

PAUL E. COOPER
EXECUTIVE ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

RAYMOND C. PALMUCCI
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

JAN I. GOLDSMITH

CITY ATTORNEY

CIVIL ADVISORY DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: October 26, 2015

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Role of the City Council on Considering Water Rate Increases.

INTRODUCTION

On September 15, 2015, the Public Utilities Department (Department) presented item 331 to the City Council on proposed Water Rate Increases. While not required under Proposition 218, since 2007 the Department has regularly brought proposed water rate increases to the City Council before mailing notices to customers to allow for public input, City Council changes to the notice or rate structure, and to approve or request further analysis in the Cost of Service Study (COSS). The Department has treated this hearing as the City Council's opportunity to make changes prior to mailing notices to customers at a cost of roughly \$250,000.00. Without this input, the City Council would be foreclosed from making any substantive changes to the rate proposal at the Proposition 218 hearing – in this case, on November 17, 2015, unless the noticing process began anew.¹

The City Council declined to take any action at the September 15, 2015 meeting. The Department considered the comments made by City Council members and mailed notices to customers announcing the November 17, 2015 public hearing to consider the proposed water rate increases. This hearing is required by Proposition 218. The question has been asked what, if any, City Council action is necessary for the City to implement the proposed water rate increases.

QUESTION PRESENTED

What actions, if any, are required of the City Council for the proposed water rate increases to go into effect?

¹ *City of Palmdale v. Palmdale Water Dist.* 198 Cal. App. 4th 926, 937 (2011) (holding that a water district failed to carry its Proposition 218 burden to justify disparate treatment of tiered customer classes without a corresponding showing in the record).

SHORT ANSWER

The City Council must first determine whether a majority of customers have submitted written protests objecting to the proposed water rate increases. If there is a majority protest, the City Council cannot approve the proposed rate increases. If there is not a majority protest, the Municipal Code requires City Council approval by resolution to implement water rate increases. The City cannot implement the proposed water rate increases without City Council approval.

ANALYSIS

Proposition 218 sets forth the procedures a local agency must follow for any new or increased property-related fees or charges.²), “[A]gency’ means any local government as defined in subdivision (b) of section 1 of article XIII C of the California Constitution.” Cal. Gov’t. Code § 53750(a). Under that provision, “local government” includes charter cities. *Id.* These procedures include a public hearing held not less than 45 days after mailing notices of the proposed fee or charge. Cal. Const. art. XIII D, § 6(a)(2). Customers may submit written protests opposing the proposed fee or charge. *Id.*

At the public hearing, the protests against the proposed fee or charge must be counted. If written protests against the proposed fee or charge are presented by a majority of customers the City cannot impose the fee or charge. *Id.*; Cal. Gov’t Code § 53755(b). A majority protest is determined based on protests from all customers, not by customer class. *Morgan v. Imperial Irrigation Dist.*, 223 Cal. App. 4th 892, 897 (2014) [The failure to implement a rate increase for one customer class could call into question the water rates for other customer classes.] If there is not a majority protest, the City Council may consider the proposed rate increases.

Proposition 218 does not specify the manner in which a public agency must approve proposed water rate increases. State legislation requiring local utility rates to be approved by ordinance³ is inapplicable to the City because the manner in which a city provides water and wastewater service to city residents is a municipal affair. *See Cramer v. City of San Diego*, 164 Cal. App. 2d 168 (1958); 45 Cal. Jur. 3d, *Municipalities* § 199 (2008). The Municipal Code requires water rates to be approved by City Council by resolution. San Diego Municipal Code (SDMC) § 67.0502.

The City cannot implement water rate increases without City Council approval. All legislative power of the City is vested in the City Council. San Diego Charter § 11. The power to collect and appropriate revenue has long been considered a legislative power. *Myers v. English*, 9 Cal. 341, 349 (1858); *Carmel Valley Fire Protection Dist. v. State of California*, 25 Cal. 4th 287, 299 (2001). The City Charter prohibits the City Council from delegating its legislative power to anyone else:

The same prohibition against delegation of the legislative power which is imposed on the State Legislature by Article XI, Section 11a of the Constitution of the State of California shall apply to the City Council of The City of San Diego, *so that its members shall not delegate legislative power or responsibility which they were*

² Domestic water delivery [base, volumetric and recycled] through a pipeline is a property-related water service within the meaning of Proposition 218. *Bighorn–Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 217 (2006).

³ Cal. Health & Safety Code § 5471.

elected to exercise in the adoption of any ordinance or resolution which raises or spends public monies, including but not limited to the City's annual budget ordinance or any part thereof, and the annual ordinance setting compensation for City employees, or any ordinance or resolution setting public policy.

San Diego Charter § 11.1 (*emphasis added*). If the City were to implement the proposed water rate increases without City Council approval, it would amount to a delegation of legislative power to the Mayor and City staff in violation of the City Charter. *See* City Att'y MOL No. 2015-13 (Aug. 24, 2015). Implementation without Council approval would also violate the San Diego Municipal Code. The City Council must approve the appropriate level of funding for water service. *See* City Att'y Report 2011-10 (Feb. 23, 2011); *County of Butte v. Superior Court*, 176 Cal. App. 3d 693, 699 (1985). If the Council fails to affirmatively approve the rates by a majority vote, then the rates will not and cannot go into effect.

CONCLUSION

If a majority of City customers have not submitted protests to the proposed rate increases, City Council approval is required for the City to implement them. The City cannot implement the proposed rate increases without City Council approval. The setting of rates is a legislative function.

JAN I. GOLDSMITH, CITY ATTORNEY

By *-s- Raymond C. Palmucci*

Raymond C. Palmucci
Deputy City Attorney

RCP:mt

ML-2015-16

Doc. No. 1155367

cc: Kevin Falconer, Mayor

Sherri Lightner, Council President

Marti Emerald, Council President Pro Tem

Lori Zapf, Councilmember

Todd Gloria, Councilmember

Myrtle Cole, Councilmember

Mark Kersey, Councilmember

Chris Cate, Councilmember

Scott Sherman, Councilmember

David Alvarez, Councilmember

Scott Chadwick, Chief Operating Officer

Andrea Tevlin, Independent Budget Analyst

Halla Razak, Public Utilities Director