

CLIENT NEWS BRIEF

Water Conservation Rates Face Judicially Refined Constitutional Mandates

In *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano*, (April 20, 2015) 2015 Cal.App.Lexis 330, the court of appeal ruled that the City's tiered water rates or "fees" were unconstitutional in violation of Proposition 218 because the rates did not correspond to the actual cost of providing service at a given level of usage. Proposition 218 forbids local agencies from charging more for a property-related service such as water than the service actually costs. To promote water conservation, the City established four classes of water users (low, reasonable, excessive, and very excessive), which were charged progressively higher rates (i.e. "tiers"). However, the court observed that the City failed to calculate the incremental cost of providing water for the various levels of use. Instead, the City based pricing on predetermined water usage budgets that were calculated using historical data of usage patterns.

The court ruled that the City "had to correlate its tiered prices with the actual cost of providing water at those tiered levels." For example, the City might charge higher users higher rates if it can show that the marginal fees are proportional to the cost of supplying those users the extra water. The court also ruled that charging customers for capital improvements to produce more or new water *in the future* does not necessarily violate the requirement in Proposition 218 that fees "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."

San Juan Capistrano is significant not only because of its holding, but because of its timing. Governor Brown's recent Executive Order B-29-15 mandates a statewide reduction of 25% in potable urban water usage through February 2016. Urban suppliers will be directed to develop rate structures and other pricing mechanisms including "surcharges, fees, and penalties" to achieve the reduction, but those rate structures have now been called into question.

The decision in *San Juan Capistrano* is not yet final and a request for review before the California Supreme Court, which is discretionary, is likely. However, unless the California Supreme Court grants review in this case, cities and other urban water suppliers with tiered water rates should be prepared to review their rate studies to ensure that the rates correspond to the costs of providing the service, and if they do not, to make adjustments accordingly. Once rates are set, cities can achieve conservation goals by enforcing existing water waste provisions and establishing mandatory usage limits, such as those the State Water Resources Control Board is considering in response to the Governor's Executive Order. Violators of those water waste provisions or usage limits can be subject to penalties that are separate and distinct from the fees charged for the cost of providing the water service.

If you have any questions regarding the *San Juan Capistrano* decision, please contact one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).

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