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Newsletter | Winter 2017

## Update on Public Law

# Online Resellers of Hotel Rooms Win Bed Tax Fight

*By Michael G. Colantuono*

In December 2016, the California Supreme Court decided In re Transient Occupancy Tax Cases, rejecting San Diego's effort (and that of many other cities) to collect hotel bed taxes on the full amount charged by online travel companies (OTCs) for hotel rooms – like Priceline.com, Travelocity and Orbitz.

OTCs operate under several business models. In the "merchant model," the price of a hotel room can be divided into: (i) the wholesale price the OTC pays the hotel, (ii) a "parity" amount — the difference between the wholesale amount and a minimum retail price agreed by the hotel and the OTC, and (ii) the OTC's fees or "spread". In this model, the OTC charges a customer a room rent as well as charge for taxes and fees. The hotel bills the OTC the wholesale price and the actual transient occupancy tax (TOT), based on the wholesale price, which it pays to the city or county.

The California Supreme Court concluded OTCs are not hotel "operators" obliged to collect and remit the tax, in part because San Diego essentially conceded the point. As San Diego's ordinance language is based on a widely used model, this conclusion will apply to most cities and counties. The Court also concluded San Diego's tax cannot be applied to the OTCs' spread because it is not "charged by the operator" — i.e., the hotel. The Court did conclude the tax applies to the wholesale price and any parity amount because those are charged by the hotel.

Cities and counties now have these options: (i) Forego the revenue. This involves essentially no legal risk and may be sensible for cities with small bed tax receipts or a low tolerance for risk; (ii) Ask voters to amend the tax. OTCs might to oppose such measures and, until the major tourist destinations impose this change on the industry, may boycott smaller cities who make the change, as they did South San Francisco. (iii) Enforce ordinance provisions requiring disclosure of tax payments. Hotel operators wish to keep wholesale prices confidential. The Four Seasons, for example, does not want it know how cheaply they resell rooms during low-occupancy periods. However, most TOT ordinances require guest receipts to separately report the tax paid. As the tax rate is known, this discloses the wholesale room rate. Cities and counties can enforce this disclosure requirement to give hotels an incentive to pay tax on the whole retail rate to conceal the wholesale rate. This can be expected to draw resistance. However, the legal basis for this enforcement strategy is plain. The ordinances say what they say and there is no credible argument they are unenforceable.

Internet disruption of local government finance will continue. Cities and counties with substantial bed tax receipts should consider how to respond to this latest development.

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

# Parking Ticket Contest Hearing Procedures

*By David J. Ruderman*

*Yagman v. Garcetti* recently upheld LA's parking-ticket contest procedure. The City requires contestants to deposit the ticket amount or demonstrate inability to pay before a hearing. Attorney Yagman requested a waiver without proof of an inability to pay, and the City denied it. He prevailed on two of three tickets, and sued, alleging the deposit requirement violated due process.

The district court dismissed the suit and the Ninth Circuit affirmed, finding the private interest at stake was modest: the largest penalty here was $73. Any deprivation was temporary because state law requires a refund within 120 days if a ticket is overturned.

The Court also found initial reviews limited the risk of erroneously (and temporarily) depriving contestants of money. Yagman alleged 75% of tickets are upheld on initial review, but the Court noted that catching mistakes in 25% of cases indicates the procedure works. The Due Process Clause, the Court noted, does not require "perfect, error-free determinations."

Finally, the Court found a substantial City interest in the deposits. Otherwise, contestants have incentive to request hearings solely to delay, leading to frivolous appeals. In addition, the City had a strong interest in avoiding the cost of collection efforts when tickets are upheld.

Although this case does not discuss the dignitary interest some California cases apply to due process analysis, *Yagman* is a helpful for cities fashioning procedures to contest low-dollar amount administrative citations. Cities should ensure timely return of any deposit if a fine is overturned and make the prehearing review meaningful.

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# Verify Connections Before Making Sewer Refunds

*By Holly O. Whatley*

In *Cape Concord Homeowners Association v. City of Escondido*, the San Diego Court of Appeal clarified the limits of Government Code § 53082, requiring refunds of fees to properties owners without a sewer connection. Section 53082 provides: "local agencies shall refund any sewer service fees collected for which no services were delivered." When an agency determines a "premises is not connected to the sewer system," it must refund persons still residing at the property. No statute of limitations applies to claims for fees paid before 1992; after that, a 180-day statute applies, which appears to conflict with statutory language that refunds must be paid "regardless of the amount of time the fees were wrongly collected."
Section 53082 sets up a rare exception to the 12-month claiming period for utility fee refunds under the Government Claims Act.

In this case, an HOA sued to recover sewer fees it paid from 2006–2012 under section 53082 applied because 97% of its water use was for irrigation of areas not connected to the sewer. It argued that, because it still owned the property, it was entitled to a refund for all six years. The City noted the HOA was served by one meter up until 2013. And, 3.2% of water delivered through that meter was for swimming and bathroom facilities connected to the sewer. Thus, the City argued, because the premises had received some sewer service, § 53082 did not apply. It also argued the 180-day limitations period applied because the challenged charges were paid after 1992. The trial court concluded § 53082 applied, but the 180-day limitations period did, too.

The Court of Appeal affirmed, with different reasoning: § 53082 did not apply because the premises had sewer service. The Court noted the statute was adopted to address Los Angeles' early

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# Light Duty to Accommodate Disability

*By Teresa L. Highsmith*

Temporarily disabled employees often seek light duty or desk assignments. A new case holds that, even without a written policy allowing such assignments, offering light duty to some employees may create a duty to do so as a "reasonable accommodation"—even for a police recruit whose essential job duties are to complete academy training.

In *Atkins v. City of Los Angeles*, five police recruits were injured during training and were assigned light duty while LAPD had a written policy allowing such assignments until recruits recovered, or if disability became permanent, assignment to a non-sworn City vacancy. LAPD changed its policy to limit light duty to 90 days. The recruits were released and they sued for wrongful termination and disability discrimination. The LA Court of Appeal found in light of the past practice and policy which applied to the recruits when they were injured, the City's duty to provide a "reasonable accommodation" under the California Fair Employment and Housing Act (FEHA) require they be allowed occupy "light duty" positions until they recovered or were deemed permanently disabled.

When a disabled employee cannot perform essential job duties, an employer must engage in an "interactive process under the federal Americans with Disabilities Act (ADA) and FEHA with the employee to attempt to identify a "reasonable accommodation" that will allow the employee to perform all essential job duties. An employer need not alter essential duties; however, "reasonable accommodation" under FEHA includes "reassignment to a vacant position" for which the employee is qualified. There is no requirement to create a position, but having a policy or practice of allowing "light duty" in their position operates like a "reassignment to a vacant position," and FEHA requires it.

*Atkins* does not obligate employers to offer a light duty assignment without a policy or practice of doing so. Nor does FEHA require an employer to exceed a written policy's time limit on light duty, if there is no past practice of doing so. Offering light duty in the absence of such a policy can create an obligation to offer this "reasonable accommodation" to others. Finally, an employer can change a written policy regarding light duty assignments, but not as to an employee injured before the change.

This case reminds us that a reasonable accommodation under FEHA includes a reassignment to a vacant position, and that in determining ability to perform essential duties, an employer must consider both an employee's own and any vacant positions.

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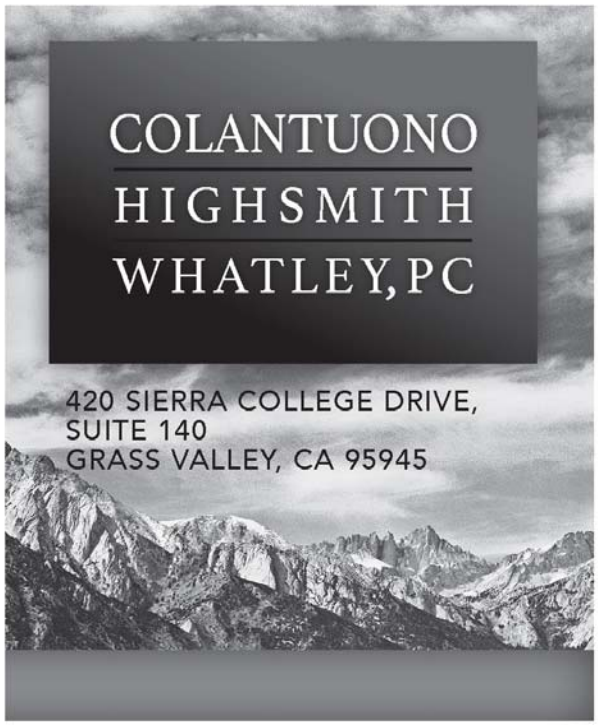
# Sewer Refunds (cont.)

1990s practice of charging sewer fees to properties not connected to the sewer at all. For "premises" supplied by a single water meter, any sewer connection is sufficient to defeat a refund claim under § 53082. For properties with two or more meters, the question is whether the portion of a premises served by each meter is connected to the sewer.

Local agencies faced with a § 53082 refund claim should verify a sewer connection. If a connection exists, no matter how little the customer may use it, § 53082 does not apply.

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

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