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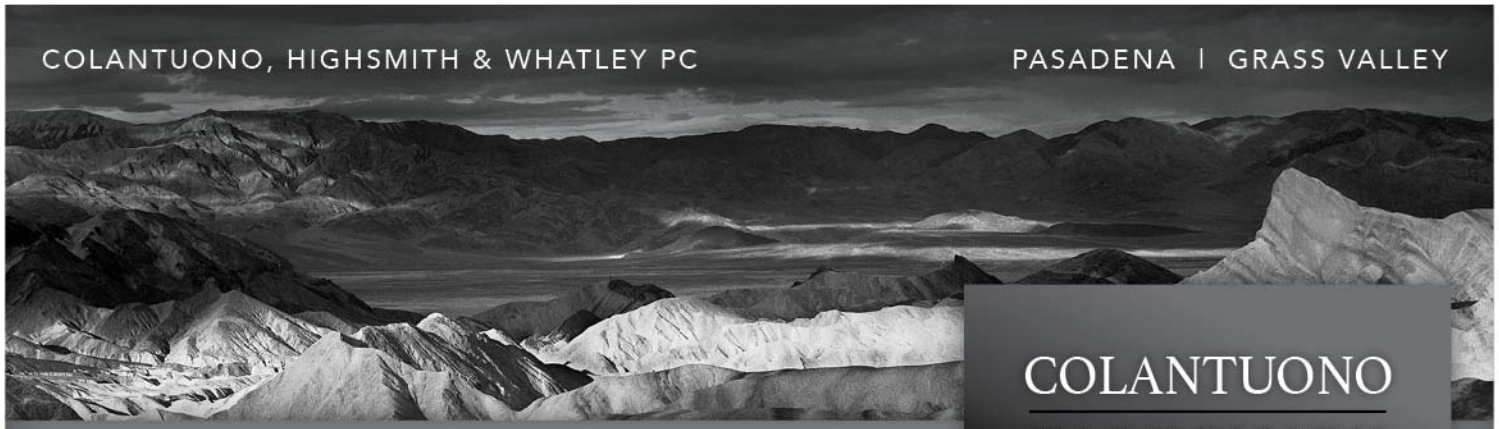

Newsletter | Spring 2017

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Update on Public Law

Courts Widen Local Revenue Powers

By Michael G. Colantuono

April brought two positive cases for local government revenues: one involving greenhouse gas credit auctions and another on a local government's power to assess other governments.

2006's AB 32 caps greenhouse gas emissions and seeks to reduce them to 1990 levels by 2020. As it predates the 2010 adoption of Prop. 26, that new tax limitation does not apply. The statute requires businesses to reduce emissions or buy emissions credits in auctions that have produced billions of dollars to fund greenhouse reduction efforts including high speed rail. Business interests allege auction prices are taxes requiring 2/3 legislative approval. AB 32 won only majority approval.

In *California Chamber of Commerce v. State Air Resources Control Board* the Sacramento Court of Appeal concluded auction fees are not "taxes" under Proposition 13 because businesses did not have to pay them — they could reduce their emissions instead, even if that would be difficult. Further, the payments are traded for something valuable — the right to pollute. This theory, that government may impose performance standards, and then allow businesses to buy around them, is not new. So-called "in lieu fees" are common in the land use context. However, business interests view this as a gaping hole in the anti-tax protections of Propositions 13, 62, 218 and 26 — government can simply mandate high standards, allow businesses to buy back what critics view as a right to do business, and fund government in the process. Accordingly, the Chamber of Commerce and two other parties are seeking review in the California Supreme Court. Decisions to accept the case and, possibly, to depublish the Court of Appeal decision, are due by late summer.

(*continued on page 2*)

Dope Control!

CH&W has a robust practice helping our clients tax and regulate burgeoning marijuana industries. We assist local governments in drafting land use, business license and health and safety ordinances to regulate cultivation, dispensaries, delivery services, testing, etc. We advise our clients about state and federal legal developments affecting their authority to regulate.

We use many tools to enforce our clients' rules: administrative cites, civil and criminal suits. We work with lenders and landlords to achieve compliance. And we help recover legal fees and enforcement costs.

For help on these issues, contact Michael Colantuono in our Grass Valley office or Pamela Graham in Pasadena.

Local Revenue (continued)

Michael Colantuono argued a similar issue under Proposition 26 to the California Supreme Court on April 4th — whether Santa Barbara's charter city franchise fee on So. Cal. Edison is a tax or a voluntary fee for use of City rights of way. Decision in *Jacks v. City of Santa Barbara* is due by early July.

The second case involves a provision of Proposition 218 forbidding the exclusion of government property from an assessment unless "clear and convincing evidence" demonstrates government property gets no benefit from the facilities and services the assessment funds. Prop. 218 also states it provides local governments no new revenue authority. Many public lawyers reconciled these provisions to conclude assessing governments must use non-assessment funds to cover benefit to other governments. In *Manteca USD v. Reclamation District No. 17*, the Sacramento Court of Appeal concluded the no-government-exemption provision trumped a statute forbidding reclamation districts to assess school property. Under this decision, Prop. 218 empowers governments to assess each other. While this may be good news for assessing governments, it is bad news for the State and counties which own rights of way in special districts with assessment power. Manteca USD petitioned for review and the Supreme Court will decide whether to take the case by late summer.

Two other finance cases may be argued in the fall: Ventura's challenge to a groundwater augmentation fee and Redding's defense of its payment in lieu of taxes from its electric utility to its general fund.

April was a productive month for local government finance, but further developments are nearly certain. As always, we'll keep you posted!

For more information on these issues, contact Michael at MColantuono@chwlaw.us or (530) 432-7359.

Initiative Cross-References Have Limits

By Holly O. Whatley

In *Wilson v. County of Napa*, the San Francisco Court of Appeal clarified application of the full text rule to initiatives. That rule requires an initiative or referendum petition to include the "full text" of proposed legislation. It ensures voters have information necessary to evaluate a measure. Cross-references to other laws in a proposal do not necessarily trigger the full text requirement. However, this Court ruled, if a cross-reference "create[s] or impose[s] new legal obligations that are not otherwise specified in the measure," the petition must set out the cross-referenced material in full.

The initiative at issue in *Wilson* aimed to protect water quality by establishing water quality buffer zones along streams and wetlands and requiring more replacement of oak woodlands lost to development in those zones. It also imposed a new tree removal permit requirement that development provide remediation that, "at a minimum," complied with best management practices included in an existing "Napa County Voluntary Oak Woodland Management Plan." Although the petition referenced those practices, it did not restate them.

The County Registrar of Voters rejected the petition for failure to restate the best management plan and trial judge (a city attorney before she was appointed to the bench) rejected the proponents' writ petition. Critical to the Court of Appeal's affirmance was that the measure made previously voluntary standards mandatory. Thus, the petition imposed new legal obligations without fully disclosing them. The Court distinguished initiatives that simply require compliance with pre-existing obligations; cross-references of that kind may not trigger the full text rule.

(*continued on page 3*)

Electronic Records After *San Jose*

By Aleks R. Giragosian

As most local officials are now aware, the California Supreme Court held in *City of San Jose v. Superior Court* that the California Public Records Act ("PRA") applies to their electronic communications on private devices and in private accounts. Now what?

The Supreme Court concluded San Jose must provide on a PRA request documents related to the public's business in private accounts and on private devices, identified by analyzing "(1) the content itself, (2) the context in, or purpose for which, it was written, (3) the audience to whom it was directed, and (4) whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment."

The PRA requires disclosure of public records, which "includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained" by an agency. Earlier cases held voicemails, emails, and text messages are "writings" under the PRA. *City of San Jose* extended the definition of a "writing" to include "other electronic platforms," which likely encompasses electronic communication via Twitter, Facebook, blog posts, and other social media.

In light of *City of San Jose*, local agencies should adopt policies addressing public records on personal accounts. Such a policy might: (1) prohibit the use of personal accounts for agency business; (2) allow use of personal accounts, but require communications to be copied to the agency's server (as by setting up an email address for that purpose); or (3) allow use of personal accounts only if communications are preserved for the time required by the policy and employees and officials agree to search those accounts (or allow the agency to do so) when necessary to respond to records requests.

Such a policy might also designate some or all voicemails, emails, text messages, and social media posts as exempt from disclosure under Government Code § 6254(a) as "memoranda that are not retained … in the ordinary course business," unless identified for retention in hard copy or in an electronic archive.

Electronic communications are plainly here to stay and the law is catching up with the rapid growth of this technology. Officials should think through how they will comply with the PRA and other laws as they use this technology. It is also useful to remind ourselves that some discussions do not belong in email. It is better to talk to people on sensitive subjects — face to face or by phone.

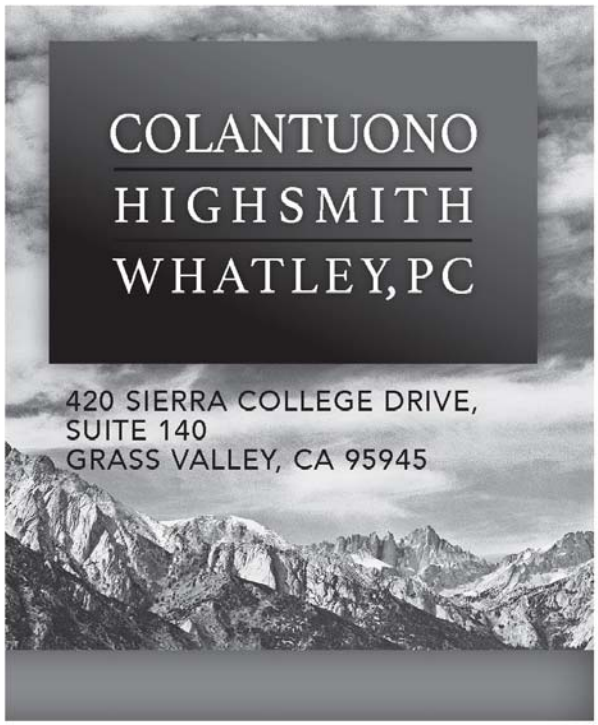
For more information on this topic, contact Aleks at AGiragosian@chwlaw.us or (213) 542-5734.

Initiative Cross-References (continued)

The Court was not persuaded the measure substantially complied with the full text requirement so as to allow writ relief to the proponents because it contained everything but the cross-referenced standards. Requiring voters to do "extraneous research" to evaluate a petition would frustrate the full text rule. The Supreme Court denied the proponents' petition for review over the relatively unusual dissents of Justices Chin and Corrigan.

When evaluating initiative and referendum petitions, a reviewer should check all cross-references for new legal obligations. If any have that effect, no matter how lengthy the cross-referenced material or how far that material may be from a measure's core purpose, the petition is void if it does not provide the full text of the referenced material.

For more information on this topic, contact Holly at HWhatley@chwlaw.us or (213) 542-5704.



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