COLANTUONO, HIGHSMITH & WHATLEY PC

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Newsletter | Spring 2019

Update on Public Law

Courts Advance Public Finance Law

By Michael G. Colantuono

We have two recent public finance developments. *Paradise Irr. Dist. v. Commission on State Mandates* concludes local water agencies cannot claim reimbursement for the cost of water quality and safety laws as unfunded mandates. Reimbursement is not available if a local agency can cover its costs by imposing fees. Water districts argued Prop. 218's majority protest procedure could prevent them from imposing fees. The Sacramento Court of Appeal ruled this did not eliminate their fee-setting power so as to make water laws reimbursable mandates. This repeats an earlier decision the Court withdrew after CH&W pointed out weaknesses in its original reasoning for the League of Cities and CSAC. The case is helpful to local governments in one respect – it describes 2018's SB 231 (Hertzberg, D-Van Nuys) as permissibly construing Prop. 218 to allow storm sewer charges to be approved without voter approval (but with a majority protest), as are sanitary sewer and water fees. Many agencies face large unfunded costs to comply with the state and federal environmental mandates as to storm drains, so the possibility of new fee-setting authority is of wide interest. An earlier decision of the San Jose Court of Appeal requires elections for storm sewer fees, so cities and counties should seek legal advice before relying on SB 231.

Our Supreme Court heard *City and County of San Francisco v. UC Regents* on April 3rd. The case asks whether charter cities can compel state agencies to collect local parking taxes on garages they own and operate. This is of interest to just a handful of cities and counties, the case may address limits on State agencies' power protect their customers, students, clients, etc. from local regulation — an issue of wider interest. Decision is due by July and may come sooner.

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

CH&W Welcomes Senior Counsel

CH&W welcomes litigator Carmen Brock. She brings 26 years' public litigation experience, most recently as a land use and public finance litigator for San Diego. She has also litigated for school and water districts in areas including eminent domain, public contracting, ADA, construction, project labor agreements, police matters, administrative hearings and code enforcement.

Levin (who uses one name) joins us after 31 years as a staff attorney to Sacramento's Third District Court of Appeal. He has extraordinarily deep experience in appellate and law and motion practice in such diverse areas as mandamus, water law, liability for flooding, CEQA, contracts and various torts, including claims under the Fair Employment and Housing Act and in whistleblower matters.

Welcome Carmen and Levin!

New Cannabis Delivery Rules Test Local Control

By David J. Ruderman and Nikhil S. Damle

On January 16, 2019, the Bureau of Cannabis Control adopted permanent regulations governing commercial cannabis supply chains under the Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA"). They largely duplicate earlier emergency regulations, but authorize cannabis delivery anywhere in California, even in communities which permit no cannabis sales. Proposition 64 states local agencies retain local control of business licensing and land use. It states a city or county can "completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction." Many cities and counties have banned or regulated retail delivery under this section.

BCCs regulations purport to override this local authority by authorizing cannabis delivery statewide if a delivery retailer is licensed by the state and the jurisdiction in which the delivery originates (i.e., where the dispensary is located): "A delivery employee may deliver to any jurisdiction within the State of California provided that such delivery is conducted in compliance with all delivery provisions of this division." The regulation appears to violate Proposition 64 and MAUCRSA. One county and some two dozen cities sued BCC in Fresno Superior Court. Assemblyman Cooley (D-Rancho Cordova) also introduced AB 1530 to overturn the BCC regulation.

In the meantime, cities and counties can require business licenses for those who make retail deliveries in their boundaries. They can also establish a delivery-only permit. They might be able to require a separate permit for each cannabis delivery driver — as is common of taxi regulations.

Finally, cities may continue to regulate or ban deliveries, preparing to rebut a defense based on the BCC regulation. Each option has advantages and varying levels of risk. You should consult legal counsel before choosing among them until the delivery issue is resolved in court or by the Legislature.

For more information on this subject, contact David at DRuderman@chwlaw.us or (530) 798-2417, or Nikhil at NDamle@chwlaw.us or (213) 542-5709.

Brown Act Updates

By Ryan A. Reed

The San Diego Court of Appeal recently decided *Ricasa v. Office of Administrative Hearings*, addressing when the Brown Act requires 24 hours' notice to employees for closed sessions on personnel matters. The Brown Act allows closed sessions "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee, or to hear complaints or charges brought against the employee by another person or employee." If specific complaints or charges are to be discussed, the affected employee is entitled to 24 hours' notice and can choose to require discussion in public. Failure to give notice invalidates any disciplinary action resulting from the closed session.

In *Ricasa*, a public employee pleaded guilty to a misdemeanor violation of the Political Reform Act in her role as an elected official for another agency. Her employer demoted her after closed session discussion whether the facts established by her guilty plea were a sufficient to justify that discipline. She challenged the discipline because she did not receive 24 hours' notice.

The court distinguished this case from *Bell v. Vista Unified School Dist.*, a 2000 decision requiring notice to a football coach fired in closed session

(continued on page 3)

Pension Reform at PERB

By Holly O. Whatley

The San Diego Court of Appeal recently decided the latest chapter in the ongoing legal battle over San Diego's pension reform initiative. *Boling v. Public Employee Relations Board* follows the state Supreme Court's 2018 decision requiring the City to meet and confer with unions before placing the initiative on the ballot because the mayor sponsored it. The Supreme Court remanded so the Court of Appeal could address the remedy.

The Court of Appeal rejected the Union's request that the court invalidate the initiative. Because the voters had amended the City charter, challenge to "purported irregularities in the legislative process of a charter amendment" requires a quo warranto proceeding — a particular kind of lawsuit the unions had not filed. The challenge raised a new and difficult question — whether voters can determine charter city employees' compensation despite the duty to bargain. The Court concluded that question is best resolved in a separate quo warranto proceeding in which all interested parties, including unrepresented employees and the Attorney General, can participate.

The Court invalidated administrative remedies PERB had ordered that the City pay represented employees the difference between the benefits the initiative allowed and the earlier PERS pensions, plus 7 percent interest, until the initiative was no longer in effect or until the City and unions agreed otherwise. This remedy made the initiative "perpetually ineffectual." The Court required the City to pay the difference in benefits only until bargaining is complete, including any impasse. This compensates employees for delay and encourages the City to bargain efficiently.

The Court also modified PERB's order that the City meet and confer with employee unions before placing on the ballot *any* citizen's initiative touching on negotiable issues. This remedy impermissibly assumed any future initiative would be subject to bargaining before any court so ruled. The Court required the City to meet and confer at the union's request as to initiatives advanced by the City which address negotiable subjects.

The unions will likely take up the invitation to file a quo warranto suit. In the meantime, however, the Court has clarified that PERB cannot achieve by remedial orders what it cannot do directly—invalidate initiatives touching negotiable subjects.

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

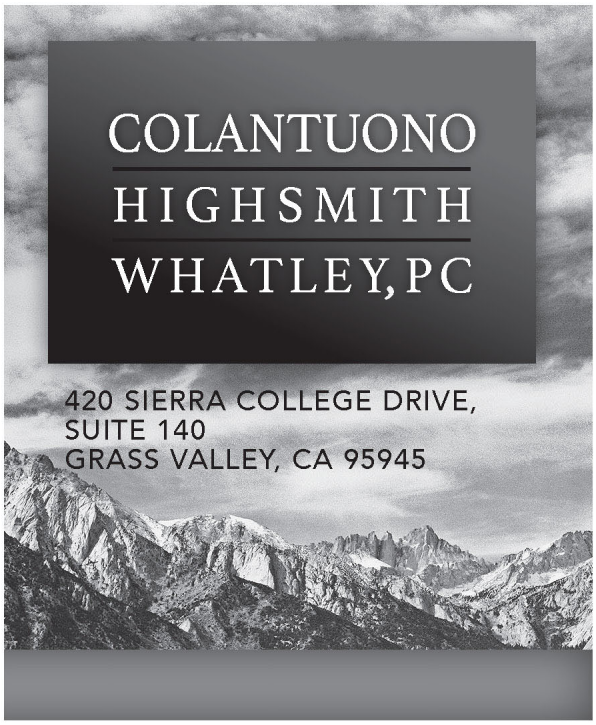
Brown Act Updates (cont.)

based on findings of a state athletic federation. *Ricasa* clarifies that a public agency can rely on prior undisputed findings to impose discipline in closed session without providing 24 hours' notice if the employee had opportunity to be heard in the earlier proceeding.

2016's Assembly Bill 2257 took effect January 1, 2019 to require agendas to be posted as a direct link on the home page of local agency websites. This means that links must open directly to the current agenda without having to click through other links or menus. If your agency an integrated agenda management platform (like Granicus), you need not provide a direct link on your home page provided the most current agenda is available at the top of the list of agendas.

The Brown Act changes a bit with each legislative session. As always, we will keep you posted!

For more information on this subject, contact Ryan at RReed@chwlaw.us or (530) 270-9490.



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