Newsletter | Summer 2020

COLANTUONO HIGHSMITH WHATLEY, PC

Busy Time for Revenue Case Law

By Michael G. Colantuono

We have a spate of important new cases regarding governments' revenue authority.

San Francisco v. All Persons holds that special taxes proposed by initiative, rather than by government officials, can be approved by a simple majority of voters – not 2/3. If the case withstands (or avoids) Supreme Court review, it will be the most significant change in local taxing authority since 2010's Prop. 26.

San Francisco voters approved Measure C in 2018 to raise a business license tax to fund homeless services by a 61% margin and the City sued to test its validity. Business interests opposed and the trial court ruled for the City, citing *California Cannabis Coalition v. City of Upland*, a 2017 Supreme Court decision suggesting many of Prop. 218's rules might not apply to initiatives. The appellate court affirmed, concluding that none of Prop. 13, Prop. 218 or San Francisco's charter were intended to impose the 2/3-approval requirement on initiatives.

Howard Jarvis Taxpayers Association v. Bay Area Toll Authority upheld 2018's Regional Measure 3, authorizing a $3 hike in Bay Area bridges tolls to fund transportation programs. HJTA argued this was a special tax requiring 2/3-voter approval (it got 55% at the polls) or 2/3-legislative approval (it got two-thirds in the Senate, but not the Assembly). The trial court ruled for the government and the Court of Appeal affirmed, concluding the fees were for use of government property and therefore not subject to a cost-of-service limit.

Zolly v. Oakland overturned that City's trial court win in a challenge to solid waste franchise fees. The trial court concluded the plaintiff trash customers lacked standing to sue because they did not directly pay the fees — haulers did. The Court of Appeal cited *Jacks v. City of*

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We're Blogging!

CHW is now blogging on issues of interest to California local government officials. The California Public Law Report is available here: www.CaliforniaPublicLawReport.com.

We provide frequent updates on legal and other developments of interest to local government leaders. Readers can visit when they wish, or subscribe to the blog via an RSS (really simple syndication) feed or email notices.

Check it out!

More Time for Map Act Disputes

By Gary B. Bell

Land use regulators and developers often interpret land use conditions of approval differently. When must something be done? What, exactly, is required? Who must comply? The answers to these questions affect the agency's regulatory goals and the costs, timeline, and successful project completion for developers. Disagreements are to be expected.

Honchariw v. County of Stanislaus involves a long-running dispute over a proposed subdivision lacking an adequate water supply. Honchariw applied for a vesting tentative map in 2006, which the County's Planning Commission denied, but which the Board of Supervisors upheld on appeal. Courts had earlier required the Board to reconsider the application and to justify renewed denial by specific findings.

Map approval was subject to 42 conditions, requiring, among other things, that Honchariw establish water service and extend fire hydrants to serve his new houses. A small community services district served the land, but could not provide required fire flows. Honchariw submitted a proposed final map, including plans his civil engineers prepared for the CSD.

The County informed Honchariw his plans violated the conditions of approval because, among other things, the fire hydrants had to work, not just be installed. County staff and Honchariw debated the requirements via email.

Honchariw sued five years after the Board conditionally approved his tentative map but shortly after the email exchange. The County contended his suit challenged conditions of approval and was therefore barred by Government Code section 66499.37, which requires suit "within 90 days after the date of the decision." The Court of Appeal held the "date of the decision" was that of emails establishing the County's "final position" on the conditions.

Disputes regarding conditions of approval are common. Thus, interpretation disputes as to conditions — even years after approval — may commonly trigger a new opportunity to sue. This suggests project approvals which may be litigated require very careful drafting and, likely, legal review.

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

Revenue Law (cont.)

Santa Barbara, a 2017 Supreme Court decision upholding a franchise fee on electric utilities as a fee for use of government property not limited to cost, but only if the fee was reasonably related to the value of the franchise rights. *Zolly* concludes the plaintiffs there adequately alleged a lack of such a relationship and remanded the case for trial.

HJTA v. BATA disagreed with *Zolly*, arguing it erred to apply a cost-of-service standard to a fee for use of government property.

Petitions for review by the Supreme Court are pending in *Zolly* and likely in the other two cases. We'll have action on those petitions by late summer. A productive time for local finance law!

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

FCC Limits Local Control of Cell Towers

By Matthew T. Summers

In June, the Federal Communications Commission adopted, on a divided vote, a new Declaratory Ruling and Notice of Proposed Rulemaking that expands wireless carriers' rights to install cell towers and other wireless facilities. It adopted this ruling to "facilitate the deployment of 5G networks" by expanding federal preemption of local controls.

The ruling stems from wireless industry petitions to narrow the test whether a proposed modification of an existing wireless facility is a "substantial change" triggering broader local authority.

Section 6409 of the Spectrum Act of 2012 imposes a "shot clock" which sets a deadline for city or county action on an application to modify a facility. This ruling starts the clock when an applicant takes the first objectively verifiable step required to submit an application and documents the application is subject to Section 6409 (i.e., proposes to modify an existing facility). This may be earlier than a formal application. Cities may wish to evaluate their application processes to eliminate steps that might start the clock prematurely, such as a required staff meeting or design review. Section 6409 allows no more than four new equipment cabinets for a modification proposal. The ruling narrows "equipment cabinets," to exclude smaller electronic components and allows four for each request. This allows successive expansions of a wireless facility, four cabinets at a time, without apparent limit. Section 6409 does not protect an application that defeats existing concealment elements (e.g., "mono-palms" or "mono-pines"). The ruling limits "concealment element" to features that make a wireless facility look like something else, not building details (such as parapets or steeples). Last, the ruling proposes a new federal regulation, which if approved after notice and comment, will limit a protected application to the boundaries of a wireless site as it exists upon an application — validating previous, unpermitted expansions.

The ruling continues FCC preemption of local land use control. Litigation is likely. In the meantime, local governments may wish to evaluate their ordinances to maintain what local control remains.

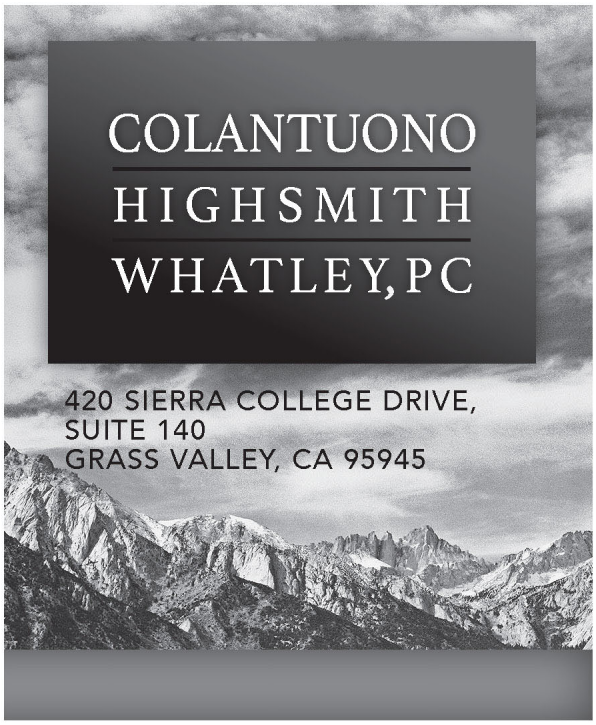
For more information, contact Matt at MSummers@chwlaw.us, or (213) 542-5719.

We've Got Webinars!

CH&W offers webinars on a variety of public law topics including mandatory policies on water-meter shutoffs; accessory dwelling unit statutes; personnel, public works, and management issues under COVID-19; the Housing Crisis Act of 2019; and, police personnel records.

Current topics are listed on our website under "Resources." Our webinars provide advice and Q&A for public agency counsel and staff in an attorney-client-privileged setting for $1,000 per agency.

To schedule a webinar, contact Bill Weech at BWeech@chwlaw.us or (213) 542-5700.



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