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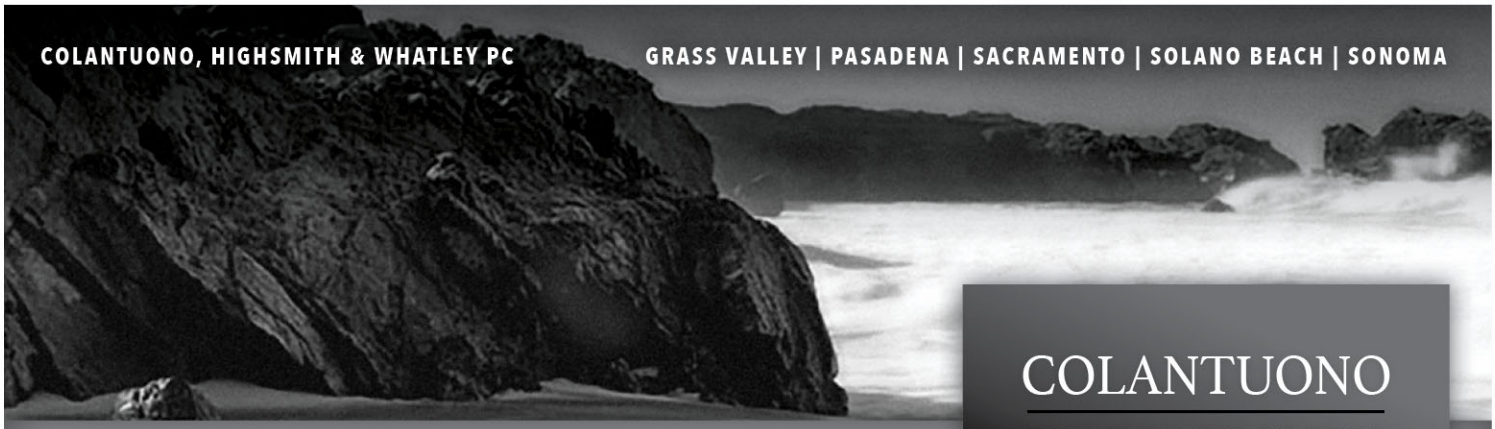


COLANTUONO HIGHSMITH WHATLEY, PC

Newsletter | Summer 2022

Update on Public Law

Garbage Fee Scofflaw's Failure to Protest Defeats Refund Claim

By Holly O. Whatley, Esq.

In *Padilla v. City of San Jose*, the San Jose Court of Appeal applied Health and Safety Code § 5472's payment-under-protest requirement to bar a class action for refunds of trash fees. As is common, the City of San Jose charges for residential solid waste collection. When those fees go unpaid, the City records liens on the property tax roll. To release a lien, an owner must pay the delinquent fees. Plaintiff filed a class action alleging this practice violated state law regarding priority of liens on property.

The City demurred, citing Health and Safety Code § 5472's requirement to pay under protest before challenging "fees, rates, tolls, rentals or other charges [] fixed pursuant to this article." Plaintiff did not pay under protest before suing. Instead, he argued § 5472 did not apply to garbage fees, and even if it did, San Jose had not adopted its charges under the Health and Safety Code. The Court of Appeal rejected both theories.

The Court first ruled the "plain language" of the article which includes § 5472 applies to trash fees. Section 5470 defines "rates or charges" to include those for "garbage and refuse collection." The Court next rejected Plaintiff's theory that the City had not adopted the solid waste fees "pursuant to this article" as § 5472 requires, because the City's ordinance did not mention the Health and Safety Code. The Court of Appeal held the only requirement to come within § 5472 is that charges be adopted by "an ordinance or resolution approved by a two-thirds vote of the members of the legislative body" as set forth in § 5471. It didn't matter that the City's Municipal Code did not mention the Health and Safety Code.

Padilla's enforcement of the payment-under-protest rule is welcome news for public agencies. It protects public revenues and provides a powerful tool for local governments to defend individual and class action refund claims for solid waste and other service fees.

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

Congratulations Matt Summers! Welcome Class of 2022!

CHW's shareholders are pleased to welcome Matt Summers to their ranks. Matt serves as City Attorney of Barstow, Calabasas, and Ojai. He is among the firm's experts on land use, telecommunications, and election law. His elevation marks the significant development of his practice and the confidence of his fellow shareholders. Congrats, Matt!

The firm also welcomes new lawyers Marjan Ramos Abubo, Mackenzie Anderson, and Nicole Garson. All three are preparing for the California Bar exam and will

(cont. on page 3)

SB 9's Effect Not Clear as a Hundred Cities Adopt Ordinances

By Matthew T. Summers, Esq.

Cities and counties around the state have taken varied responses to Senate Bill 9 — last year's statute requiring cities and counties to approve up to two units per parcel and lot splits creating two parcels from a one single-family parcel. Many agencies have taken no formal action, but have also seen very few applications under the law. Labelled a developer's panacea by both proponents and detractors, the law's practical effect remains unclear.

SB 9 protects two kinds of housing projects. First, cities must ministerially approve a "housing development" of up to two units on a parcel in a single-family zone. Second, cities must also ministerially approve "urban lot splits," dividing a single-family parcel in two. Together, these rules allow up to four units by right on a single-family parcel. Projects must meet statewide minimum standards, e.g., four-foot side and rear setbacks and one parking space per unit, and cannot displace tenants or deed-restricted affordable housing. Landmarks, historic districts, and properties in mandatory homeowners' associations are exempt. Cities may adopt "objective" zoning, subdivision, and design standards that do not "physically preclude" at least 800-square-foot units. Cities and counties may deny an SB 9 application with written findings the project would have a specific, unmitigable, adverse impact on public health and safety or the physical environment.

Nearly a hundred cities have adopted SB 9 ordinances, often protesting the loss of local control. Many of these precisely define which zones qualify for the law; enforce zoning standards SB 9 does not preempt, e.g., front setbacks, height limits; and set lot configuration and size standards for lot splits. Most also impose anti-displacement standards and strengthen the requirement that lot split applicants to live on one lot for three years. Some have taken bold approaches. A Bay Area city initially declared the whole city exempt as mountain lion habitat, but withdrew the proposal when the Attorney General threatened suit. A Southern California city applied the historic district exemption to its historic and landmark districts, also drew a quick challenge from the Attorney General, but negotiated a resolution preserving the exemption by applying the rules for historic districts to landmark districts. Still others have applied inclusionary housing rules requiring some SB 9 units to be deed-restricted affordable or adopted creative lot configuration standards.

Los Angeles County charter cities Carson, Redondo Beach, Torrance, and Whittier sued for a ruling the law violates their home rule powers. The case is pending before Superior Court Judge Mary H. Stroebel, with no trial date yet set. A decision is expected within 18 months and will surely be appealed.

Cities and counties considering SB 9 ordinances should remember options to maintain some local control. Foremost, ordinances set the maximum size of SB 9 protected units at 800 square feet. Others adopt fire protection requirements, e.g., fire apparatus access standards, sprinkler requirements, and minimum fire setbacks between structures. Lawsuits are likely over the next few years to determine the contours of defensible SB 9 ordinances.

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

Preference for Farm Water Rates Loses in Court of Appeal

By Michael G. Colantuono, Esq.

The Ventura panel of the Court of Appeal has issued the latest decision in a decade-long battle over rates for replenishment of groundwater serving the Cities of Ventura and Santa Paula and nearby farmers. The City first sued in 2011, arguing a statute requiring a 3:1 ratio of fees municipal and industrial water users (M&I) paid to those farmers (ag) paid violated Prop. 218. It won at trial, lost in the Court of Appeal, and won review in the California Supreme Court.

The Supreme Court decided the case was not subject to Prop. 218, but to Prop. 26 and remanded to the Court of Appeal to decide if the water district's administrative records could sustain its rates under that measure. Rather than do so, the Court of Appeal remanded to the trial court, directing that it allow the District another hearing before its own board to try to justify the rates, years after the fact. After making that record, the parties returned to the trial court, which ruled for the City again, concluding the statute requiring the 3:1 rate ratio violated Prop. 26 and that the district could not justify the ratio based on such differences between M&I and ag water use as the rate by which water returns to groundwater (about half of farm irrigation percolates back into groundwater; Ventura drains its wastewater treatment plant to the ocean).

The water district appealed again and this time the Court of Appeal ruled for the City. It rejected the district's argument the pre-Prop. 218 standard of review (deferential to ratemakers) applied, applying the independent judgment standard of the *Silicon Valley Taxpayers Association* case under Prop. 218. Applying deferential substantial evidence review to the trial court's fact-finding, the Court of Appeal concluded the District could not justify the 3:1 ratio. Although agriculture returns more water to the aquifer, this is "swamped" by the much larger volume of water pumped for farming than for cities (77% of pumping in these basins is for ag). Nor does article X of our Constitution's conservation mandate limit Prop. 26's rule that rates be proportional to each payor class's benefits from and burdens on a service. The Court of Appeal agreed the statute requiring the 3:1 ratio was unconstitutional.

A petition for review in the California Supreme Court is possible, but it seems this long-running case is nearing its end. The takeaway is: rates must be justified by cost of service and efforts to protect ag interests and others from high water costs require a justification based on benefits from or burdens on the service (like returns to groundwater) not a mere statutory preference like the 3:1 ratio here.

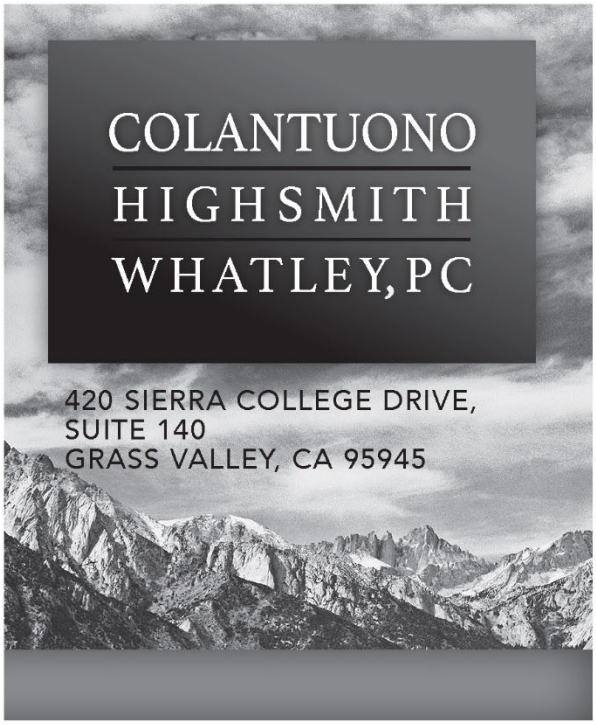
Litigation as to utility rates abounds, so ratemakers should proceed with caution. More case developments will be coming.

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

Congratulations and Welcome (cont.)

join us as law clerks in the Fall while they await results of the big exam. Marjan joins us from UC Davis Law School and will be in our Pasadena office. Mackenzie just graduated from UC Berkeley Law School and will be in our Sacramento office. Nicole comes to us with litigation paralegal experience and a University of Michigan law degree and will be in our Sonoma office.

Welcome Marjan, Mackenzie and Nicole!



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