

Cell Tower Aesthetics Fair Game

By Scott E. Porter

On October 14, 2009, the 9th Circuit decided *Sprint PCS Assets LLC v. City of Palos Verdes Estates*, deciding that California law does not prohibit cities and counties from denying approvals for proposed cell phone antenna in rights-of-way based upon aesthetic concerns.

Sprint applied to Palos Verdes Estates, a low-density, residential community on the Los Angeles County coast, to upgrade eight existing wireless towers in city rights-of-way. The city denied two on aesthetic grounds. Sprint sued, claiming violations of state and federal law.

Sprint argued California's Public Utilities Code Sections 7901 - 7901.1 bar cities and counties from regulating telephone infrastructure in rights-of-way based on aesthetics. After an unsuccessful request that the California Supreme Court decide the issue, the 9th Circuit concluded neither section limits local authority to regulate aesthetics pursuant to their constitutional police power. (The "police power" is the power of government to regulate to protect public health, safety and general welfare.) Section 7901 does not prevent aesthetic regulation because, under its terms, cities and counties can regulate wireless telephone facilities that "incommode" the use of the road or highway, and unaesthetic facilities can do so. Nor does Section 7901.1 prohibit such

regulation because cities can regulate the "manner" of a telephone corporation's access to a right-of-way under that section, and this can include installation in an aesthetic or unaesthetic manner.

Sprint also argued the City had violated a provision of the Federal Telecommunications Act of 1996, which states a local governmental "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." The court concluded there was insufficient evidence in the record that there was a "significant gap" in coverage. Sprint had merely alleged that if the facility were installed, there would be no gap after the installation – logically, this does not prove that a gap would have existed absent the installation. Moreover, there was insufficient evidence in the record before the 9th Circuit that any gap was "significant."

The 9th Circuit confirmed what most municipal attorneys have long believed: California cities and counties can regulate the aesthetics of wireless telephone facilities in public rights-of-way so long as their regulations do not violate federal law by "effectively prohibiting" the provision of personal wireless services.

Because this decision was issued by a federal court, it is not binding on California courts. That stated, given the California Supreme Court's refusal to rule on this issue, and that the opinion is well reasoned, it

should be very persuasive in California courts.

Given the persistence with which the telecommunications industry pursues its objectives, however, litigation and efforts to seek legislation will continue – such as proposals before the Federal Communications Commission to set a hard time limit on local consideration of cell tower proposals (a so-called "shot-clock" rule).

In this area of the law, it is always necessary to "stay tuned"!

♦♦♦

For more information on this topic, contact Scott at 213/542-5708 or SPorter@CLLAW.US.

We Moved!

Colantuono & Levin moved its Los Angeles office on August 1st to:

Colantuono & Levin, P.C.
300 South Grand Avenue, Suite 2700
Los Angeles, CA 90071-3137

(213) 542-5700 (voice)
(213) 542-5710 (fax)

Our Penn Valley address and phone remain unchanged at:

Colantuono & Levin, P.C.
11406 Pleasant Valley Road
Penn Valley, CA 95946-9024

(530) 432-7357 (voice)
(530) 432-7356 (fax)

Annexation Policy Triggers Civil Rights Liability

By Yvette Abich Garcia

The 9th Circuit recently ruled that an organization representing residents of an unincorporated Latino neighborhood can sue the City of Modesto and Stanislaus County for discrimination in the provision of municipal services under the federal Fair Housing Act (FHA) in *Committee Concerning Community Improvement (CCCI) v. City of Modesto* for failing to annex the community into the City, where a higher level of municipal services was alleged to be available.

CCCI alleged unincorporated neighborhoods within the City's sphere of influence were underserved "islands" with inadequate street lighting, sidewalk and street maintenance, refuse removal and police, fire and ambulance services. It further alleged that City and County policies facilitated annexation of non-Latino communities to the City, but excluded heavily Latino neighborhoods and that these policies violated federal civil rights laws. In particular, the City and County had a standard property-tax sharing agreement that applied to most areas in the City's sphere of influence, but specifically excluded the neighborhoods in question.

CCCI sued under a FHA provision which prohibits "failing or delaying maintenance or repairs of sale or rental dwellings" or "limiting the use or privileges, services, or facilities associated with the dwelling" because of discrimination.

Judge O'Neill of the U.S. District Court in Fresno dismissed CCCI's claims, holding that the FHA provision is limited to discrimination in the provision of services in connection with the acquisition of housing

and does not reach the provision of services to homeowners and renters after they acquire housing. Reversing, well-respected federal Judge Louis Pollak of Philadelphia, writing for himself and 9th Circuit Judges Mary Schroeder and Stephen Reinhardt, held that the FHA provides protection to homeowners and renters in their right to quiet enjoyment of their dwellings even after housing has been acquired, as well as against discrimination in the maintenance, repair and necessary services associated with occupancy of a dwelling. The 9th Circuit however, only reinstated plaintiff's FHA claim as it relates to the timely delivery of law enforcement services to the plaintiff's neighborhoods, finding that other claims under the FHA were barred by prior agreements between the parties or were not supported by the evidence before to the Court.

The case now returns to Judge O'Neill in Fresno to see if the CCCI is able to prove its claims against Modesto and Stanislaus County. Although the case has been to the appellate court and back, it is still at an early stage and evidence has yet to be developed to prove or disprove the allegations of the complaint.

Unincorporated areas developed to lower standards of public works infrastructure than prevail in nearby cities are common throughout California and, much attention has been given to the persistence of these areas as unincorporated islands. In addition to litigation of the type represented by the Modesto case, two bills are pending in the State Legislature to make it easier for unincorporated, underserved areas to annex to neighboring cities:

Assembly Bill 853 (Arambula, I-Fresno County) would require a

County to initiate annexation to a city of an unincorporated community near or surrounded by the city, if 25% of the registered voters or landowners in the area petition the County to do so and the area:

- (1) meets the definition of an "island" (is surrounded by the city, and county boundaries or the Pacific Ocean) or an "unincorporated fringe community" (is within the City's sphere) that lacks wastewater, drinking water services, storm drainage, paved streets, sidewalks or streetlights or there exists a serious infrastructure-related health hazard; and,
- (2) constitutes a "disadvantaged community."

Senate Bill 196 (Florez, D-Fresno & Kern Counties) would require, among other things, that cities and counties receiving certain state grants (including community development block grants, safe routes to schools grants, and water pollution small community grants) to identify in their general plans disadvantaged islands and fringe communities and analyze the feasibility of annexing them.

Both bills have drawn substantial comments from the League of California Cities, the California State Association of Counties and the California Association of LAFCOs (CALAFCO). Whether or not these bills move forward, the Modesto suit suggests LAFCOs, cities and counties with underserved County areas should consider whether and how to address the social concerns expressed by this litigation and legislation.

♦♦♦

For more information on this topic, contact Yvette at 213/542-5711 or YAbich@CLLAW.US.

Appellate Courts Ponder Tax and Fee Issues

By Michael G. Colantuono

The California Supreme Court has taken two recent actions affecting local government finance. First, the Court granted review of *Ardon v. City of Los Angeles*, a class action challenge to a phone tax. It has long been the rule that those who challenge local government taxes and fees could not seek a class action remedy and that only those who filed written claims could sue for a refund. Last year, however, the Los Angeles Court of Appeal held otherwise in *County of LA v. Superior Court (Oronoz)*. That case challenged a utility users tax LA County adopted without voter approval in 1991, when Prop. 62's requirement of voter approval of local general taxes was unenforceable. (The County has since obtained voter approval of the tax and settled the case for some \$172 million.) In *Ardon*, however, Sandi Levin of Colantuono & Levin, along with co-counsel for the City, persuaded the Court of Appeal to abandon *Oronoz* and restore the rule against class action challenges to local revenue measures. The Justice who changed her position urged the Supreme Court to take the case, which it did. It is being briefed and will not be decided before late 2010.

The Supreme Court responded to requests for depublication of *Paland v. Brooktrails Township CSD* from taxpayer groups by granting review and remanding the case for reconsideration by the San Francisco Court of Appeal. The case upheld a water fee challenged as violating Proposition 218's requirement that fees for the availability of a service not actually used be approved as assessments. The plaintiff in the case failed to pay his bill, leading the CSD to lock his meter box, but not to stop billing him

for minimum account charges (because his account was still open). Public lawyers welcomed the Court of Appeal decision, especially for its approval of minimum utility account charges. The League of California Cities is considering filing an *amicus curiae* ("friend of the court") brief in the Court of Appeal.

Argument has been set in *Priceline.com v. Anaheim*, one of several suits arising from Anaheim's effort to compel online resellers of hotel rooms, like Priceline.com, Orbitz, Expedia, etc. to pay bed taxes on the full amount they charge for hotel stays. Anaheim and other cities allege the resellers charge a "fee" to their customers in the amount of the tax on the difference between what resellers pay hotels (which pay bed tax on that amount) and what the resellers charge their customers, and keep this fee rather than paying bed tax as they should. This case involves the resellers' efforts to set aside Anaheim's administrative determination of the tax owed without first paying the tax under protest under the "pay first, litigate later" rule. The trial court denied the City's demurrer seeking dismissal of the case and the Los Angeles Court of Appeal denied discretionary review (by writ of mandate), but the Supreme Court granted review and remanded the case to the Court of Appeal for briefing and argument. Argument is set for October 19th and decision is due by mid-January.

These cases will bring important new developments in public finance law. As always, we'll keep you posted!

♦♦♦

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

C&L Welcomes Yana Welinder

C&L welcomes Yana Welinder to our team. She will advise our clients on constitutional law, public law, land use, the California Environmental Quality Act (CEQA), election law, conflicts of interest, and public utilities.

Prior to joining the firm, Yana litigated at a major real estate and land use firm. She has experience in all aspects of general commercial litigation, including pleading and motion drafting, oral argument, discovery practice, settlement negotiation, and mediation.

Yana obtained her first law degree from the London School of Economics (LL.B. 2007, *with honors*) and clerked for a number of prominent barristers in London. She successfully competed in London School of Economics Moot Court, represented the university in British Parliamentary Debate, and published articles on the English barrister profession and on copyright regulation in the **LSESU Law Review**. Yana obtained a second law degree from University of Southern California, Gould School of Law (J.D. 2008), where she was part of the highly selective dual degree program and member of the Jessup Moot Court Team.

Yana can be reached at;

YWelinder@CLLAW.US and
(213) 542-5722.

Welcome Yana!

Colantuono & Levin, PC
300 S Grand Avenue, Ste 2700
Los Angeles, CA 90071-3137

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE
PAID
MAIL MASTERS

Are you on our list? To subscribe to our newsletter or to update your information, complete the form below and fax it to 213/542-5710. You can also call Marina Song at 213/542-5715 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

The contents of this newsletter do not constitute legal advice. You should seek the opinion of qualified counsel regarding your specific situation before acting on the information provided here.

Copyright © 2009 Colantuono & Levin, PC. All rights reserved.
