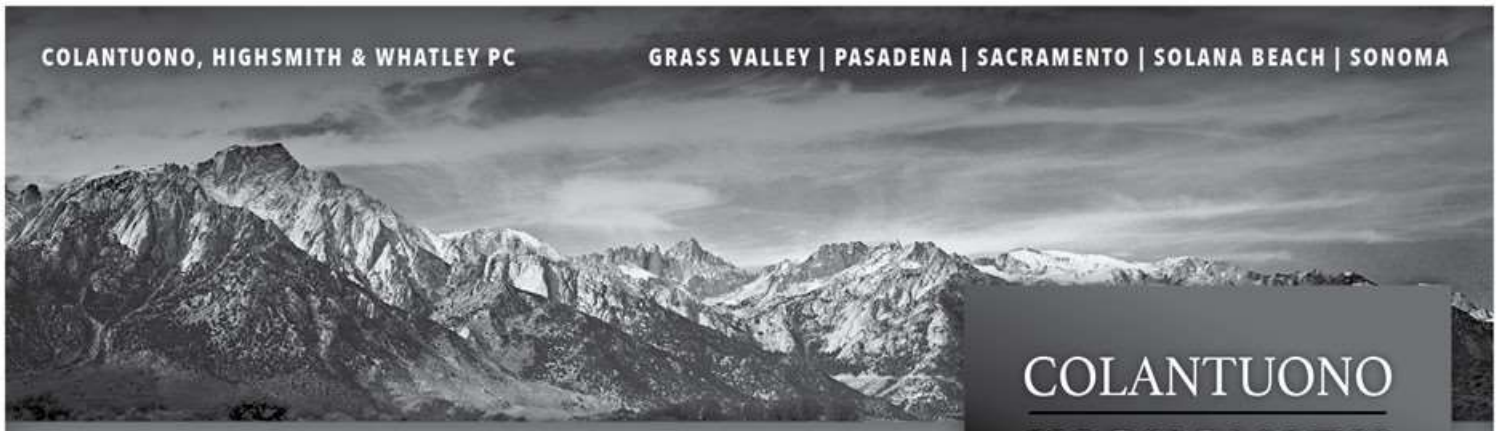

COLANTUONO HIGHSMITH WHATLEY, PC

Newsletter | Fall 2023

Update on Public Law

Finance Law Develops in the Legislature

By Michael G. Colantuono

The 2023 legislative session produced major proposals for government finance. Two measures will appear on the 2024 ballot; a statute promoting tiered water rates is on the Governor's desk.

ACA 1 (Aguiar-Curry, D-Yolo) would amend Proposition 13 to allow 55 percent of voters to approve supplemental ad valorem property taxes to support debt to fund construction or replacement of public infrastructure and affordable housing. Proposition 13 caps such taxes at 1 percent of assessed value, with exceptions, requiring two-thirds voter approval of special taxes and of supplemental ad valorem taxes to fund debt to buy or improve property. In 2000, California voters lowered the threshold for school facilities bonds to 55 percent. ACA 1 defines "public infrastructure" broadly to include water, water quality, sanitary sewer, flood control, parks and open space, streets, flood control, broadband, hospitals, public safety buildings and equipment, and libraries.

ACA 13 (Ward, D-San Diego) responds to the California Business Roundtable's "Taxpayer Protection and Government Accountability Act," on the November 2024 ballot. That measure would reverse nearly every appellate win for government under Propositions 13, 62, 218, and 26 and impose myriad restrictions on State revenues and essentially all local revenues—from taxes to library fines to water rates. It requires two-thirds-voter approval for all special taxes, whether proposed by legislators or by initiative, reversing six recent Court of Appeal decisions allowing such taxes by majority vote. ACA 13 would require any ballot measure that imposes a supermajority voting requirement to attain that same supermajority. As ACA 13 is retroactive, if a simple majority of voters approve it, the CBRT measure will require two-thirds voter approval. As that measure has drawn vigorous opposition, that may not be attainable.

Environmental interests sponsored AB 755 (Papan, D-San Mateo) to encourage tiered water rates which make water progressively more

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CHW's Appellate Practice

CHW has a leading appellate practice. Michael Colantuono has argued 11 cases in the California Supreme Court in recent years and Holly Whatley has argued two more. Few firms have appeared there as often.

The firm regularly appears in all California's District Courts of Appeal and in the 9th Circuit.

We can handle any public law appellate topic, from appellate support to trial counsel, appellate consultation in support of lead counsel, or handling an appeal or a petition for Supreme Court review.

More information is here: https://chwlaw.us/practice-areas/appellate-representation/

How to Pass a Public Records Act Audit

by Andrew C. Rawcliffe, Esq.

San Jose Spotlight v. City of San Jose is a recent trial court ruling and an object lesson for public agencies and their elected officials on the legal and political risks of using personal email accounts and devices to conduct public business.

This California Public Records Act (PRA) case stemmed from records requests news groups made to the City of San Jose for records potentially saved in its then-Mayor's personal email accounts. Unsatisfied with the City's response, they sued demanding the City and its then-former Mayor prove they properly searched for records.

Such suits are the PRA's equivalent of First Amendment audits testing an agency's compliance with public access rights. The focus of an audit is not any particular record, but public access to agency records. Such audits are effective because an agency has the burden to prove its search was reasonable.

San Jose Spotlight shows the difficulties an agency faces in meeting its burden when officials use private accounts for agency business. The trial court required San Jose's former Mayor to detail the terms he used when searching his accounts and the scope of his search, to list the records his search terms produced, and to provide an index or privilege log detailing the records he withheld as exempt or unrelated to public business. Because the former Mayor could not reconstruct his search two years after the fact, the court ruled the City violated the PRA and the news groups accused the former Mayor of having engaged in "stealth government."

Of course, most agencies' staff are familiar with the PRA and can document their efforts to locate responsive records. But nobody is happy with someone else searching their personal emails—likely why San Jose's former Mayor did the search himself. Generally speaking, an agency may rely on its officials to search their own accounts, but an official must first demonstrate he or she understands the difference between disclosable and exempt records under the PRA and must be prepared to document the search.

What's an agency to do? *San Jose Spotlight* suggests answers. The best practice is to prohibit the use of personal accounts so that staff can search official accounts for records and document they have done so diligently. If a blanket prohibition is unfeasible or records occasionally end up in personal accounts (automatic address-correction in email programs can be as harmful as helpful), agencies should direct officials to forward them to staff or another official account so they are preserved on agency servers. A third approach is to allow a third-party vendor to extract relevant data from a private account (perhaps via the cloud, which does not involve turning over one's devices) and to provide it to the account holder for review before release.

Where officials cannot prove compliance with such policies, *San Jose Spotlight* suggests the PRA obliges agencies that allow them to conduct their own searches to train them to do so adequately. Officials should be advised on search terms and how to document a search, too.

Although just a trial court decision, this case is a good indication of what the PRA requires. For California's public officials, bring your own device (or account) means bring your own commitment to do complete and well-documented searches when records requests are made.

For more information, please contact Andrew at ARawcliffe@chwlaw.us or 213.542.5729.

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.

SCOCA Adopts New, Nebulous Standard under California Voting Rights Act

By: Matthew T. Summers, Esq.

The California Supreme Court adopted a new legal standard under the California Voting Rights Act in *Pico Neighborhood Association v. City of Santa Monica* – declaring that plaintiffs must show an alternative to at-large voting would give a protected class of voters potential to elect preferred candidates, perhaps with the support of other voters. As the new standard is not a bright-line rule, more litigation is likely. Legislative reaction may also follow, as observers were optimistic after argument that the Court would provide a bright-line rule to reduce litigation — as local government amici urged — but the Court did not.

Whether at-large voting dilutes minority votes was the key question. The unanimous Opinion adopts a new standard, but remanded for further litigation as to Santa Monica. Under the new standard, plaintiffs need not prove a protected class can form a majority or near-majority of a district. Courts will conduct "a searching evaluation of the totality of the circumstances," comparing an at-large system and its results, history, and context with lawful alternatives, including single-member districts, but also ranked-choice voting and others, to determine whether an alternative would allow a protected class to elect its preferred candidate.

Local governments facing CVRA challenges to at-large voting should consult counsel and demographers to assess whether districts and other lawful voting systems would result in better potential outcomes for the plaintiff class. Agencies who switched to districts under the force of a CVRA demand letter may evaluate return to at-large elections or another system. The context-sensitive review creates uncertainty and therefore invites more litigation, but offers options for agencies seeking to maintain at-large elections. If a minority group is diffuse, or relatively small, or elections turn on issues other than race, ethnicity, language or culture, districts may be no better for that group than at-large elections. Expert evidence from demographers and, perhaps, political scientists, will be needed to make such a case. In requiring "a searching evaluation of the totality of the circumstances," this new case allows agencies to consider a variety of evidence to show that districts or another voting system would not improve outcomes for minority voting groups.

Further developments in the Legislature or the courts are likely. We'll keep you posted!

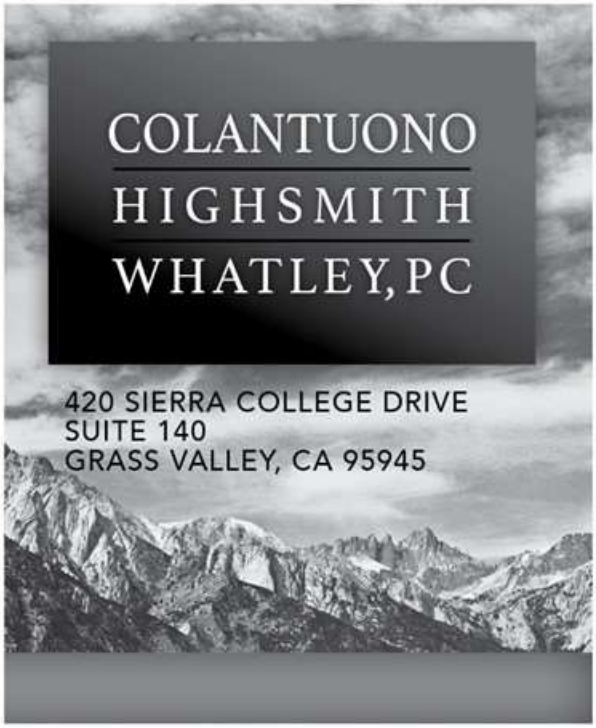
For more information, please contact Matt at MSummers@chwlaw.us or 213.542.5719.

Finance Law (*continued from page 1*)

expensive as a user consumes more—i.e., higher rates on "water wasters." Such rates were common before 2015's *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano,* which raised the bar for such fees. AB 755 requires "urban water suppliers" (generally those with 3,000+ connections) to identify in any cost of service analysis after January 1, 2024 costs to serve "high water users" and the volume of water sold to them. Suppliers must make that information public with the cost of service analysis. This has two important implications. First, evidence that "high water users" (either the top 10% of users by demand or those who exceed agency-established water budgets) impose costs on the utility may make it more difficult to recover those costs from others—i.e., not to tier rates. Second, it establishes the first legal requirement for cost-of-service analysis and to make it public. As we write this article, the bill is on the Governor's desk.

Given the wide margin of approval for AB 755 in the Legislature and the significant narrowing the bill underwent, the Governor's signature may be likely. If so, it will become law in January. Whether ACA 1 and ACA 13 become law turns on voters' decisions next year. Stay tuned!

For more information, please contact Michael at MColantuono@chwlaw.us or 530.432.7357.



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