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C&L Newsletter

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Federally Recognized Tribes Can Join JPAs

By Brian R. Guth

On September 6, 2011, Governor Brown signed AB 307 (Nestande, R-Palm Desert), which amends state law governing the creation of joint powers authorities ("JPAs"). The statute authorizes federally recognized Indian tribes to join JPAs, but limits the authority of a JPA in which a tribe is a member to issue bonds. The bill makes it much easier for tribes and public agencies to work together through JPAs and may be helpful to local governments which wish to formalize service relationships with tribal entities, such as municipal services agreements for tribal casinos.

JPAs are created by agreement of federal, state, and local public agencies to collectively exercise powers they have in common, often delivery of a service. They address public needs like financing public facilities, forming self-insurance risk pools, regional or cooperative regulation, and joint service delivery. The Marks-Roos Local Bond Pooling Act of 1985 (a chapter of the Joint Exercise of Powers Act) authorizes local governments, via JPAs, to combine several small bond issues in one larger offering to lower their issuance costs. Such pooled bonds do not require voter approval, and instead are approved by resolution of a joint powers authority because they typically qualify for such exceptions to voter approval requirements as those for utility revenue bonds, certificates of participation in financing leases, and the like.

The law which predated AB 307 authorizes two or more public agencies, as the statute defines that term, to enter into an agreement to exercise common powers. The entity formed by this agreement is often called a joint powers authority or "JPA." Federally recognized Indian tribes were not included among the "public agencies" eligible to participate in JPAs under the pre-AB 307 definition. As a result, tribes could not join JPAs absent special legislation. In the past, only three tribes have been authorized to join a joint powers authority by such legislation. Legislation to authorize several others to join one or another a JPA was vetoed or failed to pass at various times in recent years. AB 307 generalizes this rule and makes it easier for tribes to join JPAs, eliminating the need for special legislation.

AB 307's first change is to broaden the statutory definition of "public agency" to include federally recognized Indian tribes. This change grants tribes the authority to join and participate in JPAs without the need for special legislation.

AB 307's also prohibits JPAs that include federally recognized Indian tribes from issuing bonds under the Marks-Roos Local Bond Pooling Act of 1985 unless: (1) the public improvements to be funded by the bonds will be owned and maintained by the JPA or one or more of its public-agency members, and (2) the revenue pledged to repay the bonds derive from the JPA, one or more of its public-agency members, or "any governmental or public fund or account, the proceeds of which may be used for that purpose."

The term "governmental or public fund or account" is defined to exclude revenues distributed through the Indian Gaming Special Distribution Fund, which provides state funding for local governments affected by trial gaming, such as those which provide roads and law enforcement services to casino visitors. Thus, Special Distribution Fund grants may not secure pooled bonds.

AB 307 does not affect existing JPAs in which federally recognized Indian tribes are currently members under earlier, special legislation.

AB 307 creates opportunities for tribes and local governments to jointly exercise common powers and may provide a useful vehicle for municipal service agreements for services to tribes, their lands, and residents and guests of those lands.

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For more information on Indian law topics, contact Brian at 213/542-5717 or BGuth@CLLAW.US.

Code Enforcement & the 4th Amendment

By Michael R. Cobden

The Fourth Amendment to the U.S. Constitution protects Americans from "unreasonable" searches and seizures and anyone who has ever watched "Law & Order" or any of a number of other television crime shows is familiar with its application in the criminal context. However, the Fourth Amendment applies equally to inspections of private property for purposes of administrative code enforcement. The San Francisco Court of Appeal recently addressed this issue among a variety of other legal challenges a landlords' association raised in *Rental Housing Owners Association of Southern Alameda County v. City of Hayward*. The opinion addressed the authority of municipalities to authorize warrantless inspections of occupied residential units for code enforcement purposes, and the degree to which a landlord can be compelled to assist a city in conducting such inspections.

According to the Court, Hayward's ordinance authorized inspections of all rental housing units in specified areas of the city with the consent of a landlord or a tenant. The landlords association challenged the ordinance on several grounds, including a claimed violation of the Fourth Amendment by an ordinance provision allowing a landlord to consent to the search of an occupied rental unit. In 2009, the trial court granted the petition for writ of mandate, and ordered the City to revise its ordinance.

The City amended the ordinance to require consent from **both** landlord and tenant, and further required a landlord to make a "good faith effort to obtain the consent of the tenants" for inspections. The landlords objected to the amended ordinance, arguing the City compelled landlords to serve as government agents and penalized them for failing to obtain a tenant's consent to an inspection. The trial court agreed, finding the ordinance violated substantive due process by authorizing fees and penalties against landlords for a tenant's refusal to allow an inspection. The Court concluded, however, that the Fourth Amendment was not violated because tenant consent or a warrant issued by a judge was required for an inspection. The City appealed, and the landlords association renewed its Fourth Amendment objections.

The Court of Appeal noted that requiring landlords to assist City officials in obtaining tenants' consent to inspections did not make a landlord an agent of the City because California law does not recognize an agency relationship absent mutual consent. The Court also agreed with the trial court's analysis of the Fourth Amendment issue: an inspection performed with the consent of the tenant is not unreasonable. Much of the opinion focused on the trial court's erroneous conclusion the ordinance authorized the City to fine a landlord for the tenant's refusal to allow inspections; the text of the ordinance did not support that conclusion and the City argued that it did not enforce the ordinance in that way.

The case is an interesting reminder that the Fourth Amendment applies to any search of private property by the government, including building inspections. The U.S. Supreme Court has repeatedly reaffirmed that the amendment's protections are strongest in a person's home, and warrantless searches are presumed to be unreasonable and therefore unconstitutional.

The case also reminds local officials that they should never enter private property without consent, a warrant, or a clearly established legal exception — such as exigent circumstances as when police enter property in hot pursuit of a criminal, in response to calls for help, or in response to a 911 call. In this setting, like others involving law enforcement, when in doubt, it is best to seek legal advice.

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For more information on this topic, contact Michael at 530/798-2416 or MCobden@CLLAW.US.

Welcome Grass Valley and Calaveras LAFCo!

Colantuono & Levin added two new clients to its northern California practice and has awards and media attention to report. The Grass Valley City Council recently selected Michael Colantuono as its new City Attorney. Grass Valley is an historic mining town on California's scenic Highway 49, with a population of over 12,000. It is the economic center of Western Nevada County, population 89,000. Michael notes it is a pleasure to serve his "home town," as Grass Valley is just 10 miles from our Penn Valley office.

Calaveras LAFCo selected Michael as its new General Counsel. Calaveras was famously memorialized by Mark Twain's "The Celebrated Jumping Frog of Calaveras County," retelling a tale he first heard in the Angel Hotel in 1865. C&L now serves as general counsel for Yuba and Calaveras LAFCos and as special counsel to Nevada, San Diego, and Yolo LAFCOs.

Michael was named 2011 Attorney of the Year by the Santa Barbara County Chapter of the California Special Districts Association. He was recognized for his advice to Goleta Water District in its recent, contested water-rate increase under Prop. 218. He has also been named "A Top 25 Municipal Lawyer in California" by the **Los Angeles & San Francisco Daily Journal**, the state's leading legal newspaper.

On November 18th, the **Daily Journal** featured Colantuono & Levin in its "Small Firm Focus," describing our work for cities, counties and special districts and our public finance expertise.

A good fall season for C&L! Our thanks to all our clients who made these successes possible!

Public Finance Tied Up in Court

By Michael G. Colantuono

Legal developments regarding local government revenues await direction from the courts in every area of the law – taxes, assessments, and fees.

As to **taxes**, the California Supreme Court's recent decision in *Ardon v. City of Los Angeles*, in which Sandi Levin of Colantuono & Levin represented the City, opened the door to class action challenges to local government revenue measures by concluding that the Government Claims Act does not bar such claims. Two companion cases to *Ardon* raise the next important question: can a local government prevent a class refund action challenge to a fee or tax by local ordinance? These are *McWilliams v. City of Long Beach*, which Michael Colantuono and Tiana Murillo of Colantuono & Levin are handing in the Los Angeles Court of Appeal, and *Granados v. County of Los Angeles* pending in that same court. All three cases involved identical complaints, the same plaintiffs' lawyers and the same arguments that phone taxes collected under non-voter-approved ordinances that eliminated references to the Federal Excise Tax on Telephony (FET) ought to be refunded under Prop. 218.

The Court of Appeal put *McWilliams* and *Granados* on hold pending the outcome of *Ardon* and, once the Supreme Court decided it, ordered supplemental briefing on the impact of that decision. All three cases appealed trial court decisions to reject class action allegations. *Ardon* is now proceeding in trial court litigation on whether the proposed class meets procedural requirements for class actions. *McWilliams* and *Granados* should determine whether local ordinances can bar class actions. If so, further appeals to the California Supreme Court may be likely and this question may not be fully resolved for another year or two.

In the meantime, local governments are advised to ensure they have strong claiming ordinances in place to prohibit class and representative claims for refunds of fees and taxes. A model ordinance appears at WWW.CLLAW.US under "papers." Local governments which tax telephony which have not obtained voter approval of those taxes since 2006 should consult legal counsel about the benefits of doing so.

The big news in **assessment** law is the California Supreme Court's decision to grant review of *West Point Fire Protection District v. Concerned Citizens for Responsible Government*. The Sacramento Court of Appeal found the District's engineer's report failed to demonstrate its services specially benefited property in a way meaningfully different from the benefit provided to the general public. The appellate court also found the very simple, two-rate assessment formula used there inadequate to make assessments proportionate to the special benefit conferred on each property. The Court's conclusions were less troubling than its language, which questioned **all** service assessments – not just those unsupported by strong engineers' reports. Michael Colantuono wrote an *amicus* brief on behalf of four local government associations seeking depublication of the appellate decision. The Supreme Court's grant of review has the same effect and Michael will file an *amicus* brief in the case supporting the fire district on behalf of five local government associations. For now, the troubling *West Point* decision of the Court of Appeal is off the books, but much will turn on the Supreme Court's new decision of the case in 2012 or 2013.

In the meantime, local governments which rely on assessment funding should have their engineers' reports reviewed by lawyers conversant with current developments in assessment law to ensure their assessments can withstand the new, more demanding judicial review required by Prop. 218 under the *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority* decision of 2008.

Finally, two interesting cases involving **fees** are pending in trial courts. Our defense of Redding's payment of in lieu of taxes (PILOT) from its electric utility to its general fund is under submission to Judge William Gallagher in Shasta County. The challengers argue the City's December 2010 rate increase violates Prop. 26, adopted in November 2010 to convert some fees to taxes requiring voter approval, because the City continues to fund the pre-existing PILOT. Our defense of the City relies on the facts that Prop. 26 is retroactive as to state fees, but not local fees, and that Redding's PILOT pre-dates Prop. 26.

Our defense of a groundwater augmentation charge imposed by the Pajaro Valley Water Management Agency is under submission in Santa Cruz, although Judge Timothy Volkmann has tentatively ruled for the Agency. This case challenges the District's augmentation and groundwater management charges under Propositions 13, 62, and 218. Our defense of the Agency relies on a 2008 stipulated judgment barring most of these claims and our demonstration the Agency complied with the hearing and election requirements of Prop. 218 for property related fees. Two key Prop. 218 questions in the case are whether groundwater charges are "water" fees exempt from Prop. 218's election requirement and, if not, whether the District could weight election ballots in proportion to the amount each property owner would pay.

Both cases are likely to be appealed to the Courts of Appeal (in Sacramento and San Jose, respectively) regardless of their outcomes and to produce precedent to guide future fee decisions in 2012 or 2013.

In the meantime, local governments increasing existing fees or adopting new fees should consult with legal counsel to ensure their fees qualify for one of the seven exemptions from Prop. 26's new definition of "taxes" requiring voter approval and, if Prop. 218 applies, that its requirements are met.

The law is developing quickly on these issues, so stay tuned. We'll keep you posted!

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

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