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Newsletter | Fall 2022

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Update on Public Law

New Threats to Franchise Fees

By Michael G. Colantuono

The California Supreme Court's recent decision in *Zolly v. City of Oakland* reveals a new threat to the franchise fees required in many cities and counties around California of companies which have the exclusive right to collect refuse.

Oakland awarded two franchises after a controversial process that led to a critical grand jury report — one for recycling and one for municipal waste services. Apartment owners who pay trash fees for their tenants argued franchise fees were taxes under Proposition 26. The trial court ruled for Oakland on demurrer, but the Court of Appeal reversed, concluding the fees were adequately alleged to be taxes and that standing was not an obstacle. The Supreme Court agreed with the Court of Appeal.

The Court found the fees outside Prop. 26's exception for fees for use of government property because the franchises were not "government property" and the exception is limited to tangible goods and real estate, not abstract rights.

The Court was not persuaded the right to use city streets for travel, as others use them, is a property right for which a fee can be imposed. The Court held Oakland's claim that the haulers received rights in streets others do not, like the right to place dumpsters there, was a disputed fact which could not be resolved on demurrer. Oakland may litigate the issue on remand. Generally, the Court concludes, a fee within the fourth exception is for use of property not generally open to others, like a park or a toll bridge.

So, what should local governments do to preserve franchise fees? The law is still developing but, for now, we recommend: (1) document that haulers have rights in streets that the general public does not, (2) value those rights in some rational way documented in the rate-making record, and (3) show at least rough proportionality between that value and the franchise fees, as *Jacks v. Santa Barbara* requires. It will also be wise to

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Welcome Vernetra Gavin!

Vernetra Gavin has joined our litigation team in our Pasadena office. She is a third-year litigator who brings diverse experiences to our work, both before and after her legal training. She was a certificated teacher and a licensed real estate agent before turning to law as a second career. She spent 15 months in the Harris County, Texas (Houston) district attorney's office where she got trial experience—which is so hard for junior lawyers to attain in private practice.

She is already hard at work in ratemaking and other cases for our clients.

Welcome Vernetra!

Clarification of Prop. 218's Assessment Requirements Proves Elusive

By Pamela K. Graham

Broad Beach Geologic Hazard Abatement District v. 31506 Victoria Point LLC is the judiciary's latest effort to clarify Prop. 218's assessment requirements. While it shows engineers must carefully distinguish general benefits to the public from special benefits to assessees, it says little about how they should do so.

The City of Malibu formed the GHAD to protect homes on a public beach. Since the 1970's, erosion has greatly narrowed the beach. The project would import sand to widen the beach, and obtaining permits for and maintaining a revetment installed under an emergency permit before formation of the GHAD. The Coastal Commission and State Lands Commission conditioned permits on public access to the widened beach and on building dune habitat.

The assessment divided parcels into three tiers based on beach width to be added seaward of each parcel. Two County-owned beach-access-stair parcels were assigned 2 percent of special benefit (twice their share of foot-frontage) to be funded with non-assessment revenues. The report did not treat the rock revetment as part of the project (it is existing) or a measure of benefit — rather, it found beach width added was the best measure of protection whether comprised of sand and rocks or just sand.

The engineer's report recognized the improved public beach as a general benefit, assigning it "no more than 2 percent of the total benefit generated by the Project."

The Second District affirmed the trial court's conclusion the assessment violated Prop. 218 by failing to adequately distinguish general from special benefits. Essentially, it viewed the restored beach as a public park, even though the project was intended to protect homes by piling sand on an existing public beach.

The Court rejected three GHAD arguments to limit general benefits:

First, it disagreed that general benefits need not be considered unless they impose costs above those necessary to achieve the special benefit (i.e., the enhanced public beach was a consequence of protecting homes, not a project goal).

Second, the Court declined to consider the District's intent for the project. Such a rule would incentivize assessing agencies to narrowly frame a project's purpose, focusing solely on special benefit rather than benefit to the public.

Third, that the Coastal and State Lands Commissions required maintained public beach access by permit conditions was irrelevant. Beach access remained a source of general benefit even if it was the price to use state lands for the project (the revetment is partly on tidelands).

The Court also faulted the District's failure to assign benefit to the preexisting revetment even though it predates the project and was privately funded. And the District should have assessed the County-owned access parcels as it did private parcels.

Prop. 218's imprecise standards and independent judicial review make assessment litigation unpredictable and clarity elusive. Assembly Bill 2890 (Bloom, D-Sta. Monica) amended the Property and Business Improvement District Law seeking clarity. The Court of Appeal's consideration of the remand of *Hill RHF Housing Partners, L.P. v. City of Los Angeles* in October may approve or reject that statutory clarification. Stay tuned!

For more information, contact Pamela at PGraham@chwlaw.us or (213) 542-5702.

Legislature Restates Authority to Remove Disruptive People from Meetings

By Gary B. Bell

Public meetings are limited public forums under the First Amendment, which means members of the public have a right to speak on agenda items and, for regular meetings, any topic within the subject matter jurisdiction of the legislative body. Most often, public comment is a respectful exchange of ideas. But there are exceptions.

Courts have grappled with balancing First Amendment rights with the government's need to conduct productive meetings. At what point does expressive conduct become so disruptive that government can remove someone from a meeting without violating his or her First Amendment rights?

The Brown Act provides some guidance. A legislative body may adopt "reasonable regulations" for its meetings, including time limits on issues and speakers, but cannot prohibit criticism of policies, procedures, programs, or services of the agency or the legislative body's own "acts or omissions." And a legislative body may "clear the room" if attendees willfully disrupt a meeting so as to make continuing "unfeasible" and when order cannot be restored by removing the interrupters. But the press must be allowed to remain.

Courts have filled in statutory gaps. In *Acosta v. City of Costa Mesa*, the Ninth Circuit affirmed a city council's authority to remove someone for actually disrupting a meeting. Although the Court upheld the removal, it found a City ordinance unconstitutionally overbroad because it prohibited "insolent" behavior. Before removal, a speaker should be reminded of the rules governing the meeting and warned that further disruption may lead to removal. This, of course, gives the speaker an opportunity to conform to the rules and allows him or her due process.

The Legislature recently passed, and the Governor signed, Senate Bill No. 1100 (Aguiar-Curry, D-Woodland), amending the Brown Act to codify *Acosta* and related rules, adopting Government Code, § 54957.95. Legislative bodies may rely on this statute to remove disruptive attendees.

Local governments should also carefully review existing meeting policies and procedures for compliance with the Brown Act and case law. Even when removing a disruptive person from a meeting is proper, older ordinances and policies may be susceptible to challenge, as in *Acosta*. It is also wise to consider a recess or continuance, rather than removal, to address a disruption. Often a short break can cool tempers and diffuse the situation. Removal should be a nearly last resort and clearing the room is limited to very rare circumstances.

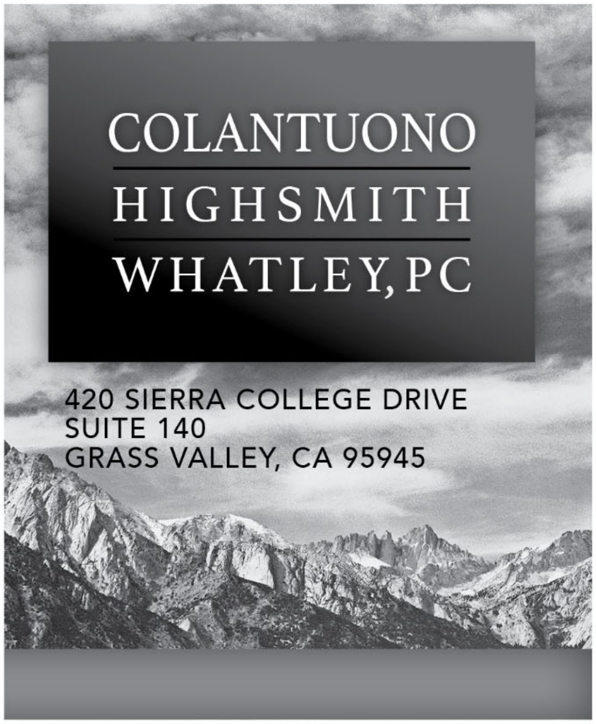
For more information, contact Gary at GBell@chwlaw.us or (916) 898-0049.

Franchise Fees (cont.)

(4) separate from a franchise fee cost-recovery fees for administering the solid waste franchise and for complying with state waste-reduction laws (AB 939, e.g.).

Litigation risk is rising as to trash rates. It will be wise to retain a consultant to prepare a cost of service analysis and have a lawyer review it. Legal developments continue; stay tuned!

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



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