Colantuono Highsmith & Whatley, PC

CH&W Newsletter

Update on Public Law

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Sisyphus Seeks a Receiver

By Michael R. Cobden

Code enforcement can often feel like pushing a boulder uphill, but when an officially branded "vexatious litigant" occupies the property, the path is littered with obstacles. Fortunately, the Court of Appeal is sympathetic. In *City of Riverside v. Horspool*, the Riverside appellate court affirmed the authority of courts and receivers to remedy nuisance properties. Since 2008, the City of Riverside fought to clean up a nuisance property owned by William and Kelly Horspool but finally obtained an appellate victory nearly six years later. After the administrative citation process failed to obtain the property owners' cooperation, the City petitioned the court to appoint a receiver to take possession of the property, clean it up, and sell it to recover his costs to do so. The City personally served the petition on William Horspool, but Kelly was served by service on William and by mail. Only William appeared in the case; the City obtained a default judgment against Kelly.

William obstructed the City at every turn, filed multiple lawsuits, including an injunction action and two bankruptcies, which initially stayed the receivership. Ultimately the City obtained appointment of a receiver because code enforcement actions are exempt from the automatic stay that bankruptcy imposes on most lawsuits against a debtor. During the extensive delays caused by the owner's litigation tactics, the house was repeatedly vandalized and — by the time the receiver was appointed — the kitchen was gutted; asbestos debris was piled on floors; and there was mold on walls, exposed wiring, and no functioning bathroom.

When the receiver sought approval to sell the house, William reopened his bankruptcy (requiring the City to make a fourth motion for exemption from the automatic stay) and unsuccessfully sought removal of the City's receivership action to bankruptcy court. As a result, the receiver was unable to obtain financing to repair the house and therefore obtained court approval to sell the house "as-is" for a very small sum.

William appealed, raising 12 issues (rarely a good idea on appeal – someone who raises so many claims likely lacks any good ones). Some of these issues were raised for the first time on appeal (which is not permitted) and many without citation to supporting authority (which allows the appellate court to ignore them). The Court of Appeal rejected all 12 issues. William had no standing to assert the interests of Kelly, the mortgage holder, or the bankruptcy trustee. The Court found William waived his due process challenges to notice and service by appearing at the initial hearing without a lawyer and without limiting his appearance to a challenge of the adequacy of service. In addition, he failed to preserve these issues for appellate review by a timely motion to challenge service. He also failed obtain a stay pending appeal, and the property had been sold by the time the Court of Appeal decided the case. Accordingly, the order appointing a receiver was not subject to appellate review after the receiver had settled accounts and had been discharged because the court no longer controlled the property. Nor was approving the low sale price reversible error: courts deferentially review for abuse of discretion orders authorizing a receiver to sell substandard structures that pose health and safety hazards. Furthermore, the trial court had equitable authority to order the sale. Finally, the Court of Appeal found no abuse of discretion in the payment of the receiver's fees and costs from the proceeds of the house sale. It was William's relentless delaying tactics which increased those fees and lowered the value of the property.

Code enforcement can be time-consuming and costly. Riverside is to be applauded for its perseverance and it is noteworthy that most of the costs of its efforts to clean up this property — no doubt to the relief of neighbors — were paid from the sale of the house. Code enforcement to preserve communities is possible, although it sometimes requires the patience of Sisyphus.

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

Who's Argument is this, Anyway?

By Holly O. Whatley

The Orange County Court of Appeal recently evaluated limits on a city clerk's power to correct a ballot argument. *Vargas v. Balz* involved the Brea City Council's arguments against two initiatives. At a special meeting the day arguments were due, the Council authorized the Mayor and Mayor Pro Tem to write the "no" and rebuttal arguments on behalf of the City Council. Later that day, the two submitted arguments to the Clerk. They also submitted the City's "Form of Statement to be Filed by Authors of Argument." The form had no space for the name of an organization for which an argument was submitted, and the Councilmembers did not list the City Council as the author of the arguments.

The City Clerk sent the arguments to the County Registrar with instructions to print them as those of the "City Council of the City of Brea by the Mayor, attested by the City Clerk." However, the Clerk did not include that change on the argument provided the initiative proponent or posted to the City's website. The Clerk gave the same direction to the County Registrar as to the Councilmembers' rebuttal arguments, but again did provide the corrected versions to the proponent or post them to the City's website.

The proponent sued to compel the Clerk and County Registrar to print the arguments without identifying the City Council as the author. The City argued the Clerk simply corrected a typographical error to "effectuate the intent of the city council." The trial court ordered the Mayor Pro Tem's name added to the signature block, but required the elections officials to omit the reference to the whole Council. The Court of Appeal, however, found that the Clerk had no discretion to correct a clerical error in the signature block even assuming she knew the authors' intent. The Elections Code requires those who submit arguments on behalf of an organization to list the organization on the signature form and the Mayor and Mayor Pro Tem did not do so.

The Court of Appeal also found the Clerk should have provided the same material for submission to the County registrar for the ballot book that she released to the proponent and posted to the City's website. To do otherwise might mislead the public and hamper the rebuttal argument by the proponent by concealing part of what he was to respond to.

The Court of Appeal considered the public interest in fair and transparent elections procedures to outweigh an interest in correcting clerical errors. Moreover, the Court noted that the Elections Code provides two methods for corrections. First, an author has a limited time to correct an argument after submitting it. Also, the Elections Code allows a court to amend ballot measure arguments if a lawsuit is filed.

Thus, elections officials should make no changes to ballot arguments without timely direction by authors or direction from a court.

Elections officials have difficult jobs and are often subject to second-guessing. The best approach is to follow the statutes exactly and to seek legal advice when needed.

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For more information on this topic, contact Holly at 213/542-5704 or hwhatley@chwlaw.us.

C&L Becomes CH&W

After more than a decade of business under the name Colantuono & Levin, PC, our firm has a new name: Colantuono, Highsmith & Whatley, PC. The change marks career milestones for Sandi Levin, Terri Highsmith and Holly Whatley. Our web address changes to www.chwlaw.us and our email addresses change to reflect that URL, too.

The change reflects elevation to shareholder status of Terri and Holly, and Sandi's departure from the practice of law to become the full-time Executive Director of the Los Angeles County Law Library — the second largest public law library in the United States.

"I'm pleased to have both Terri and Holly as my fellow shareholders. This reflects their significant contributions to the practice of municipal law and our firm," said managing shareholder Michael G. Colantuono. "We are very pleased for Sandi on her transition from law practice to a new role as Executive Director of the Los Angeles County Library. While we will miss her contributions to our firm, everyone in the legal community will benefit from Sandi's contributions in her new job."

Terri has been a local government lawyer for more than two decades, representing cities in both Northern and Southern California. Terri started her career as a litigator, successfully defending the Cities of Lafayette, Orinda, Livermore, Livingston and Fremont in land use, elections and redevelopment matters, including drafting and defending a groundbreaking firearm sales ordinance for Lafayette which became a model for similar ordinances around California, garnering her recognition from the Legal Community United Against Violence. Terri currently serves as City Attorney of Barstow and Sierra Madre and served as City Attorney to Alameda from 2006 to 2011 before joining the firm. In addition, Terri is an expert in post-redevelopment matters and represents several Successor Agencies and Oversight Boards. She also leads the firm's labor and employment practice.

Holly heads our Los Angeles litigation team. Her practice focuses on public law disputes, including post-redevelopment and other municipal finance issues, matters involving

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Supreme Docket of Tax and Fee Cases

By Michael G. Colantuono

The California Supreme Court has an unusually heavy docket of local government finance cases just now. Two cases are pending and four more are at the petition for review stage. Review of these cases provides a good summary of current developments in the law of local government revenues.

Loeffler v. Target Corporation was argued February 4th, and decision is due any day. This consumer class action under California's unfair competition laws seeks a refund of sales taxes on hot coffee which — unlike coffee beans — is not subject to sales tax. Target argues article XIII, section 32 of the state Constitution and the sales tax statute limit tax refund actions to the Board of Equalization's administrative process. While local governments rarely collect sales taxes (although they pay them because the tax is on selling, not buying), they are protected by article XIII, section 32 and other limits on actions for refund of their local taxes.

California Building Industry Association v. San Jose challenges the City's inclusionary housing fee, which requires housing developers to fund affordable housing in the City on the theory that market-rate development creates more need for affordable housing by generating low-wage jobs. The Court of Appeal ruled such fees benefit from a rebuttable presumption they are reasonably related to a city's housing goals. The Supreme Court's grant of review took that helpful precedent off the books. Amicus curiae ("friend of the court") briefs have been filed on both sides of the case and the parties are now responding to them. Decision is likely in late 2014 or early 2015.

Unlike lower courts, the Supreme Court decides what to decide; apart from death penalty cases and a few other exceptions, the Court has discretion to decide what cases to review and takes only a small percentage of cases in which review is sought. Review is pending in four water rate and local tax cases.

First, the fee cases. *Vagim v. Fresno* involves an initiative to repeal the City's 2013 water rates, rolling back rates to 2008 levels. The City Attorney refused to provide a title and summary for the measure and Michael Colantuono of CH&W sued for declaratory relief, arguing the measure was plainly illegal because it would set rates too low to honor bond covenants (promises to bondholders to set rates high enough to make debt payments and maintain utility infrastructure). The proponents sued to compel the City Attorney to provide a title and summary. The trial court refused to test the measure's legality pre-election, as a recent decision of the Riverside Court of Appeals requires. The Court of Appeal ordered the City to comply with the writ pending appeal and then dismissed the appeal as moot when the City did so, suggesting the City should pursue its declaratory relief claim in the trial court. The City petitioned the Supreme Court for review and is pursuing declaratory relief in the trial court, too. The Supreme Court's decision whether to take the case is due by early June.

Morgan v. Imperial Irrigation District involves farmers' claims Proposition 218 entitles them to a majority protest separate from other water customers. The San Diego Court of Appeal concluded that it would be nearly impossible to impose rates if each customer class had a separate veto. Local governments obtained publication of the decision, but a depublication request is pending in the Supreme Court, as is the farmers' petition for review. The case is a helpful for local government, but contains inconsistent and confusing language regarding the standard of appellate review of Proposition 218 cases. The Supreme Court should decide whether to take the case or depublish it by early May.

The tax cases are *Sipple v. Hayward* and *San Diego v. Priceline.Com, Inc.* *Sipple* involved standing and claiming defenses to refunds of allegedly excessive telephone taxes by 134 California cities and counties. Holly Whatley of CH&W and other local government lawyers persuaded the trial court the claimants lacked standing to sue and failed to comply with claiming rules. The Los Angeles Court of Appeal recently reversed and the local governments will seek Supreme Court review by mid-May, with a decision whether to grant review due mid-summer.

Priceline is the latest effort to collect bed taxes from on-line resellers of hotel rooms. San Diego lost in the Los Angeles Court of Appeal and will seek Supreme Court review by late April; the Supreme Court will decide whether to take the case by late June. Interestingly, Air BnB recently announced it will collect bed taxes for San Francisco and Portland, suggesting industry opposition to bed taxes may be breaking down.

Plainly, it will be a busy year for local government finance litigation. As always, we will 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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Local Agency Formation Commissions (LAFCOs), land use, CEQA, election, public works, employment law, and groundwater disputes. She has represented cities in complex municipal finance litigation, including writ actions involving multi-million-dollar claims and class action tax refund suits. Holly was named one of California's top 20 Municipal Lawyers of 2013 by the **Los Angeles Daily Journal** for her defense of telephone taxes. In addition, Holly serves as counsel to cities and local agencies, having served as City Attorney to the City of La Habra Heights. She currently serves as Planning Commission Counsel in Sierra Madre.

Congratulations, Sandi, Terri and Holly!

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