Colantuono Highsmith & Whatley, PC

CH&W Newsletter

Update on Public Law

Los Angeles • Nevada County

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Drought Rules Affect All Local Governments

By Matthew T. Summers

As is evident, California faces historic drought. On April 1, 2015, Governor Brown issued an Executive Order directing the State Water Resources Control Board (SWRCB) to impose regulations to achieve a 25% reduction in urban use of potable water by February 2016. On May 5, 2015, after several rounds of public comments, the Board adopted emergency regulations to do so. The new rules affect all local governments—not just water providers.

The regulations impose graduated mandatory conservation requirements on urban water suppliers. Starting June 1, 2015, all urban water suppliers—suppliers with more than 3,000 service connections—must reduce potable water use from 8% to 36%, depending on residential per capita water usage from July to September 2014. The SWRCB will evaluate compliance monthly, comparing usage for each month to the same month in 2013 as well cumulatively. The regulations require urban water suppliers to report water use to the SWRCB. Agencies that fail to meet conservation targets may be subject to fines or SWRCB enforcement orders. Each urban water supplier should consider whether additional conservation requirements are needed to achieve its conservation standard.

The SWRCB rejected other measures of conservation, relying on residential per capita water usage in summer 2014. Many agencies across the state commented on the proposed regulations, suggesting other ways to achieve the Governor's goal of 25% water use reduction statewide while accounting for regional differences in water demand and climate. Several noted the significant variance in evapotranspiration rates between drier and wetter areas that requires more water in hotter, drier areas to maintain the same area of landscaping, even for drought-tolerant, native species. The Board declined to account for climate variations in its regulations.

The regulations require smaller public water providers—those with fewer than 3,000 service connections—to comply with the Governor's order in one of two ways. An agency can prohibit outdoor watering of ornamental turf more than two days a week. Alternatively, an agency can impose sufficient conservation measures to achieve a 25% reduction in potable water usage compared to 2013. An agency taking the second option must report monthly its total potable water production for June through November 2013 and June through November 2015. This data will be used to assess compliance with the 25% reduction requirement. Those who choose the twice-a-week limit on landscape irrigation need not report use data. Many agencies will prefer the first option, as it does not require them to achieve a conservation goal.

The emergency regulations prohibit certain water uses, in addition to rules the Board adopted in 2014. Irrigation of public street medians with potable water is prohibited. This does not prohibit irrigation with recycled water or watering to maintain street trees. Landscape irrigation outside newly constructed buildings is to be governed by new rules proposed for adoption in June 2015. The final SWRCB regulations are less clear on this issue than the draft had been. The draft prohibited irrigation with potable water for new construction other than by micro-spray or drip systems. The regulations to be adopted in June can be expected to be similar.

If these new emergency regulations prove ineffective, or if the drought worsens, the SWRCB can be expect to develop and implement further regulations.

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For more information on this topic, contact Matt at 213/542-5719 or MSummers@chwlaw.us.

Housing Element State Addresses Mixed Use

By Leonard P. Aslanian

The most overused planning buzzword of our era may be "smart growth." It's hard to argue with the idea — who, after all, is for "dumb growth"? Yet state and regional authorities do not always provide local planning agencies with tools to implement smart growth ideas that address knotty, real-world planning problems like California's ongoing affordable housing crisis.

Recently adopted AB 1690 (Gordon, D-San Mateo) seeks to provide cities and counties with practical new authority to put smart growth ideas into practice. It amends Government Code section 65583.2 to expand the types of building sites that cities and counties can use to meet their Regional Housing Needs Assessment (RHNA) goals for land available for housing. The RHNA is, of course, determined at the state level on a region-by-region basis, and a share of each region's RHNA is then assigned to each city and county. When a city's or county's inventory of existing housing development sites is insufficient to meet its RHNA share for housing at all income levels, its housing element must include a program to rezone sufficient sites within the first three years of the 8-year housing element planning period to achieve the RHNA goal. Under previous law, this rezoning program was required to accommodate 100% of a city's or county's RHNA share for very low- and low-income households on sites zoned to permit owner-occupied and rental multifamily use by right. The statute further required at least half of very low- and low-income units to be accommodated on sites designated for residential use and for which nonresidential uses or mixed uses were not permitted.

AB 1690 changes these rules to authorize a city's or county's rezoning program to accommodate all of the agency's very-low- and low-income housing needs under the RHNA on mixed-use sites that allow 100% residential use and require at least 50% residential floor area. According to the author, AB 1690 is intended to allow local governments to plan for growth in a way that better integrates very-low- and low-income housing into communities and aligns with California's "smart growth" goals. This is because single-use zoning is increasingly rare in urban areas. Assemblyman Gordon also believes a mixed-use component can make a project more attractive to an area lacking key commercial services, such as grocery stores and pharmacies. Indeed, including very-low- and low-income residents in mixed-use projects makes such residents less likely to be isolated from jobs and services.

Opponents of AB 1690 expressed concerns about the likelihood very-low- and low-income housing will actually be developed on mixed-use sites. While many cities and counties have established mixed-use zones, these do not necessarily require mixed use or housing development. Thus, counting mixed-use sites towards an agency's RHNA share could result in commercial development, but not affordable housing. AB 1690 addresses these concerns by its requirements that mixed-use sites which count toward the RHNA goal must allow 100% residential use and require at least 50% residential floor area.

Notably, AB 1690 creates no new obligation for a city or county to adopt or amend its housing element before the next scheduled update. Upon a city's or county's next update, however, AB 1690 offers a new way to meet RHNA goals on mixed-use sites. This may be a particularly attractive option in built-out areas, or where affordable housing has proven difficult to integrate with jobs and commercial services.

Housing policy continues to develop in Sacramento, so land use agencies are wise to watch for new developments

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For more information on land use topics, contact Len at 213/542-5709 or laslanian@chwlaw.us.

Welcome, Megan Knize and Nina Park!

CH&W is pleased to welcome two new members of our team.

Megan S. Knize joins our litigation and municipal advisory practices in Los Angeles. She is a 2008 graduate of UC Davis Law School and comes to us from a plaintiff's class action firm. That experience will be very useful given the upsurge in class action challenges to local government revenue. Previous experience includes work at a national law firm, as staff to the Supreme Court of Palau (a Pacific archipelago in free association with the United States), and as law clerk for federal Judge Selna in Orange County and Los Angeles Superior Judge Carolyn Kuhl. While at Davis, Megan was Editor in Chief of the Davis Law Review. She has her B.A. from Stanford with honors in American Studies and was Editor in Chief of the Stanford Daily. She has published in three Law Reviews since 2008.

Nina C. Park, also of UCLA Law School's Class of 2008 comes to us from a commercial law practice and will support our litigation practice in Los Angeles. She has her B.A. from Berkeley with Highest Honors in English and studied at Oxford and Madrid while in college. At UCLA Nina was the Editor in Chief of the Asian Pacific American Law Journal. She also did a tour of duty in the LA City Attorney's office.

The firm will continue to grow as we are now recruiting a junior associate to support our municipal and litigation practices in our Nevada County office in the Sierra Foothills. A time of growth for CH&W!

Welcome, Megan and Nina!

Water Rates Case Scrambles Drought Management

By Michael G. Colantuono

On April 20, 2015 the Orange County Court of Appeal issued its long-awaited decision applying Proposition 218 to tiered water rates, which encourage conservation by raising prices as water use becomes more inefficient. Proposition 218, adopted in 1996 as the "Right to Vote on Taxes Act," limits rates for water, sewer, trash and other "property related services" and forbids a charge on any customer to "exceed the proportional cost of the service attributable to the parcel." The 2011 *Palmdale* case had ruled tiered rates comply with Proposition 218 if supported by a record demonstrating the tiered prices reflect service cost. The new decision, *Capistrano Taxpayers Association v. City of San Juan Capistrano*, states the same rule but makes clear that judicial review of cost justifications is very demanding.

The *Capistrano* plaintiffs originally had four concerns: they argued the City's groundwater recovery plant was wastefully inefficient, its failure to issue a bond to cover capital costs predicted by its cost of service study meant rates were too high, the proceeds of potable water rates should not be used to develop recycled water service, and the City had not sufficiently cost- justified its price tiers. The plaintiffs abandoned their attack on the groundwater recovery plant in the trial court and did not appeal the trial court's ruling against them on what they called the "phantom bond" issue.

The Court of Appeal found use of potable water rates to fund new recycled water services is permissible because the new service displaces demand for potable water and thus makes more water available for all customers. It relied on cases defining "water" service under Proposition 218 very broadly. Curiously, the Court also remanded to the trial court for proof no recycled water costs were covered by the Tier 1 water rate on most efficient uses of water. Logically, if recycled water benefits all, all can be asked to pay for it—even Tier 1 users. The Court also invalidated the City's upper-tier rates, finding it had not attempted to cost-justify them.

The case is not yet final. Petitions for rehearing are pending and, once the case is final as to the Court of Appeal, requests to the California Supreme Court to depublish the case (eliminating it as precedent for all but its parties) and to review it (which also depublishes the opinion) are expected. Press reports state settlement discussions are under way, but non-parties to the case—like the State Water Resources Control Board and local government associations—can seek depublication or review. The SWRCB may be interested given the Governor's order (discussed on page 1 of this newsletter) that it require water retailers to use tiered rates or fines to encourage conservation.

Capistrano contradicts decisions involving the Pajaro Valley Water Management Agency and the Imperial Irrigation District. Thus, it does not bind trial courts and they can follow the decision they find most persuasive. Indeed, the Monterey Superior Court has already refused to follow *Capistrano*, following *Pajaro* instead. If *Capistrano* becomes final as first written and is a correct statement of the law, water providers have these options: use flat rates and achieve conservation by command and control rules, including fines and education; carefully cost-justify tiered prices (which may produce relatively flat price curves that do not send a strong conservation signal); obtain 2/3 -voter approval of upper tier rates as a tax; or await further developments, including more litigation, legislation, and—perhaps—a proposal to amend Proposition 218 at the polls in November 2016.

Cases raising similar issues are pending in Los Angeles and San Diego Counties and new cases—many inspired by widespread press coverage of *Capistrano*—have been filed or threatened since the case came down.

Clearly, California's penchant for initiatives has produced complicated law that complicates delivery of government services. Until the law is clarified, water rate-makers are should consult good rate-making consultants and qualified counsel.

Oher significant developments in rate-making law are news, too. Our Supreme Court has granted CH&W's petition for review of a decision involving a payment in lieu of taxes (PILOT) from an electric utility to a City's general fund: *Citizens for Fair REU Rates v. City of Redding*. This case will test retroactivity of 2010's Proposition 26 and cost-justification of fees. CH&W's petition for review of a decision involving groundwater charges (i.e., "pump taxes") is pending in *Ventura v. United Water Conservation District* and a very helpful decision involving such charges in San Jose has been temporarily depublished by a grant of rehearing. That is *Great Oaks Water Co. v. Santa Clara Valley Water District*. Its analysis was completely at odds with *Ventura* and did not cite it, perhaps because *Ventura* was decided only eight days earlier. It seems the San Jose Court of Appeal granted rehearing in *Great Oaks* to address *Ventura*. It can be expected to re-decide *Great Oaks* shortly.

Plainly, it is a very busy time in rate-making law. As always, we will keep you posted!

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For more information on this subject, contact Michael at 530/432-7357 or mcolantuono@chwlaw.us.

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