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C&L Newsletter

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Supreme Court to Clear Medi-Pot Haze

By David J. Ruderman

Do California's medical marijuana laws prohibit local governments from using land use regulations to ban store-front dispensaries? The Supreme Court considered this question on February 5th, when it heard argument in *City of Riverside v. Inland Empire Patient's Health & Wellness Center*. *Riverside* should resolve the long-running dispute whether the Compassionate Use Act (Proposition 215) and Medical Marijuana Program Act (SB 420) preempt local land use regulations that prohibit dispensaries.

Riverside's facts mirror those of numerous cities and counties in California which reacted to the exponential growth of dispensaries after the Obama administration signaled in 2009 it would not target patients. Riverside's code prohibits medical marijuana dispensaries and, like most zoning ordinances, provides that a violation can be abated as a public nuisance. The defendants nevertheless opened a dispensary and the City sued to close it as a nuisance. The trial court granted a preliminary injunction, shuttering the dispensary. The dispensary appealed and the Court of Appeal upheld the injunction. The Supreme Court will now consider whether the Court of Appeal correctly found Riverside was likely to prevail in the case. Many California cities and counties have dealt similarly with dispensaries, including Auburn, where C&L obtained a temporary restraining order and preliminary injunction against a dispensary opened in violation of the City's zoning and business licensing regulations. A decision of the Sacramento Court of Appeal in that case, *Auburn v. Sierra Patient & Caregiver Exchange, Inc*., is due February 12th.

Since the Supreme Court took the *Riverside* case, the U.S. Justice Department renewed its prosecution of dispensaries, reducing the need for local action. In addition, two other appellate courts disagreed with the decision vacated by the grant of review in *Riverside*. *City of Lake Forest v. Evergreen Holistic Collective* and *County of Los Angeles v. Alternative Medical Cannabis Collective* reversed preliminary injunctions declaring dispensaries nuisances under local zoning laws. Unlike *Riverside*, these courts found outright zoning bans contradicted Medical Marijuana Program Act provisions that grant qualified patients and their caregivers immunity from criminal sanctions under a particular nuisance abatement statute. Although nuisance abatement actions are civil, not criminal, in nature; these courts read the medical marijuana laws broadly to bar all nuisance actions.

The Supreme Court also granted review of *Lake Forest* and *County of Los Angeles* pending its decision in *Riverside*. However, if the Supreme Court follows the analysis of these cases, it would significantly impair the long-standing authority of local governments to regulate land use. It could effectively carve out a single land use for special treatment, requiring all 482 cities and all 58 counties in our state, regardless of their size, character and circumstances, to allow at least some dispensaries. Such a decision would require a legislative response. The Court's decision in *Riverside* is due by May 6, 2012.

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For more information on this topic, contact David at 530/798-2417 or DRuderman@CLLAW.US.

Validation of Billboard Ordinance Invalid

By Holly O. Whatley

Shouldn't a judgment in a validation action be the final word on the challenged act? Not always, as a recent ruling by the Court of Appeal in Los Angeles made clear in *Summit Media LLC v. City of Los Angeles*.

The case challenged a stipulated (agreed by the parties) judgment in an earlier reverse validation action that attacked the City of Los Angeles' 2002 outdoor sign ordinance. The challenged ordinance established an off-site sign inspection program and imposed fees to fund the program to combat a serious problem of bootleg signs installed, at great profit, entirely without City permits. The City and the plaintiff outdoor advertiser settled the earlier reverse validation case via a stipulated judgment approved by the trial court. Among other provisions, the settlement exempted the plaintiff from various zoning laws, including the City's sign inspection program and its ban on new off-site signs. Based on this judgment, the plaintiff outdoor advertiser obtained permits to convert several of its billboards to digital format, which the ordinance denied to all other advertisers.

A competing billboard advertiser filed a later suit, asking the court to void the stipulated judgment in the earlier reverse validation action. It argued that the settlement improperly exempted a select few outdoor advertisers from existing ordinances and regulations and amounted to the City contracting away its police powers, which the law generally prohibits. The trial court agreed and declared the agreement void as *ultra vires* (i.e., beyond the court's power).

In affirming the trial court's ruling in the second case, the Los Angeles Court of Appeal rejected the argument that the judgment in the reverse validation action could not be collaterally attacked in a separate suit. The Court of Appeal determined that the stipulated judgment "neither validated nor invalidated the sign fee ordinance, and the settlement agreement covered matters far beyond the scope of … the validating statutes."

The Court of Appeal did more than void the settlement or affirm the trial court; it went further and voided the permits the City issued pursuant to the settlement agreement. In response to the permit holder's argument that such a ruling would be excessive, the Court noted: "We see nothing 'grossly excessive' in the revocation of illegal permits issued under an illegal settlement agreement that contravenes municipal ordinances."

Summit Media echoes limits on settlements the Court of Appeal applied in 2006 in *Trancas Property Owners Assn. v. City of Malibu* — a city or county may not contract away its police power or circumvent the public hearing process when settling a zoning dispute. And the standard courts apply to such settlements is not whether an agreement contractually exempts someone from future legislative or regulatory control. Rather, as the *Summit Media* decision states, "An agreement is *ultra vires* when it contractually exempts settling parties from ordinances and regulations that apply to everyone else and would, except for the agreement, apply to the settling parties."

Two key take-aways emerge from *Summit Media*. First, to obtain the *res judicata* benefit (i.e., binding effect) of a judgment in a validation action, the decision or agreement should be limited to matters subject to the validation statutes that were actually litigated in the case. Judgments that reach beyond those bounds, even those approved by a trial court, are vulnerable to collateral attack.

Second, carefully craft settlements in land use disputes to ensure that no wholesale exemptions from zoning regulations are promised, lest the agreement be later declared *ultra vires*. If a land use case is settled on the approval of new entitlements, as is common, this is best accomplished by providing for dismissal of the suit if the entitlements are issued after the usual process, including notice to affected neighbors and hearings. If the permits issue, the case settles; if not, it continues; but either way the rights of third parties are respected.

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What's Up for Municipal Finance in 2013?

By Michael G. Colantuono

With new Democratic two-thirds majorities in both the state Assembly and the Senate and the advent of a new session, the Legislature looks to join the courts as a source of significant new developments in municipal finance law in 2013. Developments can be expected as to all major revenue sources: taxes, assessments and fees.

As to **taxes**, the major judicial development of 2013 may well be the Supreme Court's decision in *McWilliams v. City of Long Beach*. This is a class action challenge to application of Long Beach's telephone tax to services exempt from the federal excise tax (FET) on telephony during a brief period between the Bush administration's 2006 abandonment of much of the FET tax base and approval by Long Beach's voters of a new tax ordinance to drop a local reference to the FET.

The Supreme Court decided in *Ardon v. City of Los Angeles* in 2010 that, absent a local claiming ordinance, the Government Claims Act allows class action claims for tax and fee refunds. Sandi Levin of C&L argued that case for Los Angeles. *McWilliams* is a companion to *Ardon* involving the same counsel and virtually the same complaint. A third case involving Los Angeles County is pending in the trial court and, like *Ardon*, does not involve a local claiming ordinance.

Unlike Los Angeles City and County, however, Long Beach does have a claiming ordinance for tax refunds. The Court of Appeal decided that the Government Claims Act does not allow such ordinances for tax and fee refund claims, overturning decades of practice by local government and many earlier cases. Michael Colantuono of C&L persuaded the Supreme Court to take *McWilliams* and seeks a holding to allow local ordinances to protect municipal treasuries from class action claims. *McWilliams* is fully briefed as of late January and awaiting oral argument.

Amending Proposition 13 is on the legislative agenda. Constitutional amendments require two-thirds support in both chambers of the Legislature and voter approval. Now that Democrats hold two-thirds majorities, several proposals have been made to lower the voter approval required for some special taxes from two-thirds to 55%. These include ACA 3 (Campos, D-San Jose) for police and fire services and facilities, SCA 3 (Leno, D-San Francisco) for parcel taxes to support school services (presently 55% is needed for school facilities, but two-thirds for school services), SCA 4 (Liu, D-LaCanada-Flintridge) for transportation, SCA 7 (Wolk, D-Davis) for libraries, SCA 8 (Corbett, D-San Leandro) also for transportation, SCA 9 (Corbett) for economic development programs and SCA 11 (Hancock, D-Berkeley), which would apply to all local special taxes without regard to purpose. None of these proposals has yet been heard in committee. One or another might appear on the November 2014 state ballot.

As to **assessments**, the big news is the Supreme Court's decision to dismiss as moot *Concerned Citizens for Responsible Government v. West Point Fire Protection District*, which had promised to provide guidance on Proposition 218's requirements that assessment engineers' reports demonstrate that an assessment program provides special benefit to property and that assessments are imposed on property owners in proportion to the special benefit each will receive. The Supreme Court also refused to republish the earlier Court of Appeal opinion in the case, which had questioned most service assessments. These questions are especially pressing for fire and other assessments for basic government services. More litigation is likely and judicial guidance can be expected over time. In the meantime, we recommend assessing agencies rely on strong engineers' reports and allow for careful legal review of draft reports.

On **fees**, most developments arise under Proposition 26, adopted in November 2010 to convert some fees to taxes. After an early local government win in *Griffith v. City of Santa Cruz,* a July 2012 decision upholding a rent control fee, the next Proposition 62 decision is likely to come in *Schmeer v. County of Los Angeles*, argued in the Los Angeles Court of Appeal on February 5th. That case challenges a plastic bag ban which requires retailers to charge 10 cents for paper bags. Plastic bag manufacturers argue the 10-cent fee is a tax because government orders its collection and controls how its proceeds are spent. Michael Colantuono of C&L filed an amicus brief for Los Angeles County on behalf of the League of California Cities and the California State Association of Counties. Decision is due by May 6th and appeal to the Supreme Court may be likely.

Plainly, 2013 will be an interesting year in local government finance. As always, we will keep you posted!

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