Newsletter | Winter 2025

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

Two Percent Cap on Local Sales Tax Fosters Litigation

By Michael G. Colantuono, Esq.

The Revenue & Taxation Code allows cities and counties to propose, and local voters to adopt, supplemental sales taxes ("transactions and use taxes") to be collected by the California Department of Tax and Fee Administration along with the Bradley-Burns 1 percent local sales tax, the state sales tax, transportation, and other sales and use taxes. But it imposes a 2 percent cap on all city and county special taxes taken together. Given recent reliance on sales taxes to address funding gaps, many areas (particularly LA County and the Bay Area) are hitting the cap. The Legislature has responded with a small handful of bills granting exceptions to the cap for a larger handful of cities and counties.

Perhaps because the Revenue and Taxation Code gives enormous holdup leverage to plaintiffs by requiring CDTFA to escrow tax proceeds while litigation is pending, many challenges to local sales taxes have arisen in recent years, some testing the 2 percent cap and exceptions to it.

The County of Alameda, for example, litigated its March 2020 Measure C initiative special tax to fund childhood healthcare and education until January 2024 – a four-year delay. The January 2024 decision of the San Francisco Court of Appeal upheld the tax, concluding in a published portion of its decision that initiative special taxes require only simple majority voter approval — not the two-thirds required for special taxes government propose. It also ruled that naming the Oakland Children's Hospital as a potential advisor as to healthcare spending did not violate our Constitution's prohibition on initiatives which name persons or entities to government roles. In unpublished (and therefore nonprecedential) discussion, the Court also concluded Measure C complied with the 2 percent cap on local sales taxes, due to statutory exceptions. It also ruled the exceptions were not unconstitutional "special legislation" because the Legislature had a rational basis to grant an exemption to Alameda County (and a few other local governments).

Alameda County's November 2020 Measure W — a general sales tax proposed by the Board of Supervisors to fund homelessness and other general fund services for 10 years — was upheld by the San Francisco Court of Appeal on Jan. 31, 2025, nearly halfway through the life of the tax. The Court found the tax to be a general tax notwithstanding mention of homelessness services in the ballot question

(continued on page 3)

Sacramento Office on the Move!

As of February 1, CHW's Sacramento office moved into new space. The new address is:

555 University Avenue,
Suite 275
Sacramento, CA 95825

The phone is unchanged at (916) 400-0370.

Shareholder Gary Bell, City and Town Attorney of Auburn, Novato and Yountville leads the office. Others in this team are Lakeport City Attorney McKenzie Anderson, Colfax City Attorney Conor Harkins, and new associates John Hope and Mihir Karode.

If you find yourself in the neighborhood, stop by and say "hello"!

UPCCAA Filing Requirements

By Aleks R. Giragosian, Esq.

The California Uniform Public Construction Cost Accounting Act or UPCCAA allows public agencies to lift the relatively low bidding threshold for public works projects. Under the general rules, projects valued at over $5,000 for cities or $15,000 for sanitary districts, for example, must be competitively bid. These thresholds may be onerous, as public bidding requires substantial administrative effort.

UPCCAA allows higher bidding thresholds. As originally adopted, it allowed projects of:

- $15,000 or less to be performed by force account (i.e., an agency's own employees), negotiated contract, or purchase order;
- more than $15,000 to $50,000 to be let by informal bidding; and
- more $50,000 to be let by formal bidding.

Those thresholds have increased over time.

Effective Jan, 1, 2025, AB 2192 (Carrillo, D-Palmdale) established these thresholds:

- $75,000 or less to be performed by force account, negotiated contract, or purchase order;
- more than $75,000 to $220,000 to be let by informal bidding; and
- more than $220,000 to be let by formal bidding.

But a local public agency cannot simply rely on these new thresholds!

An agency must first confirm it opted into UPCCAA by ordinance and provided a copy of that ordinance to the State Controller. If you're not on the Controller's list, you're can't use UPCCAA. Check here: https://www.sco.ca.gov/Files-ARD-Local/participating_agencies_-_general.pdf

Second, an agency must confirm its ordinance provides for automatic adjustment of bidding thresholds as the statute changes. Often, agencies opting into UPCCAA adopt fixed thresholds. If an ordinance does not authorize automatic adjustment, an agency must amend its ordinance or purchasing policy either to adopt UPCCAA's new thresholds or to automatically adjust as that statute is amended.

UPCCAA provides great flexibility to local governments. If your agency has not invoked it, you may wish to. If you have, make sure your ordinance is current and you have filed it with the State Controller.

For more information, contact Aleks at AGiragosian@chwlaw.us or 213.542.5734

Cell Tower Tug of War Continues

By Matthew T. Summers, Esq. & John P. Hope, Esq.

The 9th Circuit recently partly upheld a 2020 FCC ruling regulating cities' and other governments' authority to control changes to cell towers and other wireless facilities. The ruling requires agencies to streamline decision-making and approvals for "non-substantial" changes to cell towers. "Substantial changes" can be subjected to an agency's standard, often stricter, cell tower permitting process.

The good news for local governments is that the 9th Circuit invalidated the FCC ruling's new definition of "substantial change" to a cell tower's stealth and concealment elements as an improper legislative rule — one not adopted consistently with the Administrative Procedures Act. The FCC may try to fix this by a new rulemaking. Agreeing that concealment and stealth elements are not necessarily the same, the Court ruled each deserves protection under current law. For example, siting a cell tower atop a building, out of sight from the ground, is a concealment element, while designing it to look like a tree is a stealth element. This conclusion reestablishes local authority to require wireless facilities to maintain both stealth and concealment elements. To protect these rights, agencies should clearly define such design elements in permits and as-built surveys and document them to inform later permit applications.

Less helpfully, the 9th Circuit upheld the FCC's new shot-clock rule. Under regulations dating to 2014, agencies have 60 days to approve or deny applications to change a wireless facility, with limited tolling if an application is incomplete. A completed application not timely approved or denied can be "deemed granted." In response, many agencies adopted streamlined processes to review modification applications. Under the new FCC rule, applicants now control when a shot clock starts. It now starts when an applicant takes the first procedural step required by the agency for a modification request and submits a written statement invoking the rule. This effectively shortens the clock, requiring cities and counties to review applications promptly and complete review within 60 days of submission, plus any tolling periods.

The 9th Circuit also upheld other aspects of the new regulations – including antenna-height rules and allowing up to four new equipment cabinets with each modification application. We expect further FCC rulemaking given continuing technological and governance change. Stay tuned!

For more information, contact Matt at MSummers@chwlaw.us or 213.542.5719 or John at JHope@chwlaw.us or 916.898.4727

2025 Levine Act Updates

By Taylor M. Anderson, Esq.

The Levine Act aims to prevent "pay-to-play" practices by restricting campaign contributions to elected and appointed officials of an agency by those with business before the agency. It prohibits officials from acting on matters if they have received certain campaign contributions from those interested in a contract, permit, or other entitlement.

Previously, the Levine Act applied only to **appointed** officials, but it was expanded in 2023 to include **elected** officials. The change was challenging to implement, raising concerns it would chill civic participation. The Legislature adopted AB 1181 (Zbur, D-West Hollywood) and SB 1243 (Dodd, D-Napa), effective Jan. 1, 2025 to address these concerns.

Major changes include:

- **Increased Threshold for Recusal.** To trigger a duty to recuse, donations must now reach $500 in the 12 months before a decision, up from $250.
- **Exempt Contracts.** The "licenses, permits, or other entitlement for use" that may trigger a duty to recuse now **ex**clude:
    - Competitively bid contracts.
    - Labor contracts.
    - Personal employment contracts.
    - Contracts valued at less than $50,000.
    - Contracts by which no one receives compensation.
    - Contracts between or among public agencies.
    - Periodic review or renewal of competitively bid or development agreements without material modifications.
    - Modifications or amendments to exempt contracts (other than competitively bid contracts).
- **Cure Period.** The period in which an official can avoid the duty to recuse by returning a contribution is now 30 days (up from 14) after receiving it. This period starts from the later of when the officer makes a decision or learns about the contribution and a matter requiring decision.
- **Definition of "Pending."** A matter is "pending" before an agency so as to trigger the contribution limit when a related item is placed on an agency's agenda; or when the officer knows the matter is within the agency's jurisdiction and it is foreseeable that the officer will be involved.
- **Participants Don't Pay Dues.** The definition of "participant" now excludes individuals whose only financial interest results from a potential change in membership dues (like a Rotary Club).
- **City Attorneys and County Counsels No Longer "Officers."** If their role is only providing legal advice and they have no decision-making authority in a proceeding, the Levine Act no longer applies to local government counsel.

The FPPC considered revised regulations to implement these changes on Jan. 16th. Revised regulations could be adopted as soon as Mar. 20th.

For more information, contact Taylor at TAnderson@chwlaw.us or 626.219.2768

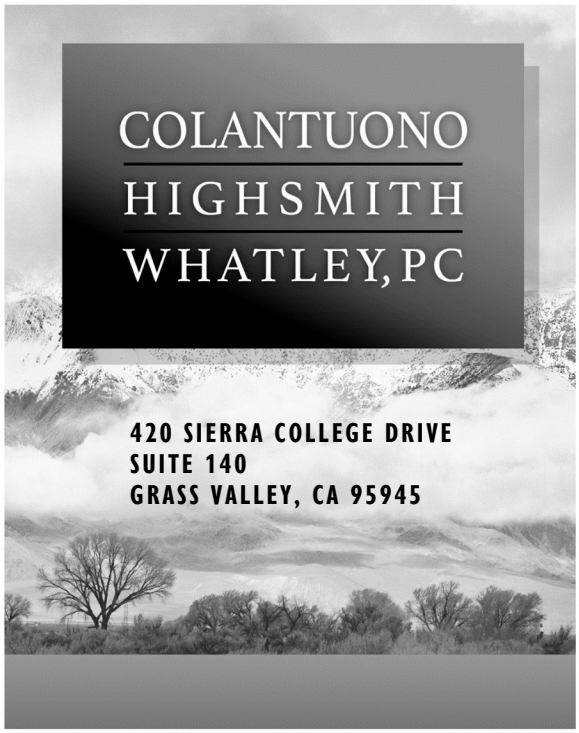
Two Percent Cap on Local Sales Tax Fosters Litigation

(continued from page 1)

and campaign messages about such services because the measure said tax proceeds could be used for any lawful County purpose — as the "no" argument emphasized. The Court also ruled statutory exemptions from the cap citing "unique fiscal pressures" on the benefited local governments did not violate the special legislation rule. But unlike the Measure C case, this ruling is precedential. It will help us defend the City of Campbell in a similar case recently filed by the counsel who sued Alameda on Measures C and W.

The Legislature might wish to revisit the statute requiring CDTFA to escrow sales tax proceeds pending litigation. It creates holdup leverage and invites weak arguments like those rejected in the two Alameda County cases. In the meantime, local governments should take care when crafting sales taxes (using CDTFA's mandatory form of ordinance) to avoid inviting procedural arguments like these. Cross your T's and dot your I's!

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



PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE
PAID
LOS ANGELES, CA
PERMIT #200

Are you on our list? To subscribe to our newsletter or to update your information, complete the form below and fax it to 530.432.7356. You can also call Marta Farmer at 530.432.7357 or subscribe via our website at https://chwlaw.us/newsletter-subscribe/.

Name _____ Title _____

Affiliation _____

Address _____

City _____ State _____ Zip Code _____

Phone _____ Fax _____

E-mail _____

☐ Mail ☐ Email ☐ Both

Our newsletter is available as a printed document sent by US Mail and as a PDF file sent by email. Please let us know how you would like to receive your copy.