COLANTUONO, HIGHSMITH & WHATLEY PC LOS ANGELES | NEVADA COUNTY

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COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

New Rate-Making Cases Proliferate

By Michael G. Colantuono

Litigation involving local government rate-making is very active at the moment for a range of reasons and we have a spate of new cases to report. October brought *Green Valley Landowners Assn. v. Vallejo*. Vallejo has an older water utility that serves areas outside the City and a newer utility that serves the City. Customers outside the City sued to prevent it from selling the older utility, alleging 19th Century contracts entitled them to subsidized water rates. The San Francisco Court of Appeal affirmed judgment for the City. Much of the case discusses whether general statutes protect charter cities before they adopt charter provisions or ordinances to adopt or reject them (they do). However, the Court also concluded it was not unreasonable to require Lakes Water System customers to pay the whole cost of operating that system because City residents get no benefit from it. This Prop. 218 case will be helpful in other cases in which one customer class or another argues for a subsidy at others' expense.

Great Oaks Water Co. v. Santa Clara Valley Water Dist. came in December and is a Proposition 218 challenge to groundwater charges. The San Jose Court of Appeal reversed Great Oaks' trial court win, holding groundwater charges are exempt from Prop. 218's election requirement. The Court remanded for trial challenges to the calculation and use of fees. Supreme Court review may be likely as the case raises issues pending before that Court in *City of San Buenaventura v. United Water Conservation District*. Those include whether groundwater fees are governed by Prop. 218 or Prop. 26 and whether a rate subsidy for agriculture can survive either measure. That case might be argued in late 2016 or early 2017.

December also brought *Crawley v. Alameda Co. Waste Mgmt. Auth.*, a decision of the San Francisco Court of Appeal upholding a property-tax-roll fee to fund household hazardous waste services. Among its many helpful conclusions are: (i) these services are directly related to property ownership and thus are property related fees under Prop. 218 even though services are provided only at County dumps. (ii) The Legislature's declaration these services benefit property was sufficient to justify them as fees, not taxes. (iii) A statutory definition of "refuse" governs the exception from Prop. 218's

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Welcome, John Davidson

JD joins CH&W as an associate in our Grass Valley municipal advisory and litigation practice groups. Prior to joining us, he had a sole practice focusing on family law and dispute resolution. Current assignments include advice to our general counsel clients about new legislation and defense of a Prop. 218 challenge to a fire assessment.

A second-career attorney, JD served in the U.S. Air Force, attaining the rank of Captain. He earned his college degree from Embry-Riddle Aeronautical University and an MS in Managerial Economics from the University of Oklahoma.

While at Stanford Law School, JD edited articles for the Stanford Journal of International Law. He spent the next few years adjudicating tort claims for the Air Force and handling personnel issues. He obtained an LLM in Public Law and Policy at McGeorge School of Law and was selected by the student body to speak at graduation.

He is fluent in Spanish and enjoys backpacking and fishing along the Yuba River with his yellow Lab, Sierra. Welcome, JD!

New Rate-Making Cases (cont.)

voter-approval requirement for refuse collection fees. That definition is like the ordinary dictionary definition. (iv) Allowing a majority protest of either parcel owners or of owners of residential units was lawful, as Prop. 218 required only the former, and allows the latter as well. (v) Finally, the Court construed Prop. 218's hearing notice requirement practically, rejecting argument the notice must identify the legal theory for the charge. This is the first Prop. 218 case on trash fees.

January brought *Newhall Co. Water Dist. v. Castaic Lake Water Auth*. The LA Court of Appeal concluded a state water contractor serving just four retailers could not make rates by customer class, but must make rates customer by customer under Prop. 26. Class-by-class rate-making is generally allowable because customer-by-customer rate-making is typically impractical. When an agency has so few customers that customer-by-customer rate-making is practical, it is required. This will commonly be true for wholesale water agencies.

The Court also found Castaic's rates, based on Newhall's use of Castaic's state water project imports as well as Newhall's own groundwater supplies, violated Prop. 26 despite Castaic's claim this was a measure of Newhall's potential service demand, i.e., a readiness-to-serve charge. Prop. 26 requires rates be fairly or reasonably related to a customer's benefits from or burdens on a service. As Castaic does not serve groundwater to Newhall, it could not charge for use of that water. This is one of the few Prop. 26 decisions to date and will govern rate-making by wholesale water agencies.

Many more cases are pending, including three in the California Supreme Court. Thus, we can expect 2016 to be a busy year for rate-making law. As always, we will keep you posted!

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

Court Limits Reach of Taxpayer Claims

By Ryan Thomas Dunn

A taxpayer can challenge nearly any public expenditure as wasteful under Code of Civil Procedure, § 526a. *Animal Legal Defense Fund v. California Expo* is a recent, helpful decision limiting such suits to those that would go unchallenged absent a claim under this taxpayer standing statute.

An animal rights group (ALDF) sued to challenge the State's display of pregnant pigs at the State Fair. ALDF alleged the pig exhibit violated animal cruelty statutes because pigs were confined to small crates during the final 15 days of their pregnancy, given insufficient bedding, and kept in close proximity to Fair visitors.

The San Francisco Court of Appeal cited a previous case holding private parties lacked standing to enforce animal cruelty laws. That earlier case, however, left open whether a § 526a claim was viable.

The Court noted the purpose of § 526a to empower taxpayers to challenge governmental actions that would otherwise go unchallenged because that taxpayer could not meet the usual test for standing — a personal stake in the outcome. The Court held that humane societies are authorized to help local authorities enforce anti-cruelty laws that and law enforcement agencies can enforce those laws, too.

The Court found no cases supporting the use of § 526a to challenge alleged crimes. Instead, precedent found such claims inappropriate as to alleged crimes or conduct amenable to another remedy, such as criminal or administrative remedies. Because animal cruelty laws can be enforced as crimes, the Court concluded the Legislature intended criminal actions to be the sole means of enforcement, precluding a § 526a claim.

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Where You Live Counts, Provisionally Speaking

By Holly O. Whatley

In *Clark v. McCann*, the Orange County Court of Appeal recently addressed whether the Registrar of Voters could exclude certain provisional ballots from the final tally in a Chula Vista City Council election decided by two of nearly 37,000 votes. The challenger contested exclusion of 10 ballots that did not contain the voters' valid, current residential addresses.

Provisional ballots allow one who claims a right to vote to submit a ballot if her qualifications cannot be immediately determined. During canvassing, elections officials determine if the provisional voter is qualified to vote. The Registrar excluded from the Chula Vista tally 10 provisional ballots that listed P.O. boxes, a business address or a nonexistent residential address. The challenger contended that only the voters' signatures could be considered to determine if the ballots were valid.

The Court of Appeal disagreed. It noted a person is not entitled to vote until she submits a registration form attesting to her residential address and, thus, a current residential address is required of all voters. Moreover, requiring provisional voters to provide a valid residential address is not burdensome and confirms eligibility to vote. The Court also reasoned that reviewing signatures alone would not eliminate double votes by those who submitted both provisional and mail ballots. The Court upheld the election despite the Registrar's failure to require affirmations of voters' registration and eligibility the Elections Code requires.

The Court also rejected a claim the Registrar should have used other documents to verify the voters' residences, such as where voters' families lived or where they paid income tax. The short time limits to certify election results, the volume of ballots, and the administrative burden that such a rule would create, made this impractical.

The Court rejected an equal protection argument, too, reminiscent of *Bush v. Gore*. California counties process provisional votes differently. However, the Registrar treated all provisional voters in this election similarly and, accordingly, did not arbitrarily or disparately deprived any of a vote. The Court was unpersuaded by "discussion points" regarding provisional ballots the California Association of Clerks and Election Officials (CACEO) prepared.

In short, if election officials implement reasonable and uniform processes to count ballots, courts will generally uphold them as within the officials' discretion. Although the CACEO standards may provide guidance, they do not control an election official's discretion.

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

Taxpayer Claims (cont.)

Thus, while § 526a claims may challenge many public expenditures and actions, they have limits. When another agency is tasked with enforcing a law, a taxpayer cannot step into the shoes of that agency.

Another § 526a case is pending in the California Supreme Court: *Wheatherford v. City of San Rafael*, which has been fully briefed since April 2015. It can be expected to be decided this year. The issue there is whether a plaintiff taxpayer must pay property taxes to the agency she wishes to sue, or whether other taxes, such as sales taxes (which are technically imposed on sellers, not buyers) allow standing.

Thus, public actions of doubtful legality can be more than politically controversial – they can get you sued. Fortunately, there are means to defend those cases if they arise, such as the standing issue in *Wheatherford* and the alternative-remedy rule of *Animal Legal Defense Fund*.

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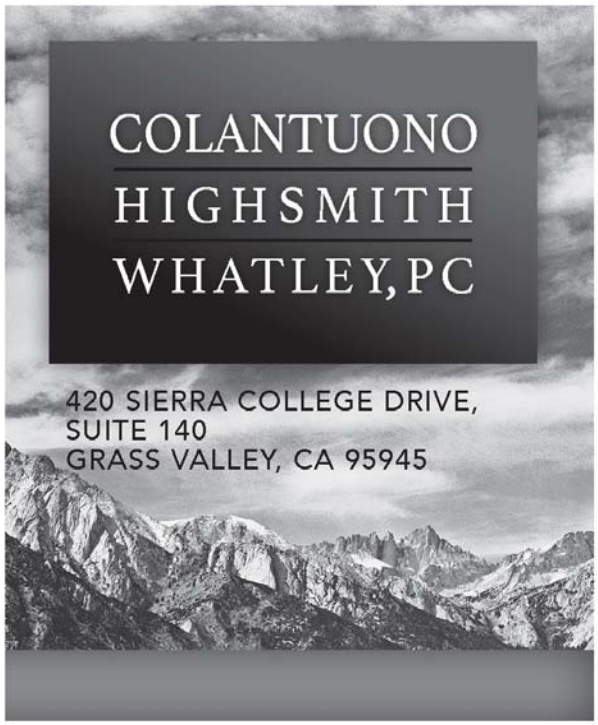
For more information on this topic, contact Ryan at 213/542-5717 or RDunn@chwlaw.us



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