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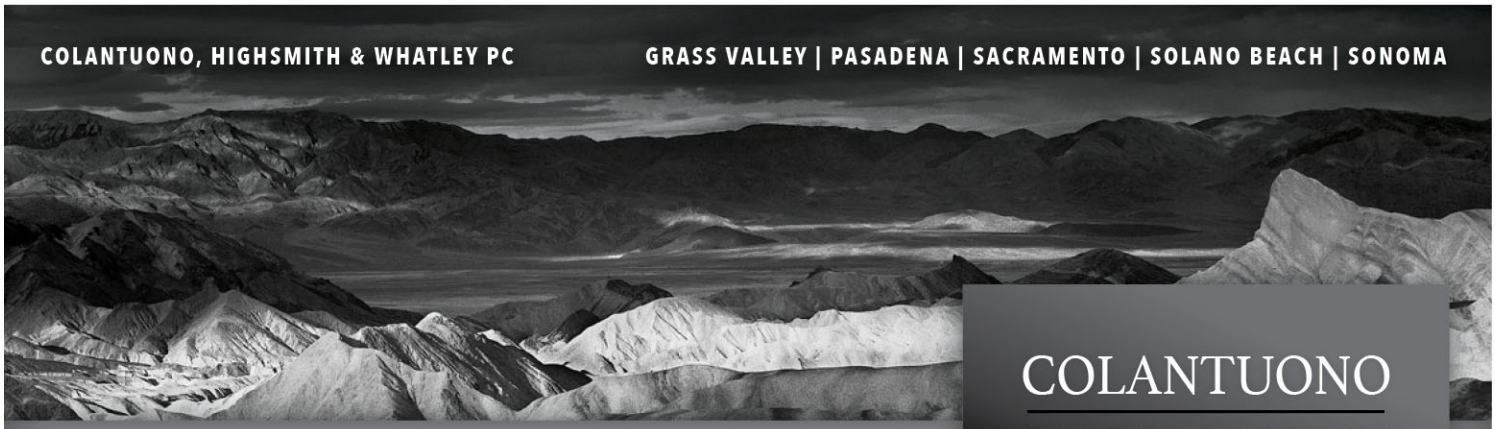


COLANTUONO HIGHSMITH WHATLEY, PC

Newsletter | Spring 2022

Update on Public Law

SCOCA Says Prop. 218 Exhaustion Not Required

By Michael G. Colantuono, Esq.

The California Supreme Court decided its latest Proposition 218 case, *Hill RHF Housing Partners, L.P. v. City of Los Angeles*, concluding the majority-protest proceeding the measure requires for new or increased assessments need not be exhausted before litigation. This means local agencies have one less defense to Proposition 218 challenges, even those which arise years after a revenue measure is adopted, perhaps in response to a headline-grabbing loss by another agency. There are steps agencies can take to reduce their risk, however.

A non-profit senior housing provider voted against renewal of business improvement district assessments in downtown LA and San Pedro (although its residents were heavy users of BID services), but did not participate in hearings, identify problems with the assessments, or otherwise attempt to exhaust remedies. When it sued, the City argued it was required to identify in the City's hearings the issues it would later litigate. The trial court disagreed, but ruled for the City on the merits. The LA Court of Appeal affirmed, but for failure to exhaust remedies, not on the merits. The Supreme Court reversed the Court of Appeal.

The Supreme Court's ruling is narrow. It does not preclude an exhaustion defense in legislative contexts like ratemaking, read Prop. 218 to forbid an exhaustion requirement adopted by legislation, or disclaim exhaustion requirements when clearly spelled out — as for challenges to revenues collected on the tax roll. Instead, it concludes a remedy need not be exhausted unless it provides a "clearly defined mechanism for … resolution of complaints by aggrieved parties." As an example, it noted that appeals to property tax assessment appeals boards allow exchanges of information, sworn testimony, and the collection and introduction of evidence, but noted not all these are required to make a procedure one to be exhausted.

(Continued on page 2)

CHW at 20 Years!

On April 2, 2002, what is now Colantuono, Highsmith & Whatley opened its doors with four attorneys and two support staff.

We were City Attorneys of four cities, although we did litigation and other special counsel work for cities, counties and special districts around California.

Today we are 33 attorneys, slated to grow to 36 when our "freshman class" arrives in the Fall. We are City Attorney to 16 cities and have offices in Sonoma, Sacramento, Grass Valley, Pasadena and Solana Beach.

Thanks for all our team members and clients for two decades of sustained growth!

Mandated Military Equipment Policy for Police

By Conor W. Harkins, Esq.

Assembly Bill 481 (Chiu, D-San Francisco) requires cities and counties to adopt and maintain a "military equipment use policy" before acquiring or using 15 broad categories of equipment police and sheriff's departments likely already own, not just MRAPS and other military surplus. State and local law enforcement agencies must inventory such equipment and adopt and publish a policy for its use by May 1, 2022. The city council or board of supervisors must approve the policy by ordinance within 180 days, or officers must stop using it.

"Military equipment" includes 15 categories of equipment, however acquired from whatever source, including: unmanned vehicles, armored personnel carriers, Humvees, "command and control vehicles," battering rams (other than hand held), firearms of .50 caliber or greater (excluding shotguns), assault weapons, flashbang grenades, tear gas, pepper balls and pepper spray, Tasers, water cannons, bean bag and rubber bullet weapons and "any other equipment as determined by a governing body or a state agency to require additional oversight."

The policy must inventory the equipment, describe its capabilities, state the agency's purpose for the equipment, its authorized use, its acquisition and maintenance cost, legal rules for its uses, and any required training. A policy must also address how the agency will ensure compliance, including oversight and sanctions for misuse, and public input procedures.

To approve such a policy, a legislative body must find: (i) no reasonable alternative to each kind of equipment can "achieve the same objective of officer and civilian safety;" (ii) the policy will "safeguard the public's welfare, safety, civil rights, and civil liberties;" (iii) the equipment's cost is reasonable in light of alternatives, and (iv) use of such equipment to date complied with policy or the agency took corrective action.

The City Council must reapprove the policy by ordinance annually, renewing the required findings. If equipment has been used outside the bounds of the policy, the council or board may not reauthorize that equipment without policy changes. The agency must maintain an annual report on its website as long as such equipment is available for use. Within 30 days of submitting the report to the legislative body, the agency must hold a "well-publicized and conveniently located community engagement meeting" on the report.

All police and sheriff's departments should be at work on these policies now.

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

Prop. 218 (Cont.)

What is critical is that government have a duty to act on complaints and to address issues.

Exhaustion of remedies is an important defense of local revenues. First, it allows agencies to head off or at least, prepare for, litigation. Second, it prevents opportunistic suits after each new legal development — like the many challenges to tiered water rates after the *San Juan Capistrano* case or to general fund transfers by power utilities following the since-reversed appellate decision in *Citizens for Fair REU Rates v. City of Redding.*

So, what can local government do? Assert the defense when you can, either because the revenue is collected on the tax roll or because your own ordinances establish the "clearly defined mechanism" for dispute resolution *Hill RHF* requires. If you lack that, you can adopt it.

Disclosure: *CHW's Holly O. Whatley and Pamela K. Graham defended* Hill RHF *for the affected BIDs.*

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

Temporary Safe Harbor for Organics Recycling

By Abigail M. Mendez, Esq.

SB 619 (Laird, D- Sta. Cruz) provides a temporary safe harbor for jurisdictions struggling to comply with newly effective CalRecycle organic waste regulations. It allows additional time to comply with 2016's SB 1383 (Lara, D-South Gate).

SB 1383 authorized CalRecycle to adopt regulations to reduce organic waste in landfills so as to decrease short-lived climate pollutants like methane. It also authorized regulations to require local entities to regulate generators of organic waste (i.e., everyone in society) and to penalize noncompliance. Local agencies must enforce programs to divert organics (food waste) from landfills and can be penalized if they don't. Local agencies were required to adopt programs, including enforcement mechanisms, by January 1, 2022. But, due to COVID and other constraints, many could not.

SB 619 provided local agencies additional time to comply, subject to conditions. Agencies not yet fully compliant with the regulations were obliged to give CalRecycle notices of intent to use the safe harbor by March 1, 2022, detailing how much organic waste continues to flow to landfills, why the agency could not comply sooner, the impacts of COVID on its efforts, and its plan to comply. CalRecycle could reject such a notice only if it fails to contain the required information. The Department must then waive administrative penalties for violations described in the notice so long as the agency implements its proposed schedule of compliance. However, the Department can impose penalties retroactive to the initial date of violation if the agency fails to follow the schedule it proposed.

The Department can also impose a corrective action plan for continuing violations that will take more than 180 days to remedy.

The time for this remedy has passed, but the bill serves as a reminder that these organics requirements are now obligatory, agencies should be implementing them and, if they cannot, they may wish to work with CalRecycle on means to get there as quickly as may be.

For more information, please contact Abigail at AMendez@chwlaw.us, or (213) 542-5738.

Welcome Attorneys!

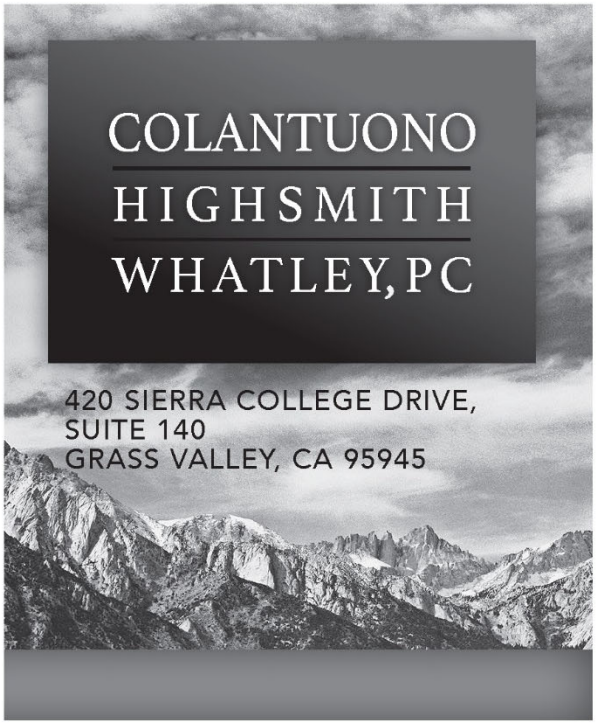
CHW welcomed six new attorneys this Spring:

Merete Rietveld and **Claudia Garcia-Salas** came from the Second District Court of Appeal in Los Angeles to join our Pasadena-based litigation team. Merete is a 15-year litigator already working on ratemaking and inverse condemnation cases. Claudia is a 4-year litigator now working on a TRO and an appeal of dispute over a regional wastewater plant.

Matthew McAleer joins us from the Los Angeles City Attorney's Office as another Pasadena-based litigator. With 11 years' experience, he now handles an easement dispute for a water utility and a 9th Circuit appeal of an EPLI insurance coverage dispute. **Thais Alves** joins us an advisory lawyer in Pasadena with two years' experience, but may join our Solana Beach team shortly.

Our Northern California team adds advisory lawyers **Alexandra Jack** in Sacramento and **Tim Crough** in Grass Valley. Tim got his law degree after a career in civil engineering and public works.

We'll have three law clerks in late Summer, too. Welcome new attorneys!



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