Colantuono & Levin, PC

C&L Newsletter

Update on Public Law

Los Angeles • Nevada County

Spring 2013

# Class Action Challenges to Local Revenues Allowed

*By Michael G. Colantuono*

On April 25, 2013, the California Supreme Court opened the door to class action challenges to local government taxes, assessments and fees. Unless the Legislature corrects this result, cities, counties and special districts are now far more likely to be sued over revenues, such suits will be far more costly to defend, and losses will be more costly. This is the most significant—and ominous—development for local finance since the adoption of Proposition 218.

*McWilliams v. City of Long Beach* is a class action challenge to application of Long Beach's telephone tax to services exempt from the federal excise tax (FET) on telephony during a brief period between the Bush administration's 2006 abandonment of much of FET tax base and Long Beach's voters' approval of a new tax ordinance to drop a local reference to the FET. The California Supreme Court decided in *Ardon v. City of Los Angeles* in 2010 that, absent a local claiming ordinance, the Government Claims Act allows class action claims for local tax and fee refunds. Sandi Levin of C&L argued that case for Los Angeles. *McWilliams* is a companion to *Ardon* involving the same plaintiffs' counsel and virtually the same complaint. Unlike Los Angeles, however, Long Beach has a claiming ordinance for tax refunds. The Los Angeles Court of Appeal decided that the Government Claims Act does not allow local claiming ordinances for tax and fee refund claims, overturning decades of practice by local government and disagreeing with earlier cases. Michael Colantuono of C&L persuaded the Supreme Court to take the case and argued for the City in March, with very able support from a amicus brief filed by San Francisco Deputy City Attorney Peter Keith. Unfortunately, the Court affirmed.

The Legislature adopted the Government Claims Act in 1959 to standardize requirements that one demanding money from government file a claim before suit. That statute had important exceptions, including one for tax, assessment and refund claims for which a claiming procedure is spelled out by another "statute." The Claims Act did not define the term, but the legislative history made clear it included local charter provisions and ordinances. Thus, in 1959 it was clear local governments could adopt local claiming requirements that bar class claims and, in recent years, most did so. In 1963, the Legislature substantially amended the Government Claims Act to account for the Supreme Court's abolition of the doctrine of sovereign immunity, which had protected government agencies from personal injury and other claims for damages. One of the goals of that 1963 amendment was to require all liability against government to arise from "statute," rather than from judge-made common law. This 1963 amendment added a definition of "statute" to the Claims Act to mean state and federal, not local, laws. The legislative history makes clear that the 1963 Legislature simply did not consider the impact of its new definition of "statute" on the 1959 claiming provisions of the Act—its sights were fixed on liability rather than claiming procedures.

However, in *McWilliams*, the Supreme Court applied the rule that courts do not consider legislative history when a statute has rational meaning on its face. Thus, because the claiming exception for taxes used the word "statute," and the Claims Act defines the term, its definition applies and local claiming ordinances are now preempted by a legislative oversight of 50 years ago.

The class action remedy is powerful and expensive. It allows plaintiffs' lawyers to litigate relatively small-dollar disputes, like a $0.25 error in monthly water bills, if enough people are affected. Moreover, plaintiffs' attorneys scour the news and internet looking for potential suits because they often are paid a third of the award, which can be millions of dollars. *McWilliams* means that challenges to local revenues are far more likely than before. Such suits can be expensive to defend due to the evidence gathering required, the need to fight certification of a case as a class action as well as the merits of the dispute, and the enormous stakes.

*(Continued on page 2)*

# Sludge Disposal a Regional Affair

*By Holly O. Whatley*

In *City of Los Angeles v. County of Kern*, the Fresno Court of Appeal reaffirmed that when adopting legislation that has extra-territorial effects, a local agency must consider the regional welfare. In that case, Kern County's initiative Measure E purported to ban the use in unincorporated areas of agricultural fertilizer made from recycled sewage sludge ("biosolids"). Los Angeles owned a farm within Kern County on which it had spent tens of millions of dollars to comply with the County's earlier regulation of biosolids. Campaign literature for Measure E made clear voters' intent to stop "being the dumping ground for everyone else in the state" and to stop Los Angeles from "dumping its human and industrial waste on us." Measure E passed overwhelmingly.

Los Angeles sued to prevent enforcement of Measure E. It argued, in part, the measure was preempted by the California Integrated Waste Management Act ("IWMA") and that it violated the regional welfare doctrine of the state Constitution. The Tulare Superior Court enjoined enforcement of Measure E. Kern County appealed that preliminary injunction.

The Court of Appeal first determined that the IWMA did preempt Measure E. The IWMA, passed in 1989, requires local governments to reduce solid waste flows to landfills and incinerators. Measure E's complete ban on biosolid application frustrates the IWMA's pro-recycling purpose and was therefore preempted. By contrast, the County's pre-Measure E regulations, which limited land application to biosolids that met the EPA's highest quality grade, were permissible.

Relying on the California Supreme Court 1976 decision in *Associated Home Builders v. Livermore*, the Fresno Court of Appeal also determined Measure E exceeded Kern County's police power to regulate for the public health, safety and general welfare because it violated the regional welfare doctrine. This doctrine limits a local agency's power to regulate if a particular enactment has an effect outside the enacting local agency's bounds. Local agencies must consider the general welfare of the entire affected area and not just the local jurisdiction when adopting such regulations. And when a court reviews such legislation, the question is whether, considering the extra-territorial effect of the ordinance, it represents a reasonable accommodation of those competing interests. This represents a significant exception to the usual rule that courts do not second-guess the wisdom of legislation.

The appellate court found the trial court properly determined that Kern County could not establish its voters considered any competing, regional interests or attempted to accommodate them. The only legislative history available was campaign materials, all of which focused on the potential harm to county residents from spreading LA's biosolids. These materials were, unsurprisingly, silent as to LA's need to dispose of biosolids in an environmentally responsible and economical manner. The trial court found that Measure E's total ban represented "no accommodation" of the regional welfare and therefore exceeded the county's police powers. The Court of Appeal agreed.

The lesson for local agencies is that the regional welfare doctrine is alive and well and that they "cannot retreat into isolationism and ignore" that their actions may affect other areas. Thus, if an agency is considering legislation that will affect areas outside its territory, it should make a record to establish that it has considered extra-territorial impacts and sought to accommodate them. And agencies should be especially cautious when considering an outright ban on activity that will have extra-territorial effects. As the Kern County case illustrates, complete bans typically preclude the necessary accommodations required by the regional welfare doctrine.

♦♦♦

*For more information on this topic, contact Holly at 213/542-5704 or HWhatley@CLLAW.US.*

## Class Tax Claims

*(Continued from page 1)*

Finally, losing such a case could be devastating for a local government given potentially large payouts to lawyers and class members and the difficulty replacing that revenue given the requirements of Propositions 13, 62, 218 and 26.

Accordingly, local governments should now become far more risk adverse when it comes to managing revenue sources. It makes sense to review your existing revenue sources for potential plaintiffs' claims and fix what you can. For example, local governments should make sure local taxes have the requisite voter approval and that the manner in which taxes are administered has not changed so as to increase any taxpayer's liability unless that change was approved by voters. This is especially true of telephone taxes, which have already generated much litigation. If you have not sought voter approval of an updated phone tax in the last decade, consider doing so now.

More care is required for assessment engineer's reports, especially those first prepared before the 2008 *Silicon Valley* decision increased judicial scrutiny of such reports. Reports should be reviewed by a lawyer before the Council or Board adopts them.

Similarly, weaknesses in the adoption, calculation, and administration of fees should be identified and addressed. Consider carefully the charges which appear on municipal utility bills to make sure all are defensible. Similarly, fees collected on the tax roll should be reviewed for compliance with Proposition 218.

The Legislature can fix this problem, as the case turns on the interpretation of a state statute. Unless and until it does, however, caution in local revenue matters is the order of the day.

Change will continue in this area of the law. As always, we will keep you posted!

♦♦♦

*For more information on this topic, contact Michael at 530/432-7357 or MColantuono@CLLAW.US.*

# Are Union Leaders More Equal?

*By Teresa L. Highsmith*

Sierra Madre Police Chief Marilyn Diaz never dreamed she risked personal liability for taking the time to consider whether she could personally attest Officer Ellins to be "of good moral character and worthy of the award based on my personal knowledge," before signing his application for a 5% pay hike after completing the advanced POST program.

Ellins was the subject of two pending internal affairs investigations and a criminal investigation. He was also president of the Police Officers Association and three months earlier (after initiation of the internal affairs and criminal investigations), led a "no confidence" vote against the Chief. When the criminal charges were dropped, Chief Diaz signed the certification, and Ellins received his pay increase after returning to work from unpaid suspension for sustained internal affairs charges.

Ellins then sued the City and Chief Diaz for roughly three months' delay in the pay increase, alleging she retaliated against him for the "no confidence" vote. A federal court granted summary judgment to the City and Chief Diaz, concluding Ellins had not proved the "no confidence" vote was a private act unrelated to his official duties. In addition, a single administrative action cannot show a policy sufficient to sustain a civil rights claim against a city.

In a decision that should concern every public agency employer throughout the 10-state 9th Circuit, the appellate court reversed summary judgment for Chief Diaz. The Court concluded she should have known union speech is always private activity because union leaders are not paid by their employers for that role and because there is an "inherent institutional conflict of interest between an employer and its employees union." This conclusion ignores the role of labor relations in public employment and that Ellins could not have been a union leader without being a City employee.

Counsel retained by the City's risk pool are now seeking rehearing of the case before an 11-judge panel of the 9th Circuit. The League of California Cities, the California State Sheriffs' Association and the California Police Chiefs' Association all provided amicus support for the rehearing request.

The 9th Circuit's departure from existing law in *Ellins* raises important issues. Prior to this case, a public employee could not state a First Amendment violation against an employer unless speaking as a "private citizen" on matters of "public concern" unrelated to official duties. Under that rule, public employee communications related to their employment were not insulated from discipline. Unless the *Ellins* opinion is vacated, union leaders will have greater First Amendment rights than other employees, which will become a factor whenever a union representative is subject to discipline. Expanding the First Amendment rights of union officers can also negatively impact labor negotiations by permitting them to argue that management positions amount to retaliation for union speech—all in an attempt to achieve a bargaining advantage. And because this opinion also erodes qualified immunity for police management, unless corrected, police management responsibility will be greatly impaired. Chiefs will weigh the risk of personal liability when determining whether a subordinate is "of good moral character," deserving of a merit increase or appropriately subject to an "adverse employment action."

Stay tuned to see if the 9th Circuit will grant rehearing.

♦♦♦

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

## C&L Founders Named to Top 25 Municipal Lawyers

The **Daily Journal**, California's leading legal newspaper, released its annual list of the Top 25 Municipal Lawyers in California. Michael G. Colantuono was named for the second year in a row. Sandra J. Levin was named as well.

The **Daily Journal** is California's leading legal daily covering courts and other legal developments with publications in San Francisco and Los Angeles. Each year it identifies 25 municipal lawyers who have made the most significant contributions to public law in the prior year.

Michael was recognized for his win in the California Supreme Court in *Alhambra and 46 Other Cities v. County of Los Angeles*, a case involving excess charges by counties to cities for operating the property tax system. Perhaps $40 million per year is at stake statewide.

Sandi was recognized for her leading role in defending local telephone taxes against industry and class action challenges, notably for the City of Los Angeles and on behalf of more than 40 cities in a suit against every city and county in the state which levies a telephone tax, *Sipple v. City of Alameda et al*.

Recognition by the **Daily Journal** as one of the Top 25 Municipal Lawyers in California is a great honor and especially so to have two of our 14 lawyers recognized at the same time. While other firms had two lawyers recognized, those were much larger firms than ours. We are very proud of Michael and Sandi!

**Colantuono & Levin** serves Auburn, Barstow, Calabasas, Grass Valley, La Habra Heights, and Sierra Madre as City Attorney and many other counties, cities and special districts as special counsel.

Colantuono is a past president of the City Attorneys Department of the League of California Cities and the State Bar named him the Ronald M. George Public Lawyer of the Year in 2010. He also serves as a Trustee of the California State Bar.

Colantuono & Levin, PC
11364 Pleasant Valley Road
Penn Valley, CA 95946



**Are you on our list?** To subscribe to our newsletter or to update your information, complete the form below and fax it to 530/432-7356. You can also call Martha Farmer at 530/432-7357 or subscribe via our Web site at **WWW.CLLAW.US**.

Name: _____ Title: _____

Affiliation: _____

Address: _____

_____

City: _____ State: _____ Zip Code: _____

Phone: _____ Fax: _____

E-mail: _____

Our newsletter is available as a printed document sent by US Mail and as a PDF file sent by e-mail. Please let us know how you would like to receive your copy.

☐Mail ☐E-Mail ☐Both