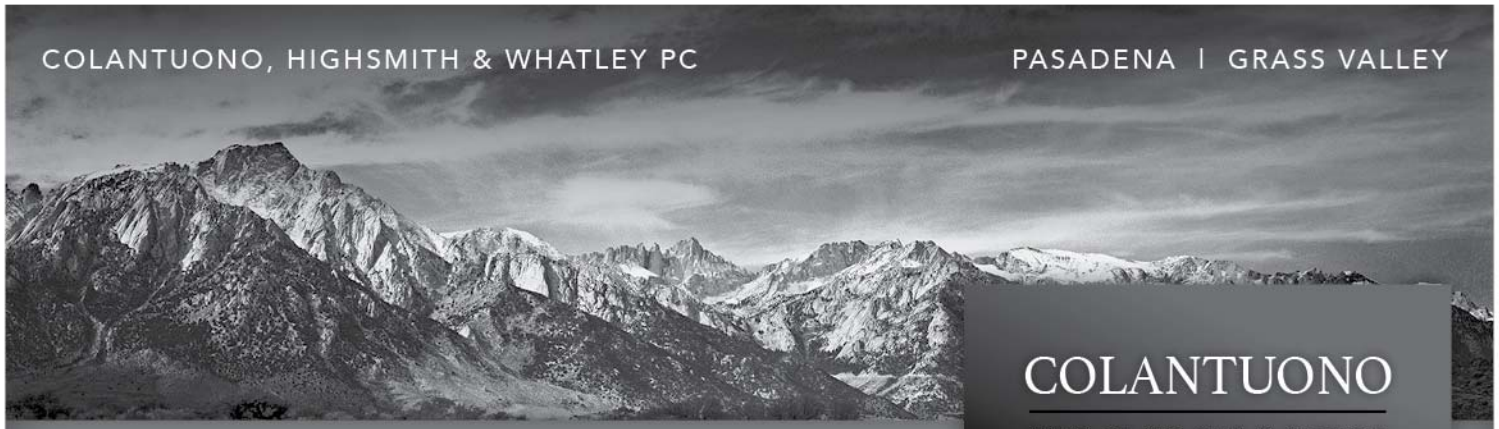
COLANTUONO, HIGHSMITH & WHATLEY PC

PASADENA | GRASS VALLEY



COLANTUONO HIGHSMITH WHATLEY, PC

Newsletter | Fall 2018

Update on Public Law

Prop. 218 Does Not Expand Mandate Reimbursement

By Michael G. Colantuono

California initiatives limit government revenues (like Props. 13, 62, 218 and 26) and spending (like the Gann Limit—1979's Prop. 4). A new case explores the interaction of the two.

The Gann Limit requires State funding to local government for newly mandated programs unless an exception applies. When the Commission on State Mandates finds a mandate to be reimbursable, the Legislature must fund or suspend the mandate. A common exception applies when local government can impose fees to fund mandated costs.

In 1997, *Connell v. Superior Court* held that recycled water mandates were not reimbursable because utilities can charge for recycled water. It rejected the Santa Margarita Water District's argument that, while it had nominal authority to charge fees, it could not do so practically because customers would shift to potable water if it raised recycled water rates. *Capistrano Taxpayers Association v. City of San Juan Capistrano* held in 2015 that Prop. 218 allows utilities to fund recycled water costs from potable water rates because a "purple pipe" system frees supplies for potable use, solving the problem.

A recent Court of Appeal decision, *Paradise Irrigation District v. Commission on State Mandates*, considered water districts' test claim the Water Conservation Act of 2009 is a reimbursable mandate because a majority of customers could block new water rates to cover costs to comply with the Act in a Prop. 218 protest. The Commission rejected the claim, concluding the districts must show they tried to set rates to fund these costs but had been stymied by a majority protest. The trial court accepted this reasoning.

(continued on page 2)

Colantuono Completes Bar Service

Michael G. Colantuono has completed a year of service as President and Board Chair of the State Bar of California—the state agency which regulates the practice of law. It was a demanding year, as the Bar implemented legislation to spin off its trade association functions to a non-profit and to refocus its own efforts on regulating lawyers to protect the public. Colantuono said: "I am grateful for the opportunity to serve—the Bar accomplished a lot of good work this year. I am also grateful to pass the torch so I can refocus my attention on our clients."

Colantuono was appointed Trustee by then-Speaker Perez in 2012; reappointed to a second, three-year term by then-Speaker Atkins in 2015; elected the Bar's last President by Trustees in 2017 and appointed the Bar's first Board Chair by the Supreme Court in 2018. That role is part-time, volunteer and demanding.

CH&W is glad to have Michael's full attention back on the firm, its clients and our practice!

Broad Reimbursement for Electronic Records Under the Public Records Act

By Ryan A. Reed

Local governments can charge for their actual costs for services needed to comply with a Public Records Act (PRA) request for electronic records. A recent case construes this to include costs to redact confidential information. This is a welcome decision for local agencies, as redaction can be costly.

In December 2014, Hayward police provided security for demonstrations in Berkeley. The National Lawyers Guild, self-described as "a progressive public interest association of lawyers and others," made a PRA request for records related to the demonstration, including body camera video. The City located 90 hours of footage and edited it to remove information exempt from disclosure. The City charged the Guild $2,939.58 for the work. The Guild paid under protest and sued when asked to pay for additional video, arguing local agencies may recover only direct costs (e.g. creating copies of requested records)—the rule for paper records.

Agencies must disclose all information requested under the PRA unless an exception applies. Agencies can, however, request reimbursement. First, they can charge for all **direct costs** (i.e., copying costs, not staff time), whether of paper or electronic records. Second, they may charge for **all** costs when a request "require[s] data compilation, extraction, or programming." Hayward argued that redacting body camera video was "extraction." The Guild argued this section applies narrowly to requests that produce records in a new form. The trial court accepted the Guild's reasoning.

National Lawyers Guild v. City of Hayward, found this section of the PRA is not limited to requests which require records to be produced in a new form. Instead, local governments can recover actual costs to redact otherwise disclosable electronic records. This includes staff time, software purchases, and vendor charges. *(continued on page 3)*

Prop. 218 (Cont.)

The Court of Appeal affirmed the result, but rejected the reasoning—concluding water districts have rate-making power, even if customers might block rates, assuming (as the Supreme Court did in the 2006 *Bighorn* case) customers would consider State policies for water service in good faith. If that reasoning seems unrealistic, consider that customers would have incentive to protest rates to fund state—but not local— priorities if a protest could exempt a district from an otherwise state-wide rule. Water providers would have incentive to make customers aware of their power to evade State priorities, too.

The Court did not consider the districts' argument the result should change under last year's SB 231 (Hertzberg, D-Van Nuys), treating storm sewer fees as for "sewer service" exempt from an election (but not a protest proceeding) under Prop. 218 (as are water, trash and sanitary sewer fees). It noted no one argued in *Paradise Irrigation District* that an election was required. Thus, the court viewed SB 231 as only an exemption from election requirements.

Language in the case regarding Prop. 218 and fee-making statutes troubles public lawyers and a petition for rehearing is pending as this article is written. Supreme Court review is possible, too.

The take-away is plain, however—Prop. 218's majority protest proceedings do not require the Legislature to reimburse local governments for costs to comply with statutes that impose mandates on the provision of fee-funded services.

A number of other appeals are pending under Props. 218 and 26, so new developments are on the horizon. As always, we will keep you posted!

For more information on this topic, contact Michael at MColantuono@chwlaw.us or (530) 432-7357.

No Initiative Development Agreements

By Holly O. Whatley

The recent decision of *Center for Community Action and Environmental Justice v. City of Moreno Valley* finds the initiative power does not apply to development agreements. It found the Legislature delegated authority to negotiate such agreements exclusively to city councils and boards of supervisors and, though such agreements are subject to referenda, they are not within the initiative power.

Moreno Valley negotiated a development agreement for the World Logistics Center, a 700-acre warehouse complex. The City certified an EIR and approved the agreement by ordinance, as statute requires. CEQA suits followed. The developer funded an initiative to repeal the development agreement and to approve a substantially similar agreement—exempting the project from CEQA. The City Council adopted the initiative rather than placing it on the ballot. Environmentalists sued, arguing development agreements are not subject to initiative.

The developer cited statutory language declaring a development agreement a "legislative act" subject to referendum. It argued this language evidenced no intent to preclude the initiative power, which is broadly construed. The Court of Appeal disagreed, concluding the Legislature's decision to make development agreements "subject to referendum" without mentioning "initiative" barred initiative approval of such agreements.

The Court also concluded the Legislature exclusively delegated approval of development agreements to city councils and boards of supervisors. The statute addressed a statewide problem of uncertainty, created by law allowing local agencies to revisit land use approvals until well into construction, that made it difficult to finance development. The statute was also protects a local agency's ability to implement and enforce such agreements. That the statute allowed referenda did not mean the Legislature could not limit the power of initiative, nor diminish its exclusive delegation of authority to legislative bodies.

The Court also noted the statute contemplates negotiation of development agreements. An initiative drafted by a developer and merely approved by the city council is not "negotiated"—it is a "take it or leave it" proposal. Such proposals would give developers vested rights without commensurate obligations to local agencies. The Court found this disserved the statutory purpose evidenced by legislative history showing legislative intent to exclusively delegate authority to legislative bodies to negotiate such agreements.

The case adds to a growing body of law defining the initiative and referendum powers. Voters may not address by initiative topics of statewide concern exclusively delegated to a city council or board of supervisors even if statute allows a referendum on such a topic. As this Court noted, however, voters always retain the power to vote out local legislators.

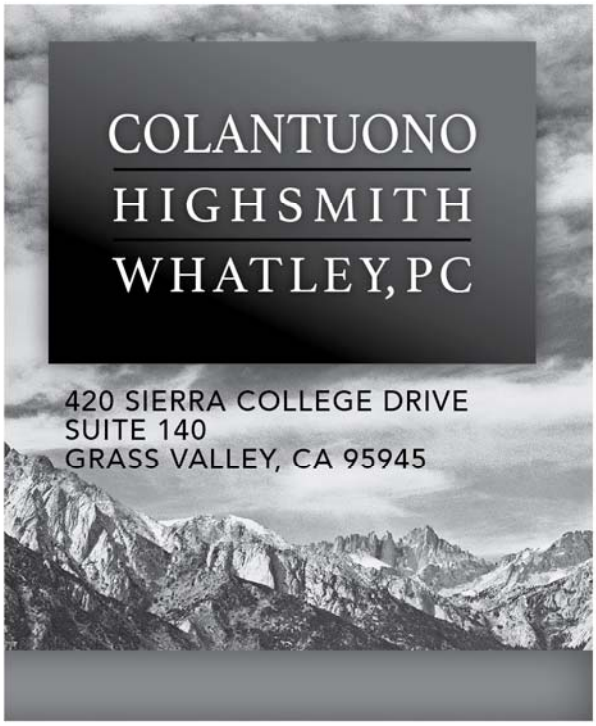
For more information on this topic, contact Holly at HWhatley@chwlaw.us or (213) 542-5704.

CPRA Costs (cont.)

This is good news for local agencies. Responding to electronic records requests can be expensive, especially given the sheer volume of electronic records. *National Lawyers Guild* allows local agencies to recover all costs to redact electronic records before disclosure.

Adapting records management practices—and laws—to the electronic age is an ongoing effort for public agencies and courts alike. Further legal developments are likely. Stay tuned!

Ryan A. Reed is a recent Georgetown University Law Center graduate, a law clerk at CH&W, and awaits November Bar results.



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 Marta Farmer at (530) 432-7357 or subscribe via our website at WWW.CHWLAW.US.

Name _____ Title _____

Affiliation _____

Address _____

_____

City _____ State _____ Zip Code _____

Phone _____ Fax _____

E-mail _____

☐ Mail ☐ E-Mail ☐ Both

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