Filed 1/13/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

BIGHORN-DESERT VIEW WATER AGENCY,

Plaintiff, Cross-defendant and Respondent,
v.

SHARON BERINGSON, as Interim Registrar of Voters, etc.,

Defendant, Cross-defendant and Respondent;

E. W. KELLEY,

Defendant, Cross-complainant and Appellant.

E033515

(Super.Ct.No. SCV97005)

OPINION

APPEAL from the Superior Court of San Bernardino County. Tara Reilly, Judge. Affirmed.

Sweeney & Grant LLP, Eric Grant and James F. Sweeney for Defendant, Cross-complainant and Appellant.

Lagerlof, Senecal, Bradley, Gosney & Kruse, LLP, Timothy J. Gosney and James D. Ciampa for Plaintiff, Cross-defendant and Respondent.

McCormick, Kidman & Behrens and Janet Morningstar; Daniel S. Hentschke, for Association of California Water Agencies; Alisa Renee Fong for League of California Cities; and Ruth Sorensen for California State Association of Counties, as Amici Curiae on behalf of Plaintiff, Cross-defendant and Respondent

No appearance for Defendant, Cross-defendant and Respondent.

1. Introduction

A voter initiative cannot control the amount of the water rate, fees, and charges fixed by a public water agency. We affirm the judgment in favor of plaintiff and respondent, the Bighorn-Desert View Water Agency (Bighorn).

2. Factual and Procedural Background

In 1969, the Bighorn Mountains Water Agency Law[1] established Bighorn as a special act agency. Bighorn supplies domestic water service to some residents in the Landers area north of Yucca Valley in San Bernardino County. Legislation empowers Bighorn's board of directors to "fix such rate or rates for water in the agency . . . as will result in revenues which will pay the operating expenses of the agency . . . provide for repairs and depreciation of works, provide a reasonable surplus for improvements, extensions, and enlargements, pay the interest on any bonded debt, and provide a sinking or other fund for the payment of the principal of such debt as it may become due."[2]

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[1] Water Code Appendix, Section 112-1 et seq.

[2] Water Code Appendix, Section 112-25.

The real party in interest, E.W. Kelley, qualified an initiative petition seeking to reduce Bighorn's water rates and charges and requiring two-thirds voter approval for any subsequent increases by Bighorn. The proposed reductions were about half of the amounts being charged by Bighorn.

Bighorn filed a declaratory relief action against the registrar of voters and the real parties in interest, Kelley and Theresa Bulone.[3] Bighorn sought a judicial declaration that the Kelley initiative was facially invalid. Kelley and Bulone filed a "cross-petition for alternative writ of mandate" and a motion for judgment on the pleadings. The court gave judgment in favor of Bighorn, granting Bighorn's request for declaratory relief and denying the real parties' motion for judgment on the pleadings, cross-petition, and request for declaratory relief. The court ruled, "the Kelley Initiative is invalid on its face because Plaintiff's electorate lacks the power to reduce or otherwise affect, by means of initiative, the water rates, fees and charges the Kelley Initiative seeks to reduce or otherwise affect."

Kelley appeals. In addition to the parties' briefs, this court has considered an amici curiae brief filed in support of Bighorn by the Association of California Water Agencies (Association) -- a 400-plus member organization.

3. Discussion

[3] Bulone is not a party to the appeal.

The resolution of this case involves interpreting Article 13C and Article 13D of the California Constitution. In November 1996, the California voters approved Proposition 218, the "Right to Vote on Taxes Act," as Article 13C and Article 13D. Kelley argues that Article 13C, section 3, standing alone, expressly authorizes the Kelley Initiative, providing: "Notwithstanding any other provision of this Constitution . . . *the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments* . . . ." (Italics added.)

In our view, however, Kelley relies too narrowly on the latter and ignores the other relevant provisions of Articles 13C and 13D, which in spite of being two different articles, function together. In summary, therefore, we hold that Proposition 218 does not apply to the rates, fees, and charges fixed by Bighorn for water services.

Proposition 218 descended from Proposition 13. Both represented efforts by the taxpayers to curb and control property taxes. As this court noted several years ago, "Proposition 218 can best be understood against its historical background, which begins in 1978 with the adoption of Proposition 13. 'The purpose of Proposition 13 was to cut local property taxes. [Citation.]' [Citation.] . . . [¶] To prevent local governments from subverting its limitations, Proposition 13 also prohibited counties, cities, and special districts from enacting any special tax without a two-thirds vote of the electorate. [Citations.].

"In November 1996 . . . the electorate adopted Proposition 218, which . . . allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge. [Citations.] It buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges."[4]

As our previous and present analyses makes clear, Proposition 218, like Proposition 13 before it, places limits on property-related levies and not on water rates, charges, and fees that are not property-based. Furthermore, Proposition 218, as expressed in Article 13D, section 6, subdivision (c), makes an exception for "fees or charges for . . . water . . . services" like those at issue in the present case.

Article 13C applies to a "general tax" or a "special tax" imposed by a "local government" or a "special district."[5] The parties agree that Bighorn is a special district meaning a state agency "formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries . . . . "[6] No one argues the subject water rate, fees, and charges are general or special taxes. Rather, Kelley repeatedly asserts that the subject of the Kelley Initiative involves "fees and charges" as used in Article 13C, section 3.

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[4] *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 681-682.

[5] Article 13C, section 1.

[6] Article 13C, section 1, subdivision (c).

[footnote continued on next page]

But we do not perceive Article 13C, section 3, exists in isolation. Kelley discounts the obvious, which is that, although Article 13C, section 3, refers to the initiative power concerning "assessment, fee, or charges," Article 13D governs "all assessments, fees, and charges."[7] Article 13D defines the latter as a property-related levy,[8] imposed by "any special district," as defined by Articles 13C and 13D. [9]

We reject Kelley's contention that "assessment, fee, or charge," as used in Article 13C, section 3, differs from "assessments, fees, and charges," as used in Article 13D. Both Articles incorporate references to one another.[10] The two definitional sections are not in conflict. Instead, the definitions complement one another. The use of two sets of definitions in the two Articles[11] does not belie the interconnectedness of the two constitutional amendments.

[footnote continued from previous page]

[7] Article 13D, section 1.

[8] Article 13D, section 2, subdivisions (b) and (e).

[9] Article 13C, section 1, subdivision (b), and Article 13D, section 1, and section 2, subdivision (a).

[10] Article 13C, section 1, and Article 13D, sections 1 and 2, subdivision (a).

[11] Article 13C, section 1, and Article 13D, section 2.

Nor, by recognizing the relationship between the two Articles, are we engaging improperly in unnecessary interpretation.[12] Instead, we are following the "cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the Constitution bearing on the same subject. [Citation.] The goal, of course, is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole. [Citations.] Strained interpretation, or construction leading to unreasonable or impractical results, is to be avoided. [Citations.]"[13] It makes no sense to read Proposition 218 as establishing two different categories of "assessments, fees, and charges" within one initiative. Clearly, Articles 13C and 13D are meant to be interpreted together.

For example, Article 13D does not include a separate section addressing "power of the initiative." Instead, the initiative power for both Articles 13C and 13D is described in Article 13C, section 3, and applies to "any local tax" as governed by Article 13C and any "assessment, fee, or charge" as governed by Article 13D. In other words, for the restrictions of Proposition 218 to apply, the circumstances must involve either a general or a special tax or a property-related assessment, fee, or charge. That is not the present situation.

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[12] *Howard Jarvis Taxpayers Assn. v. City of Riverside, supra,* 73 Cal.App.4th at 685.

[13] *Fields v. Eu* (1976) 18 Cal.3d 322, 328.

Taxes are not involved. Nor are the water services at issue "an incident of property ownership, including a user fee or charge for a property-related service."[14] Kelley offers no opposition to Bighorn's contention that "the Agency's rates and charges impacted by the Kelley Initiative are not levied solely by virtue of property ownership, but are imposed payment for water consumed or as a condition of receiving water service from the Agency." Apparently, there are property owners existing within Bighorn's service area who do not receive water services from Bighorn. Those owners do not pay fees or charges to Bighorn. As stated by the California Supreme Court: "[T]axes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners as landowners. . . . [Article 13D] applies only to exactions levied solely by virtue of property ownership. We may not interpret article XIII D as if it had been rewritten. [Citation.]"[15] Water services are not "an incident of property ownership" and Proposition 218 does not operate to affect Bighorn's water rate, fees, and charges.

A decision from the second appellate district supports our conclusion. In discussing whether Proposition 218 applies to water rates, the court said: "'The stated purpose of Proposition 218 was to "protect [] taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." [Citation.]

". . . . . .

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[14] Articles 13D, section 2, subdivisions (e), (g), and (h).

[15] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842, italics and footnote omitted.

"Appellants contend that the charges imposed for water services in Los Angeles are in reality special taxes, imposed as an incident of property ownership, and therefore, require voter approval. We disagree.

"These usage rates are basically commodity charges which do not fall within the scope of Proposition 218. They do not constitute 'fees' as defined in California Constitution, article XIII D, section 2, because they are not levies or assessments 'incident of property ownership.' [Citation.] Nor are they fees for a 'property-related service,' defined in subdivision (h) as 'a public service having a direct relationship to property ownership.' As indicated by the ordinances setting water rates, the supply and delivery of water does not require that a person own or rent the property where the water is delivered. The charges for water service are based primarily on the amount consumed, and are not incident to or directly related to property ownership."[16]

In a footnote, the same court observed: "Assuming for purposes of argument that such charges were intended to fall within the overall scope of Proposition 218, the plain language of section 6, subdivision (c) of California Constitution, article XIII D specifically excludes 'charges for . . . water. . . .'"[17] from the requirement for two-thirds majority voter approval.

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[16] *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79, 82-83, footnote omitted.

[17] *Howard Jarvis Taxpayers Assn. v. City of Los Angeles, supra,* 85 Cal.App.4th 79, 83, footnote 1.

The same reasoning applies here. As announced above, the usage-based water rates and the related charges are not incidents of property ownership or fees for a property-related service. They are excluded from Proposition 218 under Article 13D, section 6, subdivision (c).

Furthermore, as argued by amici curiae, the Bighorn board of directors is authorized and required by legislative mandate to fix water rates and charges at a sufficient amount. In this situation, the initiative process cannot interfere with a legislatively-delegated function: "The presumption in favor of the right of initiative is rebuttable upon a definite indication that the Legislature, as part of the exercise of its power to preempt all local legislation in matters of statewide concern, has intended to restrict that right. [Citation.] Accordingly, we have concluded that the initiative and referendum power could not be used in areas in which the local legislative body's discretion was largely preempted by statutory mandate. [Citations.] These and other cases led to the formulation of a general dichotomy between a governing body's legislative acts, which are subject to initiative and referendum, and its administrative or executive acts, which are not."[18] The rate-setting function delegated to Bighorn's board of directors is clearly an administrative duty not subject to initiative.

Bighorn can charge water users, as opposed to property owners or tenants, the amounts its board determines are necessary to meet its operating costs and other

[18] *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 776.

expenditures. Otherwise public water service might cease because Bighorn could not afford to supply it. A vital government function would be severely hampered, depriving all affected residents of a public water system. In such a case: "'The initiative or referendum is not applicable where "the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential."'"[19]

4. Disposition

We affirm the judgment and order Bighorn to recover its costs on appeal.

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/s/ Gaut
J.

We concur:

/s/ Ramirez
P. J.

/s/ Ward
J.

[19] *Dare v. Lakeport City Council* (1970) 12 Cal.App.3d 864, 869, citing *Simpson v. Hite* (1970) 36 Cal.2d 125, 134.