Colantuono & Levin, PC

C&L Newsletter

Update on Public Law

Los Angeles | Sierra Foothills

Fall 2004

Supreme Court Water Rates Decision on Tap for 2005

By Michael G. Colantuono

No aspect of Prop. 218 has raised more question – or litigation – that its provisions governing "property related fees." In 2000, Justice Mosk's decision in *Apartment Association v. City of Los Angeles,* together with an earlier decision of the Court of Appeal in *Howard Jarvis Taxpayers Association v. City of Los Angeles,* made it reasonably clear that ordinary utility rates were not subject to Prop. 218's requirements unless they were imposed on property ownership alone, and not due to voluntary decisions to consume utility services. In short, metered utility fees were exempt from Prop. 218.

Earlier this year, in *Richmond v. Shasta Community Services District*, in which Colantuono & Levin represented the victorious local government, Justice Kennard's opinion included dicta (language not necessary for the result and therefore not precedential) suggesting that ordinary water and sewer rates are subject to Prop. 218. Shortly thereafter, the Supreme Court granted review of *Bighorn-Desert View Water Agency v. Beringson*, a recent decision of the Court of Appeal that barred an initiative that would have halved the Agency's water rates and required ⅔-voter approval for future increases. Instead of deciding the case, the Supreme Court remanded it for reconsideration in light of *Richmond*. The Riverside panel of the Court of Appeal reconsidered the matter but reached the same result – metered utility charges are not subject to Prop. 218.

The Supreme Court has now unanimously voted to review the case on the merits. The case will be only the third Prop. 218 case to reach that Court.

Bighorn raises important questions about the application of Prop. 218 to ordinary utility charges, especially water and sewer rates. First, does the initiative power created by Article 13 C of Prop. 218 extend to *all* taxes, assessments, fees and charges, or is it limited to the specific assessments, fees and charges defined in Article 13 D? The appellate court concluded in *Bighorn* that Article 13 D's limiting definitions do apply. This is a reasonable reading of the voters' intent, as ballot arguments focused on Article 13 D's new rules for assessments and certain property-related fees and charges rather than on Article 13 C's reiteration of requirements for voter approval of taxes. However, it is inconsistent with language of the measure which states that Article 13 D's definitions apply to that article alone.

Even if the initiative power does extend to the repeal of all taxes, assessments, fees and charges, other law limits initiatives in circumstances like these. It has long been the rule that local voters may not exercise by initiative a power the Legislature has conferred on a local legislative body alone. Prior cases hold that much rate-making power is subject to this rule. In addition, the initiative cannot be employed to impair an essential governmental function – such as setting rates sufficient to provide an adequate, safe public water supply.

On the other hand, if the initiative power is limited to Article 13 D fees and charges, as the appellate court concluded, then we must ask if the Agency's water rates are subject to Prop. 218 at all. Under the two Los Angeles cases cited at the outset of this article, the answer to this question would seem to be plainly "no," because those rates are imposed only on those who choose to take the Agency's water and not on property owners solely because they own land.

On aspect of the decision does seem beyond reasonable question. The initiative at issue in *Bighorn* required ⅔-voter approval of future rate increases. That differs from the rules of Prop. 218 (if it applies), which require a majority-protest procedure, but not an election, to set water, sewer and trash rates. Under a recent, persuasive decision of the San Diego panel of the Court of Appeal, no local initiative measure may lower or increase Prop. 218's voter-approval requirements.

The Supreme Court's decision to grant review in *Bighorn* suggests to taxpayer advocates that the Court is poised to elevate its *Richmond* dicta to an authoritative holding. Local government advocates, however, will argue that the case demonstrates that ordinary water rates should not be subject to Prop. 218's initiative procedure – only a fraction of property owners in the Bighorn agency's service area take its water – others rely on private wells or trucked water. Thus, an initiative in this case would allow voters to lower rates for water they do not use and may prevent the District from maintaining a safe and adequate supply for those who do.

Thus, the application of Prop. 218 to ordinary water and sewer charges is now a pending question. A decision in the case is not likely before late 2005.

As always, we'll keep you posted!

♦♦♦

For more information on this subject contact Michael at 530/432-7359 or MColantuono@CLLAW.US.

Amendments to Housing Element Law Mandate Denser, Affordable Housing

The past legislative session reflected continued interest in affordable housing – and in solutions which come at the expense of local control of land use policy. Two bills amending the housing element statute reflect this trend. One rationalizes the processes of determining the regional housing need and of assigning each city and county its "fair share" of that need. Another greatly increases the number and specificity of the mandated components of a housing element and of land use policy – right down to the required density of land identified for affordable housing

AB 2158 (Lowenthal, D-Long Beach) responds to litigation arising from the latest regional housing needs assessment (RHNA) in the Southern California Ass'n of Governments (SCAG) region, including suits against both the Department of Housing and Community Development (HCD) and SCAG, the latter by Inland Empire governments arguing more housing should have been assigned to coastal counties.

In general, the new law: (i) coordinates the RHNA with Regional Transportation Plans; (ii) details how HCD, Councils of Government (COGs), cities and counties are to collaborate, share data, and resolve disputes; and (iii) authorizes the delegation of RHNA determinations from HCD to COGs and from COGs to subregional associations of cities and counties. Agencies interested in forming subregions to allocate housing needs among their members must notify the COG (or HCD in non-COG areas) 28 months before the deadline for new housing elements. Thus, Bay Area governments must act by early 2005. The statute also allows localities to transfer housing obligations among themselves.

AB 2348 (Mullin, D-So. San Francisco) requires housing elements not just to "identify adequate sites" for a locality's share of regional housing need, but also to "[i]dentify actions that will be taken to make sites available" to accommodate of that need. An inventory must include all units assigned by the RHNA or the locality must allow multi-family housing by right *(i.e.,* "over the counter" without a discretionary approval) with densities of at least 16 or 20 units/acre to accommodate the balance of the RHNA goal. An inventory must map sites; list their parcel numbers; state their size, zoning and general plan designations; identify known environmental constraints; and detail utility infrastructure. Specific rules govern determination of the number of units a site can accommodate. For low- or very-low-income units, a site must have density of at least: 30 units/acre in metropolitan counties; 20 units/acre in "suburban" jurisdictions (defined to include cities of up to 25,000 population in metropolitan counties); 15 units/acre in Del Norte, Humboldt, Lake, Mendocino, Nevada, Tehama, and Tuolumne Counties ("nonmetropolitan counties that have micropolitan areas"); and 10 units/acre in other non-metropolitan areas. An element must justify its conclusion that a site can accommodate lower-income units.

The statute also amends the density bonus law to favor affordable housing developers and tightens an existing law limiting the power of local governments to reject affordable housing projects.

Cities and counties may wish to budget for consulting services or additional advance planning staff in the budget year in which their elements are due. An indefensible housing element makes local land use policy-making vulnerable to challenge by housing advocates and developers. Thus, communities have a meaningful incentive to fulfill this new, and as yet unfunded, mandate. The housing element is now, more than ever, a state mandate to increase housing density throughout California.

♦♦♦

For more information on this subject call Michael Colantuono at 530/432-7359, or Sandi Levin or Yvette Abich at 213/533-4155

Colantuono & Levin is a law firm with offices in the Sierra Foothills and Los Angeles that represents public agencies throughout California. Its municipal law practice includes public revenues, land use, redevelopment, housing, CEQA, and job training programs and associated litigation. We are committed to providing advice that is helpful, understandable, and fairly priced.

The firm includes one of California's leading experts on the law of local government revenues, including Propositions 13, 62, and 218. Our litigators have broad experience in public-sector litigation as well as general commercial litigation, employment law, and unfair competition.

The firm serves as general counsel or city attorney to the cities of Barstow, Calabasas, La Habra Heights, and Sierra Madre, the Barstow Redevelopment Agency, the Sierra Madre Community Redevelopment Agency, the Orangeline Development Authority (a JPA pursuing a maglev line in Los Angeles and Orange Counties) and the Southeast Los Angeles County (SELACO) Workforce Investment Board. The firm serves as special counsel to local governments throughout California, including the cities of Alameda, Belmont, Benicia, Calexico, Cerritos, Fresno, Glendora, Huntington Beach, Lathrop, Lodi, Mammoth Lakes, Merced, Moreno Valley, Morgan Hill, Pacifica, Palo Alto, San Mateo, Solana Beach, South Lake Tahoe, Torrance, and Vacaville.

Los Angeles
555 West 5th Street, 31st Floor
Los Angeles, CA 90013-1018
213/533-4155

Sierra Foothills
11406 Pleasant Valley Road
Penn Valley, CA 95946-9001
530/432-7359

WWW.CLLAW.US

Access to Government Information Now a Constitutional Right

By Sandra J. Levin

On November 2, 2004, California voters approved Proposition 59 by an overwhelming 83 percent margin; the measure was billed as creating a constitutional right to openness in government. The proposition adds to the California Constitution: (1) a declaration that the people have a right to access government information; (2) a requirement that any action or decision limiting access to government information be "narrowly construed," and that public access rights be "broadly construed;" and (3) caveats to preserve existing exceptions to disclosure requirements. Although the proposition generated no organized opposition and little electoral controversy, significant post-election controversy and litigation seem likely.

Within days of the election, one of the measure's sponsors, the California First Amendment Coalition (CFAC), formally requested access to the Governor's appointment book. Prior to Proposition 59's passage, such information was often withheld by government officials based upon a 1991 California Supreme Court decision which held then-Governor Deukmejian's calendar exempt from disclosure because it was protected by the "deliberative process" exception as reflective of the Governor's judgment and decision-making process. The Court reasoned that the Governor's ability to gather information about proposed policies would be impaired if his every meeting were a subject of news coverage. Upon making its records request for Governor Schwarzenegger's appointment book, CFAC announced its view that the deliberative process doctrine no longer applies in California as a result of Proposition 59. Others would certainly disagree.

Although Proposition 59 strengthens existing disclosure requirements, it adds relatively few new requirements and provides no clear guidance as to its impact on existing exemptions to the duty to disclose. Indeed, it is not yet certain Proposition 59 will generate *any* additional disclosure in the long run. Even the Legislative Analyst would opine only that, "over time, this change *could* result in additional government documents being available to the public."

For example, the provision declaring a right to access information concerning the conduct of the people's business is very similar to the statements already contained in the Ralph M. Brown Act, the California Public Records Act, and other statutes. On the other hand, the Legislative Analyst concluded that because the language is now within the Constitution, "a government entity would have to demonstrate to a somewhat greater extent than under current law why information requested by the public should be kept private." Just how much the burden on a government resisting disclosure has been increased in any given situation is unclear – and is likely to be determined through litigation.

Similarly, Proposition 59 provides that a court must narrowly construe any limitation on public access to government information. However, most of the major cases discussing statutory exceptions to access – including the 1991 case protecting Governor Deukmejian's calendar – already state that exceptions to access are narrowly interpreted. Thus, this aspect of Proposition 59 does not appear to add any new requirements or undermine any existing exemptions.

However, prior case law has not addressed any requirement that the right to access be construed broadly. Proponents of Proposition 59 will therefore argue that this aspect of the measure must be viewed as giving greater weight to access and as undermining all prior judicial decisions based upon a balancing of the right to access with the government's interest in non-disclosure. It is on this ground that the deliberative-process exemption will be challenged. While it would be an overstatement to say that this exemption from disclosure no longer exists, the case law establishing its boundaries may now be subject to re-evaluation. Again, however, these are subtle changes in the law and the extent to which the new emphasis on broad construction of the duty to disclose makes a difference is not yet clear – and may only be clarified by the courts.

The other significant new requirement of Proposition 59 is that any future limitations on rights of access must be adopted based upon "findings demonstrating the interest protected by the limitation and the need for protecting that interest." Proponents argue that these findings will narrow the interpretation of any newly created exception.

News accounts indicate that Governor Schwarzenegger intends to release those portions of his calendar which cover official business, but to withhold private events, such as his children's soccer games. A column in the *Sacramento Bee* supporting disclosure of the Governor's calendar acknowledges that participants in some policy debates in the administration would now be reluctant to express their views in writing, but argues this is a fair price to pay for openness in government.

It is notable that the California Constitution already includes a clear statement of a right to personal privacy and many public records that are not made public affect the privacy rights of those who interact with government – as when a dog-food retailer seeks the home address of every dog license holder for marketing purposes. The rights created by Proposition 59 must be balanced with constitutional rights of privacy.

In the end, Proposition 59 provides no clear guidance to local governments in how to respond to requests for disclosure of information. The prudent course is to question past withholding practices, carefully considering whether the exemptions carved out by past case law have been undermined by the new constitutional provisions, and to monitor both political and judicial developments for signs as to how Proposition 59 is being interpreted throughout the state.

♦♦♦

For more information on this subject contact Sandi at 213/533-4143 or SLevin@CLLAW.US.

Colantuono & Levin, PC
555 West 5th Street, 31st Floor
Los Angeles, CA 90013-1018

Are you on our list? To subscribe to our newsletter or to update your information, complete the form below and fax it to 213/533-4191. You can also call Marina Song at 213/533-4204 or subscribe via our Web site at **WWW.CLLAW.US**.

Name: _____ Title: _____

Affiliation: _____

Address: _____

_____

City: _____ State: _____ Zip Code: _____

Phone: _____ Fax: _____

E-mail: _____

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

☐ Mail ☐ E-Mail ☐ Both