Newsletter | Spring 2025

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law
Water Rate Confusion Continues

By Michael G. Colantuono, Esq.

Propositions 218 (1996) and 26 (2010) govern adoption of retail and wholesale water rates, respectively, as well as other local government fees and charges. Challenges to water rates on residents and businesses are subject to independent judgment review in trial courts and, it seems, very deferential review of trial courts on appeal. This has created disparate outcomes and uncertainty for ratemakers.

This story starts with the 2015 decision in *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano*, which struck down that city's tiered water rates, which charge higher per-unit rates for water as customers use more. The decision came during historic drought and got worldwide attention. And it spawned a wave of copycat cases by counsel eager for the large fee awards that class litigation allows. A common summary of *Capistrano*'s holding is that ratemakers must "show the math," i.e., that rates charged at each tier covered only the cost to provide water in that tier.

Though many agencies successfully defended such rates, those rulings were mostly unpublished — i.e., not authority for future cases. Published cases have been agency losses. Most recently, the California Supreme Court denied review of a multi-million-dollar refund awarded against the Otay Water District and the Riverside Court of Appeal seems poised to affirm a companion case which invalidated San Diego's rates. However, the San Diego case, argued May 6th and not yet decided, also applied a recent statute barring refunds (but not attorney fees), requiring any financial relief to those burdened by invalidated rates (e.g., those who pay upper-tier rates) to come via updated rates. Ratemakers and their counsel are eagerly awaiting that decision, due by August, but likely sooner. A petition for Supreme Court review is likely, too.

Two other cases add to the uncertainty. *Great Oaks Water Company v. Santa Clara Valley Water District* upheld (under Prop. 26) charges on those who pump groundwater the District augments. The San Jose Court of Appeal gave that ratemaker great leeway to allocate costs and benefits among urban and rural pumpers. *Howard Jarvis Taxpayers Association v. Coachella Valley Water District* allowed much more demanding review – and invalidation – of that agency's rates for raw irrigation delivered via canals in a case from the Riverside Court of Appeal. The California Supreme Court denied review in *Coachella*; a petition for review is pending in *Great Oaks*.

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Telecom Law Firm's Team Comes to CHW

CHW is pleased to announce that the core attorneys of the Telecom Law Firm – California's leading lawyers for local governments and private property owners on issues involving cell antenna leases and related issues – will join us on June 1.

Dr. Jonathan Kramer will be Of Counsel to the firm, practicing from his office in West LA. Robert ("Tripp") May III, will open our new San Diego office, along with Senior Counsel David Nagele. They focus on regulatory and leasing issues related to communications infrastructure in both advice and litigation roles. Welcome!

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Class Action Relief Not Available in Public Records Act Suits

By Holly O. Whatley, Esq.

In *Di Lauro v. City of Burbank*, the Los Angeles Court of Appeal held class action relief is not available in California Public Records Act cases. As is common, Burbank maintains a portal on its website for public records requests. The City maintains a separate website for its Department of Water & Power, which contains no link to the City's main website.

Plaintiff allegedly submitted three requests using DWP's "Contact Us" button to seek past bills, but received no response, perhaps because the City does not monitor for records requests through this unexpected channel. She sued for two classes: 1) Those who requested records but to whom the City had not timely responded, and 2) those who were "deterred from submitting" a CPRA request because DWP's website did not offer a means to do so. The trial court sustained the City's demurrer to both class and individual claims, ending the case.

The Court affirmed dismissal of the class claims, holding the CPRA authorizes only those who request records to seek enforcement. It rejected Plaintiff's arguments for class enforcement. First, the Court found the general public policy favoring class actions unpersuasive, as the CPRA precludes one enforcing another's rights. The constitutional mandate to interpret a statute broadly if it furthers access to government information does not require a different result. The only CPRA remedy available is access to records. Here, the class sought a declaration the City violated the CPRA by failing to provide CPRA request portals on each department's website. But the CPRA creates no such remedy for that claim.

The Court found equally unpersuasive authority interpreting the federal Freedom of Information Act, on which the CPRA is modeled, and analogous Washington state law. Finally, the Court concluded class treatment provided no benefit because the trial court must evaluate the specific facts regarding advantage over ordinary litigation involving one or a few plaintiffs. And because the CPRA permits successful plaintiffs to recover attorneys' fees, aggregating individual claims is unnecessary to justify the cost of litigation. The Court did find the trial court erred to dismiss plaintiff's individual at the pleading stage.

The CPRA allows public agencies to adopt policies — and to impose request forms — governing public records requests. Such a policy can state to whom requests must be addressed and that the 10-day clock to respond to such requests does not run until the designated official receives them. Such policies can prevent such tactics as a plaintiff who argued he made a proper request under the Public Records Act by leaving it in the back of a police patrol car. Your agency may want to adopt such a policy and, if it has one, make sure it reflects how it does business digitally.

The ruling is welcome news when local agencies are increasingly targets of class action claims. There is a range of options to defeat class claims, and agencies should consult experienced counsel when these are filed.

For more information on this subject, please contact Holly at HWhatley@chwlaw.us or 213.542.5704.

Tribal Consultation Decision

By John P. Hope, Esq.

Koi Nation of Northern California v. City of Clearlake is the first published authority to analyze the tribal consultation requirements of 2014's AB 52. It concludes a city must document these components of consultation:

- notice to the tribe,
- when and how often consultation occurred,
- tribal resources identified by the tribe,
- mitigation measures the tribe requests,
- subsequent correspondence or discussion,
- measures recommended by the tribe incorporated into the CEQA document,
- why the City rejected any measures and substantial evidence for that rejection, and
- the reasons for end the consultation.

"Consultation" means "the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement." Further, the consultation must be mutually respectful of the sovereignty of the Native American tribe and the lead agency.

For more information, please contact John at JHope@chwlaw.us or 916.898.4727

SCOCA Invalidates Liability Release in Bike Accident

By Mihir A. Karode, Esq. & Gary B. Bell, Esq.

In *Whitehead v. City of Oakland*, the California Supreme Court recently held the City's liability waiver for participants in training for the AIDS/LifeCycle San Francisco-to-Los Angeles bike event was "against the policy of the law" and unenforceable under Civil Code section 1668, which provides:

> All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, **or violation of law**, whether willful or negligent, are against the policy of the law. (Emphasis added.)

Mr. Whitehead was seriously injured after hitting a pothole on an Oakland street. The City required him and all participants to sign a liability waiver which covered any claim "which may arise or result (directly or indirectly) from any participation in the Event." Such waivers are routine in local government parks and recreation programs and in the private sector, too.

Mr. Whitehead sued the City for a dangerous condition of public property. The trial court granted the City summary judgment and the San Francisco Court of Appeal affirmed, reasoning the waiver was enforceable and in the public interest.

The California Supreme Court reversed. It found a public agency has a statutory duty to maintain its streets in a reasonably safe condition and an agreement to waive liability for future violations of this duty was against the policy of the law and unenforceable. The waiver and release could not apply to violations of a statutory duty because these are "violation[s] of law" under Civil Code section 1668.

The Court did not find Oakland liable for Mr. Whitehead's injuries — the case is remanded for further proceedings and the City will raise its additional defense of assumption of the risk — i.e., people who participate in bike marathons must know that not all public roadways are in perfect condition and accept the risk of potholes.

Still, unless the Legislature responds with clarifying legislation, public agencies will need to reconsider how they manage the risk of such events. They may wish to discontinue sponsoring some events, review their programs to evaluate roadways and other public facilities for safety hazards, and to disclose risks to participants to bolster both safety and assumption-of-the-risk defenses. Consultation with risk pools and insurers will be wise.

A legislative response may be likely. Local governments should monitor events in the Capitol for that.

For more information, please contact Mihir at MKarode@chwlaw.us or 916.898.9256, or Gary at GBell@chwlaw.us or 916.898.0049.

Water Rate Litigation

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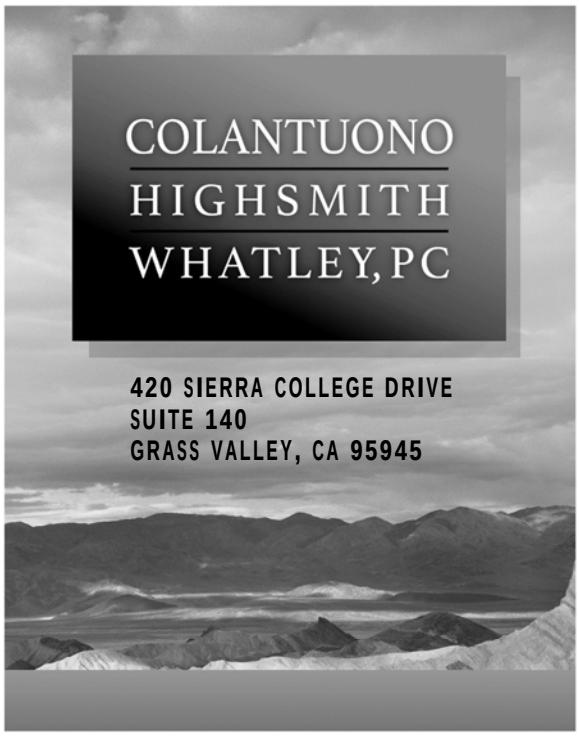
It seems that the tendency of lawyers (and judges are lawyers) to avoid math is leading to unpredictable results in trial courts and difficulty in persuading appellate courts to review searchingly trial court rulings. Even in *Otay*, where the trial court adopted a one-sided statement of decision drafted by plaintiffs' counsel. And the Supreme Court has denied review in these cases.

The Legislature has provided some help, adopting two bills sponsored by Assemblywoman Papan (D-San Mateo) to promote tiered rates, a bill by Assemblywoman Wilson (D-Solano) to impose a short statute of limitations, and by Senator Padilla (D-Chula Vista) to forbid refunds.

But uncertainty remains. While we await clarity (which may not be coming), agencies should: (i) avoid controversy — plaintiffs' counsel find clients on the internet, (ii) hire a professional ratemaking consultant and have experienced counsel review his or her work, (iii) include not just math in cost-of-service analyses, but text and graphics to allow a math-phobic court to understand your cost allocation, (vi) avoid updating cost-of-service analyses more often than every five years when possible, to reduce opportunities for suit, (v) communicate continuously with customers so they know what things cost and why; (vi) adopt a procedure allowing challengers to identify issues during a ratemaking hearing so the agency can respond and to limit the issues to be litigated, and (vii) follow legal developments closely — things change quickly in this area. It's a challenging time for ratemakers, but these tips can reduce your risk while we await hoped-for clarity.

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



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