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Newsletter | Winter 2022

Update on Public Law

Stormwater Mandates Decision Creates New Fee-Funding Authority

By Michael G. Colantuono. Esq.

San Diego County and its cities have been litigating the cost of that region's 2007 permit under state and federal clean water laws for 15 years. The Court of Appeal recently issued its second ruling in the case, and a petition for Supreme Court review is pending. The case has good news and bad news for local governments.

The requirements included street-sweeping, catch-basin cleaning, development controls to reduce runoff, education programs, and regional coordination. In 2010, the Commission on State Mandates found these to be reimbursable mandates under 1990's Prop. 9, the Gann Limit. The State need not fund mandates, however, if local governments have authority to fund them by imposing fees.

The Court of Appeal concluded storm drainage fees require voter approval under Prop. 218 and are not exempt "sewer" fees. It found 2017's SB 231 (Hertzberg, D-Los Angeles) insufficient to overturn *Howard Jarvis Taxpayers Assn. v. City of Salinas*'s conclusion that Prop. 218's exemption for "sewer" fees was limited to sanitary, not storm, sewer fees. It did so because Prop. 218's provision exempting certain preexisting assessments distinguishes "sewer" from "flood control" services. The Court also noted Prop. 218's liberal construction requirement to disfavor government revenue authority and the 15-year delay between *Salinas* and the adoption of S.B. 231, suggesting the Legislature was changing, not clarifying, the law. So, this is the bad news.

The good news is as to street-sweeping. The Court concludes street-sweeping is refuse collection and that local governments can charge fees for it without the voter approval Prop. 218 requires for many service fees. The

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Congrats to Aleks Giragosian!

CHW's Aleks Giragosian was recently named one of "20 Under 40" rising stars of the national Armenian Bar Association at an awards ceremony in Washington, D.C.

The Armenian Bar Association is a forum for lawyers of Armenian heritage to network and to address the legal concerns of the Armenian community. Upon creation of an independent Republic of Armenia, the Association undertook to help build and encourage the growth of democratic institutions in Armenia.

Aleks is the City Attorney of Sierra Madre and Assistant City Attorney of Calabasas, Ojai and South Pasadena. Congrats, Aleks!

Punitive Preemption Bubbles Up in Soda Tax Case

By Abigail A. Mendez, Esq.

The Keep Groceries Affordable Act of 2018 was a political bargain with the soda industry, banning local soda taxes for five years in exchange for withdrawal from the 2018 ballot of a proposed initiative constitutional amendment to greatly restrict State and local finances.

One provision of that law requires the California Department of Tax and Fee Administration to end its contract to collect all sales and use taxes for a charter city that imposes a tax or fee on "groceries," defined to include soda. Academics label this "punitive preemption," which does not just displace local law, but punishes local governments that enact or enforce disfavored policy. Enacting an ordinance to test the boundary between home rule and state control becomes risky due to the penalty.

The plaintiffs in *Cultiva La Salud v. State* persuaded Sacramento Superior Court that this statute violates the California Constitution by forcing a city to choose between constitutional home rule authority and essential sales tax revenues. The trial court invalidated the penalty provision because it punishes charter cities for valid regulations of municipal affairs — by its terms it applies only after a court finds a charter city soda tax to be a "municipal affair" protected from state preemption.

CDTFA appealed, arguing the penalty does not interfere with home rule authority, or appropriate or redistribute local tax revenues in violation of Propositions 1A and 22, won by local government to reduce State interference in local finances. CHW has submitted an amicus brief supporting Cultiva La Salud on behalf of the California State Association of Counties and Cal. Cities, emphasizing the history of our Constitution's commitment to home rule and the consequences of punitive preemption. A decision is likely in late 2023.

A similar debate in Sacramento may be likely soon given the California Business Roundtable's resurrection for the 2024 ballot of the proposed initiative constitutional amendment bartered for a soda tax ban in 2018. Featured in that debate will be so-called "VMT taxes" which propose to tax sprawling developments to fund the transportation improvements they require.

The 2023 legislative session will, as always, be of vital interest to those responsible for funding local services.

For more information, please contact Abby at AMendez@chwlaw.us or (213) 542-5700.

Stormwater (cont.)

Court noted there may be challenges in making such a fee proportional to the cost to serve each parcel as Prop. 218 requires, but the fact of local fee authority was enough to exempt street-sweeping from the State's duty to fund mandates.

The development regulations were, perhaps unsurprisingly, exempt from Props. 218 and 26 as real estate development and permitting fees. This Court read *Salinas* narrowly, finding local governments can distinguish among fee payors based on such things as impervious coverage of property .

So, the case is bad news for State funding of expensive water-quality mandates and for an exemption from Prop. 218's voter-approval requirement for stormwater fees. It is better news for local authority to fund street sweeping and similar water quality programs, perhaps including catch-basin cleaning and filtration, as refuse collection fees which are exempt from Prop. 218's voter-approval requirement.

The Supreme Court will decide whether to review the case in early 2023 and, of course, storm water mandate litigation will continue. Stay tuned for further developments!

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

New Campaign Donor Restrictions for Local Elected Officials

By Matthew T. Summers, Esq. & Ephraim S. Margolin, Esq.

To date, the Levine Act has regulated campaign contributions for state officials and appointed local officials, e.g., Planning Commissioners, limiting covered officials' ability to participate in governmental decisions related to those who donate more than $250 to a campaign. AB 1439 (Glazer, D-Contra Costa) extends the Act to local elected officials — city councilmembers and special district boardmembers. Subject to some key exceptions, starting January 1st, these officials cannot participate in approving a contract, license, permit, or other entitlement sought or opposed by a donor of more than $250 to their campaigns in the 12 months before the decision.

The new prohibitions apply in three situations. First, local officials are prohibited from acting on a permit or contract if a donor of more than $250 to their campaigns within the past year is a party or a financially interested "participant" in the matter. One "participates' merely by speaking at a public meeting. Second, local officials may not accept or solicit campaign contributions of more than $250 from a party or financially interested participant while a permit application or contract request is pending before their agency. Third, these officials may not accept or solicit campaign contributions of more than $250 from any party or participant in a decision for a year after it is made. FPPC regulations apply the prohibitions to land use permits and contracts, except competitively bid contracts, union and other labor contracts, and personal employment contracts, e.g., a city manager's contract.

The prohibitions apply if a campaign donor of more than $250 is directly involved in a decision, e.g., an applicant or contractor, but also if he or she speaks at a hearing. A financially interested participant under this law includes one who owns a home within 1,000 feet of a proposed land use who speaks at a hearing. In that situation each Councilmember who received a donation of more than $250 must either disclose it and abstain, or commit to returning that part of it in excess of $250 within 30 days to participate in the decision.

The new law applies only to donations to a candidate-controlled committee — not independent expenditures by non-candidate-controlled committees.

Applicants, contractors, and other participants must also disclose any contributions to council- or boardmembers of more than $250 in the past year. Agencies should consider adding the disclosure requirement to agendas, display it in meeting rooms, and on permit application and contract bid forms.

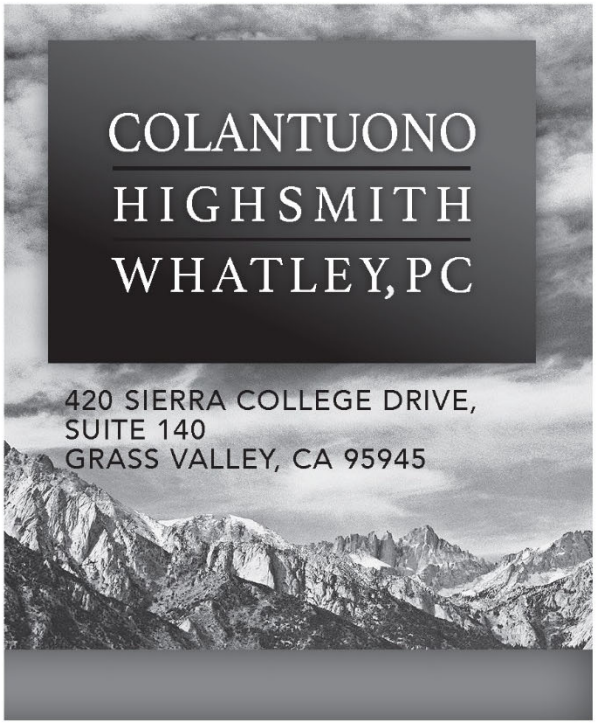
The FPPC adopted an opinion that SB 1439 does not apply retroactively to contributions made in 2022. Efforts to further clarify the law will continue in the next legislative session and business and development interests are gearing up for a court fight. Stay tuned!

For more information, please contact Matt at MSummers@chwlaw.us or (213) 542-5719, or Eppi at EMargolin@chwlaw.us or (213) 600-2102.

We've Got Webinars!

CHW offers webinars on a variety of topics, including redistricting, housing statutes, new laws on accessory dwelling units (ADUs), and police records issues. A webinar allows advice and guidance and Q&A in an attorney-client-privileged setting. The fee is $1,500 per agency.

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



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