

Date of Hearing: June 29, 2016

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Susan Talamantes Eggman, Chair

SB 1298 (Hertzberg) – As Amended June 13, 2016

SENATE VOTE: Vote not relevant

SUBJECT: Local government: fees and charges.

SUMMARY: Makes numerous changes to the Proposition 218 Omnibus Implementation Act. Specifically, **this bill:**

- 1) Adds the following definitions to the Proposition 218 Omnibus Implementation Act:
 - a) "Proportional costs of the service attributable to the parcel" to mean "when applied to a fee or charge for water or sewer service, means the share of the total cost of providing water or sewer service to water or sewer users within the service area reasonably attributable to the parcel. The total cost of providing water or sewer service includes all costs of acquiring water and water rights, costs of collecting, conveying, treating, and managing water and wastewater, costs of satisfying all regulatory requirements lawfully imposed on water and sewer service providers and costs of providing communitywide water service in an equitable manner, including the cost of lifeline water rates."
 - b) "Sewer service" to mean "services provided by all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including lateral and connecting sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or works, drains, conduits, outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." Prohibits "sewer system" from including a sewer system that merely collects sewage on the property of a single owner.
- 2) Makes changes to the definition of "water" to instead define "*Water service*" to mean *services provided by* any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source.
- 3) Makes findings and declarations including that Proposition 218 was meant to improve transparency and accountability of local government fees. Some court interpretations of the law have constrained three important tools that local governments need to manage water supplies and address water pollution: stormwater management, rates to encourage water conservation, and assistance for low-income Californians.
- 4) Provides that one vote per parcel, filed by an owner or tenant of the parcel, shall be counted in determining whether a proposed fee or charge is approved by a majority vote, pursuant to Article XIII D of the California Constitution, which establishes voter approval requirements for new or increased fees or charges, except for sewer, water, and refuse collection services.

- 5) Adds the following findings and declarations to the Proposition 218 Omnibus Implementation Act:
- a) Water service may be used for purposes that are indispensable to the use of the property, including, but not limited to cooking, sanitation and reasonable irrigation;
 - b) Water service may also be used for purposes that are not indispensable to the use of property, including, but not limited to excessive indoor use, unabated leakage, excessive irrigation, and other activities that constitute an inefficient use of water;
 - c) The amount of water that is indispensable to the use of a property may vary depending on the use to which the property is put, local conditions, water shortages, environmental factors, and other factors affecting water demand and supply availability.
 - d) Local agencies should have the authority to determine the amount of water that is indispensable for property use, pursuant to specified conditions;
 - e) Charges for water that are not indispensable for property use are not imposed as an incident of property ownership and therefore are not property-related charges, as defined by Article XIII D of the California Constitution;
 - f) Charges for water that is not indispensable for property use may be either specific benefits or specific government services under Article XIII C of the California Constitution; and,
 - g) Article XIII C of the California Constitution does not identify the costs that may be associated with water service, define "a fair or reasonable relationship" between costs of the service and the burdens or benefits associated with the service, or prescribe a particular method for allocating the costs of providing nonproperty-related water services or benefits.
- 6) Authorizes an agency, in addition to any property-related fee or charge imposed, pursuant to Article XIII D of the California Constitution, and this bill for water service, to impose or increase a separate and distinct conservation and efficiency fee or charge for the same service to create price signals to encourage conservation and increased efficiency in the use of water.
- 7) Authorizes a conservation and efficiency fee or charge imposed pursuant to this bill to be imposed on water that is not indispensable for property use.
- 8) Authorizes a conservation and efficiency fee or charge imposed, pursuant to this bill, to be imposed for purposes, including, but not limited to:
- a) Deterrence of excess consumption of water, as determined by the local agency;
 - b) Encouragement of the adoption of technologies that support more efficient use of water; and,
 - c) Encouragement of compliance with the goals of avoiding waste and unreasonable use of water, pursuant to Section 2 of Article X of the California Constitution.

- 9) Authorizes a conservation and efficiency fee or charge to raise revenue as an incident to its intended purposes. Requires any revenue produced to only be used to pay the costs of providing water service, to lower the rate or rate structure of the associated property-related fee or charge for water service, or to provide lower rates or rebates for disadvantaged households. Prohibits the total amount collected from the property-related fee or charge for water service and the conservation and efficiency fee or charge from exceeding the reasonable costs incurred by the agency to provide water service.
- 10) Requires the rate of a conservation and efficiency fee or charge to bear a fair or reasonable relationship to the burden imposed on the local agency or the benefits received from the water service based on the amount of water used by each customer or class of customers.
- 11) Authorizes the agency to determine that the burden on, or benefits derived from, the provision of water service per unit of water used is greater for customers who use relatively large amounts of water for their type and size of real property.
- 12) Authorizes the agency to establish a water structure for a conservation and efficiency fee or charge intended to encourage conservation and increased efficiency of water use in order to bring the burdens of providing water service to customer or classes of customers into reasonable balance. Authorizes the charge to be structured in a tiered, ascending, or other incremental manner. Authorizes the agency to determine that the fairness of the rate structure is enhanced if it provides for lower rates, known as lifeline rates, for disadvantaged households.
- 13) Requires consideration and imposition or increase of a conservation and efficiency fee or charge to comply with the notice, hearing, protest, and election requirements, if any, required by Article XIII D of the California Constitution. Provides that the requirements in the California Constitution, which prohibit the amount of a fee or charge imposed on any parcel or person as an incident of property ownership from exceeding the proportional cost of the service attributable to the parcel, does not apply to any conservation and efficiency fee or charge levied pursuant to this bill.
- 14) Requires, for the purposes of this bill, "reasonable costs" of the specific benefit or specific government service to include, but not be limited to costs that will, directly or indirectly, enable an agency to meet water demands, reduce water demands, conserve potable water supplies, procure water supplies to provide water that is not indispensable to the use of property, and provide communitywide water service in an equitable manner, including lifeline water rates. Provides that the determination of reasonable costs may consider the relative income of the payer of the fee or charge.
- 15) Defines, for purposes of this bill and Article XIII C of the California Constitution, "fair or reasonable relationship" to include a relationship consistent with principles of equity that hold that more affluent individuals benefit more from public services, including water service, than less affluent individuals receiving the same service.
- 16) Provides that the provisions of this bill are severable. Provides that, if any provision of this bill or its application is held invalid, the invalidity shall not affect other provisions or application that can be given effect without the invalid provision or application.

FISCAL EFFECT: None

COMMENTS:

- 1) **Financing Water Infrastructure.** Local governments in California provide most water related services in the state which include water service, sewer service, flood control, and stormwater management. A PPIC report, *Paying for Water in California*, outlines four sources of funding currently used for water in California: a) Fees, which include water and waste water bills, property assessments or fees, developer or connection fees, and permitting fees; b) Taxes, which include both general and special taxes, including parcel taxes; c) Fines and penalties, which include excessive pumping on groundwater or directly to customers in violation of rationing restrictions during drought emergencies; and, d) Bonds, which include general obligation and revenue bonds. Local agencies frequently point to the series of constitutional reforms, Proposition 13 (1978), Proposition 218 (1996), and Proposition 26 (2010), that have made it increasingly more difficult to generate the necessary revenue to fund the costs of providing water and other essential services.

On January 17, 2014, the Governor declared a state of emergency in California due to severe drought conditions. In addition to challenges presented by the drought, local governments face several barriers to funding for stormwater and dry weather runoff projects due to the constitutional requirements for special taxes, benefit assessments, and property-related fees. Many of the local governments that operate MS4 (Municipal Separate Storm System) systems differ from water and wastewater utilities that existed prior to the passage of Proposition 218, which have in place service fees. On the other hand, many stormwater programs in cities and counties are funded by the general fund, primarily through property and local sales taxes. As regulatory burdens continue to increase, financially strapped local governments are forced to examine alternative funding mechanisms and regional strategies to address MS4 costs, which some cities in Los Angeles County are citing to be in the millions of dollars.

- 2) **Proposition 218.** Proposition 218 distinguishes among taxes, assessments and fees for property-related revenues, and requires certain actions before such revenues may be collected. Counties and other local agencies with police powers may impose any one of these options on property owners, after completing the Proposition 218 process. Special districts created by statute, however, must have specific authority for each of these revenue sources.

The Constitution defines a fee (or charge) as any levy other than an ad valorem tax, special tax, or assessment that is imposed by a local government on a parcel or on a person as an incident of property ownership, including a user fee for a property-related service. The fee imposed on any parcel or person cannot exceed the proportional cost of the service that is attributable to the parcel. Prior to imposing or increasing a property-related fee, the local government is required to identify the parcels, mail a written notice to all the property owners subject to the fee detailing the amount of the fee, the reason for the fee, and the date, time, and location of a public hearing on the proposed fee. No sooner than 45 days after mailing the notice to property owners, the agency must conduct a public hearing on the proposed fee. If a majority of owners of the identified parcels provide written protests against the fee, it cannot be imposed or increased by the agency.

Additionally, Article XIII D, Section 6, subdivision (c) of the California Constitution, provides election requirements, "Except for fees or charges for sewer, water, and refuse

collection services, no property-related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.” The election for the fee is required to be conducted no less than 45 days following the public hearing.

The definition of "water" and "sewer" under the Proposition 218 Omnibus Implementation Act are significant because the election requirements are on fees for services other than water, sewer, and trash services.

- 3) **Bill Summary.** This bill addresses a number of issues in the Proposition 218 Omnibus Implementation Act. This bill is sponsored by the Water Foundation.
 - a) **Conservation Rates.** Tiered rates are common among local governments to promote water conservation by structuring the price of water per unit according to the level of use. An appellate court ruled that the city's tiered rate violated the proportionality requirements for property-related fees (*Howard Jarvis Taxpayers Association v. City of Salinas* (2002)). In this case, the city failed to demonstrate that its rate tiers corresponded to the actual cost of providing service on a parcel basis at a given level of usage.

This bill authorizes a local agency to impose or increase a separate and distinct conservation and efficiency fee or charge for the same services (water service) to create price signals to encourage conservation and increased efficiency in the use of water. The conservation and efficiency fee or charge imposed, pursuant to this bill, is authorized to be imposed on water that is not indispensable for property use.
 - b) **Lifeline Rates.** Lifeline programs reduce the water and sewer service rates charged to low-income households in order to provide them with more affordable services. In order to backfill a decrease in revenue from lifeline rates, agencies would need to either charge higher rates to other households or backfill with other sources of funding.

This bill prohibits the total amount collected from the property-related fee or charge for water service and the conservation and efficiency fee or charge from exceeding the reasonable costs incurred by the local agency to provide water service. This bill defines "reasonable costs" and "fair or reasonable relationship" to provide that the determination of a reasonable cost may consider the relative income of the payer of the fee or charge.
 - c) **Storm Drainage.** The definition of "water" and "sewer" under the Proposition 218 Omnibus Implementation Act is significant because the election requirements are on fees for services other than water, sewer, and trash services. This bill provides a definition of "sewer" in the Act using the definition of sewer from the Public Utilities Code.
- 4) **Author's Statement.** According to the author, "Proposition 218, approved in 1996, was meant to improve transparency and accountability of local government fees. Some court interpretations of the law have constrained three important tools we need to manage water supplies and address water pollution: stormwater management, rates to encourage water conservation, and rate assistance for low-income Californians. These tools are needed now more than ever because California remains in an historic five-year drought.

"Stormwater is a key source of local water supply, and careful management is necessary to reduce pollution. Currently, stormwater and flood control programs must meet a higher standard than other services to raise capital, thus preventing many important projects from being built.

"One way to encourage conservation is to charge the largest water users more per gallon. This is a common practice throughout the world – and a requirement for California’s private water agencies. Unfortunately, a recent court decision makes it unclear if local agencies can employ this option.

"The US Environmental Protection Agency has found that drinking water rates exceeding two percent of monthly income are unaffordable, which is the case for millions of Californians. Private water and energy utilities are required to offer programs to make rates affordable to low income households. Local governments in California, however, are largely prohibited from doing the same thing.

"SB 1298 addresses these issues by adding missing definitions and direction on the interpretation of Proposition 218 while maintaining transparency and accountability. SB 1298 defines “sewer service” to include stormwater so local governments can build and finance those projects, and provides options for water agencies to develop rates that low income households can afford and that encourage extravagant water users to conserve. These fixes are urgently needed during the current drought to safeguard our water supplies and ensure that all Californians have access to safe, affordable drinking water."

- 5) **Prior Legislation and Ballot Measures.** AB 1362 (Gordon) of 2015, would have provided a definition for "stormwater" to mean "any system of public improvements, or service intended to provide for the quality, conservation, control, or conveyance of waters that land on or drain across the natural or man-made landscape" in the Proposition 218 Omnibus Implementation Act. AB 1362 would have only become operative if a constitutional amendment was approved by the voters. The introduced version of AB 1362 was subsequently amended into a different issue area to address mosquito and vector control districts.

AB 2403 (Rendon), Chapter 78, Statutes of 2014, expanded the definition of "water" in the Proposition 218 of 1996 Omnibus Implementation Act.

The League of California Cities, California Association of Counties and Association of California Water Agencies filed a ballot initiative, California Water Conservation, Flood Control and Stormwater Management Act of 2016. The proposed constitutional amendment addressed the same three issues and this bill seeks to address with a majority vote bill. The proponents of the initiative declined to move forward after doing polling research.

6) **Policy Considerations and Committee Amendments.**

- a) **History of the Proposition 218 Omnibus Implementation Act.** The creation of and amendments to the Omnibus Implementation Act have been done on a consensus basis. The Committee may wish to note that the approach taken by this bill diverges from that tradition. Historically, if provisions could not be agreed upon, they were left out of the Act and litigated in the courts. Proponents argue that it is the Legislature's job to

establish policy and provide policy guidance to the courts and that this bill addresses the same important issues that failed ballot initiatives and constitutional amendments have failed to do.

- b) **Litigation.** Following Proposition 218 there is an extensive history of litigation involving both tiered rates and services related to stormwater. Opposition argues that this bill will result in additional uncertainty and more litigation.
- c) **Committee Amendments.** Given the policy considerations, the Committee may wish to ask the author to narrow the scope of this bill to address the stormwater issue and remove all other provisions that have elicited the strongest opposition. Moving forward, the Committee may wish to encourage the author to work collaboratively with the stakeholders on the remaining stormwater provisions in the bill.

7) **Arguments in Support.** Supporters argue the following:

Lifeline and Conservation Rates. The Sierra Club argues, "Water rates that encourage conservation should not be required to be strictly linked to the specific parcel the water is being provided to. Taking a broader approach in a community will allow for better price signals to high users and lifeline rates consistent with the human right to water. Pushing for greater conservation can actually lower the total cost of service for all users, and supply increases and new infrastructure are not needed."

Stormwater Drainage. The Water Foundation argues, "While hundreds of California's cities, counties, and stormwater districts face federal mandates to reduce stormwater pollution and are under pressure to seek new sources of local water supply, only a handful of them have been able to collect funds to meet these needs. Drinking water and sanitary sewer services, however, have not suffered such problems. SB 1298 simply clarifies that stormwater is an integral part of both sewer and water systems and that its management should be held to the same high standards of transparency and accountability."

8) **Arguments in Opposition.** Opposition argues the following:

Lifeline Rates. The League of Cities argues, "Lifeline rates are unconstitutional under Article XIID, Section 6 (b) because the rate imposed on the higher-income user exceeds the 'proportional cost of the service attributable to the user's parcel.' SB 1298 seeks to address this issue by defining 'cost of service' to include the cost of providing water services in an 'equitable manner' including the cost of 'lifeline water rates'. This definition of 'cost of service' does not address Proposition 218's proportionality requirement."

Conservation Rates. The Association of California Water Agencies argues, "SB 1298 attempts to provide more flexibility for voluntary conservation-based pricing. SB 1298's provisions in this area, however, have legal problems that would create legal uncertainty and litigation risk for any local agency which would try to implement them. They also have policy problems." The League of California Cities writes, "Unfortunately, SB 1298's water conservation and efficiency charge does not take into account the cost and revenue nexus required by Proposition 26."

Stormwater Drainage. The Association of California Water Agencies argues, "This proposal will create legal uncertainty. One court has held that unless an agency operates a combined storm/sewer system, fees for storm water facilities and services do not fall under the exception in the Article XII D, Section 6 for sewer and water services."

REGISTERED SUPPORT / OPPOSITION:

Support

Water Foundation [SPONSOR]
American Rivers
California Coastkeeper Alliance
Humboldt Baykeeper
Inland Empire Waterkeeper
Klamath Riverkeeper
Los Angeles Waterkeeper (LAW)
Monterey Coastkeeper
Orange County Coastkeeper
Planning and Conservation League
Russian Riverkeeper
San Diego Coastkeeper
San Francisco Baykeeper
San Luis Obispo Coastkeeper
Santa Barbara Channelkeeper
Sierra Club California
South Yuba River Citizens' League (SYRCL)
Ventura Coastkeeper

Concerns

League of California Cities

Opposition

Association of California Water Agencies
City of Watsonville
Coachella Valley Water District
Cucamonga Valley Water District
Dublin Sam Ramon Services District
East Valley Water District
Great Oaks Water Company
Howard Jarvis Taxpayers Association
Las Virgenes Municipal Water District
Mesa Water District
Monte Vista Water District
Mountain Counties Water Resources Association
Oakdale Irrigation District
Rowland Water District

Opposition (continued)

San Juan Water District

Vallecitos Water District

Vista Irrigation District

San Diego County Water Authority

Western Canal Water District

Wheeler Ridge Maricopa Water Storage District

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