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Newsletter | Winter 2018

Update on Public Law

Water Rate Case Good News for Rate-Makers

By Michael G. Colantuono

The ongoing battle between the San Diego County Water Authority and the Metropolitan Water District has generate a published Court of Appeal decision that will help local rate-makers.

San Diego County Water Authority v. Metropolitan Water District of Southern California reverses part of SDCWA's trial win but gives it some wins, too. First, the Court rejected Met's claim SDCWA's challenges to its rates to transport water from the Imperial Valley to San Diego were not time-barred by the validation statute of limitations running from when Met last sold revenue bonds because those bonds were backed by Met net revenues, not these water rates in particular.

The Court concluded Met could recover State Water Project costs in a rate to transport across the Colorado River Aqueduct. The conclusion overturns a trial court ruling we found more persuasive but, importantly, the Court writes: "courts do not weigh competing methodologies to determine the best water rates. We determine only whether substantial evidence supports the fair compensation determination made by the rate-setting agency." This is a construction of a wheeling statute, not Prop. 218 (which is not in issue in this case) or Prop. 26, but it will be helpful nevertheless and reinforces that rate-making is legislation.

Met was not entitled to recover the cost of water conservation programs from a transportation rate because this is a water supply function. This reinforces that supply rates can cover conservation.

The Court found no Prop. 26 violation in Met's rates, either: "Metropolitan provides a specific service (use of the conveyance system) directly to the payor (a member agency) that is not provide to those not charged and which does not exceed the reasonable costs to Metropolitan of providing the service (Cal. Const., art. XIII C, [section] 1, subd. (e)(2).)" The Court distinguishes the *Newhall* case, concluding it involved a charge for a

(continued on page 2)

Colantuono Elected President of State Bar

Michael G. Colantuono was elected President of the California State Bar in July, taking office in September. The Bar is the state agency which regulates the practice of law; it has a budget of some $175 million and more than 500 employees. Michael serves on the Board of Trustees as an appointee of former Assembly Speakers John Perez and Toni Atkins. His fellow Trustees elected him President and his term will end by September 2018. Service in the role is demanding, but is an uncompensated, part-time position. Like local governments, the Bar is managed by a full-time CEO and has a part-time policy-making Board. Michael maintains a full-time law practice, arguing two cases in the California Supreme Court this year and looking forward to another argument early in 2018. Congratulations, Michael!

New Ballot Language for Local Agency Measures

By Holly O. Whatley

Starting in 2018, tax measures local legislative bodies place on the ballot are subject to a new ballot-language requirement. AB 195 (Obernolte, R-Big Bear Lake) amends Elections Code § 13119 to require all local measures imposing or increasing a tax, including those proposed by a local agency, to be accompanied by a ballot statement specifying the annual revenue to be raised and the rate and duration of the tax. A similar, earlier requirement applied only to initiatives.

The amendment was spurred by suit on a tax measure the Los Angeles Metropolitan Transportation Authority ("MTA") put on the November 2016 ballot. Measure M proposed a half-cent sales tax to support MTA services. Seven cities filed a pre-election challenge citing Elections Code § 13119 alleging ballot materials did not state the amount to be raised annually nor accurately state its rate and duration. The MTA argued § 13119 applied only to initiatives—not measures a legislative body places on the ballot. The trial court agreed.

The Howard Jarvis Taxpayers Association sponsored AB 195 to extend § 13119 to tax measures placed on the ballot by local governments. Its requirements also apply to measures to approve bonds or other debt. AB 195 also mandates a ballot statement be an "impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure."

The new requirements apply to measures proposed by general law and charter cities, general law and charter counties, and special districts, including school districts. While there might be an argument charter cities are beyond the Legislature's reach, most charter cities adopt the Elections Code by reference and others must confront the Legislature's declaration that § 13119 serves a statewide purpose.

Local governments placing revenue measures on the ballot should be careful to include in ballot books statements specifying the annual revenue expected from proposals and to state the rate and duration of taxes. The more difficult task may be to ensure the ballot statement is impartial, arguing neither for nor against the measure.

No doubt those opposed to local tax measures will continue to look to the courts to edit ballot language to which they object and such suits may become more common. Careful drafting and legal review are therefore essential.

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

SDCWA v. Met (cont.)

service the defendant district did not provide (groundwater management). The Court did not decide whether Met "imposes" its rates on San Diego so as to trigger Prop. 26 at all, finding the rates satisfy Prop. 26.

The Court also found SDCWA could challenge a plainly unconstitutional condition Met imposed on its receipt of water transport service because:

(i) the rule that federal courts will not entertain claims between a subordinate government and its state is not applicable because Met and SDCWA are peers — neither is the State;

(ii) local governments have First Amendment rights;

(iii) the rule that local governments cannot seek due process in court does not bar them from petitioning for redress of unlawful acts.

So the partial win for San Diego is a helpful case for rate-makers. Further developments are coming soon, so stayed tuned!

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

Inclusionary Rental Housing Ordinances are Back

By Aleks R. Giragosian

On September 29, 2017, Governor Jerry Brown signed Assembly Bill 1505 (Bloom, D-Sta. Monica) — part of the Legislature's 15-bill affordable housing package. AB 1505 authorizes inclusionary housing ordinances that require rental housing. An inclusionary housing ordinance requires developers of market-rate housing to include a percentage of affordable units in their projects to mitigate the affordable housing demand their developments stimulate. The statute overturns a 2009 decision limiting inclusionary ordinances to ownership housing.

Palmer/Sixth Street Properties, L.P. v. City of Los Angeles (2009) held inclusionary housing ordinances for rental housing to be preempted by the Costa-Hawkins Rental Housing Act, California's vacancy-decontrol rent control law. The Court concluded forcing a developer "to provide affordable housing units at regulated rents in order to obtain project approval is clearly hostile to the right afforded under the Costa-Hawkins Act to establish the initial rental rate for a dwelling or unit." Since *Palmer*, many cities have repealed inclusionary rental housing ordinances or declined to enforce them.

AB 1505 overrules *Palmer*. Effective January 1, 2018, cities and counties may adopt inclusionary rental housing ordinances and specify the required percentage of new, affordable rental units. There is no statutory limit on the percentage of affordable units a jurisdiction may require, but ordinances must provide an alternative method of compliance, such as in-lieu fees, land dedication, offsite construction, and/or acquisition and rehabilitation of existing housing. The federal Constitution sets an upper limit on inclusionary requirements, too.

To prevent inclusionary rental housing ordinances from stifling development, AB 1505 authorizes the Department of Housing and Community Development ("HCD") to review ordinances (1) adopted or amended after September 15, 2017, (2) requiring more than 15% low-income units, and (3) in a city or county that met less than 75% of its regional housing need, measured over at least a five-year period, or has failed to submit its annual housing element report to HCD for two consecutive years. HCD may require a city or county to prove its ordinance does not unduly constrain housing production. If it cannot, HCD may limit application of the ordinance or cap the required percentage of affordable units.

An inclusionary housing ordinance is an important tool to attract workers, diversify neighborhoods, and satisfy regional housing needs. It remains to be seen how AB 1505 and the 14 other new housing laws will affect cities' and counties' ability to promote affordable housing.

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

CHW Welcomes Four!

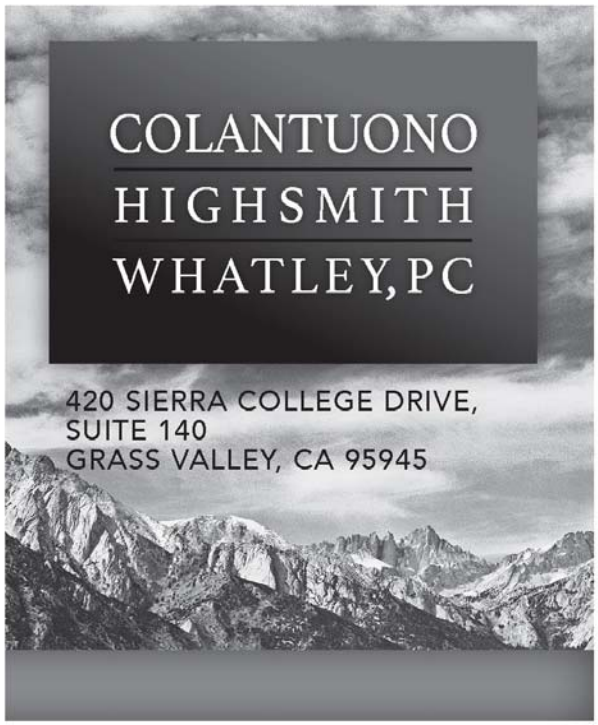
CHW welcomes four lawyers to our Pasadena office.

John L. Jones, II is a 14-year attorney with his law degree from Yale who also graduated *summa cum laude* from Creighton University with a math degree. He will be a welcome addition to our rate-making and municipal litigation practices and will establish our bankruptcy and creditors' rights practice.

Andrew C. Rawcliffe is a graduate of Boston University and Southwestern University School of Law who brings us nine years' municipal litigation experience. He comes to us from the Glendale City Attorney's office and is already knee-deep in an inverse condemnation trial; rate-making; Political Reform Act litigation; and marijuana enforcement.

Lindsey F. Zwicker has seven year's municipal advisory experience, advising cities, counties and special districts in a wide range of legal areas. She will have a mix of litigation and advisory assignments. She has her degrees from UC Santa Barbara and UCLA Law School.

Nikhil S. Damle is a fourth-year litigator and joins us from an Orange County firm that represents local governments. He previously litigated misdemeanors for the Los Angeles City Attorney's Office and has more trial experience than typical for lawyers of his tenure. He has his degrees from UC Irvine and the University of Arizona College of Law.



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