COLANTUONO, HIGHSMITH & WHATLEY PC

PASADENA | GRASS VALLEY

Newsletter | Winter 2019

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law – Courts Take the Lead in Finance Law

By Michael G. Colantuono

With a "peace treaty" keeping a broad measure to limit local government revenue authority off the November ballot, most recent activity in the law of local revenues has been in the courts.

California Cannabis Coalition v. City of Upland disputed an initiative to authorize marijuana dispensaries, imposing what courts deemed a general tax on each. The California Supreme Court concluded this general tax need not appear on a general election ballot (as Prop. 218 requires for most general taxes) because that provision of Prop. 218 applies only to local officials, not voters acting by initiative. This raised the possibility that special taxes proposed by initiative might be approved by a simple majority of voters rather than the two-thirds Prop. 218 requires for taxes proposed by city councils and boards of supervisors. The San Francisco City Attorney issued an opinion that the two-thirds rule could be avoided in this way and, as a result, three San Francisco revenue measures approved in 2018 are now in litigation. Those cases will provide guidance for all local governments over the next year or two.

In *South Dakota v. Wayfair*, the U.S. Supreme Court allowed taxation of e-commerce by state and local governments even if a taxpayer has no physical presence in the taxing jurisdiction, provided it does business there. The California Department of Tax and Fee Administration, which succeeded to most powers of the Board of Equalization, issued rules late last year to implement California's sales and use taxes consistently with *Wayfair*. As a result, some modest increase in local sales tax receipts may follow. The case creates more flexibility for taxes local governments may propose to voters in the future, too.

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Congratulations Gary Bell

Welcome Conor Harkins and Ryan Reed

The shareholders of CH&W are pleased to welcome Gary Bell to their ranks. Gary chairs the firm's Public Law Department and serves as Town Attorney of Yountville, Assistant City Attorney of Auburn, and General Counsel of the Garden Valley Fire Department, the Pine Grove CSD and the First Five Yuba Commission. He is among the firm's experts on conflicts of interest, public works contracting and election law. His elevation marks the significant development of his practice and the confidence of his fellow shareholders. Congrats, Gary!

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No Need to Bargain Use of Force Policy

By Holly O. Whatley

In *SF POA v. SF Police Commission*, the Court of Appeal held a city need not meet and confer before implementing a use of force policy. The Police Commission sought to prohibit officers from shooting at moving vehicles or using the carotid restraint, which applies pressure to a subject's neck to cut off blood to the brain, leaving his wind pipe open. Some subjected to that hold have died.

San Francisco argued the policy was a management right, but agreed to meet with the POA "to consider the negotiable impacts that the policy may have." The City and POA met nine times. The City ultimately determined that only training and discipline issues were subject to bargaining, and the parties agreed on those. The City refused to meet and confer further. The POA grieved and demanded arbitration, the City denied both, and the POA sued.

The Court of Appeal affirmed the trial court's refusal to compel arbitration. It first noted the MOU provided the City's compliance with law "shall not be grievable hereunder" and, if such actions are grieved, a court determines arbitrability — not an arbitrator. It cited *POA v. City of San Jose*, which held establishing a use of force policy is a management right. That authority is within the constitutional police power which the City cannot "suspend, bargain or contract away." In *Claremont Police Officers Assn. v. City of Claremont*, our Supreme Court applied a balancing test to determine whether bargaining is required as to implementation of a management right affecting terms of employment. Such actions are bargainable "only if the employer's need for unencumbered decisionmaking … is outweighed by the benefit to employer-employee relations." The Court of Appeal concluded the burden of bargaining on a use of force policy outweighs any labor relations benefit. Otherwise, a POA could stall a new policy indefinitely.

Good news for those cities and counties considering revising their use of force policies in light of the current debate about such policies in California and around the country!

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

Finance Law (cont.)

Johnson v. Mendocino County confirms that the strategy of combining a general tax with an advisory measure stating how voters would like tax proceeds to be spent is lawful as a majority-approval, general tax under Prop. 218. A 1997 case involving a pre-Prop. 218 measure had upheld this strategy under Props. 13 and 62, but whether Prop. 218 made a difference was an open question. No more. Still, this strategy can confuse voters and generate controversy, so it is not often invoked. Instead, local governments commonly rely on ballot labels (questions printed on ballots), impartial analyses and "yes" arguments to tell voters how they will spend tax proceeds.

2019 promises decisions on sales tax remedies, groundwater charges under Prop. 26, tiered water rates to encourage conservation, general fund transfers from electric utilities after Prop. 26 and the *Redding* decision of last year, the duty to exhaust remedies under Prop. 218, and franchise fee requirements under *Jacks v. Santa Barbara*. Stay tuned for new developments in what promises to be a busy year!

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

New State Mandate For Water Meter Shutoffs

By Gary B. Bell

SB 998 (Dodd, D-Napa), the "Water Shutoff Protection Act" imposes new requirements for shutting off residential water service for unpaid bills. Water systems with 200 or more connections must revise shutoff policies by early 2020.

The policy must:

- Be posted to the agency's website in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean whether or not those languages are spoken by significant numbers of customers. It must also be translated into any other language spoken by 10 percent or more of residents. It must offer: (i) deferred or reduced payment plans, (ii) alternative payment schedules, (iii) a means to appeal a bill, and (iv) a customer service number.
- Prohibit shut-off until a customer is delinquent for 60 days. At least 7 days before termination, the agency must contact the customer by telephone or written notice (such as mail or door hangers).
- Prohibit shut-off if: (i) a bill appeal is pending, (ii) a primary health care provider certifies termination poses a serious threat to the health and safety of a resident, (iii) a customer is financially unable to pay as demonstrated by a household member's receipt of government assistance or a declaration that household income is below 200 percent of the federal poverty level, or (iv) the customer is willing to enter into a deferred, reduced, or alternative payment plan.
- An agency that shuts off a meter must inform the customer how to restore service. For customers receiving government assistance or declare that household income is below 200 percent of the federal poverty level, reconnection fees are capped at $50 for reconnection during operating hours and $150 otherwise. The agency must waive interest on delinquent bills once every 12 months.
- A water system must report on its website, and to the State Water Resources Control Board, the annual number of meter shutoffs for non-payment.

The law will likely increase bad debt and slow recovery of accounts receivable. These costs can likely be recovered from rates imposed on all customers. Agencies should anticipate these costs, monitor their cash flows, and prepare to raise rates as needed to fund this new mandate. They may also wish to check the credit of new account holders and require security deposits in appropriate cases.

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

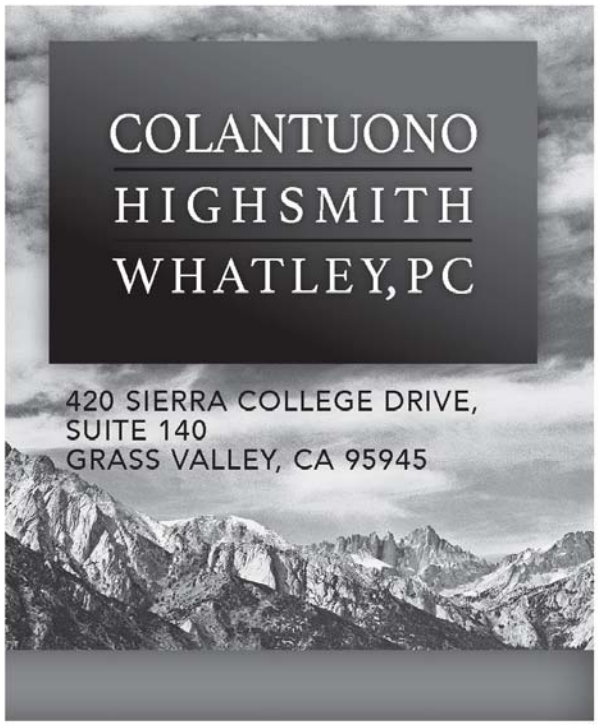
Welcome (cont.)

The firm also welcomes first year lawyers Conor Harkins and Ryan Reed.

Conor joins us after externing for Justice Robie on the Third District Court of Appeal in Sacramento and graduating from the McGeorge School of Law. He is in our Litigation Department with an interest in appellate work.

Ryan comes to us after graduating from the Georgetown University Law Center. He is in our Public Law Practice supporting our general and special counsel clients on a wide range of public law issues.

Welcome Conor and Ryan!



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