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OPINION NUMBER 2013-1

DATE: April 26, 2013

SUBJECT: Potential Conflict Between AB 3030 and Proposition 218

REQUESTED BY: Roger Bailey, Director of Public Utilities

PREPARED BY: City Attorney

INTRODUCTION

The Public Utilities Department (PUD) may be seeking City Council approval to raise water rates to offset the next annual San Diego County Water Authority (CWA) pass-through wholesale water rate increase. As part of this request, PUD may seek City Council approval to automatically pass through these rate increases for the next five years, allowable under recent state legislation.

Assembly Bill 3030, codified as Government Code section 53756 (AB 3030), was enacted in 2008 and became effective on January 1, 2009. AB 3030 allows a public utility to authorize automatic pass-through rate increases from water wholesalers for up to five years with only one opportunity for a public notice and protest. AB 3030 does not require any "cap" on the subsequent, multi-year increases. This raises a question whether AB 3030 could conflict with Proposition 218, which requires public notice of the calculated amount of the proposed increase.

Research on the actions of the other water agencies in San Diego County in relation to AB 3030 has shown that of the fourteen agencies that responded to a request for information, seven have taken advantage of the full five year provision without any cap; two passed the provision for two years, one of which imposed a cap of 10% per year; and six agencies, in addition to San Diego, chose not to implement AB 3030's provisions.

QUESTION PRESENTED

Does AB 3030's allowance of a five year schedule for uncapped wholesale water pass-through rate increases conflict with Proposition 218's requirement that the amount of the fee be calculated and described in the public notice?

SHORT ANSWER

Possibly. There are no published court opinions or trial court decisions addressing this question. Because AB 3030 does not provide for a cap on the amount of the pass-through rate increases over the five year period, it arguably violates Proposition 218's requirement that the amount of any proposed rate increase be calculated and described in the public notice. We believe a public notice containing a "not to exceed" cap on pass-through water rate increases over the five year period would be more likely to survive a legal challenge.

ANALYSIS

Proposition 218, entitled the "Right to Vote on Taxes Act," stated the intent of the statewide initiative: "The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval [or protest] of tax [or rate] increases. . . . This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (See *Historical Notes*, Cal. Const. art. XIII C, § 1, *Apartment Assn. of Los Angeles County Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 838 (2001).

As it relates to the procedures for increasing water rates, the plain language of Proposition 218, codified as California Constitution, Article XIII D section 6 (a)(1) states:

> SEC. 6. Property Related Fees and Charges. (a) Procedures for New or Increased Fees and Charges. *An agency shall follow the procedures pursuant to this section* in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:
>
> (1) The parcels upon which a fee or charge is proposed for imposition shall be identified**.** *The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of* the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, *the amount of the fee or charge proposed to be imposed* upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge. (Emphasis added).

Under Proposition 218, a separate public notice and protest is required each time the City seeks a water rate increase. The City's past notices all include the numerical amount of the rate increase.

Before the first provisions of Proposition 218 became effective on July 1, 1997, the Legislature adopted the Proposition 218 Omnibus Implementation Act (the Omnibus Act). (Gov't Code, §§ 53750–53753.5.) The Omnibus Act was specifically intended to clarify any of Proposition 218's inconsistencies with preexisting statutes affecting local government finance. (Ibid.) *Barratt American, Inc. v. City of San Diego*, 117 Cal. App. 4th 809, 816 (2004). Since that time, the state legislature has periodically enacted new statutes amending the Omnibus Act. The subject of this opinion is one such addition. AB 3030 allows a public utility to authorize automatic pass-through rate increases from water wholesalers, for up to five years, with only one opportunity for a public notice and protest. AB 3030 states:

> *An agency providing water, wastewater, sewer, or refuse collection service may adopt a schedule of fees or charges authorizing automatic adjustments that pass through increases in wholesale charges for water*, sewage treatment, or wastewater treatment or adjustments for inflation, if it complies with all of the following:
>
> (a) It adopts the schedule of fees or charges for a property-related service *for a period not to exceed five years* pursuant to Section 53755.
>
> (b) The schedule of fees or charges may include a schedule of adjustments, including a clearly defined formula for adjusting for inflation. Any inflation adjustment to a fee or charge for a property-related service shall not exceed the cost of providing that service.
>
> *(c) The schedule of fees or charges for an agency that purchases wholesale water, sewage treatment, or wastewater treatment from a public agency may provide for automatic adjustments that pass through the adopted increases or decreases in the wholesale charges for water, sewage treatment, or wastewater treatment established by the other agency.*
>
> (d) Notice of any adjustment pursuant to the schedule shall be given pursuant to subdivision (a) of Section 53755, not less than 30 days before the effective date of the adjustment. (Emphasis added).

Cal. Gov't Code § 53756.

AB 3030 arguably takes away from one of the main substantive requirements of Proposition 218: namely, the obligation for the agency to calculate the amount of the proposed fee and to provide notice of the amount of the proposed fee.

The California Constitution prohibits the Legislature from amending an initiative measure like Proposition 218 unless the initiative measure itself authorizes legislative amendment. (Cal. Const., art. II, § 10, subd. (c); *People v. Cooper*, 27 Cal. 4th 38, 44 (2002). Proposition 218 contains no such authorization. Although no trial court or appellate decision has addressed the issue, an argument could be made that AB 3030 amounts to an impermissible amendment of the substantive requirements of Proposition 218:

> "An amendment is '. . . any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form, . . .' [Citation.] A statute which adds to or takes away from an existing statute is considered an amendment."

Franchise Tax Board v. Cory, 80 Cal. App. 3d 772, 776 (1978); *Knight v. Superior Court* 128 Cal. App. 4th 14, 22 (2005).

It is important to note that not every statutory change amounts to an amendment of a constitutional initiative. As the California State Supreme Court stated in *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 829-830 (2008) "'[L]egislative enactments related to the subject of an initiative statute may be allowed' when they involve a 'related but distinct area' [citation] or relate to a subject of the initiative that the initiative 'does not specifically authorize or prohibit.'" *People v. Hochanadel*, 176 Cal. App. 4th 997, 1011-13 (2009). In *NORML*, the Court held that a statute requiring a medical marijuana ID card did not "amend" Proposition 216, the "Compassionate Use Act". As the Compassionate Use Act was silent on the issue of medical marijuana ID cards, so requiring them was not considered to be an impermissible amendment.

Typically, wholesale water agencies such as CWA raise their rates for the cost for wholesale water annually. There is no way for the City to know in advance the amount of the rate increases over the next five years. Therefore, it would not be possible to strictly comply with Proposition 218's requirement that the amount of the fee be calculated and that the amount of the proposed fee be included in the public notice. As a result, the City prospectively adopting and automatically passing through CWA increases, whatever they may be, could violate Prop. 218's requirement of stating the amount of the increase in the public notice.

The focus of Proposition 218 is tax and fee relief. Proposition 218 declares that the purpose of the initiative is to prevent local governments from "frustrating the purposes of voter approval for tax increases" as set forth in Proposition 13. Thus, Article XIIID, section 6(a) provides that a fee may not be imposed or increased if protests against the imposition or increase are submitted by "a majority of the owners of the affected property." This purpose may be frustrated if the public is given

notice of rate increases of an unknown amount, depriving them of a meaningful opportunity to protest.

However, we believe that it is possible to utilize the provisions of AB 3030 and mitigate the possibilityof a successful legal challenge by placing a "cap" on the amount of the rate increase. The cap could be a maximum annual amount or a maximum amount over the five year period. In this way, the City can indicate the maximum amount of the rate increase being sought and give the customers a more meaningful opportunity to protest that amount.

CONCLUSION

Although courts have been silent on this aspect of AB 3030 to date, there is a possibility that AB 3030's lack of a cap on pass-through water rates violates the substantive provisions in Proposition 218; *i.e.*, that the "amount" was not calculated or contained in the public notice because it was unknown at the time of the public hearing on the rate increase. This issue can be mitigated by placing a defined, maximum cap on the amount water rate increases being authorized.

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