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CH&W Newsletter

Update on Public Law

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City Can Control Cell Tower Aesthetics

By Mathew T. Summers

The Ninth Circuit recently affirmed the City of San Diego's denial of conditional use permit applications for three cell towers for which original permits had expired. (*American Tower Corporation v. City of San Diego*). The case confirms cities' and counties' power to deny cell tower permits for aesthetic reasons, if the decision is supported by substantial evidence. The Court also refused to apply the "deemed approved" provision of the Permit Streamlining Act because insufficient notice was given to affected neighbors.

American Tower applied for new permits for three existing towers in San Diego. After hearings before a hearing officer and the Planning Commission, the City denied all three applications, finding American Tower had failed to minimize the towers' visual impacts. San Diego's Municipal Code requires major telecommunications facilities to "be designed to be minimally invasive through the use of architecture, landscape architecture, and siting solutions."

The Ninth Circuit affirmed summary judgment for the City on American Tower's Federal Telecommunications Act claims. Substantial evidence supported the City's finding that American Tower had not designed the facilities to be "minimally invasive." American Tower proposed only minor modifications to its towers; *i.e.,* painting and additional landscaping; and refused to consider redesign or reduced height. The case builds on previous Ninth Circuit cases affirming cities' rights, when supported by substantial evidence, to regulate wireless facilities on aesthetic grounds under state and federal law. The Court also rejected American Tower's argument the City unreasonably discriminated between providers, holding a city may impose different requirements on its own public safety communications facilities than on towers operated by commercial wireless providers.

Helpfully for cities and counties, the Court stated an applicant arguing a permit denial effectively prohibits provision of wireless service in violation of the Telecommunications Act must show the proposed facility is the least intrusive means to close a significant gap in service. American Tower asserted that point without evidence. The opinion thus confirms a city or county may require a cell tower applicant to analyze alternative sites, demonstrating its preferred site is the least intrusive means to close a gap in service.

The Court also rejected American Tower's claim its applications had been automatically approved under California's Permit Streamlining Act. Under that Act, if a city or county fails to act on an application within 60 days of determining it exempt from CEQA, the application is deemed approved if required public notice has been given. San Diego did not act timely, but the Court concluded that the city's hearing notice was insufficient under state constitutional due process requirements because it failed to provide both notice and an opportunity for affected property owners to be heard. The opinion thus narrows the Permit Streamlining Act, requiring a city or county to provide notice and a public hearing to affected property owners before an application may be deemed approved.

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For more information on this topic, contact Matt at 213/542-5719 or msummers@chwlaw.us.

Police Office Records: *Brady* and *Pitchess* Collide

By Michael R. Cobden

In August, the San Francisco Court of Appeal held in *People v. Superior Court* (Case No. A140768) that prosecutors must inspect police personnel records and disclose potentially relevant information to the defense by a motion in court. The Court's stated intention was to harmonize statutory protection of police officers' privacy interest in their personnel records (discoverable only through "*Pitchess* motions"), and prosecutors' constitutional duty to disclose material exculpatory evidence to defendants under *Brady v. Maryland* (1963) 373 U.S. 83. The opinion may be short-lived; a petition for review and a depublication request are pending in the California Supreme Court.

Under *Brady*, a prosecutor has a duty to learn of any exculpatory evidence known to any member of the prosecution team (including the arresting agency), but has no general duty to seek out other evidence that might help the defense. Courts have concluded that a prosecutor is not in "possession" of police personnel files for *Brady* purposes; if the prosecution wants personnel records, it must file a *Pitchess* motion just as a criminal defendant must.

In this case, the San Francisco District Attorney's *Pitchess* motion requested the Court to review the officers' files and disclose to the prosecution any *Brady* material so they could make it known to the defendant. Perhaps daunted (at a time of deep cuts to court budgets) by the burden of regularly conducting such reviews, the Court denied the motion and ordered the DA to review the files for *Brady* material. The Court of Appeal agreed: the DA may review the files without violating officers' privacy rights.

In attempting to harmonize *Pitchess* and *Brady*, the Court of Appeal may have created new problems. For example, "good cause" for disclosure under *Pitchess* includes anything **relevant** to a proposed defense in the case. In contrast, under *Brady*, the standard for disclosure is **materiality** to a fair trial, a higher standard.

Further, *Brady* disclosure is broader than *Pitchess* discovery, as *Pitchess* statutes requires the trial court to exclude records more than five years old and *Brady* has no such limit. Finally, most courts limit *Pitchess* disclosure to the names and addresses of persons who have complained against the officers involved in a case; *Brady* disclosure is broader and can include training notes, internal discipline records, or anything else which may affect a fair trial.

If the Supreme Court allows this decision to stand, we predict many *Pitchess* motions — filed by prosecutors. The Court may review or depublish the case, so stay tuned!

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For more information on this topic, contact Michael at 530/798-2416 or mcobden@chwlaw.us.

Welcome, Charlie LaPlante!

Charlie LaPlante joins us as Senior Counsel in our LA office and as a member of our litigation group. His work covers a broad range of disputes, including rate-making, taxation, and land use. He also advises governments on compliance with constitutional requirements for raising revenue. Current assignments include defending a city against claims by an investor which foreclosed on a development project and then disputed the scope of the rights it had acquired; a petition for review in the California Supreme Court in a dispute involving inverse condemnation liability for damage caused by a street tree toppled by a windstorm; and defense of a county fire suppression benefit assessment.

Before joining CH&W, Charlie represented lenders and loan servicers in litigation arising from disputes with borrowers, in class actions and other cases. He handled matters from the pleading stage through appeal, including a satisfactory result in an argument to the LA Court of Appeal.

Before moving to LA, Charlie was an associate in the Minneapolis office of Dorsey & Whitney LLP, where his practice included complex commercial litigation, securities law, intellectual property disputes, wage-and-hour law, the federal Administrative Procedure Act, and Indian law.

Charlie received his law degree from the University of Virginia School of Law in 2008, where he was a member of the editorial board of the **Virginia Law Review.** Charlie also worked as a research assistant for Professor Michael Klarman on projects concerning the Warren Court and the history of school desegregation. In 2005, Charlie graduated cum laude from Miami University in Oxford, Ohio, where he served as a research assistant in Professor Samir Bali's optics laboratory and earned a B.S. in Physics with minors in Mathematics and Political Science.

Welcome, Charlie!

Fee Litigation on the Upswing

By Michael G. Colantuono

Suits challenging local government fees are increasing for many reasons. First, our Supreme Court's decisions in *Ardon v. Los Angeles* (2011) and *McWilliams v. Long Beach* (2013) to allow class action challenges to local government revenues is gaining attention in the plaintiff's bar — including some of the best-known and most resourceful firms in California. Second, the Court's *Bighorn* (2006) decision to apply Prop. 218 to utility charges based on metered consumption is still generating uncertainty and litigation, primarily as to water rates. Third, the 2010 approval of Prop. 26 extended cost-of-service limits to electric and wholesale water rates. The fee-making authority granted by new groundwater management statutes will generate controversies, too.

Charges by existing **groundwater management** agencies have been understood to be governed by Prop. 218 since the 2007 *Pajaro* decision. The Court of Appeal upheld Pajaro's new rates in the *Griffith* decision last fall, explaining how agencies can adopt rates in compliance with Prop. 218. Nevertheless, groundwater rate litigation is pending in San Jose, Ventura, and Los Angeles. Issues include whether Prop. 218 allows preferences for agriculture, whether groundwater charges should be subject to Prop. 26 instead, and whether an agency can give notice and protests to property owners rather than to well operators (water retailers) who pay the fees. While the San Jose case has been awaiting argument for nearly three years, the Ventura case will be decided soon, with post-argument briefs due November 3rd. Although the Superior Court invalidated the Water Replenishment District of Southern California's rates almost three years ago, its case remains in LA Superior Court.

Retail water agencies are beginning to challenge **wholesale rates**. We successfully challenged rates imposed on Newhall County Water District by Castaic Lake Water Agency under Prop. 26. CLWA's appeal is pending in LA. CLWA based rates on its retailers' total water use, including use of local groundwater and other non-CLWA sources, effectively (in our view) taxing Newhall's use of groundwater. The San Diego County Water Authority has persuaded the San Francisco Superior Court that the Metropolitan Water District violated Prop. 26 in setting rates to carry water to San Diego from the Imperial Valley. The case is in the trial court.

Much attention has been paid to **tiered or "conservation block" water rates** after the 2011 *Palmdale* decision setting aside a water district's rates as insufficiently justified by its record. The Orange County Superior Court reached a similar conclusion as to San Juan Capistrano's rates in a case we are defending. Argument to the Orange County Court of Appeal had been set for November 21st, but the Court recently deferred argument to January and invited supplemental briefing. This case also involves funding of new recycled water service. The plaintiffs' lawyer in that case has sent a pre-litigation public records request to another large Southern California city and we will defend that matter, too.

We are also defending a class action in Santa Barbara County t challenging **discounted agricultural rates** for retail service that can be interrupted in drought.

Several large Southern California cities have faced suits challenging **transfers from water funds** to general funds and to **surcharges on water customers outside city limits**. Such practices are most easily defended if supported by a cost-of-service study showing the value of general fund services to the utility or additional costs to serve out-of-city customers, respectively.

Gas and electric rates are exempt from Prop. 218, but not Prop. 26. Last year's *Brooktrails* case holds Prop. 26 is not retroactive as to local government, but this is being tested as to Redding's payment in lieu of taxes (PILOT) from its electric utility. We argued the case to the Sacramento Court of Appeal in September, but persuaded the Court to allow post-argument briefing, so the matter will not be submitted until November 6th. Decision is due 90 days after that. Electric utilities are well advised to consult counsel before setting rates to ensure they protect pre-2010 practices such as PILOTS, general fund transfers, low-income discounts, etc.

A.B. 2403 (Rendon, D-So. Gate) expands the statutory definition of "water" to include water "from any source". This means water supplies from storm and waste water can be funded by water rates and sewer rates may fund use of treated wastewater to recharge groundwater.

Plainly, a lot is going on under Props. 218 and 26. Rate-makers are advised to get good counsel in this very litigious environment. Change is coming quickly. As always, we'll keep you posted.

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For more information on this subject, contact Michael at 530/432-7357 or mcolantuono@chwlaw.us.

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