KMTG Legal Alert

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Environmental Law
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UPDATE: Minimum Charge Imposed On Parcels of Land Connected To Water Or Sewer Service Regardless Of Actual Use Does Not Require Ballot Approval By Affected Owners

In *Paland v. Brooktrails Township Community Services District Board of Directors*, (--- Cal. Rptr.3d ---Cal.App. 1 Dist., December 3, 2009), a California Court of Appeal considered whether "the minimum charge imposed on parcels with connections to a water district's utility systems for the basic cost of providing water or sewer service, regardless of actual use, is a charge for an immediately available property-related water or sewer service" that requires ballot approval by the affected owners. The Court of Appeal concluded that such a charge does not require ballot approval.

UPDATE:

KMTG reported on this case in a previous Legal Alert. The case was reconsidered in light of depublication requests and the July 31, 2009 decision was vacated and the December 3, 2009 decision stands. We have updated our previous Legal Alert to reflect the new date but the outcome of the case did not change.

Facts

David Paland ("Paland") owns property within the Brooktrails Township Community Services District ("District"). District charges parcels that are not connected to its systems annual water availability and sewer standby fees. Parcels that are connected to the systems are charged a hookup fee and then a fixed monthly base rate for water and sewer services and a usage-based rate for water service. Paland paid $1,800 in 1986 to connect his parcel of land to the water and sewer systems. Since that time, Paland has periodically discontinued water service when he could not afford the service or when he was away from his property for extended periods of time. Prior to 2003, when Paland chose to turn off his service, District charged him a prorated rate for the month in which he discontinued his service and then did not charge him again until he reactivated his water service.

In 2003, District changed its policy and decided to charge a monthly base rate to those parcels which had existing connections, "regardless of whether the owner was actually using the District's services." Paland protested the new policy on the ground that the District's Board of Directors ("Board") had not complied with Proposition 218 or provided due process. The Board did not rescind its policy.

Paland did not take any legal action at that time. Paland fell behind on paying his bill in late 2006 and District shut off his service. Paland paid the past due amount but he did not use any more water. District, however, continued to charge Paland a monthly base rate for water and sewer service.

Paland brought a lawsuit against the Board in May 2007 asserting that the base monthly charges are "standby charges" and District was required to put the charges to an owner vote pursuant to Proposition 218. The court dismissed the lawsuit because Paland had failed to launch his challenge within 120 days of the effective date of the resolution. District adopted Resolution No. 2007-10 on June 26, 2007 to establish new water and sewer base rates. Paland amended his earlier complaint, alleging that District had not complied with Proposition 218. Although the trial court found that the challenge to this resolution was not time-barred, it ultimately held that the water and sewer fees charged by District are user fees and not standby fees or assessments and are therefore not covered by Proposition 218.

Decision

The core issue as framed by the Court of Appeal "is whether the imposition of minimum monthly water and sewer base rates on parcels connected to the District utility systems,

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regardless of actual usage, is a property assessment subject to owner ballot approval requirements adopted in Proposition 218 (art. XIII, § 4), or is instead a fee or charge for a property-related service exempted from those requirements." Paland only challenged District's failure to comply in regard to assessments; he did not argue that District did not comply with the requirements for the imposition of water or sewer fees. The court concluded that the charges which Paland disputed are fees and not assessments as defined by Proposition 218.

Article XIII D of Proposition 218 "'sets forth procedures, requirements and voter approval mechanisms for local government assessments, fees and charges.'" Article XIII D § 4 provides that for new or increased property assessments, agencies must (1) obtain an engineer's report, and (2) mail to the property owners a detailed notice which explains the method of calculating the assessment and identifies the amount chargeable to the owner. For property assessments, the notice must inform of the public hearing on the assessment and include a ballot.

If an agency seeks to impose a new or increased property-related fee, it must mail to affected property owners a detailed notice that explains the proposed fee and announces a public hearing. However, no formal balloting is required at this stage in the process. Instead, the agency must at the public hearing consider all protests against the fee or charge. "If written protests against the fee or charge are presented by a majority of owners . . . the agency shall not impose the fee or charge." Section 6, subdivision (c) of Article XIII D provides that if a majority of the affected property owners protest a fee, "then, '[e]xcept for fees or charges for sewer, water, and refuse collection services,' the fee still may not 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.'"

A fee or charge is defined under Article XIII D as "any levy other than an ad valorem tax, a special tax, or an assessment imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." At issue here is the application of section 6, subdivision (b)(4) which provides that a fee or charge may not "be imposed for a service unless that service is actually used by or *immediately available to*, the owner of the property in question." Additionally, fees or charges that are based on future or potential use are prohibited. "Standby charges" are assessments and may not be imposed without compliance with the requirements for imposition of assessments found in Article XIII D section 4.

Paland argued that the water service is not immediately available to him because he does not have an active connection and District will not unlock his meter until he pays his past-due bills. He claimed that the District's imposition of minimum base rates on parcels with inactive connections amounts to a standby charge. The court conceded that if the minimum monthly base rate is a standby charge, it would be subject to the assessment approval procedures found in Article XIII D section 4. The critical question therefore is "how to distinguish between charges for services that are 'immediately available' to the property owners though not actually used, which are fees . . . and standby charges for 'potential or future use of a service,' which are defined as assessments."

An assessment is "a charge on land" that is secured by a lien on property. In the context of water and sewer services, assessments "must be justified by an engineer's report and submitted to a weighted vote of affected property owners." On the other hand, fees for water and sewer services "may be imposed after notice and a public hearing" and are specifically exempted by section 6 from the requirement of an owner vote. Fees are not automatic liens on property but only become liens if they are delinquent and the district records a certificate of delinquency. The court opined that this scheme was created because of a greater potential of government abuse in the imposition of assessments than in the imposition of fees. Also, agencies need to be

able to determine rates for water and sewer services to guarantee the continued operation and maintenance of these services "without the undue burden of potential owner veto." There is also a substantive constraint on fees that prohibits an agency "from using fees to extract revenue that is not immediately translated into tangible service to the property owner."

The court concluded that the "immediately available" requirement hinges on the conduct of the agency, not that of the property owner. Where the agency provides the necessary service connections and the property owner's own actions cause the inability to use the service, the service is still "immediately available" and the charge for the service is a fee and not an assessment. Here, any lack of availability is due to Paland's own actions, not those of District.

The court concluded that water and sewer base rates imposed by District on property with connections to the services, regardless of the property owners' use of the services, is a fee within the meaning of Article XIII D, section 6, and not an assessment. Accordingly, the Court of Appeal affirmed the trial court's judgment in favor of District.

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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