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Governor Brown Proposes Pension Reform

By Teresa L. Highsmith

Governor Brown has released draft legislation to implement his 12-point pension reform plan, the heart of which is to move from a defined benefit pension system to a "hybrid" defined benefit (such as current PERS pensions) and defined contribution pension system (like 401k plans). The proposal includes a constitutional amendment and implementing legislation. The proposed changes would apply to all public agency employers, state and local, general law and chartered. A two-thirds vote of the Legislature is required to place the proposed constitutional amendment on the November 2012 ballot. At the moment, the Democratic caucuses seem cool to the proposal, although the Republican caucuses have endorsed it. If voters approve the measure, the implementing legislation would lake effect in January 2013.

Here is a summary of the major points in the legislation:

Effective January 1, 2013, for all employees regardless of hire date:

- Employees must contribute at least half the cost of their defined benefit pension plans, upon expiration of any MOU or employment contract existing as of November 7, 2012.
- No more "PERS pickup" will be allowed; again, upon expiration of existing MOUs and contracts.
- No applications to buy "air time" (*i.e.*, service credits) will be allowed as of January 1, 2013.
- No "pension holidays" for employers will be permitted—employers must pay annual costs of a defined benefit plan unless the unfunded normal cost is zero or negative.
- Pension enhancements will not apply retroactively, but only for subsequent, actual service.
- Upon conviction of felony arising from the performance of his or her duties or connected with obtaining salary or other benefits for public service, an employee forfeits the portion of his or her pension accrued after the commission of the crime. This might be called the "Bob Rizzo" provision, after the notorious former City Manager of Bell.

For those hired after January 1, 2013:

- New minimum retirement age is 52 for safety (*i.e.*, police and fire) and 57 for other employees, but these will be extended by same number of years by which the Social Security retirement age is extended in the future.
- Defined benefit pensions would be based on the highest 36 months of base salary, ending more generous formulas that are more easily subject to "spiking," such as the single-highest-year formula, and excluding compensation other than "base compensation," such as leave payouts and the like.

For those hired after July 1, 2013:

- PERS, STRS, 37 Act and other public-sector pension systems will offer only a "hybrid" defined benefit and defined contribution pension plan or an "alternative" plan the system's chief actuary determines to have less risk and cost to employers.
- "Hybrid" plans must have a "goal" of providing a maximum benefit of 75% of average base salary of the highest 36-month period after a "full career in public service," defined as 30 service years for safety employees retiring at age 57, and 35 service years for other employees retiring at age 67. This implies that those who retire earlier must receive less generous pensions.
- The total pension benefit, when added to Social Security payments due an employee, cannot exceed the federal limit on wages subject to the tax which funds Social Security, currently $110,100. For an employee who never participated in Social Security, the limit is 120% of the cap on wages subject to Social Security, currently $132,120.

While the Governor's proposal attempts to avoid impairing "vested rights" as the more aggressive, but unsuccessful, initiative proposals would have done, its limits on pension enhancements, forfeiture provisions and new contribution requirements may generate litigation from existing employees. It remains to be seen if pension reform will move through the Legislature and, if not, whether initiative efforts to address the cost of public sector pensions will be revived. Accordingly, all those affected by the cost and value of public-sector pensions should stay tuned!

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For more information on labor law topics, contact Terri at 213/542-5703 or THighsmith@CLLAW.US.

Planning Mandate for Disadvantaged Islands

By David J. Ruderman

On October 7, 2011, Governor Brown signed SB 244 (Wolk, D-Davis), which mandates that cities plan to serve adjacent, disadvantaged, unincorporated communities. The statute is intended to encourage investment in communities that often lack basic infrastructure by mandating cities and LAFCos to plan for them. However, it represents an unfunded state mandate and presents a planning and financial challenge for cities.

SB 244 requires cities to review and update the land use elements of their general plans with or before the next housing element update. Updated land use elements must map "island" and "fringe unincorporated communities." "Island" communities are surrounded or substantially surrounded by a city. "Fringe" communities are within a city's sphere of influence. An updated land use element must also analyze these communities' service needs and means to fund services to them.

Interestingly, though SB 244 is intended to help disadvantaged communities, it mandates land use element analysis of **all** island or fringe communities, not just low-income areas. SB 244 also requires cities to update these reviews with each subsequent housing element update and, if necessary, to update the land use elements of their general plans as well.

SB 244 also limits annexations. LAFCos are now prohibited from approving annexation to a city of territory greater than 10 acres (or any smaller area defined by LAFCo policy) contiguous to a disadvantaged unincorporated community unless the city also applies to annex the disadvantaged unincorporated community. A "disadvantaged unincorporated community" is any area with 12 or more registered voters in which the median household income is 80% or less of the state median. Although SB 244 does not require LAFCos to approve the annexation of a disadvantaged unincorporated community to approve a contiguous annexation, it will empower LAFCos to link the two decisions (which some LAFCos already do as a matter of local policy). This will likely add to the cost of annexations and could discourage annexation applications.

SB 244 states "[n]o reimbursement is required" for its unfunded mandates because a local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act." Local agencies, however, must be careful when levying fees to cover these increased planning costs due to 2010's Proposition 26, which limits permitting fees to the amount necessary to provide the permitting service for which a fee is imposed. SB 244's authorization to borrow funds also may not be an attractive way to fund its mandate. One agency or another can be expected to bring a test claim before the Commission on State Mandates to test the State's failure to designate this as a reimbursable mandate. In the meantime, local agencies can likely recover these costs from planning permit fees or from a fee on building and land use approvals to fund advance planning costs. Cities and LAFCos should track their costs to implement SB 244 to facilitate mandate reimbursement should that be forthcoming.

In sum, SB 244 requires cities and LAFCos to identify and plan to serve unincorporated island or fringe communities within cities' spheres of influence and to consider disadvantaged communities when a proposal is made to annex adjacent territory.

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For more information on LAFCo issues, contact David at 530/798-2417 or DRuderman@CLLAW.US.

Zoning Dispute Hits the Spot

By Scott E. Porter

Every dozen years or so since 1963, when the California Supreme Court decided *Hamer v. Town of Ross*, a court somewhere in California has discussed so-called "spot zoning."

Spot zoning is the illegal practice of unreasonably restricting (or, conceivably, enhancing) the development rights of a small number of parcels (*i.e.*, a "spot"), even though all or nearly all surrounding land uses have greater (or lesser) development rights, without adequate justification. If the reasonableness of a restriction is fairly debatable, the legislative determination will not be disturbed.

Given that there had not been a spot-zoning decision since 1991, we were apparently overdue. As if to make up for lost time, two courts discussed spot zoning in 2011. The first was *Arcadia Development v. City of Morgan Hill*. There, the City of Morgan Hill denied an application to subdivide the plaintiff's 70 acres into hundreds of lots. Instead, the city zoned the site for only three. The plaintiff argued the city had unfairly prevented it from subdividing at densities comparable to lots to the north and east of the site. But the San Jose Court of Appeal upheld Morgan Hill's policy because there was at least some rational public policy justification for it. The property was treated in the same way as the large agricultural lots to the west and south—a city must draw a line somewhere, and it just happened that its urban-limit line was at the northern boundary of the plaintiff's property.

In December, the Orange County Court of Appeal decided *Avenida San Juan Partnership v. City of San Clemente*. In that case, the plaintiff sought to develop a 2.85 acre property with four single family homes—*i.e.*, at the density allowed all surrounding parcels. The court concluded there was no adequate justification for the City's decision to restrict the property. The lot in question was placed in a zone intended to protect environmentally sensitive canyon sites—the lot was merely on a slope and surrounded by suburban development. The court's discussion suggested the city imposed an inappropriate zone intended for very different land to appease NIMBY opponents of the project. Given the court's view of the facts, the outcome of the case is not surprising.

These cases demonstrate that questioned zoning classifications are upheld where a "rational reason in the public benefit exists for such a classification." But they also provide an object lesson to communities with circumstances were spot-zoning can be alleged. In such cases, local officials would do well to ask these questions: (1) Is the "spot" is small? (2) Is it is totally or substantially surrounded by less restrictive zoning? (3) Was the property recently down-zoned (so as to disrespect the reasonable expectations of its owners when they purchased it)? (4) Do the purposes of the zoning classification correlate to the circumstances of the site (*e.g.*, are you applying a "canyon" zone to a non-canyon parcel)? (5) Are there topographical or other reasons to distinguish the lot from neighbors zoned for greater development? These questions can provide a principled basis to protect land owners from unreasonable NIMBY pressure, to justify appropriate down-zoning, and to avoid litigation.

Spot-zoning is, in essence, a particular application of the general rule of Equal Protection that any government action to treat people differently must have a rationale that is worthy of judicial respect. Cities and counties need only show a rational basis for a challenged zoning classification. If public officials make a habit of considering these questions when processing land use applications, it could be another twenty years until the next "spot-zoning" case arises.

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For more information on this topic, contact Scott at 213/542-5708 or SPorter@CLLAW.US.

Congratulations, Mike Cobden!

Mike Cobden, an associate in our Penn Valley office who serves as Assistant City Attorney of Auburn and Grass Valley, has been named the City Attorneys Department representative to the League of California Cities Revenue & Taxation Policy Committee. This committee advises the League Board on legislation and other policy issues. Congratulations, Mike!

What's Up with Public Finance?

By Michael G. Colantuono

Public finance law developments of late have mostly been in court and the most pressing issues still await decision. The biggest pending question involves claims for refunds of taxes, assessments and fees.

In 2011, the California Supreme Court decided in *Ardon v. City of Los Angeles* that the Government Claims Act allows class-action claims for refund of local government taxes, assessments and fees. C&L's Sandi Levin represented Los Angeles in that case. This is ominous news, as the class-action remedy will attract the attention of talented teams of lawyers seeking the very lucrative fee awards available in litigation of very small errors affecting many people.

One such case is *Sipple v. City of Alameda*. Colantuono & Levin is defending some 40 cities in this case, which involves every California city and county which taxes telephony. A consumer class action settlement in federal court in Illinois required AT&T and its affiliates to refund taxes collected on service packages that included wireless internet access, which is exempt from tax under the federal Internet Tax Freedom Act. The winners of that case then sued 134 California local governments in Los Angeles Superior Court seeking refunds of the allegedly improper taxes. The case was not brought as a class action and the defendant local governments have vigorously challenged the plaintiffs' standing to sue, compliance with local claiming ordinances, and right to sue governments from all over California in Los Angeles.

An important question was left undecided in *Ardon*: can a local claiming ordinance bar class claims? Michael Colantuono of C&L is representing Long Beach in a case now pending in the Court of Appeal which may decide the issue. *McWilliams v. City of Long Beach* involves the same lawyers as *Ardon* and a complaint identical to the one filed in that case and in a third case, *Granados v. Los Angeles County*.

The Los Angeles and LA County cases have now been remanded to the trial court to determine if the proposed plaintiff classes are proper and to resolve the substantive dispute (regarding non-voter-approved clarifications of the relationship of local phone taxes to the Federal Excess Tax on Telephony). In *McWilliams*, however, we argue the Long Beach Municipal Code bars a claim on behalf of a class. Oral argument before the Court of Appeal was held February 8th. Justice Kitching announced that the tentative decision was in favor of the plaintiffs—that *Ardon* had decided the issue and that the Government Claims Act's authorization of local claiming ordinances did not extend to tax and fee refund claims due to definitions added to the statute in 1963.

Michael made a forceful argument that the 1963 definitions were not intended to apply, citing the 1959 statute which originally adopted the Government Claims Act, the legislative history of that statute, and its legal context. At the close of argument, Presiding Justice Dempsey Klein stated that Michael had raised significant questions in the court's mind and it would consider the matter further. Decision is due by early May. A petition for hearing by the California Supreme Court may be likely regardless of how the court decides.

Millions of dollars hang in the balance, not just for Long Beach, but for all local governments, so this case is definitely worth following.

We should have significant new law on public finance topics in the coming year. As always, we'll keep you posted!

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For more information on this subject, contact Michael at 530/432-7359 or MColantuono@CLLAW.US.

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