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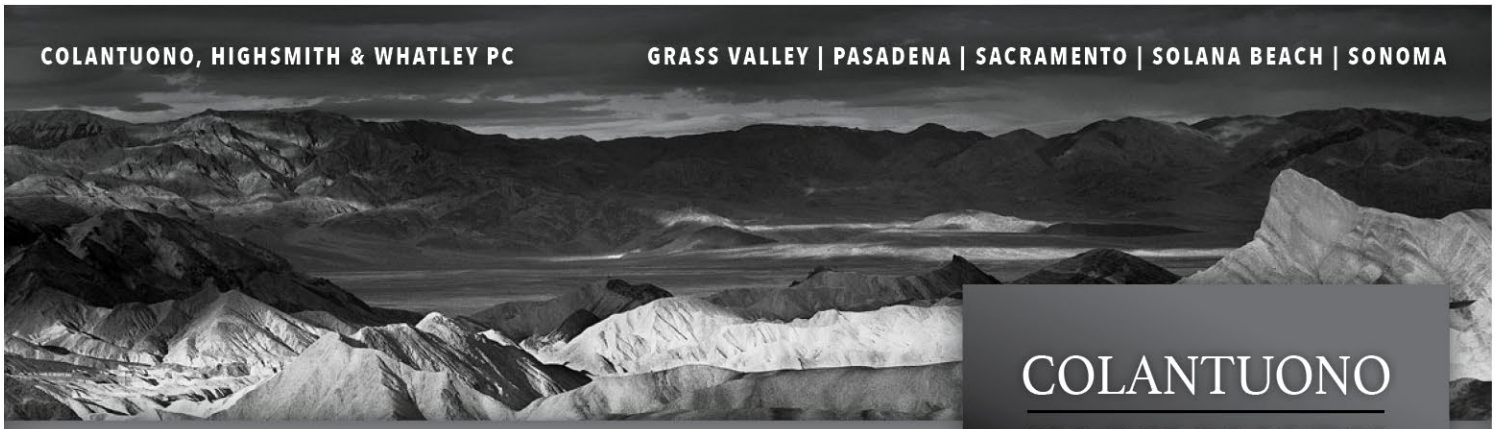

COLANTUONO HIGHSMITH WHATLEY, PC

Newsletter | Summer 2023

Update on Public Law

Development Impact Fees at Risk

By Michael G. Colantuono, Esq.

Litigation challenging fees on developments to fund the services and facilities they require has abounded lately. Oakland had a significant recent win and Palo Alto has a case pending review in the Supreme Court.

In *Discovery Builders, Inc. v. City of Oakland*, a multi-decade development project involved an agreement between the City and the developer for fee-funding of the City's considerable cost to implement the mitigation and monitoring program associated with the project EIR. That 2005 agreement stated the agreed fees covered "all of the Developer's obligations for fees to the City due to the Project." In 2016, the City adopted new citywide impact fees for affordable housing, transportation, and capital facilities for city services. The developer of a later phase of the development paid the fees under protest under the Mitigation Fee Act (AB 1600) and sued to invalidate the fees. The trial court granted the writ, concluding the City could not escape its promise to limit fees. It also applied equitable principles of laches (unreasonable delay) and estoppel (promises or conduct on which others rely) and found both common law vested rights in the developer's reliance on its permits and statutory vesting under a vesting tract map.

The San Francisco Court of Appeal reversed, concluding that if the contract amounted to a perpetual promise to impose no new fees, the City could not contract away its police power in that way. It applied the agreement's severability clause to excise the no-new-fees promise. The Court noted that the ban on contracting away the police power applies widely in land use cases and that local governments cannot grant by contract an exemption from generally applicable law. The Court also found the developer's estoppel claim was both waived (although the trial court relied on it, the developer did not raise or brief it) and because public policy makes estoppel against government very rare.

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Welcome, Jennifer Woo Burns!

Jennifer Woo Burns joins CHW's labor and employment practice group on August 1st, based in our Solana Beach office. She brings 30 years of experience, including roles in law firms and in-house, serving as General Counsel and Human Resources Director.

Jennifer adds to our depth in policy development, training, and representation on a range of labor and employment issues. She has advocated before DFEH, the EEOC, the Labor Commissioner and the Unemployment Appeals Board.

Welcome Jennifer!

Supreme Court Hears Voting Rights Act Case

By: Matthew T. Summers, Esq.

Cities and special districts will soon have clear guidance from the California Supreme Court on the California Voting Rights Act's demand that many of them convert from at-large to district-based elections for Council- and Boardmembers. On June 27th, the Court heard argument in *Pico Neighborhood Association v. City of Santa Monica*, considering: "What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act?" Based on the tenor of the Justices' questions, at least some appear inclined to adopt a definitive standard, perhaps even a minimum minority percentage for CVRA vote-dilution claims. Decision is due by September 25th.

In 2002, California was the first state to adopt its own law modeled on the Federal Voting Rights Act. The CVRA lowers the evidentiary burden for challenges to allegedly discriminatory voting practices, such as at-large voting. Under the CVRA, a plaintiff need only show that "racially polarized" voting exists in a community, e.g., that minority and majority voters vote differently — as they commonly do. Unlike the federal law, plaintiffs need not show that a sufficiently numerous and geographically compact minority group exists to form a "majority minority district." Whether at-large voting systems dilute minority votes is the key question in the Santa Monica case.

Plaintiffs allege Santa Monica's at-large elections dilute the votes of Latinx residents. The City argues Latinx candidates have succeeded in recent elections and plaintiffs' victory would force one of three from the Council as two live in the Pico neighborhood (including the husband of a plaintiff in the suit). The City also notes its voters twice rejected district elections.

The Justices grappled at oral argument with what a plaintiff must prove to establish vote dilution. Questions focused on fashioning a workable standard. Justices asked both parties about the difference between a minority group's "ability to elect" and its "ability to influence" an election. Plaintiffs argued the CVRA requires only an "ability to influence" — a majority minority district need not be possible. Santa Monica argued that sufficiently numerous minority groups can influence at-large elections. Given Plaintiffs' hesitance to adopt a numerical threshold for a minority population sufficient to bring a CVRA claim, several Justices expressed concern Plaintiffs' standard would apply the CVRA more widely than the Legislature intended.

The City argued Plaintiffs' standard would compel race-based classifications, and can harm minority groups. The City argued that a group's ability to influence arises from coalitions which are easier to form in citywide elections. Plaintiffs conceded it would be difficult to show a CVRA violation if a district cannot be created without at least a 20-25% minority electorate. If the Supreme Court adopts that standard, agencies with diffuse minority populations that switched to districts might be able to return to at-large voting. The Court's decision should answer these questions.

We've Got Webinars!

CHW offers webinars on a variety of topics, including the CVRA and 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 $1,800 per agency.

To schedule a webinar, contact Bill Weech at BWeech@chwlaw.us or (213) 542-5700. If there's a topic you would like a webinar on, let us know!

AB 205 – Are Fixed Rates Right for Your Utility?

By Matthew C. Slentz, Esq.

Governor Newsom signed Assembly Bill 205 on June 30, 2022. A trailer bill to the FY 2022–23 budget, it significantly changed regulation of investor-owned utilities, such as PG&E and Southern California Edison. Among its provisions is a requirement that fixed charges — flat rates collected to recover fixed costs for infrastructure and other capital costs — be imposed on an income-graduated basis so low-income ratepayers pay less than high-income ratepayers. The Public Utilities Commission previously capped fixed charges for all electric customers at $10 per month. Under new income tiers the industry proposes, monthly fixed charges may range from $15 to $128, offsetting lower "volumetric" rates for energy use.

Collecting fixed costs through a fixed rate component has several advantages. Much of the utilities' costs are fixed, and do not vary with consumption. Collecting some of those costs through a fixed rate makes utility revenues stable and predictable, and provides better price signals to customers, who can more accurately see the costs of consumption in their volumetric rates. Basing fixed rates on income also avoids making an increase to fixed costs regressive by raising costs on those who use less (and are often least able to pay). By lowering the cost of electricity for most users, the Legislature sought to incentivize electrification of California's energy market — encouraging electricity over natural gas appliances and internal combustion engines.

Can municipal utilities use this rate structure? Not entirely. Collecting fixed costs through a fixed rate component is an accepted ratemaking practice. The California Constitution generally requires a utility's rates not exceed its costs, although rates for some services — such as gas and electricity — only need to bear a "fair and reasonable" relationship to a customer's benefits from or burdens on the service. With a properly conducted cost of service analysis, municipal utilities can justify recovering their fixed costs through fixed rates. However, basing fixed costs on income will mean some ratepayers pay more than the reasonable cost of service because they can afford to, likely making such rates a "tax" under California's Propositions 13, 218 and 26. Such a tax requires voter approval, and not every public entity has taxing authority (cities and counties do, but many special districts do not). Additionally, California courts are split on whether, under Proposition 218, a tax may ever be imposed in relation to water, sewer, or trash services without two-thirds voter approval. Public agencies should therefore carefully weigh the costs and benefits, including the risk of litigation, before setting utility rates based on income.

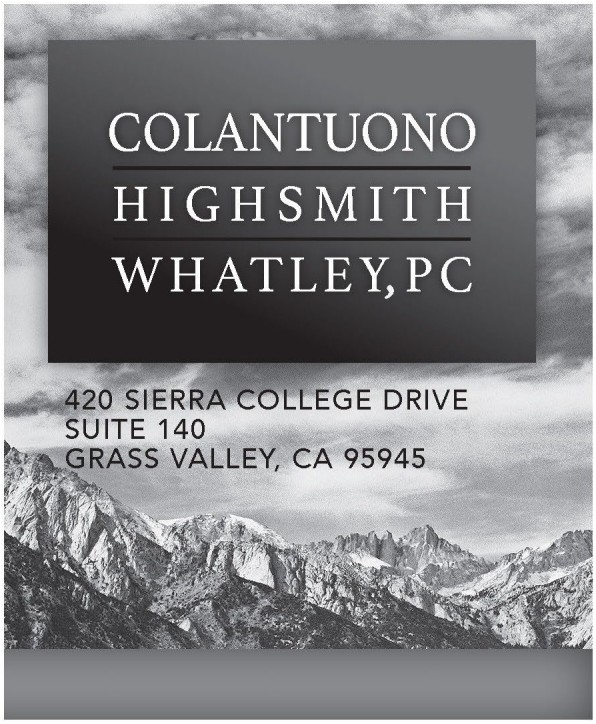
Development Impact Fees

(continued from page 1)

By contrast, Palo Alto lost a case in the San Jose Court of Appeal which concluded, surprisingly, that a fee a developer paid voluntarily in lieu of providing required parking was subject to the Mitigation Fee Act as a fee "imposed" to fund facilities to serve new development. It concluded, because the City had not consistently made the one- and five-year findings AB 1600 requires as to the parking in-lieu fees, the developer was entitled to a refund. Palo Alto retained CHW to petition the California Supreme Court for review and that Court has until July 27th to decide whether to grant review.

Plainly, development impact fees are a fertile area of litigation right now. Cities and counties are well advised to adopt such fees on solid nexus studies, spend fees promptly, and diligently make the required one- and five-year findings, even if consulting services are required to do so.

This area of the law is developing, so stay tuned!



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