appropriate to use ADR in complex redevelopment transactions. They typically arise when there is an anticipated income stream, or an obligation to pay certain monies, to the redevelopment agency. In these circumstances, the probability exists that a dispute may occur. The parties may disagree on the precise amount due, particularly where the calculation is to be in accordance with a formula specified in the agreement. Such a matter does not involve the overall determination of a major default in the project or construction of the project, and may have less of the public policy rationale that normally warrants a judicial process. Two examples come to mind.

We recently negotiated a comprehensive OPA and related documents for the redevelopment of an obsolete commercial center. One of the many complexities was the relocation of more than forty tenants remaining in the center. In the agreement, we worked out an arrangement for the agency and the developer to share the relocation costs according to a specified formula. The developer was responsible for the first million dollars, and then the parties evenly split each additional dollar. Although the agency was responsible for the relocation process, many of the tenants had been operating on month-to-month license agreements or short term leases (in anticipation of redevelopment of the center), and the developer was willing to “buy them out.” Thus, there would be some involvement by the developer in compensating the tenants directly, as well as the typical relocation activities of the agency.

This situation required strict accounting by both parties to track expenditures for relocation, and to determine the eligibility of those expenditures as a “relocation cost,” a defined term in the agreement. The

developer had an incentive to ensure every dollar it spent was determined to be for an eligible relocation cost (and thus counted toward the \$1 million threshold), while at the same time ensuring that the agency was not overly generous in its payment of relocation expenses. The agency had an incentive to ensure that only those developer expenditures that constituted eligible relocation expenses counted towards the threshold, as well as the obligation to ensure that relocatees received all benefits to which they were entitled.

In order to resolve potential disputes between the parties concerning whether the appropriate amount of relocation costs was being paid to a tenant and whether that amount was legally required, we set up an ADR process. In this transaction, we provided for the usual first step of a voluntary settlement. This involved notification by the party claiming a dispute to the other, with a statement of the basis of the dispute. There was a ten-day period of time in which the parties were to meet to attempt to resolve the matter voluntarily. The short time frame was mandated by the developer's tight schedule. The second step in the process would be binding arbitration. We specified time limits for conducting the hearing and for the arbitrator's determination after the hearing. In order to avoid disputes over the arbitrator, we agreed in advance who the arbitrator would be. Because relocation law requires specialized knowledge, we agreed on someone who was an expert in this field, and who at the same time, was qualified to act as a mutually acceptable arbitrator. Finally, we included the usual provisions regarding decision enforcement and apportionment of fees and costs.

We cannot say how this process works

because no arbitrable dispute ever arose that required its use. There were a couple of disputes that led to voluntary negotiations and were resolved at that stage. Nonetheless, we believe the process is a useful model for replication in similar circumstances. It provided a mechanism that addressed the developer's valid need for a prompt dispute resolution process, while at the same time protecting the public policy interests of the agency.

Another typical redevelopment agreement scenario involves a projected income stream to the agency. In the case where that income stream is to be used for payment of a promissory note secured by a deed of trust, such as the commonplace residual receipts repayment provisions for an affordable

**In order to avoid disputes over the arbitrator, we agreed in advance who the arbitrator would be.**

housing agreement, the mechanisms provided by the promissory note and deed of trust will usually suffice. In some commercial redevelopment transactions, however, there may be an income stream anticipated (or perhaps hoped for) by the agency that is not required, but if it exists, a certain portion is to be allocated to the agency.

For example, in one recent transaction for a commercial and retail development, the agency provided a substantial write-down of land costs and relocation costs. As part of the consideration for that assistance, the

developer pledged a certain portion of the return on costs to be provided to the agency (as the agency’s participation interest). In the agreement we established a complex formula for calculating that interest, determining what costs were to be taken off the top and which ones were to be taken after apportionment between the parties, and determining what constituted revenue. No matter how well written, however, there remains the possibility of a dispute about whether a cost is appropriately deducted from revenue and whether an item is appropriately attributed as revenue.

We agreed on an ADR process for the resolution of any dispute involving the agency’s participation interest. There were the usual provisions for a right to audit. In the event a dispute could not be resolved by an independent audit, we provided for a judicial reference action pursuant to Code of Civil Procedure Section 638 *et seq.*

Popularly known as a trial by reference, this procedure is more formal than arbitration or other common ADR procedures. Strict orders of proof and rules of evidence apply. Essentially, the judge’s function has been replaced by the referee. Nevertheless, referees may bend the rules more than judges, which allows some leeway. Some of the flexibility in this process is that an attorney need not be the referee. Alternatively, a panel of up to three referees may be selected. The referee must be appointed by the court and has only the powers set forth in the order of appointment. The parties may designate the referee to be approved by the court. A time limit is imposed on the referee; a decision must be rendered within 20 days. The referee issues only a statement of decision; it is the court that renders the judgment. The referee has no post-trial authority without the parties’ consent. Thus, for example, a trial by reference leaves

the parties with discretion whether to let the referee handle enforcement of the judgment, or whether to employ the more traditional attachment and other post-judgment remedies. In situations such as that described above, where a redevelopment agency wants a speedier resolution than that provided by a lengthy civil trial, and also desires some formality, such as use of the rules of evidence, it may be appropriate to agree to a trial by reference process.

No one method may be appropriate in all circumstances. And, as a general rule, we do not recommend the use of ADR procedures for complex redevelopment transactions, at least not for the public agency. There may, however, be circumstances, such as a specific limited obligation to pay money, when an ADR approach may be appropriate.

**FOR ADVICE CONCERNING REDEVELOPMENT ISSUES, PLEASE CONTACT YOUR OWN LEGAL COUNSEL, MICHAEL ESTRADA, OR ANY OF THE ATTORNEYS IN THE FIRM’S REDEVELOPMENT PRACTICE GROUP.**

**PUBLIC WORKS**

**Recent Public Works Legislation**

**BY DAROLD PIEPER**

The Legislature enacted several bills in 2002 that are important to public works projects.

**SB 278 (MACHADO)**

Labor Code Section 1771.5 permits local agencies to adopt a labor compliance program, and the local agency then becomes responsible for staffing various labor compliance requirements. Most significant among these are the requirements to review and, if necessary, audit a contractor’s certified payroll records to verify that the contractor is paying prevailing wages, to withhold funds under certain circumstances, and to administer a notice process when funds are withheld.

Agencies that adopt a Section 1771.5 program thereafter only have to require prevailing wages on projects in excess of \$25,000 (new construction) or \$15,000 (alteration, demolition, repair or maintenance). Agencies without a Section 1771.5 program must require the payment of prevailing wages on any public works project of more than \$1,000.

Historically, implementing a Section 1771.5 labor compliance program has been voluntary. Two bills change that rule this year, however: SB 278 and AB 1506. Each requires public agencies to adopt and enforce Section 1771.5 programs if they use funds from specified funding sources. SB 278 applies to any use of funds from the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002 (Prop. 50), a funding source available to a variety of local agencies. AB 1506 applies to the use of certain education bond funds.

Thus, if a local agency is eligible and desires to use any funds from Prop. 50, it will be required to initiate a Section 1771.5 program. It is likely that more such funding “tying arrangements” will be enacted in the future, and that Section 1771.5 participation will ultimately be mandatory as a practical matter in order for local agencies to use any state funding source. Once such a program is in place, a local agency may have little incentive to limit its use to the specified funding source and may instead choose to take advantage of its increased prevailing wage thresholds on all public works projects.

SB278 and AB1506 each also include introductory language which could be interpreted to require charter cities to pay prevailing wages, but the actual legal effect of that language is not clear.

**SB 972 (COSTA)**

SB 972 continues the Legislature’s efforts to refine Labor Code Section 1720, which defines “public works” and thus determines what projects require the payment of prevailing wages. SB 972 eliminates some of the confusion and unintended consequences that resulted from last year’s SB 975 (Alarcon), which greatly expanded the statutory definition of public works.

Of particular interest are the changes made to Section 1720(c)(6). That provision exempts privately-owned residential projects from the definition of public works under the following conditions:

- Self-help housing projects in which no fewer than 500 hours of construction work are performed by the homebuyers.
- Rehabilitation or expansion work on not-for-profit temporary or transitional housing for

homeless persons where the total project value is less than \$25,000.

- Financial assistance provided in the form of mortgage assistance, down payment assistance, or rehabilitation assistance for a single-family home.
- Construction work on temporary or transitional housing for homeless persons where the facility is developed by a non-profit organization that provides more than 50% of the total project cost from non-public sources.
- Public funding in the form of below-market interest rate loans to a low-moderate income housing project meeting the requirements of Section 1720(c)(6).

SB 972 also amends Section 1720 to expressly provide that it does not preempt local ordinances requiring the payment of prevailing wages on housing projects.

**AB 138 (NATION)**

Public Contract Code Section 20103.8 authorizes invitations for bids that require a bidder to price additive or deductive items as part of its bid, and it specifies methods by which those additive or deductive items may be used to determine the lowest bidder. AB 138 amends subsection 20103.8(c) to clarify that any ordered list of additive or deductive items to be used to determine the lowest bidder must be included as part of the bid solicitation, and the agency must declare its funding limit before the bids are opened. Subsection 20103.8(d) permits a bid selection process that ranks the bidders from lowest to highest before the identity of the bidders is revealed to the agency. The amendment to this subsection applies the requirement of anonymity to subcontractors as well.

**AB 2037 (DIAZ)**

Public Contract Code Section 9201 has long provided an agency with full authority to compromise or otherwise settle any claim relating to a contract at any time. AB 2037 limits that broad grant of authority by requiring the agency to include in all of its public works contracts a provision for timely notification to the contractor of the receipt of any third-party claim relating to the contract. It also permits agencies to recover their reasonable costs of providing that notification.

This bill is intended to give the contractor an opportunity to be aware of any third-party claim against it before the agency settles that claim without its knowledge and to ensure that the contractor is able to comply with the notice requirements of its insurance policy. Compliance with AB 2037 will require changes in both agency contract language and claims procedures.

**SB 937 (MARGETT)**

This bill amends Public Contract Code Section 4104.5 to explicitly require that any bids received after the time specified for opening bids must be returned to the bidder unopened. While local agencies have followed this requirement for years pursuant to Government Code Section 53068, this amendment extends the requirement to all agencies, including the state. The bill also rewords the existing language to make it clear that the date and time by which bids must be received must be listed in the bid invitation and the public notice inviting bids.

**FOR ADVICE CONCERNING PUBLIC WORKS ISSUES, PLEASE CONTACT YOUR OWN LEGAL COUNSEL, DAROLD PIEPER, OR ANY OF THE ATTORNEYS IN THE FIRM'S PUBLIC WORKS PRACTICE GROUP.**

**FIRM NEWS**
**Litigation Victories**

**Roy A. Clarke** obtained an award from a labor arbitrator upholding a city’s decision to terminate an employee for punching a co-worker. The arbitrator rejected the employee’s and union’s arguments regarding evidence insufficiency, self-defense, disparate treatment, illegal discrimination and excessive penalty.

**Juliet Cox** and **B. Tilden Kim** successfully defended the City of Rancho Cucamonga in a suit by builder Barratt American challenging fees for building, plumbing, mechanical, electrical inspections and plan-checking. Barratt American alleged that the method of calculating such fees violated the Government Code, and asked the court to order Rancho Cucamonga to reduce its fees substantially. Barratt American also sought a refund of more than \$140,000 in permit fees it alleged it had paid during the last several years. The trial court dismissed the entire suit, ruling both that Barratt American had waited too long to challenge Rancho Cucamonga’s fee structure and that even a timely suit would not have entitled Barratt American to any refund.

**Roy A. Clarke** also obtained a decision from an administrative law judge on behalf of a city overturning a decision of the Public Employees Retirement System (PERS) regarding the determination of final compensation for retirement purposes. This decision was especially significant because PERS generally prevails in 85–90% of the cases that go to hearing and rarely loses on compensation issues.

**CALPELRA Conference**

**RW&G** was again a corporate sponsor at the Annual Training Conference of the California Public Employers Labor Relations Association (CALPELRA) in Monterey on November 13–15, 2002. The following firm attorneys made presentations or prepared papers for the conference.

**Roy A. Clarke** presented a paper entitled “Military Leave in Light of the War on Terrorism and the Potential Actions in Iraq.” A copy of the paper is available by request to [rclarke@rwglaw.com](mailto:rclarke@rwglaw.com).

**Peter K. Kim** prepared papers entitled “New Requirements for Conducting Background Investigations: Does Your Employment Application Need to be Amended?”; “Workers’ Compensation Reform 2002: What Should You Do to Prepare for the Increasing Costs?”; and “Carpal Tunnel Syndrome Under the ADA and the FEHA: Does the Same Standard Apply?”. Copies of these papers are available by request to [pkim@rwglaw.com](mailto:pkim@rwglaw.com).

**Elizabeth A. Sullivan** prepared a handbook entitled “Recent Developments in Labor and Employment Law: 2002 in Review.” A copy of the handbook is available by request to [esullivan@rwglaw.com](mailto:esullivan@rwglaw.com).

### League of California Cities Conference

The following firm lawyers moderated panel discussions or prepared papers for the League of California Cities Annual Conference in Long Beach on October 2–4, 2002.

**Rochelle Browne** moderated a panel discussion at the Environmental Justice Focus Session. A copy of the materials is available by request to [rbrowne@rwglaw.com](mailto:rbrowne@rwglaw.com).

**Steven L. Dorsey**, as the City Attorney’s Department representative to the Board of Directors of the League of California Cities, moderated the “Council-Manager Form of Government” panel discussion.

**Robin D. Harris** presented a paper entitled “California Constitutional Debt Limits and Municipal Lease Financing.” A copy of the paper is available by request to [rharris@rwglaw.com](mailto:rharris@rwglaw.com).

**B. Tilden Kim** presented a paper entitled “Injunctions Against Dangerous Persons.” A copy of the paper is available by request to [tkim@rwglaw.com](mailto:tkim@rwglaw.com).

### Presentations and Appointments

**Erwin E. Adler** presented a paper entitled “The Ten Commandments of Bad Faith” at the Society of Claim Law Adjusters’ Annual Conference in Orlando, Florida, on September 13, 2002, and to the Alea Insurance Company and the London Market Companies on November 6, 2002. A copy of the paper is available by request to [eadler@rwglaw.com](mailto:eadler@rwglaw.com).

**Terence R. Boga** has been appointed City Attorney of the City of Westlake Village. Terence has also been appointed Editor of the *Public Law Journal* published by the Public Law Section of the State Bar of California.

**Regina N. Danner** made a presentation on “Preparing a Witness for Trial? How to Get There” at the 35th Annual Litigation Seminar of the Southern California Chapter of the Appraisal Institute on November 15, 2002. A copy of the materials is available by request to [rdanner@rwglaw.com](mailto:rdanner@rwglaw.com).

**Steven L. Dorsey** participated in a panel discussion entitled “A Local Official’s Guide to the Ethics Laws” at the Fall Contract Cities Conference on September 28, 2002.

**Gregory W. Stepanicich** has been appointed to the League of California Cities' "Housing Opportunity Task Force." Greg made presentations on the Public Records Act to staff members and councilmembers of cities in Solano County on November 20 and 25, 2002.

**Peter M. Thorson** has just completed his two-year term on the Legal Advocacy Committee and on the Editorial Board of the California Municipal Law Handbook for the League of California Cities.

**Laurence S. Wiener** served as an instructor at the "Introduction and Updates to the Subdivision Map Act," UCLA Extension Public Policy Program on November 15, 2002. Larry will also complete his term as President of the City Attorney's Association of Los Angeles County on December 31, 2002.

### New Attorneys

**Michael P. Coyne** received his J.D. from Wake Forest University School of Law in 1999 and his LL.M. in 1996 from the University of Sussex, England. Michael joins the firm's Litigation Department in our Los Angeles office.

**Bruce W. Galloway** received his J.D. from the University of California at Berkeley, Boalt Hall School of Law in 1986. Bruce joins the firm's Real Estate and Business Departments in our Los Angeles office.

**Daniel Rene Garcia** received his J.D. from Stanford University Law School in 2000. Daniel joins the firm's Litigation Department in our Los Angeles office.

**Jim R. Karpiak** received his J.D. from the University of San Francisco School of Law in 1993. Jim joins the firm's Public Law and Real Estate Departments in our San Francisco office.

**Evan J. McGinley** received his J.D. from Illinois Institute of Technology/Chicago-Kent College of Law in 1996. Evan joins the firm's Environmental Department in our Los Angeles Office.

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