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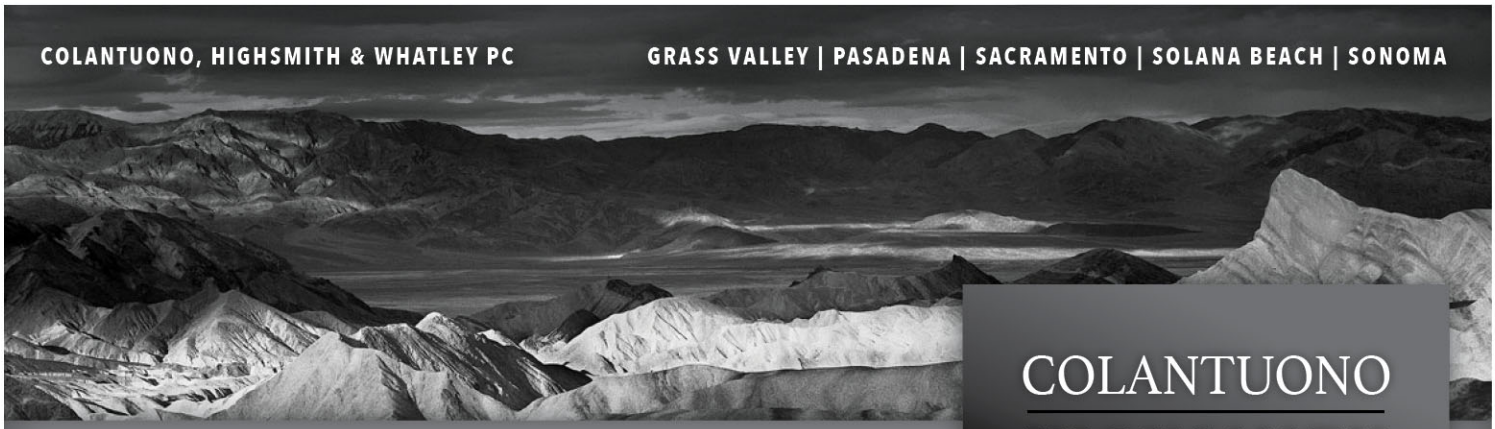


Newsletter | Spring 2023

COLANTUONO HIGHSMITH WHATLEY, PC

Update on Public Law

Another Ominous Decision on Impact Fees

By Michael G. Colantuono, Esq.

Ever since 2015's *White v. City of San Clemente*, local officials have been concerned about challenges to development impact fees subject to AB 1600, the "Mitigation Fee Act." That case ordered the city to refund millions in unexpended fees for beachside parking facilities for failure to spend the money within five years or adequately report why more time was needed. Concerns abated somewhat with the 2019 decision in *County of El Dorado v. Superior Court*, applying a short, one-year statute of limitations to such refund claims.

The San Jose Court of Appeal's recent decision in *Hamilton and High, LLC v. City of Palo Alto* raises the stakes again. This was a challenge to $906,900 in fees paid in lieu of parking spaces required for a mixed-use development in downtown Palo Alto. The City Council certified an EIR for a project to timely spend those funds, but members of the public and some Councilmembers questioned the need for more parking rather than parking demand management. The developer demanded a refund of fees paid 7 years earlier, the City denied it, and the developer sued. The trial court (a judge since elevated to this Court of Appeal) ruled for the City, concluding the case was not timely under *El Dorado* and AB 1600 did not apply because the fees were optional, not "imposed." The Court of Appeal reversed, concluding that the claim did not accrue until the City rejected the refund demand — without stating when a refund claim must be made. The appellate court also concluded the Act applied because the fees were a condition of development (even though the developer chose to pay them rather than provide on- or off-site parking), the City's belated 5-year report did not satisfy the requirement to prepare it within 6 months of the end of a fiscal year, and that Government Code section 65010(b) did not require the developer to prove prejudice. The court directed the trial court to order

(continued on page 3)

Welcome, Meghan Wharton!

Meghan A. Wharton joins CHW's litigation team in our Grass Valley office, helping clients around California.

She is an 22-year litigator who joins us after 10 years in the San Diego City Attorney's Office where she supervised the Special Litigation Unit. She advised the Mayor and Public Utilities Department on Proposiiton 218 issues.

Meghan has appeared in the 9th Circuit, the California Supreme Court, and the California Court of Appeal, winning published decisions in each.

Welcome, Meghan!

Campaign Disclosures

By Nicole L. Garson, Esq.

California law requires ads published by campaign committees to identify the committee's chief financial contributors. A San Francisco ordinance also requires committees to identify "secondary contributors." 2019's Proposition F requires newspaper and broadcast ads to identify the campaign's top three donors by name and donations of $5,000 or more. If any is a committee, ads must also identify the top two "secondary contributors," or donors to the donor committee. In *No on E v. David Chiu*, a campaign committee challenged Proposition F in federal court under the First Amendment.

Plaintiffs alleged the ordinance illegally "compelled speech." According to plaintiffs, the ordinance deters donors who wish anonymity, displacing too much speech, as listing secondary contributors would overwhelm an ad's message. The Ninth Circuit affirmed a lower court's denial of a preliminary injunction against enforcement of the ordinance. The appellate court found the ordinance to be substantially related to government's legitimate interest in informing voters of the source of funding for ads. As Circuit Judge Graber explained: "Defendants show that donors to local committees are often committees themselves and that committees often obscure their actual donors through misleading and even deceptive committee names." Accordingly, the ordinance does not excessively burden plaintiffs' First Amendment rights and is sufficiently tailored to that governmental interest.

Recent state and local laws have sought to increase election finance transparency and face frequent First Amendment challenges. This case affirms that robust local campaign disclosure laws can be upheld. S.B. 1439 (Glazer, D-Contra Costa), effective as of January 1st, prohibits local officials from voting on permits and contracts benefiting donors of more than $250 to officials' campaigns in the 12 months before a decision. This law faces a similar First Amendment challenge from business and real estate development interests.

For more information, please contact Nicole at NGarson@chwlaw.us or (707) 986-8087.

Stadium Lighting CEQA Case Erased

By Michael G. Colantuono, Esq. and Marjan R. Abubo, Law Clerk

The California Supreme Court recently granted San Francisco's request to depublish a CEQA case, *Saint Ignatius Neighborhood Association v. City and County of San Francisco*. That Court of Appeal decision overturned a categorical exemption of a project to light a high school football field. Depublication leaves the opinion intact as to its parties, but eliminates it as precedent for other cases.

In 2018, Saint Ignatius High School applied to the City for permits for four, 90-foot-tall lights for its football stadium. The Planning Commission decided the lights were subject to Class 1 and Class 3 categorical CEQA exemptions for existing facilities involving negligible expansion and new construction of small structures, respectively. The Board of Supervisors approved the project without further environmental review and neighbors sued.

The trial court upheld the categorical exemptions, but the Court of Appeal reversed, finding the Class 1 exemption did not apply because the lights would nearly triple the school's nighttime use of the athletic field, constituting an "expansion." Additionally, it found the City incorrectly invoked the Class 3 exemption because the 90-foot structures were much taller than neighboring homes and streetlights and the associated light, noise, and traffic impacts warranted an exception to the exemption.

The Court of Appeal decision seems to be a bad-facts-make-bad-law situation. The prospect of 90-foot polls looming over 30-foot residences is noteworthy, but exceptions to categorical exemptions are not easily found and CEQA review would be slower, more costly, and more complex if categorical exemptions are weakened.

For more information, please contact Michael at MColantuono@chwlaw.us or (530) 432-7359.

New Covid Workplace Rules

By Thais P. Alves, Esq.

Effective February 3, 2023, Cal OSHA issued its permanent General Industry Safety Orders regarding COVID-19, applicable to all workplaces. These rules are in effect until February 3, 2025 and require employers to institute COVID-19 prevention programs and other safety measures.

The new standards define "close contact" based on the size of an indoor workplace. A close contact occurs if an employee shares the indoor space of 400,000 cubic feet with someone with a COVID-19 for 15 minutes or more over 24 hours. For larger spaces, a close contact occurs when an employee is within six feet of someone with COVID-19 for that long. The rules require employers to notify employees and others who have had such close contacts with someone with COVID.

The rules require employers to develop policies for employees who have close contacts with those with COVID based on California Department of Public Health Guidance. Currently, for those with close contacts with someone with COVID but who do not have symptoms following that contact, the Guidance recommends: (i) no quarantine; (ii) testing within 3 to 5 days after the last exposure; (iii) wearing a mask around others for 10 days; and (iv) getting vaccinated or boosted.

The "infectious period" has also been updated. For symptomatic COVID-19 cases, an infectious period is from two days before the onset of symptoms until 24 hours pass with no fever, without fever-reducing medications, and symptoms have improved, and either (i) 10 days have passed after symptoms first appeared or (ii) five days have passed after symptoms first appeared, if testing negative on day five or later.

For asymptomatic COVID-19 cases, an infectious period is from two days before the positive specimen collection date through 10 days or—if testing negative on day five or later—five days after the date on which the specimen for the first positive COVID-19 test was collected.

Under the new rules, employers must still exclude from the workplace all with COVID-19 during their infectious periods and inform excluded employees of sick leave and similar benefits to which they may be entitled.

Employers should update COVID-19 prevention plans to reflect these new rules.

For more information, please contact Thais at TAlves@chwlaw.us or (626) 219-0481.

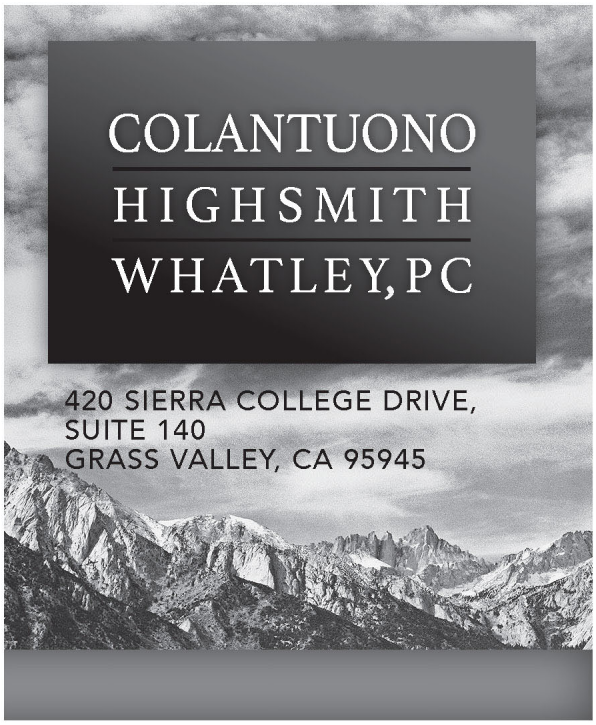
Impact Fees (cont.)

the City to refund the unexpended fees. The City has retained CHW to seek Supreme Court review.

In lieu fees had not previously been understood to be subject to AB 1600, because no one need pay them – they are in lieu of complying with zoning standards. Thus, local agencies have been inconsistent in making the AB 1600 one- and five-year findings as to in-lieu fees. In light of this decision, agencies are advised to: (i) require a recorded agreement, perhaps a development agreement, with a developer who chooses to pay a fee rather than comply with zoning standards by which it expressly waives application of AB 1600, (ii) comply with the finding requirements and spend funds promptly, which can be difficult for parking garages and affordable housing; (iii) return funds if a decision is made not to pursue the capital project for which fees are collected; and (iv) consider eliminating in-lieu fee ordinances in favor of enforcing zoning standards and rely on variances and development agreements to vary those standards if necessary.

Whether or not the Supreme Courts reviews it, the case is reason to renew focus on AB 1600 compliance, especially timely and well drafted findings.

For more information, contact Michael at MColantuono@chwlaw.us or (530) 432-7359.



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