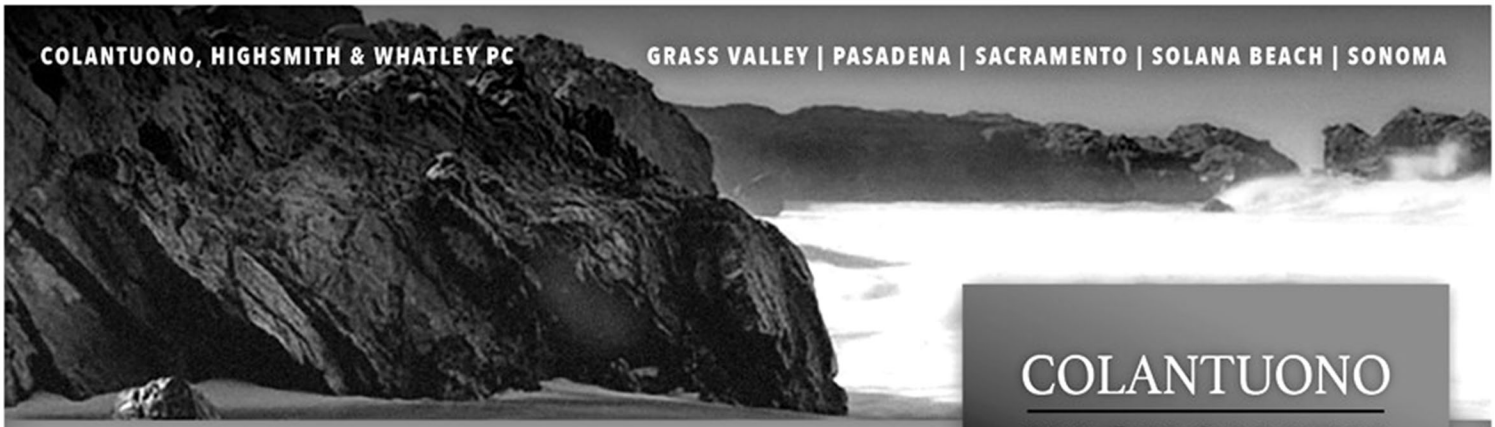


Newsletter | Summer 2024

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

Another Loss for Tiered Water Rates

By Michael G. Colantuono, Esq.

The San Diego Court of Appeal recently issued the latest published decision striking down tiered water rates under Proposition 218, *Coziahr v. Otay Water District*. Such rates make water progressively more expensive as use becomes inefficient to encourage efficiency. The District serves communities to the southeast of San Diego. The Court concluded a deferential standard of review applies on appeal (making it difficult to overturn a trial court loss) and that the trial court properly accepted an after-the-fact expert's report to invalidate the rates.

The District raised on appeal many open issues under Proposition 218. This Court rules against government on nearly all of them. The Court's many unwelcome conclusions include: refunds are available in Proposition 218 cases; water rates require firm justification in historical cost data, not reasonable projections and estimates; policy goals like ensuring water affordability and encouraging conservation cannot justify rates; Otay's record showed that tiering rates for residential but not commercial and irrigation customers was discriminatory; refunds could not be based on estimates and projections because historic data could be made available; evidence can be submitted to a court that was not submitted in agency hearings; ratemaking decisions are not "quasi-judicial" such that some judicial deference is appropriate; the issues are not primarily legal so as to allow more searching appellate review; reasonableness of ratemaking judgments is not sufficient to comply with Proposition 218 – firm rooting in "relevant, verifiable data" is needed (disagreeing with earlier published cases); refunds can be established using expert evidence; and a remedy based on average cost (i.e., after-the-fact uniform rates) could not be justified without obtaining customer payment data and historical cost information. Whew! The Court remanded for retrial of damages.

(continued on page 2)

Class of 2024

CHW's Fall class is arriving between now and October.

Adam Mentzer joins our Pasadena litigation team as a 7th year lawyer, bringing deep housing expertise from work in both the Portland City Attorney's Office and the Housing Authorities of the City of Salem and Clackamas County, Oregon. He has licenses in four western states and comes to us from Neighborhood Legal Services in Los Angeles.

Darianne Young, joins us from a "big law" business litigation practice as a soon-to-be 3rd year in Pasadena. She has her law degree from the Thurgood Marshall School of Law at the Texas Southern University. She has had diverse experience in civil and administrative litigation.

(continued on page 3)

SCOTUS Restores Local Power to Regulate Public Places

by Mackenzie D. Anderson, Esq.

The U.S. Supreme Court's recent decision in *City of Grants Pass, Oregon v. Johnson et al.* held that enforcing generally applicable laws restricting camping on public property does not constitute cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. This means that cities and counties can enforce restrictions on camping in public places (including in vehicles) without evaluating shelter capacity.

The Ninth Circuit's 2019 *Martin v. Boise* decision held the City of Boise, Idaho violated the Eighth Amendment by enforcing anti-camping restrictions against the homeless when the number of unhoused persons exceeded the number of "practically available" shelter beds, as sleeping outside was an involuntary and unavoidable consequence of their homeless status. In 2023, the Ninth Circuit applied *Martin* to prohibit Grants Pass from enforcing its camping regulations against homeless people sleeping in cars or outside when there is no shelter space available in the city.

The Court noted that, although a homeless defendant charged with illegal camping cannot rely on the Eighth Amendment to avoid conviction, she can still invoke the defenses of necessity, insanity, diminished capacity, or duress. And, beyond the Eighth Amendment, the Constitution still protects against unfair notice, unequal treatment under the laws, and selective prosecution.

Local governments may now enforce restrictions on camping in public places. Cities and counties may want to revisit policies or ordinances tailored to the Ninth Circuit's *Martin* and *Grants Pass* decisions.

Grants Pass did **not** overturn the Ninth Circuit's decision in *Lavan v. City of Los Angeles*, which prohibits cities from seizing and destroying the personal property of homeless people without providing reasonable notice and an opportunity for owners to reclaim their possessions before they are destroyed.

So, this case restores government's authority to regulate the use of public places and, in appropriate contexts, to use a threat of fines or penalties to induce homeless persons to accept services and come in off the street. But homeless advocates continue to litigate and further developments are likely. Be alert to those. And, of course, we will keep you posted!

For more information, please contact Mackenzie at MAnderson@chwlaw.us or 916.898.0042.

Another Loss for Tiered Water Rates (*continued from page 1*)

The case is not yet final. Supreme Court review and depublication (which would preserve the ruling for Otay but eliminate it as precedent for others) are possible. San Diego's tiered rates will soon be argued to the Riverside Court of Appeal, which could disagree with *Coziahr*. And the Legislature is considering bills which disagree with some of these points, including AB 1827 (promoting tiered water rates), AB 2257 (allowing local agencies to require litigants to raise issues in rate hearings before suit), and SB 1072 (stating refunds are not available under Proposition 218), all of which may soon be on the Governor's desk.

The decision is discouraging for those of us who have been working to implement Proposition 218 since 1996. What is a water agency to do? Make sure you get good legal advice when making rates and keep an eye out for new developments in the courts and the Legislature. We'll keep you posted!

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

New ADA Rules for Local Governments Online

By: Julia W. Cohene, Esq.

Public agencies must make their web content and mobile apps accessible to individuals with disabilities by April 2026 (cities and counties serving 50,000 or more people) or April 2027 (special districts and smaller cities and counties), according to a Final Rule published by the Department of Justice under the Americans with Disabilities Act ("ADA").

Under this ambitious new rule, public entities, including special districts, must ensure web content and mobile apps they "provide[] or make[] available, directly or through contractual, licensing, or other arrangements" are accessible to and usable by individuals with disabilities.

Web content means more than "content" as that word is commonly used. It means "the information and sensory experience to be communicated to the user by means of a user agent [*e.g.*, a web browser], including code or markup that defines the content's structure, presentation, and interactions." Examples include text, images, sounds, videos, controls, animations, and conventional electronic documents in formats including PDF, Word, PowerPoint, and Excel.

For example, a website must be accessible, including its text, images, and code defining the content's structure, presentation, and user interactions; as must also be documents posted on it. Live audio captioning will be required for synchronized media, like public meeting broadcasts.

The rule also applies to web content and mobile apps that a public entity makes available through contractual, licensing, or other arrangements. For example, a vendor's app allowing the public to pay city parking fees by cellphone must be accessible.

Web content also includes social media posts. As to these, public entities will need to use accessibility features provided by social media platforms, such as text descriptions of images.

Public entities can achieve compliance using Web Content Accessibility Guidelines 2.1 ("WCAG 2.1"), Levels A and AA, which are guidelines intended to make web content accessible for people with disabilities, including blindness and low vision, deafness and hearing loss, limited movement, speech disabilities, and photosensitivity.

Limited exceptions ease the burden. Compliance is not required if a public entity can show compliance would impose an undue financial or administrative burden, or fundamentally change a service, program, or activity. Certain exceptions also apply, including for archived web content and preexisting social media posts.

It may make sense to consult with your technical support and communications teams sooner rather than later.

For more information, please contact Julia at JCohene@chwlaw.us or 213.542.5736.

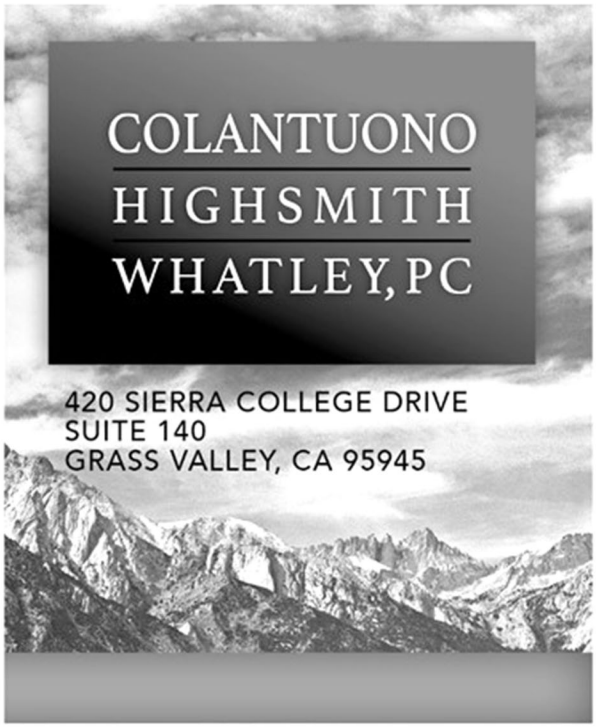
Class of 2024 (*continued from page 1*)

Julia Homaechevarria joins us as a second year in our Pasadena office after completing a clerkship with the Anchorage Superior Court. She will start with a mix of litigation and advisory assignments. She has her J.D. from UC Davis Law School.

We'll have two Law Clerks joining us soon, too — recent law graduates awaiting the results of the July Bar exam. John Hope comes to us from the McGeorge School of Law where he was a judicial extern to Justice Ronald Robey of the Sacramento District Court of Appeal.

Mihir Karode joins us with his J.D. from UC Davis Law School. He has his B.S. in Environmental Science from the University of Illinois at Urbana-Champaign and has an interest in land use and CEQA. At Davis he was the Senior Articles Editor of the Environs Environmental law & Policy Journal.

Welcome, CHW's class of 2024!



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