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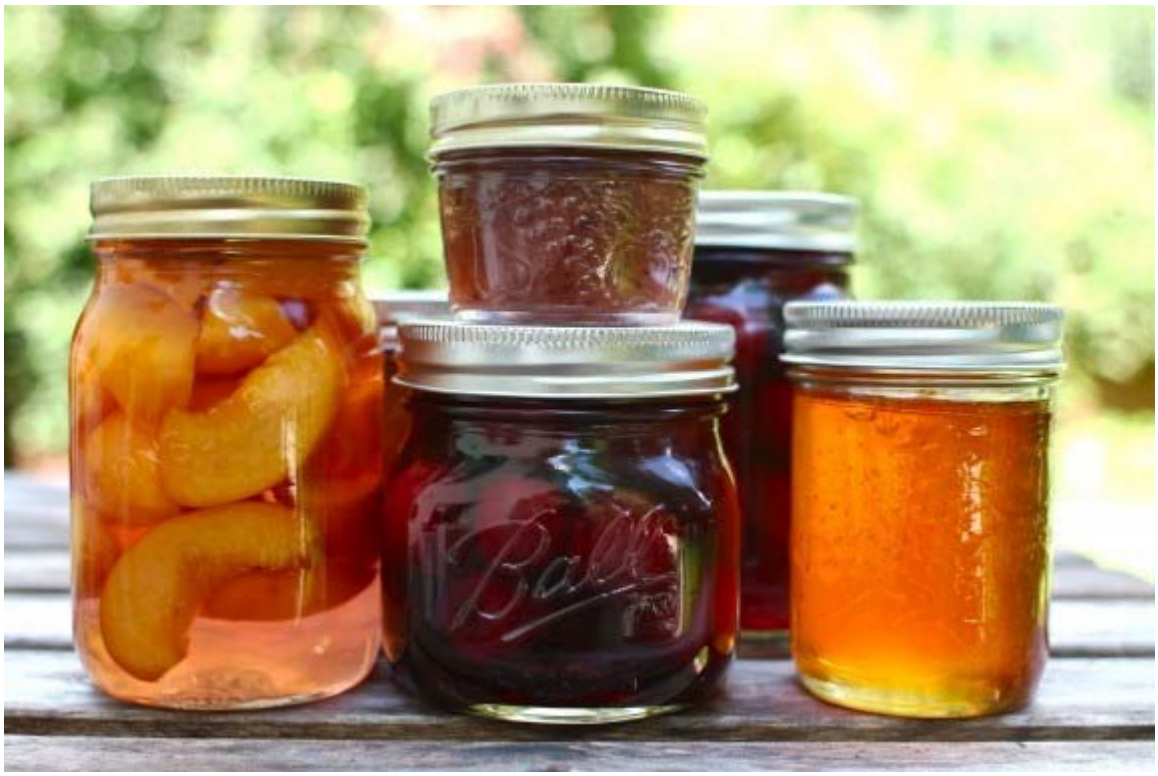
January 2013



THE CALIFORNIA HOMEMADE FOOD ACT: COTTAGE FOOD OPERATIONS ARRIVE IN CALIFORNIA

By Stephen A. McEwen, Esq.

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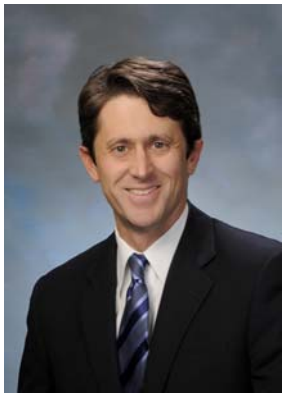
January 2013 **Volume 7, Number 1**



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THE CALIFORNIA HOMEMADE FOOD ACT: COTTAGE FOOD OPERATIONS ARRIVE IN CALIFORNIA

By Stephen A. McEwen, Esq.

Some call it the "homemade food renaissance." In recent years, there has been a significant rise in the number of home-based food businesses across the country, as both professional and amateur chefs have begun churning out a wide variety of homemade baked breads, jams, jellies, and other goodies. These micro-enterprises have found wide-spread support in state legislatures, as 33 states have passed laws allowing and regulating home-based food businesses, commonly known as cottage food operations. California officially joined this list on January 1, 2013, when the California Homemade Food Act (AB 1616) became effective. While this law will undoubtedly strengthen the cottage food trend and make it possible for individuals to operate these businesses from their own kitchens, the new law creates significant zoning issues and challenges for local governments.

Prior to AB 1616, individuals who wanted to produce food products for sale had to use a certified kitchen or approved food facility. Such operations typically required expensive commercial-grade kitchen equipment and were subject to frequent health and safety inspections. Existing health and safety regulations made home-based food businesses prohibitively expensive in most instances. In addition, residential zoning standards usually did not allow food production and distribution, especially the direct sale of food items from private residences. The objective of AB 1616 was to remove these traditional obstacles to individual food producers and small food enterprises.

In sum, AB 1616 exempts cottage food operations from many of the regulations that apply to traditional food production. It also requires cities and counties to allow cottage food operations in private residences, but permits local ordinances that impose "reasonable" standards, restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control. Cottage food operations must register with county health departments, but, depending on the nature of the operation, are subject to only very limited inspections.

AB 1616 defines cottage food products as "nonpotentially hazardous food" prepared for sale in the private kitchen of a cottage food operator. Under this definition, meats, dairy products, or perishable items will not qualify as cottage foods. Cottage foods are those that do not require refrigeration to keep them safe or prevent bacterial growth. Newly-enacted Health and Safety Code section 114365.5(b) establishes the current list of approved cottage foods, which includes the following:

- Baked goods without cream, custard, or meat fillings, such as breads, biscuits, churros, cookies, pastries, and tortillas
- Candy, such as brittle and toffee
- Chocolate-covered nonperishable foods, such as nuts and dried fruit

- Dried fruit
- Dried pasta
- Dry baking mixes
- Fruit pies, fruit empanadas, and fruit tamales
- Granola, cereals, and trail mixes
- Herb blends and dried mole paste
- Honey and sweet sorghum syrup
- Jams, jellies, preserves, and fruit butter that comply with the standard described in Part 150 of Title 21 of the Code of Federal Regulations
- Nut mixes and nut butters
- Popcorn
- Vinegar and mustard
- Roasted coffee and dried tea
- Waffle cones and pizelles

The State Public Health Officer may add to or delete from this list of cottage foods by posting notice of the proposed change on the California Department of Health's website. The public will have an opportunity to comment on any change before it becomes effective.

The new state law also establishes certain limits and requirements for cottage food operations:

- A cottage food operation may only have one full-time equivalent employee, not including the operator's family or household members. (Health & Safety Code, § 113758(a).)

- Cottage food operations may not have gross sales greater than $35,000 in 2013, $45,000 in 2014, and $50,000 in 2015 and beyond. (Ibid.)

- Cottage food preparation may not occur in the home kitchen concurrent with other domestic activities, such as family meal preparation, dishwashing, kitchen cleaning, or guest entertainment. (Health & Safety Code, § 114365(a)(1)(A)(i).)

- There cannot be any infants, small children, or pets in the kitchen during cottage food preparation, packaging, or handling. (Health & Safety Code, § 114365(a)(1)(A)(ii).)

- The operator must keep all kitchen equipment and utensils clean and in good repair. (Health & Safety Code, § 114365(a)(1)(A)(iii).)

- Food contact surfaces, equipment, and utensils must be washed and sanitized before each use. (Health & Safety Code, § 114365(a)(1)(A)(iv).)

- Food preparation and food and equipment storage areas must be maintained free of rodents and insects. (Health & Safety Code, § 114365(a)(1)(A)(v).)

- Smoking is prohibited in the kitchen during food preparation and packaging. (Health & Safety Code, § 114365(a)(1)(A)(vi).)

- Individuals with contagious illnesses may not be in cottage food kitchens. (Health & Safety Code, § 114365.2(a).)

- All individuals involved in cottage food preparation must wash their hands before food preparation and packaging. (Health & Safety Code, § 114365.2(b).)

- All water used in the cottage food process must be potable water. (Health & Safety Code, § 114365.2(c).)

- Anyone who prepares or packages cottage food products must complete a food processor course provided by the Department of Health within three months of becoming registered. (Health & Safety Code, § 114365.2(d).)

- A cottage food operation must label all its products in compliance with the Federal Food, Drug, and Cosmetic Act (21 U.S.C § 343 et seq.). (Health & Safety Code, § 114365.2(e).)

County health departments will be responsible for ensuring compliance with these food safety standards. However, as set forth below, the ability of county officials to inspect cottage food operations is severely limited, thus making enforcement difficult.

Before starting a cottage food business, an operator must obtain approval from the county health department. AB 1616 classifies cottage food operations in two categories, "Class A" and "Class B," and establishes different approval procedures for each category. Class A cottage food operations are those which involve only direct sales between the operator and the consumer. (Health & Safety Code, §§ 113758(a)(1), (b)(4).) To conduct a Class A cottage food operation, the operator need only "register" with the county health department and submit a completed self-certification checklist that verifies compliance with the state-mandated operational requirements described above. (Health & Safety Code, § 114365(a)(1)(A).) If the operator completes the checklist, the county *must* issue the operator a registration number. (Health & Safety Code, § 114365(a)(1)(B)(ii).) Class A cottage food operations are not subject to either an initial or routine inspection. (Health & Safety Code, § 114365(a)(1)(C)(i).) The county may only inspect a Class A site if there has been a consumer complaint or there is reason to believe that the operator is not complying with the applicable food safety standards. (Health & Safety Code, § 114365(a)(1)(C)(ii).)

Class B cottage food operations are those which involve both direct sales between the operator and the consumer and indirect sales involving third-party retailers, such as supermarkets. (Health & Safety Code, §§ 113758(a)(2), (b)(5).) Unlike Class A operations, Class B operations require a permit from the county health department. (Health & Safety Code, § 114365(a)(2)(A).) This permit, however, is still relatively routine and ministerial. The local health department must issue the permit following an initial inspection if it determines that the operation meets the statute's basic operational requirements. (Health & Safety Code, § 114365(a)(2)(B)(ii).) Following the issuance of a Class B permit, the County may inspect the operation no more than once a year, unless there is a need to respond to a specific consumer complaint. (Health & Safety Code, § 114365(a)(2)(C).)

With regard to local zoning regulations, the new law states that a city or county "shall not prohibit a cottage food operation . . . in any residential dwellings." (Govt. Code, § 51035(a).) Instead, cities and counties must do one of the following:

(1) Classify a cottage food operation as a permitted use of residential property for zoning purposes.

(2) Establish a "nondiscretionary permit" for residential cottage food operations that must be granted administratively without a hearing if the applicant "complies with local ordinances prescribing reasonable standards, restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control." The applicable noise standards must be consistent with local noise ordinances implementing the noise element of the general plan.

(3) Establish a process for a zoning administrator to review permit applications for cottage food operations. The "permit shall be granted if the cottage food operation complies with local ordinances, if any, prescribing reasonable standards, restrictions, and requirements concerning the following factors: spacing and concentration, traffic control, parking, and noise control relating to those homes." As with option 2, the applicable noise standards must be consistent with local noise ordinances implementing the noise element of the general plan. (Govt. Code, § 51035(a)(1)-(3).)

In addition, AB 1616 provides that the commencement of a cottage food operation in a residence does not constitute a change of occupancy for purposes of either the State Housing Law or local building and fire codes and that cottage food operations must be considered residences under applicable building codes. (Govt. Code, §§ 51035(c), (d).)

Understandably, these provisions regarding local zoning and building regulations have caused concern among cities and counties. Cottage food operations could very likely cause significant quality-of-life impacts on residential areas. Cottage food operations will likely result in increased traffic and noise given AB 1616's provisions allowing a full-time employee and direct sales of food products in the operator's kitchen. Noise and traffic

resulting from the loading and delivery of cottage food products may also add to these concerns. Existing home occupation standards may be inadequate to deal with these issues and, in fact, may be preempted by AB 1616's permissive language. Cities and counties will need to review their existing home occupation regulations carefully to determine whether and to what extent such regulations are enforceable against the evolving cottage food industry.

Given the unique nature of cottage food operations, it is unlikely that existing local regulations will be sufficient to address the potential impacts of these businesses. Newly-enacted Government Code section 51035(a) contemplates the creation of local ordinances addressing cottage food operations, but it does not provide any guidance on the extent of permissible regulations. Section 51035(a) merely states that cities and counties may adopt "*reasonable* standards, restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control." What constitutes a "reasonable" standard, restriction, or requirement is left for future interpretation and, unfortunately, possible litigation.

Despite this uncertainty, there are a number of potential local regulations that would likely be considered reasonable under AB 1616:

- A maximum number of on-site customers at any given time. AB 1616 authorizes on-site direct sales of cottage food products, but does not prevent cities and counties from placing a cap on the number of customers in order to minimize the impact on nearby residences. A cap of two on-site customers at any given time should be considered a reasonable traffic control. A total ban on direct sales, however, would likely be subject to legal challenge on state law preemption grounds.

- A restriction on the hours for on-site direct sales. Neighbors should not have to deal with customers visiting a cottage food operation at all hours of the day and night. A restriction that limits on-site direct sales to business hours, Monday through Friday, should be considered reasonable. Cities and counties should have some flexibility in devising these types of restrictions.

- No on-site dining. On-site dining could create a restaurant setting, which would further disrupt residential areas and create additional health and safety concerns. A ban on this activity appears consistent with AB 1616.

- Parking requirements. Cities and counties should be able to require sufficient off-street parking to accommodate an employee, if necessary, and any on-site customers (e.g., one off-street spot for an employee and an off-street spot for each on-site customer). There is a potential legal argument that an onerous off-street parking requirement would be inconsistent with AB 1616 and its express authorization of on-site direct sales. However, if a particular location cannot accommodate the increased need for parking, it is reasonable to argue that direct sales are not appropriate for such a location.

- Vehicle size and loading requirements. Many cottage food operators will sell their products off-site at farmers' markets and fairs, provide door-to-door deliveries, or take their products to third-party retailers. Therefore, it is expected that cottage food operations will usually result in the use of delivery vehicles and loading activities. The use of large trucks in residential areas would undoubtedly be disruptive. A regulation that delivery vehicles shall not be any heavier than 10,000 lbs. in gross vehicle weight should be supportable. In addition, cities and counties should be able to restrict loading activities to certain hours of the day and/or days of the week.

- Spacing and concentration restrictions. AB 1616 expressly allows cities and counties to impose reasonable spacing and concentration regulations. The exact parameters of permissible spacing and concentration regulations are unclear. Each city and county will need to evaluate local conditions, such as average lot width, to determine proper spacing requirements and to ensure that such requirements are effective in alleviating projected traffic impacts.

- Food and equipment storage. Newly-enacted Health and Safety Code section 114365(a)(1)(A)(v) mandates that all food preparation and food and equipment storage areas shall be maintained free of rodents and insects. There is no language in AB 1616, however, that addresses where operators can store such items. Cities and counties should be able to prohibit outdoor storage and to limit storage of cottage food products and equipment to the principal residence.

- Noise regulations. Under Government Code section 51035(a), noise restrictions on cottage food operations must be consistent with existing noise ordinances that implement the noise element of the general plan.

As this list demonstrates, local government can still play an important regulatory and oversight role with regard to cottage food operations despite AB 1616's mandate that cities and counties allow these businesses in residential dwellings. In addition to these development standards, cities and counties can also require operators to obtain local business licenses.

Whether the combination of local ordinances and county health department oversight is enough to alleviate concerns about the impacts of cottage food operations is yet to be determined. Although AB 1616 sets forth numerous health and safety requirements and allows local ordinances addressing spacing, traffic control, parking, and noise control, enforcement of many of these standards will be a challenge because the targeted activities will be taking place in a private kitchen. Cities and counties simply do not have the resources available to monitor compliance with traffic and parking requirements or limits on on-site direct sale customers. The county health department's limited inspection authority will only complicate enforcement efforts. Therefore, enforcement of both state and local cottage food regulations will be largely, if not entirely, complaint-based.

By requiring cities and counties to allow cottage food operations, AB 1616 limits control over basic land use decisions that have been reserved traditionally to local authorities. While the law allows cities and counties to retain some control over these operations, the extent of that control is unclear. Cities and counties will need to monitor the effects of cottage food operations on residential neighborhoods and may have to experiment with various regulations and restrictions along the way.

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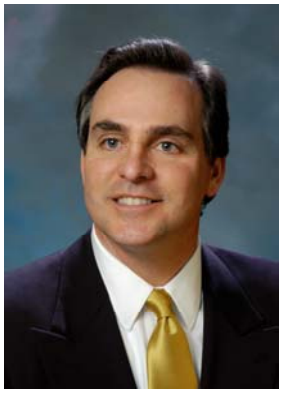

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RECENT AMENDMENTS TO THE BROWN ACT

By Donald M. Davis, Esq., Lisa S. Kurihara, Esq., and Aaron G. Ezroj, Esq.

There were four legislative acts in 2012 that affected the Ralph M. Brown Act ("Brown Act"): Proposition 30, SB 1003, AB 2690, and SB 475. Each of these legislative acts took effect beginning in 2013.

1. Proposition 30 – Adding Section 36 to Article XIII of the California Constitution and Making Brown Act Mandates Ineligible for State Reimbursement

Among the lesser known provisions of Proposition 30 that was approved by California voters in November 2012, was the addition of Section 36 to Article XIII of the California Constitution, which provides that any requirement for a local agency to comply with the Brown Act is no longer considered a reimbursable state mandate. Newly adopted Article XIII, Section 36(c)(3) states in part:

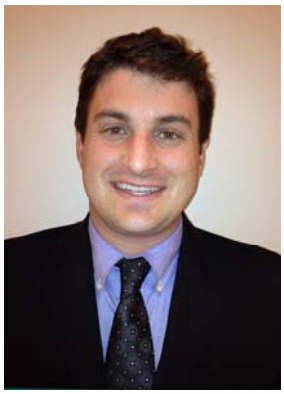
> "… Any requirement that a local agency comply with Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code, with respect to performing its Public Safety Services responsibilities, or any other matter, shall not be a reimbursable mandate under Section 6 of Article XIII B." (Emphasis added.)[1]

Under Section 6 of Article XIII B of the California Constitution, the state must generally provide reimbursement for the costs of new programs or higher levels of services that the Legislature or any state agency mandates upon local government. In addition, under Government Code section 17581(a), when a state mandate has been suspended, a local agency is no longer required to implement or give effect to the applicable statute during the period of the suspension.[2] In July 2012, the Governor approved the State Budget Act, which included provisions suspending portions of the Brown Act (primarily related to posting agendas prior to public meetings and disclosing information from closed sessions), which had been deemed reimbursable mandates.[3] As a result, local agencies were no longer required to implement these provisions during the period covered by the

[1] Here is the Legislative Analyst's summary of the provision from the official Proposition 30 ballot title and summary publication at page 16: *"**Ends State Reimbursement of Open Meeting Act Costs**.* The Ralph M. Brown Act requires that all meetings of local legislative bodies be open and public. In the past, the state has reimbursed local governments for costs resulting from certain provisions of the Brown Act (such as the requirement to prepare and post agendas for public meetings). This measure specifies that the state would not be responsible for paying local agencies for the costs of following the open meeting procedures in the Brown Act."

[2] *See generally,* California School Boards Ass'n, et al. v. Brown (2011) 192 Cal.App.4th 1507, 1512-13; Tri-County Special Education Local Plan Area, et al. v. County of Tuolumne (2004) 123 Cal.App.4th 563, 571.

[3] *See* Item Number 8885-295-0001 of AB 1464.



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suspension.[4]

The adoption of Section 36 of Article XIII of the California Constitution essentially supersedes the suspension of the Brown Act mandates by rendering all of the requirements of the Brown Act ineligible for reimbursement. As a result, local agencies are once again required to implement all provisions of the Brown Act and will not receive any further reimbursement from the state for complying with the Brown Act beginning in 2013.

2. SB 1003 (Yee) - Amending Government Code Sections 54960, 54960.5 and Adding Government Code Section 54960.2

Under existing Brown Act provisions, a district attorney or any interested person may bring a lawsuit to determine the applicability of the Act to a recent "action taken" by a local agency in order to declare such action void"[5] or to prevent future "violations or threatened violations" by local agencies.[6]

This bill amended the Brown Act to authorize legal action against a legislative body to determine whether certain "past actions" violated the Brown Act. Specifically, the district attorney or any interested person may now bring a civil action for a Brown Act violation pursuant to Government Code section 54960 and new section 54960.2 based on a legislative body's past actions occurring within the previous nine months. However, before suing for such past actions, the district attorney or interested person must submit a cease and desist letter to the legislative body that sets forth the alleged violation, and the legislative body must have failed to approve at an open session the issuance of an unconditional commitment to cease and desist from the alleged past practice in substantially the form provided in Section 54960.2 within 30 days of receiving the letter.[7]

If an action brought pursuant to new Section 54960.2 is dismissed with prejudice because a legislative body has subsequently provided an unconditional commitment to cease and desist from an alleged past practice after the 30-day period for making such a commitment has expired, the court must award attorney fees and costs to the plaintiff if the filing of the action caused the legislative body to issue the unconditional commitment.[8]

And similar to the rights of a prevailing plaintiff in an action alleging a Brown Act violation under existing Sections 54960 and 54960.1, a court may award attorney fees and costs to

[4] Note, however, that many local agencies have local ordinances that require implementation of the suspended Brown Act mandates despite the suspension. Moreover, many local agencies continued to implement the Brown Act mandates in an effort to demonstrate commitment to transparency in local government.

[5] Cal. Gov. Code § 54960.1.

[6] Cal. Gov. Code § 54960.

[7] Cal. Gov. Code § 54960.2.

[8] Cal. Gov. Code § 54960.5.

a plaintiff under new Section 54960.2 where it is found that a legislative body has violated the Brown Act.

Finally, the bill permits a legislative body to rescind its commitment to cease and desist from a past practice by taking such action at a regular meeting; provided, however, that the body has first given at least 30-days' written notice to the individual who brought the original allegation that the legislative body intends to rescind such commitment. If such commitment is rescinded, the individual may then commence a legal action to challenge the applicability of the Brown Act to ongoing actions or threatened future actions of the legislative body.

Comment

This bill reflects a compromise by the Legislature in response to strong opposition to the initial draft legislation by local agencies, who complained that by allowing lawsuits for "past" actions, the alleged or actual past violation would likely be moot by the time the case came to trial, and if so, no relief could be granted. The agencies contended that the result would be unnecessary litigation that, at best, would lead to an advisory opinion while imposing burdensome defense costs and potential attorney's fees on public agencies when an alleged questionable practice is no longer taking place.[9] By allowing local agencies the option of issuing the unconditional commitment to cease and desist from repeating past actions or practices, such litigation costs can be avoided.

3. AB 2690 – Technical Changes to Government Code Sections 54954.5 and 54956.9

This bill implements a new numbering scheme to the subsections within Government Code section 54956.9. As a result, the renumbering affects how the closed session description for "Conference with Legal Counsel" is to be listed on public agendas. Prior to holding a closed session to discuss pending litigation, legislative bodies must state on the agenda or publicly announce the paragraph of Government Code section 54956.9(d) that authorizes the closed session.[10] Pursuant to the new numbering scheme:

1. Existing litigation is under paragraph "(d)(1)" of Section 54956.9;

2. Significant exposure to litigation is under paragraphs "(d)(2)" and "(d)(3)" of Section 54956.9; and

3. Potential initiation of litigation is under paragraph "(d)(4)" of Section 54956.9.

[9] *See for example,* McKee v. Tulare County, 2011 WL 5184469 (Cal.App. 5 Dist.), which held that injunctive or declaratory relief was inapplicable to the alleged past violations of the Brown Act by the Tulare County Board of Supervisors since the past practice at issue had ceased.

[10] Cal. Gov. Code § 54956.9(g).

Corresponding changes were also made to agenda safe harbor descriptions in Section 54954.5 to address the renumbered paragraphs of subdivision (d) of Section 54956.9.

4. SB 475 (Wright) – Amending Government Code Section 54953 Regarding Quorum Requirements for Teleconferenced Meetings by a Health Authority

This bill amends the teleconferencing provisions of Government Code section 54953 in order to continue to permit a "health authority" (as defined in Section 54953) to conduct a teleconferenced meeting by allowing the representatives of members who are outside the jurisdiction of the authority to be counted towards the establishment of a quorum when participating in the teleconference if at least 50% of the number of members that would establish a quorum are present within the jurisdiction. The statute requires the health authority to identify in the notice and agenda of the meeting the teleconference number and associated access code, if any, that allow any person to call in to participate in the meeting. The provision originally expired in 2009, and the amendment revives this special rule through 2017.

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PUBLIC LAW

The Legislature acted within its constitutional authority in directing redevelopment agencies to deposit portions of their property tax funding into supplemental educational revenue augmentation funds, and Assembly Bill 4X 26 is a valid exercise of the Legislature's inherent budgetary powers. Initial litigation in the case did not impose a burden on the California Redevelopment Association and its members out of proportion to their individual stakes in the matter and, hence, the association is not entitled to an award of attorney fees.

California Redevelopment Association v. Matsosantos; Third District; filed January 24, 2013
http://www.metnews.com/sos.cgi?0113//C064907
Cite as C064907

The Child Abuse and Neglect Reporting Act does not impose a mandatory duty on a mandated reporter to report his or her own acts of physical or sexual abuse of a minor, since such a requirement would violate the Fifth Amendment privilege against self-incrimination.

Kassey S. v. City of Turlock; Fifth District; filed January 17, 2013
http://www.metnews.com/sos.cgi?0113//F063805
Cite as F063805

The state was not estopped, as the result of allegedly misleading statements it made during mediation, from raising plaintiff's noncompliance with the Government Tort Claims Act. The state is immune, as a matter of law, from liability resulting from an alleged failure to biopsy a deceased prisoner while he was in custody, because statutory law only permits claims for failure to summon immediate medical care when needed, not for the inadequacy of such care.

Castaneda v. Department of Corrections and Rehabilitation; Second District, Div. Three; filed January 15, 2013
http://www.metnews.com/sos.cgi?0113//B229246A
Cite as B229246A

City's placement of magnolia tree in center median of roadway did not render it liable for deaths of driver and passengers killed when a negligently driven vehicle veered into decedents' car, pushing it into median, where it struck the tree; the tree was not a dangerous condition of public property in absence of evidence that it contributed to the other motorist's negligent driving.

Cordova v. City of Los Angeles; Second District, Div. One; filed December 20, 2012
http://www.metnews.com/sos.cgi?1212//B236195
Cite as B236195

Technological advances in moveable median barriers do not constitute the "changed physical conditions" required to end design immunity, because such do not constitute changes in physical conditions at the actual public property in question.

Dammann v. Golden Gate Bridge, Highway and Transportation District; First District, Div. Two; filed December 20, 2012
http://www.metnews.com/sos.cgi?1212//A131453
Cite as A131453

Use of a motion in limine to exclude the entirety of an appraiser's opinion in an eminent domain action improperly denied the owner of land his right to a jury trial on the question of just compensation.

County of Glenn v. Foley; Third District; filed November 26, 2012, publication ordered December 21, 2012
http://www.metnews.com/sos.cgi?1212//C068750
Cite as C068750

ENVIRONMENTAL LAW

The flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the Clean Water Act.

Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.; filed January 8, 2013
http://www.metnews.com/sos.cgi?0113//11-460_3ea4
Cite as 11-460_3ea4

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LABOR AND EMPLOYMENT LAW

Negligence claim for wrongful instructions a Sheriff's Department employee allegedly gave to the bank pursuant to a levy of writ of execution is barred by the litigation privilege.

Tom Jones Enterprises, Ltd. v. County of Los Angeles; Second District, Div. Five; filed January 17, 2013
http://www.metnews.com/sos.cgi?0113//B242535
Cite as B242535

Where safety employee was not dismissed or terminated from employment, but was physically unable to perform the duties of her classification because of her permanent work restrictions; county continued to explore possible positions for her reassignment, which would meet her qualifications while accommodating her permanent work restrictions; and employee never looked for another job, and never filed for or received unemployment insurance benefits, employee was not "dismissed" or "separated" from employment within the meaning of the County Employees Retirement Law of 1937.

Mooney v. County of Orange; Fourth District, Div. Three; filed January 11, 2013
http://www.metnews.com/sos.cgi?0113//G046262
Cite as G046262

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