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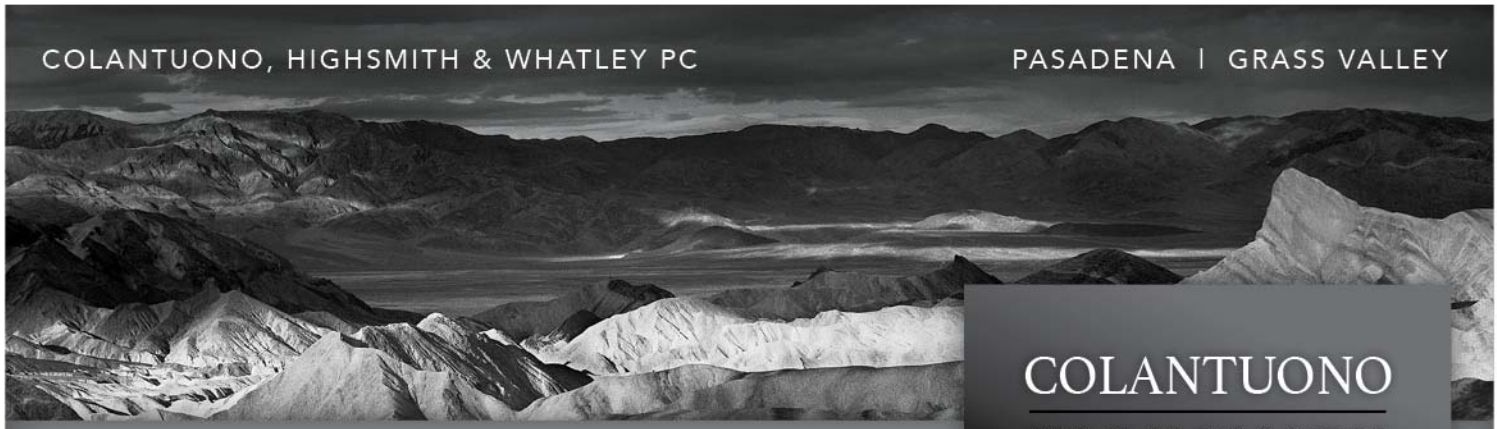


Newsletter | Spring 2018

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

City Councils Control Election Timing for Initiatives

By Matthew T. Summers

Election season is in full swing and initiative proponents are actively circulating measures statewide. Under last year's AB 765 (Low, D-Cupertino), City Councils and Boards of Supervisors now control election timing for both agency ballot proposals and initiatives. If an election official certifies an initiative as having sufficient signatures, the legislative body may adopt it or submit it to voters at a general or special election.

The state Constitution empowers voters to propose initiative constitutional amendments, statutes, and local ordinances. When exercising the initiative power, voters generally have the same authority as a legislative body. *California Cannabis Coalition v. City of Upland* recently held voters are only subject to limits on the initiative power that expressly apply to them. The Supreme Court concluded that Proposition 218's requirement that general taxes be considered at general elections did not apply to an initiative, but does apply to legislative bodies.

AB 765 amends the Elections Code. Previously, initiative proponents could compel a special election on an initiative if their petition sought a special election and was signed by at least 15% of voters. Under AB 765, proponents no longer have that option. The threshold is 10% of voters, or for initiatives affecting taxes, 5% of the number of votes cast in the City or County in the last gubernatorial election—a lower threshold set by Proposition 218. If an initiative qualifies, the legislative may adopt it, place it on the next general election ballot, or call a special election. It may also sue to keep a clearly invalid measure off the ballot.

This legislation allows legislative bodies to control the timing of initiative elections. Assemblymember Low stated the statute prevents initiative proponents from compelling important matters to be considered at low-turnout special elections. It is a part of a trend of statutes discouraging special elections and stand-alone local elections, in favor of consolidation with State elections, to encourage turnout.

For more information on this subject, contact Matt at MSummers@chwlaw.us or (213) 542-5719.

Sexual Harassment Prevention Training

California law requires all public agency employers to provide training of at least two hours of sexual harassment prevention training to all supervisors and local agency officials who receive compensation — whether elected or appointed — within the first six months of becoming a supervisor or being elected or appointed, and then once every two years thereafter.

We are available to provide on-site training, off-site training, or lower-cost training for multiple agencies. For more information, contact:

Michael Colantuono at *MColantuono@chwlaw.us*
Holly Whatley at *HWhatley@chwlaw.us* or
Terri Highsmith at *THighsmith@chwlaw.us*

Business Roundtable Proposal Drastically Cuts Local Revenue Authority

By Michael G. Colantuono

The California Business Roundtable is circulating an initiative amendment to our Constitution to rewrite two decades of case law to drastically reduce State and local revenue authority. As of April 13, 2018, the measure had obtained at least a quarter of the required signatures, but had not yet been submitted for signature verification. The measure and its current status can be found on the Secretary of State's website.

The measure eliminates the distinction between general and special **taxes**, requires two-thirds voter approval of all local taxes, and requires a separate statement in a tax ordinance of how funds may be used. If for general government, the tax must state: "unrestricted general revenue purposes." The measure is retroactive to January 1, so taxes balloted this year should include those words.

It requires a two-thirds vote of a legislative body to adopt or increase any of the few fees not defined as taxes, limits all taxes to general elections absent an emergency declared by a unanimous vote of legislators present; allows referenda on **fees** (which suspend an increase when signatures are certified) using Prop. 218's very low standard for a tax initiative (5% of the voters who cast votes in the last gubernatorial election). It requires "clear and convincing evidence" to justify a fee and limits fees to the "reasonable and actual" service cost, not just "reasonable" cost.

It invalidates all local taxes adopted or increased in 2018 unless they meet its standards, including a separate statement of the purposes for which funds can be spent and its label for general fund money.

It eliminates the Prop. 26 exception for fees for a benefit or privilege, but retains the exemption for uses of property, in an effort to undo *Cal. Chamber v. ARB* (the greenhouse gas fee case). It may undermine some **franchise fees**.

It retains exemptions for **development impact fees**. The Legislative Analyst predicts such fees will become more vital than ever in funding infrastructure and local services. These will include Tourism Marketing District Assessments. Non-property-based business **assessments** now require two-thirds voter approval as taxes.

It eliminates the requirement that revenues be "imposed" to constitute taxes. This is intended to undermine *Cal. Chamber,* but may have unpredictable impacts on voluntary relationships between business and government. It also states a voluntary relationship between a payor and government does not defeat characterization as a tax. This may bar in lieu fees outside the land use context.

Fines and penalties are not taxes only if imposed to punish law violations and "pursuant to adjudicatory due process." What that requires is unclear.

Revenues to non-government actors are taxes if government restricts use of the funds. This undermines *Schmeer* (the plastic bag ban case) without preventing minimum wage laws.

All non-taxes are subject to an oddly stated proportionality requirement: "proportional based on the service or product provided" or "proportional to the cost to government created by the payor in performing regulatory tasks."

Voter approval is required to "extend" a revenue measure by extending its duration, applying it to new territory (this repeals *Sunset Beach* and will require two-thirds voter approval for inhabited annexations), to a new class of customers, or to a wider tax base.

(continued on page 3)

Exhaustion of Administrative Remedies Still Required in Employment Cases

By Holly O. Whatley

The LA Court of Appeal recently clarified that Labor Code § 244, which states that one need not exhaust administrative remedies before bringing certain suits, applies only to Labor Commissioner claims. *Terris v. County of Santa Barbara* held plaintiffs must exhaust administrative remedies before suing on other claims. This is welcome news for public agencies.

During the Great Recession, Santa Barbara County projected a shortfall of $11 million for FY 2009–2010 and laid off 35 employees, including Terris. She tried to "bump" a less senior employee, but the County found she lacked skills the position required. She filed a claim with the County Civil Service Commission, arguing the County violated her bumping rights and discriminated against her for exercising them, for serving on the County Employees Retirement Board, and for her complaints related to her labor organizing activities. However, she did not file a discrimination claim with the County's Equal Opportunity Office (EEO).

The Commission concluded the County correctly applied its seniority rules, the "special skills" determination was valid, and the layoff authorized. But it declined to decide the discrimination claims because Terris did not file a claim with the EEO. She then sued, alleging wrongful termination and her discrimination claims. The trial court gave the County summary judgment on the discrimination claims because Terris failed to file an EEO complaint and, if necessary, appeal its outcome to the Commission. And, if she disagreed with the Commission decision, she could then sue to challenge it.

Terris claimed Labor Code § 244 excused her from presenting a claim to the EEO. The Court of Appeal disagreed, finding § 244 was not intended to overturn the Supreme Court's 2005 decision in *Campbell v. UC Regents* requiring an employee to pursue administrative remedies. Instead, it concluded § 244 was intended to resolve conflicting rulings whether Campbell requires a plaintiff to file a Labor Commissioner claim before suing. The Court of Appeal held that, although a plaintiff need not file a Labor Commissioner claim, she must exhaust administrative remedies provided by her employer before suit.

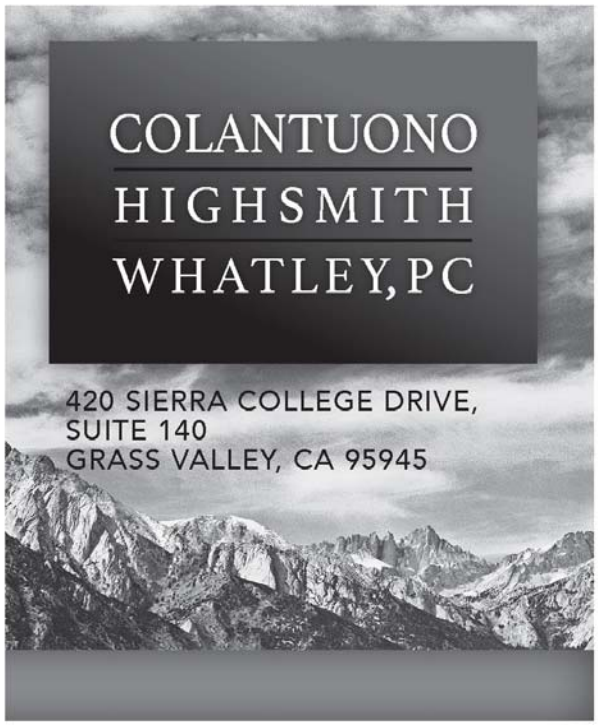
This is good news for local agencies. Terris has petitioned for Supreme Court review, but even if review is granted, local agencies may rely on the published opinion until the Supreme Court's decision issues—in two years or so. Till then, we will keep you posted!

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

Local Revenue Authority (cont.)

The measure has not qualified for the ballot and may not. Local officials with concerns about the measure may wish to review the businesses which are members of the Business Roundtable on its website and talk to those that work in your communities about the impacts this will have on local governments' ability to provide public services — to businesses and others. The deadline for the November ballot runs in late June, so we will soon know if this makes the 2018 or 2020 ballot.

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



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