COLANTUONO, HIGHSMITH & WHATLEY PC
LOS ANGELES | NEVADA COUNTY

NEWSLETTER | FALL 2015

COLANTUONO
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Update on Public Law

Court Orders $10.5m Fee Refund

By Michael G. Colantuono

Most cities and counties in California, and many special districts, fund facilities and services for new development with impact fees, typically collected upon issuance of building permits or certificates of occupancy. Such fees have proven essential since Proposition 13 reduced property taxes in 1978. Developers dislike such fees, of course, and persuaded the Legislature to adopt the Mitigation Fee Act to regulate them.

Among other things, the Mitigation Fee Act requires local governments to justify fees before adopting them by identifying the purpose of a fee, the uses to which it is to be put—including any facilities it will fund (as by referencing a capital improvement program or a general or specific plan), and demonstrating a reasonable relationship between the use of the fee and the developments which pay it, and between the need for a facility and the type of development on which a fee is imposed.

The Act also requires agencies to annually account for fee receipts and expenditures and to adopt a report every five years to renew the findings described above and to identify the sources expected to complete funding of incomplete facilities and approximately when that funding will be in hand. If those findings are not made, the agency "shall refund the moneys." Once funding is in hand, the agency has six months to identify a construction start date. Any unneeded funds must be refunded "by direct payment, by providing a temporary suspension of fees, or by any other reasonable means" the local agency chooses.

Although the Act dates from the 1980s, no published appellate decision enforced the duty to refund fees until now. In August 2015, the Orange County panel of the Court of Appeal found the City of San Clemente had failed to properly account for $10.5 million in beach parking fees and ordered the City to refund them. The City has petitioned the Supreme Court to review that decision; that petition is pending as of early October.

(continued on page 2)

We've Moved!

Colantuono, Highsmith & Whatley moved its Northern California office on July 24, 2015 to:

Colantuono, Highsmith & Whatley, PC
420 Sierra College Drive, Suite 140
Grass Valley, CA 95945–5091

Our phone numbers remain unchanged:

(530) 432-7357 (voice)
(530) 432-7356 (fax)

Our Los Angeles address and phones also remain unchanged:

Colantuono, Highsmith & Whatley, PC
300 South Grand Avenue, Suite 2700
Los Angeles, CA 90071–3137
(213) 542-5700 (voice)
(213) 542-5710 (fax)

Michael Colantuono, David Ruderman, Michael Cobden, Jon diCristina, Gary Bell, and our payables and receivables departments are in Grass Valley. Our other attorneys are in Los Angeles.

Our website and email addresses remain unchanged, too:

www.chwlaw.us.

Court Orders $10.5m Fee Refund (cont.)

San Clemente faced substantial residential development in its eastern area, outside the coastal zone, in the mid-1980s. It expected that development to create demand for increased beach parking and imposed a $1,500 fee on new units in 1989 to fund that parking. Although it spent about $500,000 to acquire a parcel adjacent to an existing parking lot, it never developed any parking. It the 1990s, the City studied its parking needs and, in 1995, it concluded a new parking structure was unnecessary. It therefore reduced the fee, but did not spend or refund funds on hand. The City adopted a five-year report to justify retaining the funds in 2004 and readopted the same report in 2009.

Homeowners sued in August 2012 to compel the City to refund the unexpended fees. They also sought to force the City to sell the undeveloped parcel it had acquired and to refund fee proceeds used to administer the parking fee program. The trial court ordered the City to refund unexpended fees and accrued interest of approximately $10.5 million to owners of the properties for which it had been paid, finding the five-year reports were not sufficient to justify retention of the fees. However, the court denied the plaintiffs' other demands.

The Court of Appeal affirmed, agreeing the City had not adequately shown a continuing need for the funds and that the statute therefore required refunds. That the 2009 report duplicated the 2004 report was proof the City had not make a fresh finding it still needed the funds to provide the parking facilities for which the fees had been paid. The Court also faulted the City for failing—20 years after the fee was imposed—to identify what it would build. It did affirm the trial court's conclusions the City need not sell the vacant parcel or refund its costs to administer the fee program.

Every local government with significant development impact fee revenues should review fee balances, ensure annual and five-year reports are current and credible, and have an articulate plan to spend fees timely.

There is no doubt the administrative burden to comply with the Mitigation Fee Act is high and many cities and counties retain consultants and outside counsel to assist. However, the *San Clemente* case shows consequences of non-compliance can be dire.

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For more information on this topic, contact Michael at 530/432-7357 or MColantuono@chwlaw.us

Welcome, Gary Bell

Gary Bell has joined our Grass Valley office, in both our municipal advisory and litigation practices.

He previously served as City Attorney of Firebaugh and as General Counsel to the Sierra Cedars Community Services District. His practice covers a range of public law issues, including constitutional law, public works, conflicts of interest, code enforcement, land use, open meetings and records, and post-redevelopment issues. He serves as Assistant City Attorney of Grass Valley and Assistant General Counsel of the Successor Agency to its Redevelopment Agency and supports the work of our other Northern California general counsel clients. His current litigation projects include defense of a Proposition 218 challenge to a water agency's connection charge.

Gary graduated with highest honors from UC Santa Cruz in 2008 with a B.A. in psychology. He received his J.D. in 2012 from UC Davis, where he was staff editor of the UC Davis Business Law Journal, a research assistant in constitutional law, and served on the Student Services and Fees Administrative Advisory Committee. While at Davis, Gary worked as a law clerk in the Governor's Office of Legal Affairs and as a legal extern to Placer County Superior Court.

Gary was a California State Senate Fellow and staffed the Senate Local Government Committee. Before joining CH&W, Gary advised municipal clients throughout California on a wide range of issues, including those affecting counties, cities, school districts, and special districts. Welcome, Gary!

City's At-Large Elections Okayed

By Ryan Thomas Dunn

A Local Agency Formation Commission (LAFCO) can condition incorporation of a city to allow voters to at-large or by-district Council elections. The Court of Appeal recently clarified that new cities can change the voters' choice by another ballot measure.

Riverside LAFCO approved incorporation of Wildomar in August 2007 subject to voter approval. Voters approved incorporation effective July 1, 2009, elected 5 initial Councilmembers at large and opted for district elections in the future.

A year later, the City Council drew districts, but also placed a question on the ballot to change to at-large elections. In November 2009, voters approved that measure. A Cityhood opponent and an election consultant sued, claiming the change to at-large elections violated the Government Code. The trial court ruled for the City, and the Court of Appeal affirmed.

The plaintiffs cited several Government Code provisions, including section 34871, which allows four options to create districts; because at-large elections were not among these, the plaintiffs argued the City could not change to an at-large system before at least one by-district election. The court cited section 57378, providing for the choice of district elections on incorporation, and read it to allow the City to use section 34873 to repeal a by-district system if a council member's term is not affected. The court also cited cities' inherent power, recognized in case law, to repeal their own ordinances.

The plaintiffs also argued the LAFCO resolutions approved by voters on incorporation could never be repealed. The court found no authority to elevate LAFCO resolutions over city ordinances and cited the Government Code to conclude an ordinance could trump the LAFCO resolutions. The court also cited a Government Code provision requiring a newly incorporated city to apply County ordinances for 120 days after incorporation or until superseded by City ordinance. If cities can override County ordinances, why not LAFCO resolutions? If the Legislature protected County ordinances for 120 days, but was silent as to LAFCO ordinances, what authority protects them at all? Finally, the Court found no law to make district elections irrevocable.

This case is most relevant to new cities, but stands for the broader proposition that cities may switch to an at-large system in the absence of any authority to the contrary, such as a city's charter or California Voting Rights Act (which generally requires by-district elections in cities with significant minority populations).

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For more information on this topic, contact Ryan at 213/542-5717 or RDunn@chwlaw.us

Act Now on Pre-Paid Cell Phone Taxes

By Holly O. Whatley

Prepaid mobile telephony is fast-growing and includes services such as prepaid wireless cards, pay-as-you-go mobile phones and prepaid top-off cards. Despite this growth, collection of utility users taxes (UUT) on such services has been inconsistent. Gov. Brown signed into law last year's AB 1717 (Perea, D-Fresno), the Local Prepaid Mobile Telephony Services Collection Act. It requires retailers and phone carriers to collect UUT on prepaid services beginning January 1, 2016. Retailers must pay the local UUT to the Board of Equalization (BOE), which will distribute it to cities and counties quarterly, as it does sales and use tax.

AB 1717 has a few wrinkles to note. First, it imposes rate tiers that dictate the rate to be collected, which may be less than the local UUT rate. For example, AB 1717 reduces a city's UUT from 3.5 to 2.5 percent for prepaid services. Thus, it reduces tax rates for cities and counties with UUT rates above the top of each tier; the top-most tier is 9 percent. It remains to be seen whether the improved UUT collection AB 1717 promises will make up for these lower rates. A city's or county's tax rate for services other than prepaid mobile telephone is unaffected.

To receive all the UUT to which it is entitled, a city or county must adopt resolutions and a tax collection agreement with BOE a quarter in advance. The deadline for collections starting on January 1 was September 1. The BOE will collect UUT beginning April 1, 2016 for cities and counties which approve the resolutions and agreement by December 1, 2015. Thus, cities and counties which have not yet acted should do so soon.

BOE requires a collection agreement to include the city's or county's certification that its UUT ordinance applies to prepaid cellular telephony and its promise to indemnify the BOE for any liability for collecting the UUT. Thus, each city and county must carefully analyze its ordinance to determine whether it applies to prepaid cellular telephony. Legal help may be needed.

Agencies should also consider whether UUT ordinances comply with Proposition 218. If not, or if an ordinance does not include prepaid services, a city or county should consider seeking voter approval of an updated ordinance. Legal assistance on that task is advisable, too.

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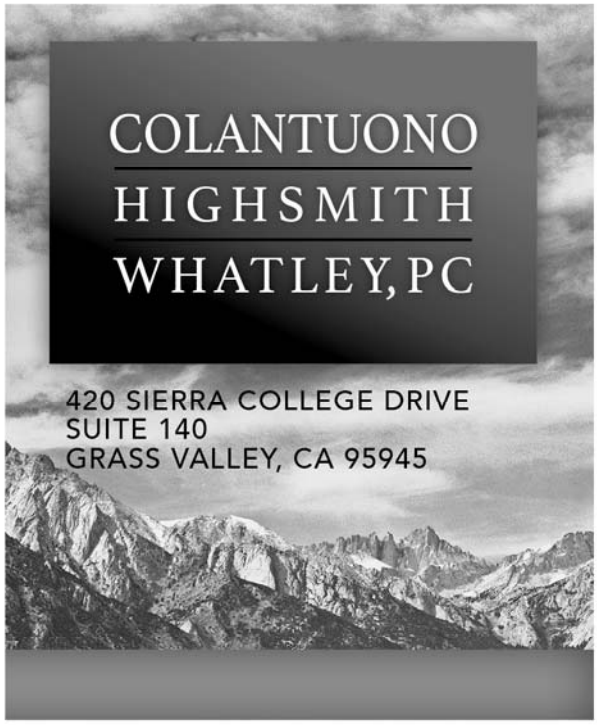
For more information on this topic, contact Holly at 213/542-5704 or HWhatley@chwlaw.us



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