

Date of Hearing: June 14, 2017

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

SB 231 (Hertzberg) – As Amended April 19, 2017

SENATE VOTE: 23-10

SUBJECT: Local government: fees and charges.

SUMMARY: Defines "sewer" for the purposes of the Proposition 218 Omnibus Implementation Act. Specifically, **this bill**:

- 1) Adds a definition for "sewer" to the Proposition 218 Omnibus Implementation Act, that "includes systems, 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 water 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 water or storm waters." Prohibits "sewer system" from including a sewer system that merely collects sewage on the property of a single owner.
- 2) Specifies that the definitions in the Proposition 218 Omnibus Implementation Act shall be read and interpreted in light of the findings and declarations established by this bill.
- 3) Adds the following findings and declarations:
 - a) Proposition 218 was approved by the voters at the November 5, 1996, statewide general election. Some court interpretations of the law have constrained important tools that local governments need to manage storm water and drainage runoff;
 - b) Storm waters are carried off in storm sewers, and careful management is necessary to ensure adequate state water supplies, especially during drought, and to reduce pollution. But a court decision has found storm water subject to the voter-approval provisions of Proposition 218 that apply to property-related fees, preventing many important projects from being built;
 - c) The court of appeal in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 (*HJTA v. City of Salinas*) concluded that the term "sewer," as used in Proposition 218, is "ambiguous" and declined to use the statutory definition of the term "sewer system," which was part of the then existing law as Section 230.5 of the Public Utilities Code;
 - d) The court in *HJTA v. City of Salinas* failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term "sewer." Courts have long held that statutory construction rules apply to initiative measures, including in cases that apply specifically to Proposition 218 (see *People v. Bustamante* (1997) 57 Cal.App.4th 693; *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006). When construing statutes, courts look first to the words of the statute, which should be given their usual,

ordinary, and commonsense meaning (*People v. Mejia* (2012) 211 Cal.App.4th 586, 611). The purpose of utilizing the plain meaning of statutory language is to spare the courts the necessity of trying to divine the voters' intent by resorting to secondary or subjective indicators. The court in *HJTA v. City of Salinas* asserted its belief as to what most voters thought when voting for Proposition 218, but did not cite the voter pamphlet or other accepted sources for determining legislative intent. Instead, the court substituted its own judgment for the judgment of voters;

- e) Neither the words "sanitary" nor "sewerage" are used in Proposition 218, and the common meaning of the term "sewer services" is not "sanitary sewerage." In fact, the phrase "sanitary sewerage" is uncommon;
- f) Proposition 218 exempts sewer and water services from the voter-approval requirement. Sewer and water services are commonly considered to have a broad reach, encompassing the provision of clean water and then addressing the conveyance and treatment of dirty water, whether that water is rendered unclean by coming into contact with sewage or by flowing over the built-out human environment and becoming urban runoff;
- g) Provides numerous sources predating Proposition 218 rejecting the notion that the term "sewer" applies only to sanitary sewers and sanitary sewerage;
- h) In *Crawley v. Alameda Waste Management Authority* (2015) 243 Cal.App.4th 396, the Court of Appeal relied on the statutory definition of "refuse collection services" to interpret the meaning of that phrase in Proposition 218, and found that this interpretation was further supported by the plain meaning of refuse. Consistent with this decision, in determining the definition of "sewer," the plain meaning rule shall apply in conjunction with the definitions of terms as provided in Section 53750;
- i) The Legislature reaffirms and reiterates that the definition found in Section 230.5 of the Public Utilities Code is the definition of "sewer" or "sewer service" that should be used in the Proposition 218 Omnibus Implementation Act; and,
- j) Courts have read the Legislature's definition of "water" in the Proposition 218 Omnibus Implementation Act to include related services. In *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, the Court of Appeal concurred with the Legislature's view that "water service means more than just supplying water," based upon the definition of water provided by the Proposition 218 Omnibus Implementation Act, and found that actions necessary to provide water can be funded through fees for water service. Consistent with this decision, "sewer" should be interpreted to include services necessary to collect, treat, or dispose of sewage, industrial waste, or surface or storm waters, and any entity that collects, treats, or disposes of any of these necessarily provides sewer service.

4) Makes additional findings and declarations.

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 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.

Local governments face several barriers to funding for storm water 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 storm water 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. For example, the costs in Los Angeles County alone are cited to be over \$20 billion 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, the California Constitution Article XIII D, Section 6, subdivision (c) 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 (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) the court relied on the definition of "water" in 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".

- 3) **Bill Summary.** This bill adds a definition for "sewer" to the Act. The definition of "water" and "sewer" under the 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, which includes storm drainage. Additionally, this bill adds a number of findings and declarations to the Act. This bill is sponsored by the Water Foundation.
- 4) **Author's Statement.** According to the author, "Storm water is a key source of local water supply, and careful management is necessary now more than ever due to California's cycles of drought and flood. This legislation adds a missing definition of "sewer" to state law, including sewage and storm water, conforming with an existing 25-year-old definition in the California Public Utilities Code and dictionary definitions for sewer water which make no distinctions among types of dirty water — rain water, urban runoff, and sewage. Clarity is needed due to debate among the courts on interpreting "sewer.""
- 5) **Prior Legislation and Ballot Measures.** AB 1362 (Gordon) of 2015, would have provided a definition for "storm water" 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 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 Omnibus Implementation Act. This bill is substantially similar to SB 1298 (Hertzberg) of 2016, which would have added definition of "sewer" but contained fewer findings and declarations.

In 2016, the League of California Cities, California Association of Counties and Association of California Water Agencies filed a statewide ballot initiative - California Water Conservation, Flood Control and Stormwater Management Act of 2016. The proponents of the initiative declined to move forward after doing polling research.

- 6) **Arguments in Support.** The Association of California Water Agencies states, "SB 231 would make it clear that under state law, the process for funding storm water projects is the same as the process for funding other water and sewer projects. The bill is based on the fact that state law has long recognized that the term "sewer" includes services for the management of storm water. The definition of "sewer" in Public Utilities Code Section 230.5, on which SB 231 is based, dates back to 1970. It predates Proposition 218."

The California State Association of Counties, and the Rural County Representatives of California argue, "SB 231 authorizes counties, cities, and local water agencies to finance storm water projects in the same manner as other public works projects under Proposition 218. Counties, cities, and local water agencies throughout California face many cost pressures and funding challenges that affect water, including maintenance of aging infrastructure and requirement to comply with higher regulatory standards. These entities need to fund storm water and flood control projects to protect people and property from flooding, remove pollutants from storm water, and increase groundwater recharge. However, financing these projects is costly and difficult under current law."

- 7) **Arguments in Opposition.** Howard Jarvis Taxpayers Association argues, "SB 231 amends the Proposition 218 Omnibus Implementation Act in ways that violate the California Constitution and will only lead to unnecessary litigation and increased costs for ratepayers. Most importantly, SB 231 contravenes the appellate court case of *HJTA v. City of Salinas*...By including storm water within the definition of a property related fee, SB 231 ensures that voters will be unable to have a say at the ballot box. SB 231 shows contempt for the separation of powers by proposing, in a statute, the same plan that the judiciary has already found unconstitutional. Should SB 231 be signed into law and adopted by local agencies, a precedent setting victory invalidating this clearly unconstitutional bill would be followed by copycat lawsuits that impose retroactive refunds and attorney fees on public treasuries all across California."

The California Contract Cities Association states, "We believe that SB 231, while well-intentioned, violates the intent of Proposition 218 to only include limited exceptions to the requirement of a vote on most taxes to maintain a baseline level of public health and safety services. Carving out new exceptions by changing the definitions of the original exceptions would set an unfortunate precedent and undermine the longstanding right of residents to vote on their own local taxes and fees. While our member cities certainly need assistance in complying with our MS4 requirements for storm water management, we believe that passing the costs on to property owners without a vote is not the right or sustainable way to do it."

REGISTERED SUPPORT / OPPOSITION:

Support

Water Foundation [SPONSOR]
Association of California Water Agencies
Bay Area Council
Bay Area Stormwater Management Agencies Association
California Association of Sanitation Agencies
California Building Industry Association
California Council for Environmental & Economic Balance
California State Association of Counties
California Stormwater Quality Association
California Water Partnership (if amended)
Cities of Alameda, Beverly Hills, Camarillo, Carmel-by-the-Sea, Commerce, Culver City,
Cupertino, Del Rey Oaks, El Cerrito, Hawthorne, Hermosa Beach, Industry, Lakewood,
Lawndale, Monterey, Norwalk, Pacific Grove, Petaluma, Santa Rosa, Signal Hill, Torrance,
and Woodland
City /County Association of Governments of San Mateo County
Contra Costa Clean Water Program
Contra Costa County
County of Santa Clara's Clean Water Program
County of Santa Cruz Department of Public Works
Environmental Defense Fund
Inland Empire Utilities Agency
Integrated Stormwater Resources
Los Angeles County
Los Angeles Gateway Region Integrated Regional Water Management Joint Powers Authority
Marin County
Mayors' and Councilmembers' Association of Sonoma County
Metropolitan Water District of Southern California
Monterey Bay Aquarium
Monterey Regional Water Pollution Control Agency
Rural County Representatives of California
San Joaquin County
San Joaquin Delta Coalition
Santa Clara County
Santa Clara Valley Water District
Save The Bay
Sierra Club California
State Building and Construction Trades Council of California
Town of Tiburon
TreePeople
Individual letters (1)

Opposition

BizFed

California Association of Realtors

California Contract Cities Association

California Taxpayers Association

Cities of Baldwin Park, Claremont, Diamond Bar, Duarte, Gardena, Glendora, Los Alamitos,
Maywood, Rolling Hills, Rosemead, Sierra Madre, South El Monte, Walnut, West Covina,
and Whittier

Contra Costa Association of Realtors

Council Member Charlie Rosales, City of La Verne

Howard Jarvis Taxpayers Association

Mayor Joseph Romero Rocha, City of Azusa

Monterey County Association of Realtors

North Bay Association of Realtors

North San Diego County Association of Realtors

Northern Solano County Association of Realtors

Pacific Southwest Association of Realtors

San Gabriel Valley Council of Governments

San Gabriel Valley Economic Partnership

San Rafael Neighborhoods Association

Southwest Riverside County Association of Realtors

Yolo County Association of Realtors

Individual letters (5)

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