



COLANTUONO
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Newsletter | Fall 2024

Update on Public Law New Statutes Defend Utility Rates

By Michael G. Colantuono, Esq.

In September, Governor Newsom signed three statutes to bolster defense of water and sewer rates. Action is needed to maximize benefits of one, but all three are good news for local governments.

First, AB 2257 (Wilson, D-Suisun City) makes two helpful changes to the Prop. 218 Omnibus Implementation Act. First, it authorizes agencies to require those who challenge new or increased fees, charges, or assessments for water or sewer services to exhaust administrative remedies before suit. That would require litigants to inform the agency, in writing, of the legal theories of suit along with a protest under Prop. 218's procedures for property-related fees or assessments. If they do not, they cannot sue. If they do, they can sue only on the issues an objector raised. The requirements for the local remedy (best clarified by ordinance or resolution) are many, but most restate existing law. New requirements are that an agency must state in hearing notices that an exhaustion requirement applies and must respond in writing to every substantive comment made in objection to a proposed rate, charge, or assessment. This will require some work and last-minute comments (common in CEQA disputes) will slow down ratemaking, but adopting a local policy to clarify and maximize the exhaustion requirement ought to be a priority for every local water or sewer provider.

AB 2257 also provides that Prop. 218 challenges to water and sewer charges, fees, and assessments are litigated on the agency's record of its ratemaking – expensive discovery of other information is not permitted on the merits of such disputes. This is what many public lawyers understood to be the law, but we have been litigating the point and not always winning it. So, this is a helpful change. In addition, the statute defines the contents of a ratemaking record, ending expensive disputes on that subject, too. These rules take effect in January without local action.

SB 1072 (Padilla, D-Chula Vista) states that refund remedies are not permitted in Proposition 218 challenges to property-related fees, including those for water, sewer and trash service. If a challenge to a fee determines that one class of customers or another, or all customers, have been overcharged, the necessary repayment is to be accomplished in the next ratemaking. This will prevent the multimillion-dollar refunds a few cases have awarded, threatening the finances of providers of vital utility services. Such refunds wipe out agency reserves, which have to be refunded by rate increases, so this is all a very expensive way of shifting money from ratepayers' left pocket to their right – generating defense costs and large fee awards to plaintiffs'

(continued on page 2)

Welcome Ajit Thind, Anchor of our O.C. Office!

CHW welcomes Ajit Thind, City Attorney of La Palma and anchor of our new Orange County office. Ajit previously served as Assistant City Attorney of Laguna Beach, Menifee, and San Clemente. He also represents the operator of the Uptown Whittier Community Benefit District .

He has advised a wide variety of clients on issues relating to open government, land use, civil rights, housing, water, environmental protection and labor/employment.

His current cases involve the role of an elected city attorney, disruption at city council meetings, and gaming regulation.

He anchors our new Irvine office, where Thais Alves, Carmen Brock, and Matt Slentz also practice.

Welcome Ajit! Welcome,
Orange County!

More (But Not Much More) Than “Zilch” Needed to Justify Fine and Penalty Amounts

By Holly O. Whatley, Esq.

The Ninth Circuit recently expanded on the application of the Eighth Amendment’s Excessive Fines Clause to municipal fines in *Pimentel v. City of Los Angeles (Pimentel II)*. That case follows the Court’s 2020 decision in *Pimentel I*, which found Los Angeles’s \$63 parking fine did not violate the Eighth Amendment’s Excessive Fines Clause. But *Pimentel I* reversed and remanded as to whether Los Angeles’s \$63 late fee, 100% of the fine and due if the fine is not paid within 21 days, violated the Eighth Amendment. On remand, the trial court granted summary judgment to Los Angeles, ruling the late penalty was not grossly disproportionate to the failure to pay timely. In *Pimentel II*, the Ninth Circuit reversed.

The opinion takes pains to limit its holding to its procedural context, grant of summary judgment, and whether the opposing party’s evidence created a triable issue of fact. The Court found a genuine factual dispute existed as to the City’s basis for the late fee. Plaintiff submitted declarations of two former City employees claiming the late fee was set only to raise revenue and not to induce timely payment. The Court of Appeals found the City provided no material evidence to rebut this claim and reversed. The decision provides valuable guidance for setting and, if necessary, defending fines and penalties.

First, the opinion reiterates *Pimentel I*’s holding that cities need not prove “strict proportionality” between a fine and the seriousness of the offense for which it is imposed. But, a local government cannot rely solely on the deference afforded such legislation. Here, the Court recognized the City’s legitimate interest in ensuring timely payment of parking tickets, but declined to find that deference, alone, required a conclusion the \$63 penalty was proportionate to the seriousness of failure to timely pay parking tickets.

Second, a fine’s revenue-raising purpose does not make it unconstitutional under the Eighth Amendment. The test is whether the fine “bears some relationship to the gravity of the offense that it is designed to punish.” That it may also generate revenue is irrelevant.

Third, a city’s evidentiary burden to justify a fine is low, but more than “zilch.” A city should demonstrate a fine is large enough to deter, but not “grossly out of proportion” to the offense. Because the Court found Los Angeles presented no evidence as to how or why it set its late fee, summary

judgment was inappropriate. But the Court noted the burden is a “low evidentiary bar” and “just requires the government to provide some evidence that the fine amount was not wholly arbitrary.”

When setting fines and penalties, local agencies should ensure the record justifies the amount and that it bears some relationship to the seriousness of the offense. Though the bar is low, an agency must still clear it to defeat an Eighth Amendment claim.

For more information, please contact Holly at HWhatley@chwlaw.us or 213.542.5704.

New Statutes Defend Utility Rates

(continued from page 1)

counsel, too. Orders that rates be corrected will be sufficient to protect ratepayers and to enforce Prop. 218. Indeed, this was how limits on revenue measures were enforced until the advent of class action claims in the last decade.

Finally, AB 1827 (Papan, D-San Mateo) encourages adoption of tiered water rates, which make water progressively more expensive as customers use more of it — to encourage conservation. The statute is declaratory of existing law and allows the use of peaking factors (the extent to which a customer’s or customer class’s peak use exceeds its average or typical use) to allocate costs to rate tiers — a common approach. It may make such rates more easily defended notwithstanding published losses for the City of San Juan Capistrano and the Otay Water District.

Good news for local ratemakers! Further developments are coming as the Supreme Court must act by year end on San Jose’s petition for review in a regulatory fee case under Prop. 26 and requests that the decision be depublished (making it authority only as to San Jose, binding no other agency). Stay tuned!

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

Remote Meeting Attendance for Disabled Elected Officials

By Aleks R. Giragosian, Esq.

The Ralph M. Brown Act governs the conduct of meetings of a local legislative body. In 1988, the Brown Act was first amended to authorize remote participation. In 2021, AB 361 amended the Brown Act to authorize remote participation during a state of emergency (like COVID). In 2022, AB 2449 amended the Brown Act to authorize remote participation for “just cause” or an “emergency circumstance.” “Just cause” includes “a need related to a physical or mental disability ... not otherwise accommodated by [the ADA].”

The Americans with Disabilities Act prohibits discrimination against disabled people. Under the ADA, a public agency must offer a “reasonable accommodation” as to its programs, services, and public facilities to a “qualified individual” with a disability.

In July 2024, the California Attorney General published Opinion No. 23-1002. The Opinion concludes members of a legislative body are “qualified individuals” under the ADA, and that the ADA may require remote participation consistent with the just cause exception as a “reasonable accommodation” for a disabled member of the legislative body.

AB 2449 limits the use of its just cause exception to no more than two meetings per calendar year. In September 2024, the Governor signed AB 2302, which takes effect January 1, 2025. AB 2302 places a combined limit on the number of times a member of a legislative body may use the just cause and emergency circumstances exceptions to:

- two meetings per year, if the body meets once a month or less frequently;
- five meetings per year, if it meets twice a month; and
- seven meetings per year, if it meets three or more times a month.

Unlike the Brown Act, the ADA does not limit the number of times a member of a legislative body may participate remotely. Because federal law preempts contrary state law, the Brown Act’s limits under AB 2449 and AB 2302 do not apply to a disabled member of a legislative body. The Attorney General’s Opinion notes this distinction, stating, “The most logical explanation ... is that the Legislature presupposed that a member may already participate remotely for an unlimited number of sessions as an ADA accommodation.”

Therefore, if a member of a local legislative body demonstrates a disability protected by the ADA, the agency can follow the requirements of the just cause exception and waive any caps on frequency under the Brown Act.

Note that the Opinion does not allow remote participation in public meetings by staff or members of the public. The Opinion will likely raise questions as to disabled members of staff or the public, however, and public agencies should be prepared to consult counsel if a request is made by one who makes an adequate showing of disability preventing him or her from attending a meeting in person.

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

We’ve Got Webinars!

CH&W offers webinars on a variety of public law topics including districting and redistricting, this year’s 32 new housing laws; personnel, public works, and management issues under COVID-19; and police personnel records. Current topics are listed on our website under “Resources.” Our webinars provide advice and Q&A for public agency counsel and staff in an attorney-client-privileged setting for \$1,500 per agency.

To schedule a webinar, contact Bill Weech at BWeech@chwlaw.us or (213) 542-5700.



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