MEMORANDUM OF LAW

DATE: May 16, 1986

TO: Henry Pepper, Deputy Director, Water Utilities

FROM: City Attorney

SUBJECT: Review of Assembly Bill 1774

Since we first alluded to AB 1774 in our September 5, 1985 Memorandum of Law on water shutoff, agencies across the state have been wrestling with its provisions and whether it is applicable to charter cities. You have asked our thoughts on the matter and, if applicable, interpretation of its key provisions.

As we have often pointed out, chartered cities have exclusive power in and are free from legislative enactments dealing with municipal affairs. California Constitution, article XI, sections 5 and 7. This primary power is explicit in supplying water. California Constitution, article XI, section 9. However this autonomy does not extend to all aspects of supplying water. Hence the purity of the water supply is a matter of such statewide concern that its regulation is governed by state and not local standards. De Aryan v. Butler, 119 Cal.App.2d 674 (1953) (subjecting the City of San Diego to the Pure Water Law, California Health & Safety Code, sections 4010-4035 since renumbered); 26 Ops. Cal. Atty. Gen. 7 (1955).

Thus to simply conclude that since control of the water supply is a municipal affair, that AB 1774 deals with water hence it is a subject over which charter cities have complete control is an incomplete syllogism. We note that the City of Sacramento only expresses "considerable doubt" about the applicability of AB 1774, yet provides neither analysis nor supporting authority.

To the contrary, what existing law there is points to the statewide applicability of AB 1774. First the legislative intent expressed in Section 1 provides:

> Section 1. This act is intended to establish minimum standards for procedural safeguards applicable to
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> utility shutoffs, notices, and billing disputes by all providers of utility service, whether investor-owned or publicly owned ....
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> Emphasis added.

While legislative intent is not conclusive as to whether a matter is a municipal affair or of statewide concern, the courts certainly give great weight to the legislative purpose. Bishop v. City of San Jose, 1 Cal.3d 56, 63 (1969).

Secondly, AB 1774 adds sections 10009, 10010 and 10010.1 to the California Public Utilities Code which sections are added to Division 5 entitled "Utilities Owned by Municipal Corporations." Public utilities are therein defined at Section 10001 with a specific reference to municipal corporations.

> Sec. 10001. Public utility defined
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> "Public utility" as used in this article, means the supply of a municipal corporation alone or together with its inhabitants, or any portion thereof, with water, light, heat, power, sewage collection, treatment, or disposal for sanitary or drainage purposes, transportation of persons or property, means of communication, or means of promoting the public convenience.
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> California Public Utilities Code, section 10001

Such specific mention was deemed significant in County of Inyo v. Public Utilities Commission, 26 Cal.3d 161 (1980).

> Although none of the foregoing sections mentions municipally owned public utilities, the Legislature has not ignored that subject. Sections 10001 to 10251 expressly regulate municipally owned utilities. Section 10005 specifically authorizes municipally owned utilities to sell outside the corporate limits. No provision, however, grants the PUC jurisdiction to regulate the rates for such sales.
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> County of Inyo, supra at 166.
>
> Emphasis added.

Although not germane to the holding of the case, this reference nevertheless clearly intimates that municipal utilities even of a chartered city may be regulated.

For all of the above reasons, we cannot say that AB 1774 and its procedural requirements are not applicable. The procedural requirements extend and make uniform the minimal constitutional safeguards pointed out in Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 56 L.Ed.2d 30, 98 S.Ct. 1554 (1978). The statewide uniformity of these safeguards clearly is the intent of the legislation and could clearly be held to be of statewide concern.

Assuming applicability and pending legislative changes supported by the League of California Cities (see May 6, 1986 memorandum from Patricia Tennyson to John Witzel), we will

address your questions. Your first concern focuses on Section 10010(a) and (b) which uses the term "residential" without definition. While this is true, "residential" commonly refers to the manner of occupancy of a structure and the manner of use as a dwelling unit in contradistinction to commercial or business purposes. Cf. California Insurance Code section 12740; California Civil Code section 1675. Hence the noticing requirement refers to structures utilized for dwelling purposes.

Secondly, you ask if there is a difference between "every good faith effort" used in Section 10009 (a) to notice actual users and "reasonable, good faith effort" used in Section 10010.1(b) to contact the adult person residing at the premises. While again there is no definition provided, we construe these phrases to mean the same and to refer to the effort of the fictional reasonable man to provide notice. While "good faith" necessarily has some element of subjectivity, it means an honest effort without fraud, collusion or deceit.

> The court further observes that while the phrase "good faith" is used in differing senses (see 18 Words and Phrases (perm. ed.), p. 475 et seq.) "in common usage it has a well defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation" (35 C.J.S. p. 488 and cases therein cited).
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> "Good faith" has also been defined as meaning "an honest intention to abstain from taking an unconscientious advantage of another, even though the forms and technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." (Bouvier's Law Dictionary, Rowles (3d rev.), p. 1359.)
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> Gibson v. Corbett,
> 87 Cal.App.2d Supp. 926, 932 (1948)

Hence a good faith effort to contact the resident of a dwelling unit means a reasonable and honest effort to make contact. Clearly this should be documented and may vary as to the size and location of the dwelling units involved. Written notice securely attached to the dwelling entrance certainly appears sufficient where actual contact is impossible.

Thirdly, you inquire about the actual user assuming responsibility of the entire account and reneging on the obligation. Section 10009(b) clearly conditions this right on "the satisfaction of the public utility" which clearly permits the demand of sufficient security before the utility permits the service to the actual user.

Lastly you inquire on the manner of establishing credit under Section 10009(c) where prior service for a period of time is a condition of establishing credit. Proof of payment of rent for such a time via receipts or cancelled checks would clearly be acceptable but a mere lease is not proof of payment.

CONCLUSION

Since the municipal affairs doctrine is subject to a balancing of local concerns against subjects of statewide interest and legislative intent is weighed heavily in that balance, we believe the intent of AB 1774 is to have uniformity throughout the state in matters of termination of water service and therefore is a subject of statewide concern. Moreover, these requirements standardize a previously announced constitutional right to notice and hearing before water service can be terminated. Memphis Light, Gas and Water Division, supra; Perez v. City of San Bruno, 27 Cal.3d 875 (1980).

Being a constitutional right, we previously advised you that the rights attach to each user and thus do not depend on whether one is a renter or owner. City Attorney Memorandum of Law, September 5, 1985. Hence the notice requirements of Section 10010.1(b) (forty-eight (48) hour notice) is a recognition of that right and requires a good faith effort to contact the adult resident of the dwelling.

We understand the increased burdens this legislation imposes and, as previously offered, are ready to work with your department to implement these changes.

JOHN W. WITT, City Attorney
By
Ted Bromfield
Chief Deputy City Attorney

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Attachment
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