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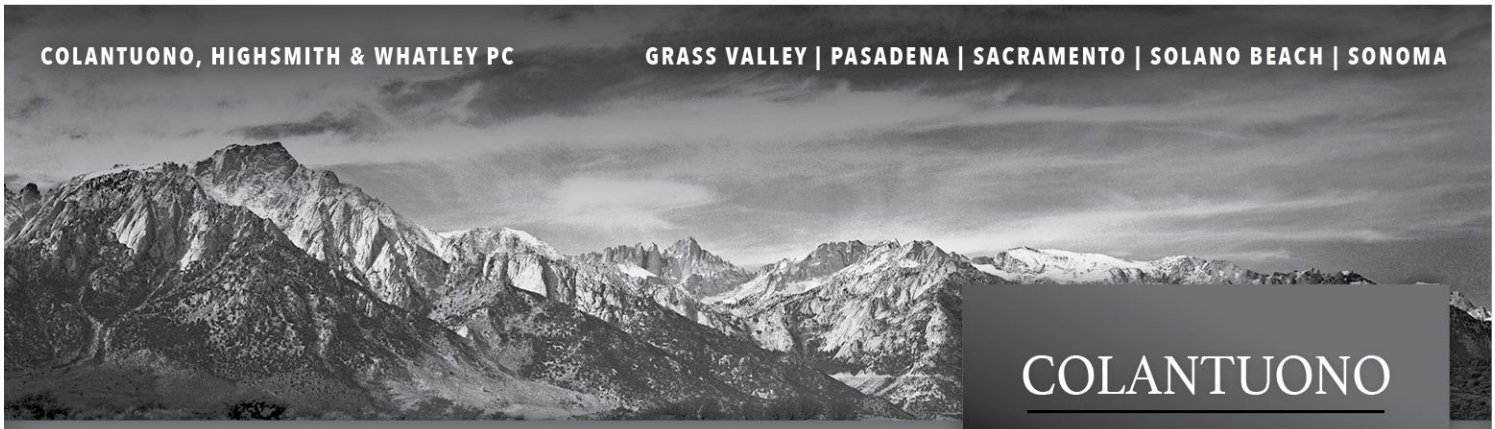

Newsletter | Fall 2021

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

New, Short Time to Challenge Water and Sewer Rates

By Michael G. Colantuono

The Governor recently signed into law SB 323 (Caballero, D- Salinas) sponsored by the Association of California Water Agencies to require challenges to water and sewer rates "adopted, modified or amended after January 1, 2022" to be filed as validation suits within 120 days. It is very good news for local utilities.

In 1996, California voters approved Proposition 218 to impose procedural and substantive restrictions on a newly defined class of "property related fees and charges." The California Supreme Court made clear in 2006 that these include ordinary water and sewer charges and litigation of water rates, in particular, became common. 2011 and 2015 appellate decisions striking down tiered water rates in Palmdale and San Clemente lead to dozens of copycat suits, some of which are still in the courts. One suit now pending against 81 water agencies around the state challenges use of water rate proceeds to fund fire flows — water at the pressures and in the volumes necessary to serve hydrants and sprinklers. Some of these rates are more than 4 years old — there had been no meaningful statute of limitations (deadline for suit) because the Supreme Court had ruled in a utility users tax case that a new claim arises with each utility bill.

SB 323 changes this. Water and sewer rates adopted or amended after January 1, 2022 can be challenged only within 120 days of the later of their effective date or adoption and suit must be brought in validation — a particular kind of suit commonly used to resolve all issues regarding public revenues and debts in a single case. This is the existing rule for public electric rates and for water and sewer connection and capacity charges.

Notice of a Proposition 218 majority protest hearing on new or increased rates must mention the 120-day deadline. The new deadline

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Welcome, Merete Rietveld and Abby Mendez!

CHW added two litigators this Fall. Merete is Senior Counsel in our Pasadena office with 14 years' experience—including eight as a staff attorney at the LA Court of Appeal. She will be a very good fit for our public law litigation practice in both trial and appellate courts.

Abby joins us in Pasadena as a first-year attorney. A Southern California native, she has her undergraduate degree *magna cum laude* from Tufts and her law degree from Boston University.

Abby and Merete will support a range of our public law clients in state and federal courts.

Welcome, Merete and Abby!

Continuing Challenge of Managing Homeless in Public Spaces

By Conor W. Harkins

A recent decision of the Supreme Court of Washington holds the federal Eighth Amendment's excessive fines clause requires courts to analyze a person's ability to pay a municipal fine. (*City of Seattle v. Long*.) Although not binding in California, *Long* illustrates courts' willingness to stop cities from punishing the status of homelessness, much like the 9th Circuit's 2019 *Martin v. City of Boise* decision prohibiting that City to enforce its ban on camping on public land when other shelter is unavailable.

Seattle imposed $946.41 in fines and fees on Steven Long for parking on city property for more than 72 hours. A magistrate waived the $44 parking ticket, reduced the impound charges to $547.12, and added a $10 administrative fee. Represented by a legal aid organization, Long sued, arguing the impound fees violated the Eighth Amendment's excessive fines clause. The case attracted no fewer than 19 amicus briefs from criminal defense, homeless advocacy, and municipal interests from around the country.

The Eighth Amendment to the U.S. Constitution prohibits "excessive fines" and penalties as well as "cruel punishments." To trigger Eight Amendment scrutiny, a fine must be excessive and at least partially punitive. The Washington Court held Seattle's impound fees were partially punitive because the City's Municipal Code described impoundment as a penalty. It need not have done so; impoundment can be understood as management of public rights of way, not punishment.

A fine is excessive "if it is grossly disproportional to the gravity of a defendant's offense." The Washington Court also considered Long's ability to pay, stating, the "homeless crises and widespread use of fines to fund the criminal justice system … fully support an ability to pay inquiry." California courts also consider ability to pay, and the use of fines to fund the justice system is of concern to California courts and legislators, too.

The Washington Court found "Long's circumstances were such that he had little ability to pay $547.12." Long earned $400 to $700 a month, lived in his truck, and had saved only $50. The truck held Long's "clothes, food, bedding, and various work tools essential to his job as a general tradesman." After his truck was towed, Long could not obtain work without his tools, and was forced to sleep outside. The Court concluded the impound fees were grossly disproportionate to a "not particularly egregious" parking infraction.

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Rate Challenge (Cont.)

does not apply to disputes about application of established rates — like billing errors. Nor does it apply if another statue provides a specific procedure to challenge a particular fee.

The statute was surprisingly uncontroversial. Only the Howard Jarvis Taxpayers Association opposed it and the final Assembly vote was unanimous (68-0) and the Senate vote was 33-2, with just two southern California Republican Senators voting "no."

Water and sewer providers may wish to defer adopting new rates until the new year — or to readopt existing rates then — to benefit from this new law. But, ratemaking is still risky and it is wise to use a qualified consultant unless an agency has in-house ratemaking staff, to make a good record that "shows the math" supporting rates and to have a lawyer review the ratemaking analysis.

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

Form 700 a "Political Work," Complaint Subject to Anti-SLAPP Law

By Gary B. Bell

The Orange County Court of Appeal recently held in *Exline v. Gillmor* that a mayor's Form 700 was a "political work" and therefore a lawsuit challenging it as insufficient under the Political Reform Act could be challenged as a SLAPP suit — a "strategic lawsuit against public participation," or a suit intended to silence free expression. The case protects public officials in lawsuits alleging incorrect or incomplete disclosures on Form 700s and makes private litigation of such forms less likely.

Representing student Brian Exline, a prominent San Jose plaintiffs' firm sued Santa Clara Mayor Lisa Gillmor, alleging she had failed to disclose a business position and income on her Form 700. Exline sought money damages, to compel Mayor Gillmor to disclose the position and income, and interest, court costs, and attorney fees. Although the case arose in San Jose, the appeal was heard in Orange County to assist the San Jose Court of Appeals while two of its seven seats were vacant.

The Mayor filed an anti-SLAPP motion—a special motion to dismiss the case at the outset. Such a motion is a powerful tool to weed out meritless claims at an early stage and allows a prevailing defendant to recover attorney's fees and costs from the plaintiff. The motion requires the defendant to show the challenged claim arises from expressive activity. If she does, the burden shifts to the plaintiff to demonstrate the suit has a probability of success.

There are exceptions to the anti-SLAPP law and exceptions to the exceptions, too. The anti-SLAPP law is construed broadly to achieve its purpose to protect free speech and its exceptions are construed narrowly for the same reason. Exline argued an exemption to the anti-SLAPP law for suits which seek to confer a significant benefit on the general public. But this "public interest" exemption does not apply to "any action … based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, **political**, or artistic **work**."

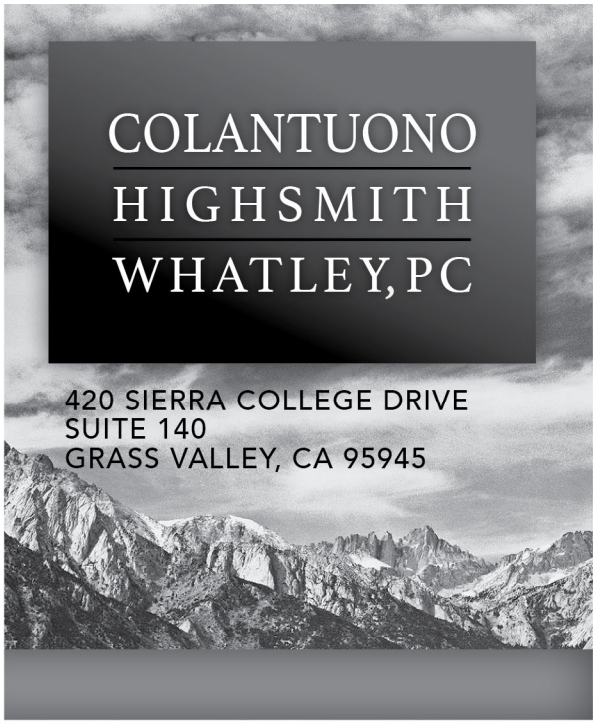
The Court of Appeal explained "work" means something produced or accomplished by effort, exertion, or exercise of skill and "[t]here is no question Form 700 is political in nature." A Form 700 requires both "effort" and "exertion" to complete, including "discern[ing] what the law requires the official to disclose, as it may not always be obvious." Accordingly, a Form 700 is a "political work" subject to the exception to the exception and the Mayor had the protection of the anti-SLAPP law.

The result is a bit surprising and establishes a powerful tool for defense of suits over Form 700s. The plaintiffs' bar may have less appetite for such suits in the future, leaving enforcement of disclosure requirements to the Fair Political Practices Commission and the court of public opinion.
For more information, contact Gary at GBell@chwlaw.us or (916) 898-0049.

Homeless (Cont.)

But the case raises an obvious question — how do local governments manage public spaces to serve all of society and not just the homeless? Courts have vigorously protected the homeless, but have not been as articulate about how to achieve other public policy goals also worthy of judicial respect. Persistence, creativity — and good legal advice — will be needed to make progress on these vexing social problems.

For more information, contact Conor at CHarkins@chwlaw.us or (530) 798-2416.



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