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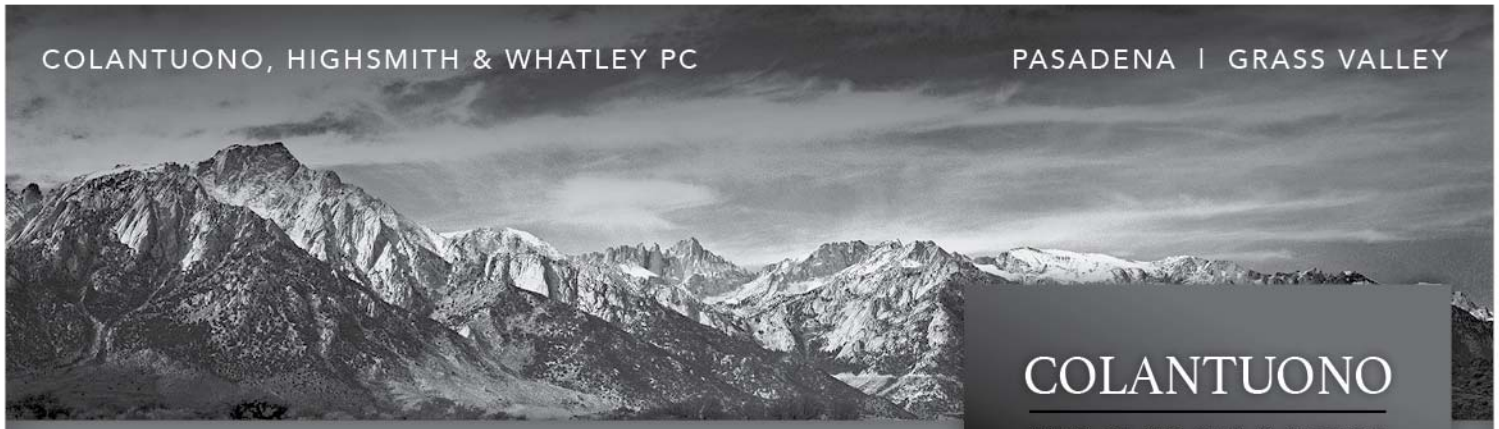

Newsletter | Fall 2016

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

Court Upholds Infill Mello-Roos District

By Michael G. Colantuono

One of the realities of local government finance in California is that residential developments generally do not create sufficient revenues to cover the cost of services to the new residents they bring. While retail developments generate sales taxes, and commercial developments generate business taxes and relatively greater property taxes, residential developments often generate only the property tax capped by Proposition 13.

The City of San Ramon responded to this reality by requiring new residential developments to provide supplemental revenues via a Mello-Roos Community Facilities District, which imposes a special property tax, or by other means. Mello-Roos taxes may be approved by a two-thirds vote of voters or, if a district has fewer than 12 registered voters, by landowners. Such taxes are common in the development setting, when developers alone need vote. Although the developer of the first project to face San Ramon's requirement agreed to form a Mello-Roos district, the Building Industry Association sued. It argued the tax does not provide "additional services" as the Mello-Roos Act requires, is an unconstitutional general tax on property, and its provision for a reduction in services if the tax were repealed by initiative was unconstitutional "retaliation" against voters for exercising their initiative rights.

The Court of Appeal affirmed a trial court ruling for the City in *Building Industry Association of the Bay Area v. City of San Ramon* in October. CH&W filed an amicus brief supporting San Ramon in the case on behalf of the League of California Cities. A petition for review in the California Supreme Court is pending.

(continued on page 2)

We've Moved!

Colantuono, Highsmith & Whatley has moved its **Southern California** office to:

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Phone numbers remain unchanged:
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Grass Valley, CA 95945-5091
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Lawyers resident in Pasadena include Terri Highsmith, Holly Whatley, Jenni Pancake, Pamela Graham, Matt Summers, Ryan Dunn, Megan Knize, Len Aslanian, and Aleks Giragosian, as well as our Executive Director Kate Henderson. Receivables and payables should continue to be directed to our Grass Valley Office. Our electronic address remains unchanged, too: www.chwlaw.us.

Mello-Roos Districts (cont.)

As to the "additional services issue," the BIA argued a Mello-Roos District must fund wholly new services, not just more of services already provided. However, police and school services are provided everywhere in California and, if the BIA's view of "additional services" were the Legislature's intent, it would not have allowed a Mello-Roos district to fund those services. It is enough that a district funds the higher level of services a residential development requires as compared to undeveloped land.

Proposition 218 prohibits general property taxes, which can be approved by a simple majority of voters and generate general fund revenues that can be spent in the discretion of a City Council or Board of Supervisors. Other than the 1% tax permitted by Proposition 13, only special taxes, which are limited to stated purposes and require two-thirds voter approval, may be imposed on property. The Court concluded San Ramon's tax did not cease to be a special tax because it funded many city services. Although it is theoretically possible that a tax might authorize so many services as to be a general tax, no case has identified one that does. Moreover, the services to be funded in San Ramon must be provided in the Mello-Roos district, not anywhere in the City. Thus, it was a special tax.

Finally, it is not "retaliation" to observe that services cannot be funded for free and that loss of tax revenues will require service cuts. This is simple economic reality.

The case is helpful for local governments, allowing Mello-Roos districts to fund services to new development. It also demonstrates the extent to which revenue questions — even under 1978's Proposition 13 — continue to be litigated. Money, it seems, is always worth fighting over.

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

Cell Tower Aesthetics

By Matthew T. Summers

In *T-Mobile West LLC et al. v. City and County of San Francisco*, the SF Court of Appeal confirmed local governments' authority to consider aesthetics when evaluating cell-tower applications.

State law has long granted "telephone corporations" the right to construct lines, poles, and other necessary fixtures along public roads to deliver telephone services. Under Public Utilities Code section 7901, this allows facilities that do not "incommode the public use of the road."

In 1995, the Legislature adopted Public Utilities Code section 7901.1 to authorize "reasonable [local] control as to the time, place, and manner in which roads … are accessed." These two statutes bar local governments from prohibiting telephone facilities in rights of way, but allows reasonable local regulation. A 2009 decision of the federal Ninth Circuit Court of Appeals concluded such "reasonable regulations" may address aesthetics.

Ninth Circuit rulings on questions of California law guide, but do not bind, our state courts. Thus, *T-Mobile West* makes helpful new law as a state-court decision. There, the Court of Appeal upheld a San Francisco ordinance requiring aesthetic review of cell towers. T-Mobile argued sections 7901 and 7901.1 permit local standards governing only physical access to rights of way — not aesthetics.

Cities and counties may consider aesthetics in evaluating cell tower proposals, but should adopt clear procedures and standards to do so, rather than making decisions ad hoc. They should also consider federal law, which prohibits them from "effectively denying" a wireless carrier from serving any area.

The case helpfully clarifies local authority to prevent ugly cell installations. However, federal law limits local regulation of cell towers and local governments should seek legal advice when regulating cell towers.

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

Court Limits Duty to Use Two Lawyers in Administrative Decisions

By Holly O. Whatley

In *Drakes Bay Oyster Company v. California Coastal Commission*, the San Francisco Court of Appeal recently clarified due process requirements for quasi-judicial proceedings before state and local agencies. Drakes Bay challenged Coastal Commission enforcement orders after termination of its lease of federal tidelands in Tomales Bay. Drakes Bay argued due process barred Commission enforcement staff from defending its suit, even as advisors to the Commission, citing the "separation functions" doctrine which bars one lawyer from both prosecuting a case and advising the decision-maker in the same case. The Court of Appeal unanimously rejected Drakes Bay's position.

Drakes Bay cited a 2009 California Supreme Court decision advancing the separation-of-functions rule. That case acknowledged that due process guarantees an impartial decision-maker in quasi-judicial proceedings. Thus, one law office can play both advocacy and advisory roles in a hearing only if those who fill the two roles cannot confer in private or access each other's files. Such "ethical screens" to separate these roles are allowed only in public offices; when contract counsel are used, separate law firms are required. The 2009 Supreme Court case held that, so long as an agency screens its enforcement from its advisory staff, due process is satisfied absent evidence of actual bias by a decision-maker or circumstances creating an unacceptable risk of bias.

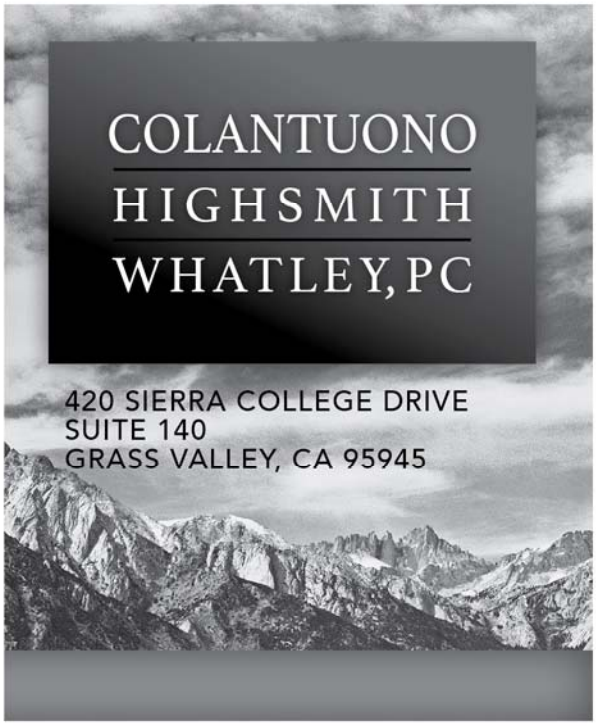
Drakes Bay sought to extend the separation of functions rule, arguing a prosecutor may not assist in defense of an administrative decision resulting from her prosecution. The Court of Appeal refused to extend the rule. It noted the rule is necessary in quasi-judicial administrative proceedings to ensure a decision-maker does not favor enforcement staff which it has come to trust and rely on when those same lawyers play advisory roles. But after the administrative proceedings are complete and a decision is challenged in court, that risk no longer remains. Enforcement staff can advise an agency without risking the impartiality of the decision-maker in litigation — the Superior Court. "Once litigation has been filed, the Commission and its staff share the same interest in defending its decision." And, the Court observed, the administrative decision-maker is entitled to rely on enforcement staff for expertise and advice when "administrative proceedings are no longer pending … ."

The Court also rejected Drakes Bay's argument that the Commission might revisit the enforcement decision in the future, requiring a separation-of-functions rule in litigation. The Court thought this possibility too speculative to justify barring an agency from consulting its enforcement staff in defending a challenge to its orders. "We see no reason why the Commission should be impaired in exercising its right to litigate as best it can."

However, public agencies should give careful thought before allowing prosecution staff to defend decisions in court. If a matter returns for further administrative proceedings — as is common — those lawyers may be barred from any role in the new proceedings. If you cross the street from prosecutor to advisor, you may not be able to cross back.

Drakes Bay is good news for state and local agencies. Though the separation-of-functions rule is unchanged as to quasi-judicial administrative decisions, we now have clear appellate guidance that due process requirements do not mandate an agency maintain that separation when defending its decisions in court. As the Court of Appeal declared, due process does not require a city or agency to "tie its hands" when defending itself.

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



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