

Date of Hearing: August 11, 2020

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

SB 1386 (Moorlach) – As Amended July 28, 2020

SENATE VOTE: 39-0

SUBJECT: Local government: assessments, fees, and charges: water: hydrants.

SUMMARY: Provides that fire hydrants are a part of water service for the purposes of Proposition 218 (1996). Specifically, **this bill:**

- 1) Specifies that the fees or charges for property-related water service imposed or increased pursuant to Section 6 of Article XIII D of the California Constitution (added by Proposition 218) may include the costs to construct, maintain, repair, or replace hydrants as needed or consistent with applicable fire codes and industry standards, and may include the cost of water distributed through hydrants. In addition to any other method consistent with Section 6 of Article XIII D of the California Constitution, fees or charges for the aspects of water service related to hydrants and the water distributed through them may be fixed and collected as a separate fee or charge, or included in the other water rates and charges fixed and collected by a public agency, as specified.
- 2) Defines “hydrants” to mean all hydrants and other infrastructure used to distribute water that aids in the protection of property from fire, and all related or appurtenant infrastructure and facilities owned by a water service provider necessary or convenient for distributing water that aids in the protection of property from fire, including adequately sized and pressurized lines, pumps, and all appurtenances, but does not include privately owned hydrants or other fire response related infrastructure.
- 3) States that it is declaratory of existing law.
- 4) Includes findings and declarations that state that:
 - a) Fire service is a different and distinct category of service from water service, which is one of several property-related services that aids in the provision of fire service provided to properties.
 - b) Fire hydrants are a part of a system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source.
 - c) Hydrants are designed to provide immediately available water service to extinguish fires that threaten properties served by water service providers, and are not used for the purpose of aiding in extinguishing wildfires or fires that threaten properties not served by a provider. Providers also use hydrants for systems operations and maintenance.
 - d) Hydrants are generally located close to properties that are served by a water service provider. Hydrants and the water distributed through them are directly related to property

ownership because they are generally sized based on property use and installed when parcels are connected to a water system.

- e) Hydrants and the water distributed through them are not available to the public at large in substantially the same manner as they are to property owners because they only serve the properties receiving water service, and the public generally cannot access these hydrants. Incidental or minimal use of these hydrants does not change their character as a property-related service.
- f) Hydrants and the water distributed through them are part of the property-related service because these hydrants provide immediately available water that can aid in extinguishing fires that threaten those properties. The cost associated with this aspect of water service is proportionately allocable among properties that receive a similar level of service.
- g) Property-related water service costs can include any costs associated with constructing, maintaining, repairing, upgrading, and replacing hydrants and the water that is distributed through them, including water supplied for firefighting purposes. The fees or charges related to those costs are imposed upon a parcel or person as part of property ownership.

EXISTING LAW:

- 1) Defines, for purposes of Article XIII C and Article XIII D of the California Constitution and the Proposition 218 Omnibus Implementation Act, "water" to mean "any system of public improvement intended to provide for the production, storage, supply, treatment, or distribution of water."
- 2) Authorizes an agency providing water, wastewater, sewer, or refuse collection services to adopt a schedule of fees or charges for its services.
- 3) Requires that any fees and charges assessed for a property-related service may only be assessed if the:
 - a) Revenues derived from the fee or charge do not exceed the funds required to provide the property-related service;
 - b) Revenues derived from the fee or charge are not to be used for any purpose other than that for which the fee or charge was imposed;
 - c) Amount of a fee or charge does not exceed the proportional cost of the service attributable to the parcel charged;
 - d) Service being charged for is actually used by, or immediately available to, the owner of the property being charged; and,
 - e) Fee or charge assessed is not for a general governmental service, which is a service available to the general public in substantially the same manner as the person paying the fee, including, but not limited to, police, ambulance, library, or fire services.

- 4) Provides notice, protest, hearing, and election procedures for the levying of new or increased assessments or property-related fees or charges by local government agencies pursuant to Proposition 218.

FISCAL EFFECT: None

COMMENTS:

- 1) **Bill summary.** This bill specifies that, for the purposes of the Proposition 218 Implementation Act, the fees or charges for water service may include the costs to construct and maintain fire hydrants and may include the cost of the water distributed through the hydrants. Additionally, this bill defines hydrant to mean all hydrants and related infrastructure owned by a water service provider for distributing water that aids in the protection of property from fire. The Irvine Ranch Water District and the San Diego County Water Authority are the sponsors of this bill.
- 2) **Author's Statement.** According to the author, "SB 1386 is patterned after a recent unpublished case - *Glendale Coalition for Better Gov't v. City of Glendale* (2018) - where the court effectively reaffirmed the appropriateness of current charges by stating that fire hydrants used to protect properties from fire and costs associated with them are in fact property-related services and therefore allowable under Proposition 218. The bill is an important measure that can be enacted to protect fire hydrant system funding that would not increase water rates because the costs of fire hydrant system maintenance and operation are already appropriately embedded in customers' water rates, as permitted by existing law."
- 3) **Financing Water Infrastructure.** Local governments in California provide most water related services in the state which include water service, sewer service, flood control, and storm water management. A Public Policy Institute of California (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.
- 4) **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, stating, “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" 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. Determining the services that fall within the definitions of "water" and "sewer" services has been the subject of litigation. An appellate court decision in *HJTA v. City of Salinas* (2002) found that a city's charges on developed parcels to fund storm water management were property-related fees, and were not covered by the exemption for sewer or water services. A subsequent appellate court decision in *Griffith v. Pajaro Valley Water Management Agency* (2013) relied on the definition of "water" in the Proposition 218 Omnibus Implementation Act narrowly construing an earlier decision in *HJTA v. City of Salinas*, which did not apply the Act's definitions to a storm water charge dispute. The Griffith decision found that a groundwater augmentation charge is a fee for "water service.”

- 5) **Recent Court Decision.** On February 19, 2020, a class action lawsuit was filed against 81 water agencies throughout the state alleging that their practice of charging ratepayers for the costs associated with supplying water for fire protection violates Proposition 218. Specifically, the complaint argues that this practice results in water agencies charging ratepayers for more than the cost of service to their parcel and imposes costs on property owners for general governmental services that are available to the public at large in substantially the same manner as they are available to property owners. Water agencies see it differently: they argue that the benefit of fire hydrants accrues to the property owners because hydrants are positioned and used to fight structure fires, not wildland or other types of fires that are unrelated to a specific property. One recent court decision agrees with the water agencies (*Glendale Coalition for Better Gov't v. City of Glendale*, 2018 Cal. App. Unpub. LEXIS 8783). The Second District Court of Appeals stated:

“...despite the nomenclature, ‘public fire protection’ is not generally available to the public at large in substantially the same manner as it is to the property owners who pay the fee. The general public does not have access to water through fire hydrants. ... Fire hydrants are required to protect subdivisions, buildings, and portions of buildings within City limits. Common sense dictates that fire hydrants are located and available to extinguish fires that threaten property damage. ... Although fire departments could conceivably use any available measure to extinguish a fire unrelated to real property, including hydrant water in the

absence of an alternative, hydrants are not located, designed, or intended for all fires that happen to occur in public places, and the water pressure is excessive. ... We conclude: the public fire protection fee provided through hydrants is not a service available to the general public in substantially the same manner as it is to the property owners who pay the fee. Charging the fire protection fee to property owners, therefore, did not violate article XIII D, section 6, of the California Constitution."

SB 1386 borrows heavily from this ruling in an attempt to codify the water agency position, affirming that fire hydrants are a component of water service.

- 6) **Policy Consideration.** Proposition 218 imposes constitutional limitations on property-related fees. As a result, the Legislature is limited in the actions it can take to change how the Proposition works, absent a constitutional amendment. The Legislature can enact statutes to help shape the courts' interpretations of constitutional provisions, but ultimately the courts will interpret Proposition 218's constitutional requirements. Nonetheless, the case at issue in SB 1386 may be well suited to legislative intervention.

In two recent decisions related to water service fees, the courts arrived at different conclusions. While *Glendale* affirmed the use of ratepayer funds for water and facilities used for fire protection, a second decision by the Fourth District Court of Appeals declined to reverse a ruling that fees charged by the City of Delano for the water costs associated with fire suppression were improperly imposed (*Delano v. City of Delano*, Cal. App. Unpub. LEXIS 7500). Both decisions were unpublished, meaning they are not binding and cannot be cited by other courts.

This split in decisions at the appellate level indicates ambiguity on how Proposition 218 should be interpreted. Going forward, courts may lend weight to statutory clarification by the Legislature in the form of SB 1386. SB 1386 closely tracks *Glendale*, which is much more detailed in its analysis of Proposition 218's application to fire suppression fees than *Delano*, so the bill may be on firmer constitutional footing. SB 1386 also provides that it is declaratory of existing law. Ultimately, if the courts find a conflict between Article XIID and SB 1386, they will be bound to follow the Constitution, meaning SB 1386 may have little effect on the litigation at hand. The Committee may wish to consider the need for the bill in light of existing constitutional constraints.

- 7) **Prior Legislation.** SB 231 (Hertzberg), Chapter 536, Statutes of 2017, defined "sewer" for the purposes of the Proposition 218 Omnibus Implementation Act.

SB 1298 (Hertzberg) of 2016 would have specified the definition of "sewer" for the purposes of the Proposition 218 Omnibus Implementation Act. SB 1298 died on the inactive file.

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 to mean any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source.

SB 919 (Rainey), Chapter 38, Statutes of 1997, enacted the Proposition 218 Omnibus Implementation Act to prescribe specific procedures and parameters for local jurisdictions in complying with Article XIII C and Article XIII D of the California Constitution.

- 8) **Arguments in Support.** Proponents of SB 1386 contend that the bill protects fire hydrant system funding and ensures public water suppliers can operate water systems to supply their customers and to fight fires. A large coalition of supporters, including the sponsors, contend that the lawsuits alleging, including the costs of servicing fire hydrants, is prohibited by Article XIII D of the California Constitution are “without merit and threaten to force all of California’s public retail water service providers to charge fire protection agencies directly for these costs. If that occurs, the ability of fire protection agencies to fund essential equipment and personnel would be greatly impacted. Our property-related service charges are legitimate under existing law, but in order to avoid lengthy and expensive legal battles with costs that will be passed on to our customers and to avoid additional burdens on fire protection agencies, the law needs to be affirmed by the Legislature.”

Further, the East Bay Municipal Utility District argues that, “At a time when the risk of wildfire is at an all-time high in California, adequate funding for fire protection services is critical. SB 1386 would ensure that the long-held understanding of allowable property-related service charges and the inclusion of costs associated with the public agency’s fire hydrants and water supplies used for fire protection is clarified in statute. Additionally, the bill would help protect public water agencies, like EBMUD, from future litigation regarding these service charges.”

- 9) **Arguments in Opposition.** None on file.

REGISTERED SUPPORT / OPPOSITION:

Support

Irvine Ranch Water District [SPONSOR]
 San Diego County Water Authority [SPONSOR]
 Alameda County Water District
 Anaheim Public Utilities
 Association of California Cities, Orange County Chapter
 Association of California Water Agencies
 Bighorn Desert View Water Agency
 California Fire Chiefs Association
 California Municipal Utilities Association
 California Professional Firefighters
 California Special Districts Association
 California State Firefighters’ Association
 California Water Association
 California Water Service

Cities of Carlsbad, Clovis, Escondido, Fountain Valley, Fresno, Fullerton, Hayward, La Habra, Long Beach, Napa, Oceanside, Pasadena, Poway, Sacramento, San Diego, Santa Clara, Santa Cruz, Santa Monica, Santa Rosa, Torrance, Tustin, Tracy, Vacaville, and Whittier
Coachella Valley Water District
Community Water Systems Alliance
Contra Costa Water District
County of Ventura
Cucamonga Valley Water District
Desert Water Agency
East Bay Municipal Utility District
East Valley Water District
Eastern Municipal Water District
El Toro Water District
Elsinore Valley Municipal Water District
Fire Districts Associations of California
Helix Water District
Inland Empire Utilities Agency
Las Virgenes Municipal Water District
Monte Vista Water District
Moulton Niguel Water District
Municipal Water District of Orange County
Orange County Water District
Otay Water District
Padre Dam Municipal Water District
Palmdale Water District
Rainbow Municipal Water District
Rancho California Water District
Regional Water Authority
Rowland Water District
Sacramento County Water Agency
San Bernardino Municipal Water District
San Francisco Public Utilities Commission
San Gabriel Valley Water Association
Santa Ana Public Works Agency
Santa Clarita Valley Water Agency
Santa Margarita Water District
South Orange County Economic Coalition
Trabuco Canyon Water District
Valley Center Municipal Water District
Valley County Water District
Vista Irrigation District
Walnut Valley Water District
Western Municipal Water District

Opposition

None on file.

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