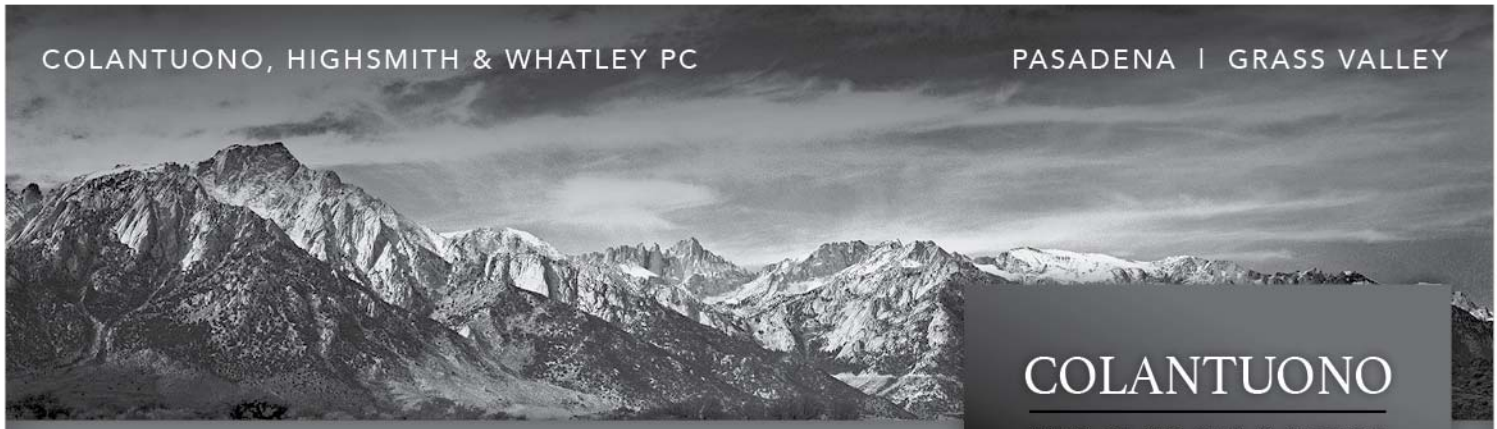


Newsletter | Fall 2017

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

California Constitution Prohibits Promises Not to Tax

By Michael G. Colantuono

A recent San Francisco Court of Appeal decision highlights an obscure provision of our Constitution barring contracts that limit governments' taxing power. There are ways to protect contractors against taxes, but a promise not to tax is unenforceable.

Russell City Energy Co. v. Hayward arose on these facts: Russell contracted with Hayward to develop a multi-million-dollar, natural-gas-fired, power plant. The parties agreed Russell would pay $10 million for a City library but not taxes other than those "generally applicable to similarly situated owners of real property … in the City." Voters adopted a 5.5% utility users tax (UUT) and the City applied the tax to natural gas Russell used to generate power. The City successfully defended the resulting suit, citing article XIII, § 31 of the state Constitution: "The power to tax may not be surrendered or suspended by grant or contract." Russell appealed and the Court of Appeal affirmed, but remanded to allow Russell to argue for return of the library payment.

Russell unsuccessfully argued article XIII, § 31 was limited to perpetual tax exemptions and this contract exempted it from tax only while it operated a power plant. Its reliance on an Arizona Supreme Court case allowing a one-time settlement of a tax dispute was similarly unsuccessful. Its effort to limit § 31 to tax-exemption provisions of corporate charters (one of the motivations for this clause) failed, too. Nor could it persuade the Court the no-tax provision of the contract was an exercise of the City's taxing power.

The Court of Appeal allowed Russell to amend its complaint on remand to state a "quasi-contractual restitution claim." The City cited cases holding contracts cannot implied against government — only written contracts approved as required by law may be. For most local governments, this requires a writing approved by the legislative body and signed by one authorized to bind the agency, like a mayor. The Court noted that this case involved such a contract. The holding seems driven by the unfairness of letting the City keep $10 million without giving Russell the tax exemption it bargained for.

A public agency can protect a private party from future taxation by: (i) settling tax disputes, but such settlements must look backward, not forward; (ii) public landlords can pay taxes for tenants and public agencies might be able to agree to pay taxes for other private parties if there is adequate consideration to the agency; (iii) agencies can explain how to comply with taxes and be bound by those instructions; (iv) they can credit private payments against future taxes.

This case reminds us of an old, and somewhat overlooked, rule affecting public-private partnerships.

There is still time for a petition for Supreme Court review of *Russell*, so things could change. If so, we will keep you posted!

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

Legal Bills Remain Protected Under PRA

By Gary B. Bell

The California Supreme Court recently concluded in *County of Los Angeles Board of Supervisors v. Superior Court (ACLU of Southern California)* that legal bills are exempt from disclosure under the Public Records Act while litigation is pending, but might be disclosable when it ends. Less noticed was that the Court remanded to the lower courts to decide whether the bills in question should be released. The Los Angeles Court of Appeal held it is a factual question to be resolved in the trial court whether fee totals in concluded litigation can be disclosed. It also held the services descriptions in such invoices are not subject to disclosure. This is a narrower disclosure than many public lawyers expected.

Following public allegations of excessive force at County jails, the ACLU submitted a PRA request for bills of law firms defending nine suits claiming excessive force. Los Angeles County disclosed invoices related to concluded cases, but redacted the descriptions of services. It withheld invoices for pending suits, arguing the information withheld was privileged and nondisclosable under the PRA.

The Supreme Court stated that, although invoices are not completely privileged, information in them may be, such as information about the nature or amount of work performed in a pending case. Whether fee totals as to concluded litigation should be disclosed is a factual question: "the contents of an invoice are privileged only if they either communicate information for the purpose of legal consultation or risk exposing information that was communicated for such a purpose" – including an invoice for active litigation.

On remand, the ACLU argued it was entitled to an evidentiary review of the withheld information. The Court of Appeal found the Supreme Court opinion to be limited to "fee totals." Other information in a bill **does** communicate the substance of legal services and is therefore privileged under the Court of Appeal's reading of the Supreme Court opinion.

Thus, while fee totals may be disclosable in concluded cases, service descriptions are privileged in both pending and concluded cases. The Court of Appeal noted what it saw as the "logical reason" the Supreme Court limited post-litigation disclosure to fee totals: A court generally may not require a litigant to disclose to the Court assertedly attorney-client privileged information to decide a privilege claim.

For more information on this subject, contact Gary at GBell@chwlaw.us or (530) 208-5346.

Charter Cities and State Elections

By Matthew T. Summers

The California Attorney General recently opined that the California Voter Participation Rights Act applies to charter cities, not just general law cities, despite charter cities' broad power over local elections.

The Act requires cities and other agencies to hold regular elections after January 1, 2018, on statewide June or November election dates if turnout in past elections on other dates was at least 25 percent less than the average voter turnout in the past four statewide elections. This is almost always true and the law will therefore affect most cities and special districts. A city or district with past low voter turnout may act before January 1, 2018, to move its elections effective by the November 8, 2022, statewide election. Special elections, such as those required by an initiative or referendum, are exempt.

The California Constitution empowers charter cities to govern municipal affairs, including elections, in ways that are inconsistent with state law. Home rule power is not absolute, however, as State law may preempt charter city legislation as to matters of statewide concern. The California Supreme Court

(continued on page 3)

Court Overturns Malibu Growth-Control Initiative

By Aleks R. Giragosian

The California Constitution reserves to the People the initiative power, but that power has its limits — as a recent court decision demonstrates. *Park at Cross Creek, LLC v. City of Malibu* holds that local initiatives can only initiate legislative (not administrative or judicial) acts and cannot contravene State land use law.

In 2014, Malibu voters approved Measure R to limit large development and chain establishments ("formula retail") of more than 20,000 square feet. The measure required the City Council to approve a specific plan and to report on it at a public hearing. It required all future specific plans to be submitted for voter approval.

The courts invalidated the measure. Although the adoption or amendment of a specific plan is a legislative act, Measure R required what amounted to project-by-project review by voters exercising adjudicative power by applying existing policies (like Measure R itself) to particular developments.

Additionally, initiative ordinances (unlike initiative amendments to city charters) that broadly limit the power of legislative bodies are not legislative measures. Measure R withdrew the City Council's authority under the State Planning and Zoning Law to issue discretionary land use entitlements or ministerial development permits until voters approve a specific plan. Thus, Measure R stripped the City Council and Planning Commission of authority the Legislature had conferred and effectively amended the Planning and Zoning Law as applied in Malibu. That, a local initiative cannot do.

A conditional use permit ("CUP") authorizes a land owner to use property in a particular way subject to conditions. A CUP relates to a property, not an individual person or business, and typically runs with the land. The Court held Measure R violated the Planning and Zoning Law by tying the permit to a project applicant, rather than a specific use of a particular parcel.

The initiative power allows voters to limit development in their communities. *Park at Cross Creek, LLC* demonstrates limits on that power. Land use initiatives, it seems, require land use lawyers.

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

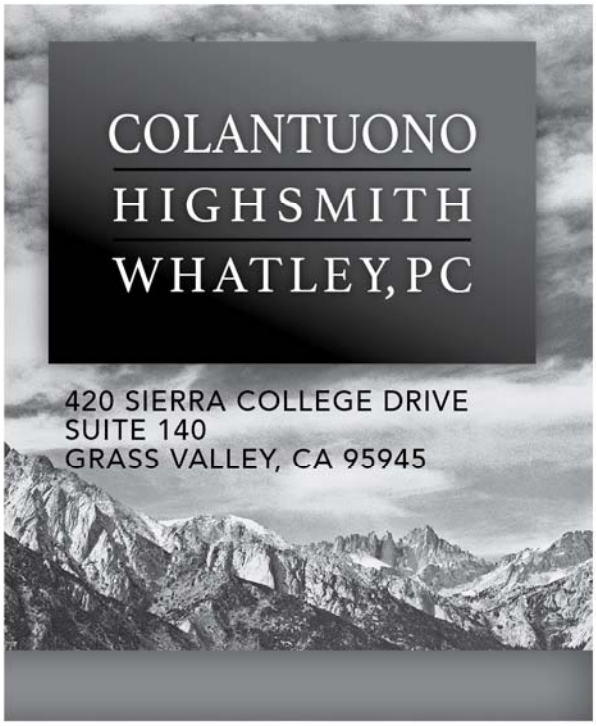
Charter Cities (cont.)

adopted a four-part charter city home rule power preemption test: If (1) a charter city law regulates a municipal affair; (2) the city law and State law actually conflict; (3) the State law addresses a matter of statewide concern; and, (4) the State law is reasonably related to that statewide interest and is narrowly tailored to avoid unnecessary local interference, the State law preempts the contrary local rule.

Applying these factors, the Attorney General concluded the Act applies to charter cities. The timing of local elections is definitively a municipal affair. A charter or ordinance requiring an off-cycle election conflicts with the Act for any agency with sufficiently low voter turnout. The Attorney General cited *Jauregui v. City of Palmdale* holding the California Voting Rights Act, requiring district elections in cities with meaningful minority populations, applies to charter cities. He concludes that existing low voter turnouts undermine electoral integrity — a matter of statewide concern. He also determined that requiring consolidated elections only if there is a history of lower voter turnout is reasonably and narrowly tailored to address that problem.

Accordingly, all cities and local agencies — including charter cities — should examine voter turnout levels and decide whether to move election dates or adopt a plan to do so before January 1, 2018.

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



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